

No. _____

In The
Supreme Court of the United States

—◆—
AMIRA OLIVIA GUNN,

Petitioner,

vs.

NORTH DAKOTA,

Respondent.

—◆—
**On Petition For Writ Of Certiorari
To The Supreme Court Of North Dakota**

—◆—
PETITION FOR A WRIT OF CERTIORARI

—◆—
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QUESTION PRESENTED

Whether Gunn was convicted of speech protected by the Free Speech Clause of the First Amendment, applicable to the States under the Due Process Clause of the Fourteenth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Amira Olivia Gunn respectfully petitions for a writ of certiorari to the Supreme Court of North Dakota in *State v. Gunn*, No. 20170138.

**OPINION BELOW**

The opinion of the Supreme Court of North Dakota, App. 1-13, is reported at 2018 ND 95, 909 N.W.2d 701. The relevant trial court proceedings and orders, App. 14-39, are unpublished.

**JURISDICTION**

The opinion of the Supreme Court of North Dakota was issued on April 10, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

**RELEVANT CONSTITUTIONAL
AND STATUTORY PROVISIONS**

The Free Speech Clause of the First Amendment to the United States Constitution provides, “Congress shall make no law . . . abridging the freedom of speech”

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, “nor

shall any State deprive any person of life, liberty, or property, without due process of law”.

North Dakota Century Code § 12.1-06-01(2), Criminal attempt, provides:

2. A person who engages in conduct intending to aid another to commit a crime is guilty of criminal attempt if the conduct would establish his complicity under section 12.1-03-01 were the crime committed by the other person, even if the other is not guilty of committing or attempting the crime, for example, because he has a defense of justification or entrapment.

North Dakota Century Code § 12.1-03-01, Accomplices, provides:

1. A person may be convicted of an offense based upon the conduct of another person when:
 - a. Acting with the kind of culpability required for the offense, he causes the other to engage in such conduct;
 - b. With intent that an offense be committed, he commands, induces, procures, or aids the other to commit it, or, having a statutory duty to prevent its commission, he fails to make proper effort to do so; or
 - c. He is a coconspirator and his association with the offense meets the

requirements of either of the other subdivisions of this subsection.

A person is not liable under this subsection for the conduct of another person when he is either expressly or by implication made not accountable for such conduct by the statute defining the offense or related provisions because he is a victim of the offense or otherwise.

2. Unless otherwise provided, in a prosecution in which the liability of the defendant is based upon the conduct of another person, it is no defense that:
 - a. The defendant does not belong to the class of persons who, because of their official status or other capacity or characteristic, are by definition of the offense the only persons capable of directly committing it; or
 - b. The person for whose conduct the defendant is being held liable has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, is immune from prosecution, or is otherwise not subject to justice.

North Dakota Century Code § 12.1-20-03(1)(d),
Gross sexual imposition, provides:

1. A person who engages in a sexual act with another, or who causes another to

engage in a sexual act, is guilty of an offense if:

...

- d. The victim is less than fifteen years old ...



STATEMENT OF THE CASE

Petitioner Amira Olivia Gunn was charged with Attempted Gross Sexual Imposition in that she “engaged in conduct intending to aid . . . [one Calvin Till] . . . to commit the crime of Gross Sexual Imposition” (App. 24-29). Gunn would be guilty of Criminal Attempt under N.D.C.C. § 12.1-06-01(2) if she engaged in conduct intending to aid Till to commit the crime of Gross Sexual Imposition under N.D.C.C. § 12.1-20-03(1)(d) if her conduct would establish her as an Accomplice under N.D.C.C. § 12.1-03-01 were said crime of Gross Sexual Imposition committed by Till, “even if . . . [Till] . . . is not guilty of committing or attempting the crime, for example, because he has a defense of justification or entrapment.” The Gross Sexual Imposition alleged here, were Till to have committed it, was Till (at least twenty-two years of age) engaging in a sexual act with another less than fifteen years old.

“In November 2015, Gunn and Calvin Till communicated in private conversations on MeetMe.com, a social networking website.” (App. 2). Gunn used a computer at her residence in Bismarck, North Dakota,

and Till used a computer at a different location in Bismarck.

MeetMe.com connects persons who do not know each other. Gunn and Till had not known each other before the events of this case, and Till initiated the first conversation with Gunn.

The conversations consisted of the typing of text. No video was involved.

“Gunn and Till exchanged more than 700 messages between November 11 and 13, 2015. In a portion of the conversations, Gunn gave explicit and lewd instructions to Till on how to groom and sexually assault his young daughter and how to abduct and sexually assault . . . ” (App. 2) a six- and an eight-year-old neighbor.

At a point “in the conversations Till relayed to Gunn that he was sexually assaulting his daughter in real-time.” (App. 3). The State’s case was that Gunn believed Till was actively molesting his daughter while they were messaging, and that Gunn believed there were actual neighbor children.

The State admitted there was no Till daughter present during the conversations.

One testifying police officer stated he did no investigation of the neighbor children and no neighbor children were identified. A second police officer who testified stated there was an investigation of the neighbor children but the ages of the children in Till’s neighborhood did not coincide. This officer admitted the

neighbor children could have been imaginary in Till's mind.

Gunn told the police in an interview the conversations were role-playing.

In that interview, the police falsely told Gunn that Till actually did these things. Gunn responded she did not think Till would do that.

Before trial, Gunn moved the trial court to exclude the conversations, arguing they were protected by the First Amendment (App. 30-39). The trial court denied her motions (App. 14-20).

On direct appeal to the Supreme Court of North Dakota, Gunn argued the conversations were protected by the First Amendment (App. 7, ¶14). The Supreme Court agreed with the trial court "that Gunn's statements were obscene," but held "the primary reason Gunn's statements fall outside the protection of the First Amendment is because they were integral to the commission of a crime." (App. 10, ¶19).



REASONS FOR GRANTING THE WRIT

In *Packingham v. North Carolina*, 582 U.S. ___, 137 S.Ct. 1730, 1736 (2017), this Court stated, "This case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet. As a result, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to

vast networks in that medium.” Gunn’s case involves the relationship between the First Amendment and the modern Internet.

If Gunn and Till and a child would physically be at a same location, and Gunn engaged in the conversations (instructions) in this case, then clearly there could be circumstances where she would be engaging in conduct intending to aid Till to commit Gross Sexual Imposition on the child in violation of these North Dakota criminal statutes, even if her conduct was just words. There could be “both speech and nonspeech elements” which the police power of the State of North Dakota could regulate. See *Miller v. California*, 413 U.S. 15, fn. 8 (1973). Or, as cited by the Supreme Court of North Dakota in this case, “*Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (allowing a state to prohibit ‘advocacy [] directed to inciting or producing imminent lawless action and [] likely to incite or produce such action’).” (App. 8, ¶17).

On the other hand, if Gunn and Till would physically be at a same location, with no child, and they engaged in all of the conversations in this case, then there would be just words, and no crime.

The facts of this case are that there was no child and there was nothing but words. The question becomes how Gunn’s conduct can be a crime, simply because the conversations occurred over the Internet and not physically in person.

The Supreme Court of North Dakota misapplied *Brandenburg v. Ohio* when it found Gunn’s speech

integral to the commission of a crime. Gunn's speech did not incite or produce imminent lawless action, and was not likely to do so, even if you give the prosecution the benefit of accepting that Gunn's speech over the Internet was intended by her to incite or produce imminent lawless action.

In dictum, the Supreme Court of North Dakota found Gunn's statements to be obscene (App. 10, ¶19). However, Gunn was not prosecuted for violating any of North Dakota's obscenity crimes (App. 38, ¶¶6-7).

The First Amendment protects Gunn's speech in this case.



CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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