



OFFICE OF THE DISTRICT ATTORNEY
14TH JUDICIAL DISTRICT
MATT KARZEN, DISTRICT ATTORNEY

DECLINATION OF PROSECUTION

Subject: Educator, Steamboat Springs High School
Investigating Agency: SSPD
Agency Case #: P1910417
Date: October 2, 2019

This situation was submitted to the District Attorney by the reporting party, Mr. Ken Mauldin, originally via email and later in person. A supplemental submission was later received by Mr. Brett Cason.

On September 4, 2019, at a meeting of the SSSH Parent Information Committee, Mr. Mauldin was told that a teacher at the high school had introduced the poem *Howl*, by Allen Ginsberg, to some number of high school students in a literature class. He was told some or all of those students were under the age of eighteen, and that one or more parents were offended and concerned due to the presence of certain words and descriptions in that poem. Mr. Mauldin referred this incident to the Steamboat Springs Police Department as well as the District Attorney's Office, for assessment as to whether the teacher had violated Colorado's Criminal Obscenity statute, under C.R.S. 18-7-102. Subsequent to Mr. Mauldin's report, the DA's office received an email from a Mr. Brett Cason. Mr. Cason indicated he understood this office received a complaint regarding his daughter being "exposed to sexually explicit material in a high school classroom". According to Mr. Cason, "the poem was distributed in a handout to the course with the profanity removed. The students were then asked to fill in the blanks of the explicit material in their own handwriting." The SSPD determined the material at issue, the poem *Howl* by Allen Ginsberg, did not meet the definition of obscenity under C.R.S. 18-7-101(2) and for that reason declined further pursuit of the case. Mr. Mauldin requested the DA's Office assess the matter as well, and this office agreed to do so.

This review is limited to whether a criminal violation occurred under Colorado law. Defining criminally obscene speech requires assessment of the societal value and role of the speech at issue, meaning the First Amendment of the U.S. Constitution and Article II section 10 of the Colorado Constitution are at the center that analysis. Notably, in Colorado, freedom of expression is accorded broader protections than those provided by the First Amendment to the U.S. Constitution. People v. Ford, 773 P.2d 1059, 1066 (Colo. 1989).¹

¹ In reference to the constitutionality of incorporating community standards into a statute defining criminal obscenity, the Colorado Supreme Court articulated our more robust Colorado freedom this way: "In order to be constitutionally sufficient, the definition of "patently offensive" must incorporate a standard which protects all but the most



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The first statutory provision involved is C.R.S. 18-7-102(2.5)(a), which defines Promotion of Obscenity to a Minor: A person commits promotion of obscenity to a minor if, knowing its content and character, such person promotes to a minor or possesses with intent to promote to a minor any obscene material. The key here is whether Howl is obscene, and Colorado defines obscene this way, in C.R.S. 18-7-101(2):

“Obscene means material or a performance that:

(a) The average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;

(b) Depicts or describes:

(I) Patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or

(II) Patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, or covered male genitals in a discernibly turgid state; and

(c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.”

Because subsection (c) applies as a requirement to each other defining characteristic of obscenity that precedes it in the statute, and because that component of the offense is singularly dispositive in this case, it is addressed first.

The poem Howl has undisputed status as a profound act of speech in American literature, culture and politics. Nominal research demonstrates that its significance on all of these fronts is well-documented by diverse and committed stakeholders in American history, politics and culture, and education - from “Encyclopedia Britannica”, to “Slate”, to the “Yale-New Haven Teachers Institute”.

A piece of speech that has for over sixty years inspired countless people to consider their individualism, their relationship to the organized state, their political voice and ability to think freely – if that is not the definition of “serious literary, artistic or political value”, then that statutory phrase has no discernable meaning, which would mean the statute is unconstitutionally vague.

The criminality of Howl was famously litigated in 1957 and produced a result consistent with this assessment. Although the modern Colorado definition of obscene incorporates as one component the ever-shifting standard of “contemporary” “average” values, a statutory scheme that is on seriously amorphous constitutional ground, in this scenario attempting to identify those values,

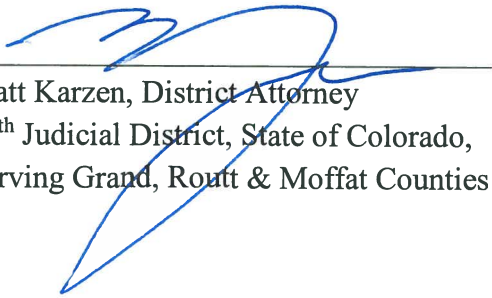
insufferable of sexually explicit material. Although both federal and state courts have approved definitions of “patently offensive” which incorporate community standards of decency, acceptance, or tolerance, we believe that the tolerance standard better protects freedom of expression, and is the only standard of the three which would satisfy the Colorado Constitution. Whereas “decency” implies a community standard of what is proper, and “acceptance” connotes approval, tolerance stretches the community’s standards to their outermost limits. *When a tolerance standard is employed, material is not offensive unless the community cannot endure it.* (emphasis added).

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such as they might be today, is not required: Howl, as a whole, has demonstrable and serious literary, artistic and political value, and is therefore not, by definition, obscene. Because Howl is not obscene, there was no crime.²



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² This declination of prosecution does not address whether a civil entity such as a school could impose, as an administrative policy, any time, place or manner restrictions on the dissemination of material such as Howl by Allen Ginsberg, as that type of restriction on freedom of expression is outside the scope of authority of the District Attorney's Office.

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