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Child Pornography Regulation and Punishment: Analysis and Recommendations

In the past few years, opinions from the Court of Appeals and Supreme Court have called the continued viability of Section 30-6A-3 into question. *See State v. Olsson / Ballard*, (consolidated), 2014-NMSC-012, 324 P.3d 1230; *State v. Ballard*, 2012-NMCA-043, 276 P.3d 976. The Courts found that the statute, in the possession context, does not clearly define how many crimes a person commits when they possess multiple images at once. The Courts noted that changes in technology and digital file storage required changing the statute to bring it up to date. Noting that image-by-image punishment could lead to excessively long prison sentences, the Supreme Court held that – without clarification of the Legislature’s intent – it could not impose more than one possession conviction when multiple images are possessed in the same place at the same time.

In the 2015 legislative session, House Bills 251 and 440 sought to amend Section 30-6A-3 to clarify the charging procedure for child pornography possession. However, the bills’ “one count per depiction” approach for possession is problematic and does not adequately respond to the appellate Courts’ specific concerns. Because most cases involve large numbers of digital files, image-by-image punishment assures extremely lengthy sentence exposure; defendants often face hundreds of years in prison. This excessive exposure leads to fear-based plea bargaining that greatly limits defendants’ rights to trial by jury and proof beyond a reasonable doubt.

Digital imagery and Internet access have changed the way these crimes are committed. Possession of large numbers of digital files is unfortunately the norm. In response to the actual way people commit the crimes, a targeted sentencing scheme is necessary to ensure the sentences are rational when compared to other crimes, such as those involving actual *contact* with children. The statute must rationally address *digital* materials to avoid excessive punishment while still deterring ongoing behavior.

Recommendation:

The first necessary amendment in light of the existing statutory structure is to expressly add digital storage devices (hard drives, CD-Rs and DVD-Rs, USB flash drives, etc.) to the statutory definition of “*visual or print medium*,” establishing one felony is committed per device *containing* illegal images. Thus if a person possesses digital images

on the hard drive of two different computers, it would be two felonies; each additional storage device they possess that contains child pornography would be its own separate felony possession.

Then, to adequately address the *quantity* of images in the digital age, the *penalty* provisions must be updated. The recommendation is to allow for one-year enhancements for every X number of images possessed. In light of the trends in possession, the number must account for the realities of easy access to an endless supply and massive storage capabilities. A possible structure for possession would be: a baseline fourth-degree felony sentence (18 months) for possessing up to 100 images, with a one-year enhancement for every 50 additional images.

This approach is responsive to the statute's current shortcomings, provides boundaries for sentence exposure that are easy to apply, and still provides deterrence value against the continued acquisition of digital files. This type of balanced approach also gives both defendants and prosecutors bargaining room in plea negotiations.

Background: Appellate Litigation

The statute currently prohibits knowingly possessing any “visual or print medium” that either is or contains child pornography. § 30-6A-3(A). The definition of “visual or print medium” includes various physical objects. §§ 30-6A-2(B) (definitions). In reviewing the charging and sentencing under Section 30-6A-3(A) (possession), both the Court of Appeals and Supreme Court grappled with this specific language.

The Courts concluded that Subsection 3(A) (possession) is unclear as to what is “one count” because the definition of “visual or print medium” includes single-image items as well as books and “computer diskettes,” *containing* imagery, yet capable of holding many images at once. *See State v. Olsson / Ballard*, 2014-NMSC-012, ¶ 20; *Ballard*, 2012-NMCA-043, ¶ 24. Both Courts emphasized the absurdity if someone possessing five digital images would face 7 ½ years but someone possessing one book with hundreds of images faced 1 ½, especially where peer-to-peer downloads involving batch downloads of multiple files are the most common method of acquiring these images.

The Supreme Court advised:

Since Section 30-6A-3(A) was enacted in 1984 and amended in 2001, **significant and rapid technological developments** have occurred. **Digital storage has become widely available and can store massive amounts of data.** We respectfully recommend that the Legislature revise Section 30-6A-3(A) **to reflect modern advances in technology** and clarify the intended unit of prosecution.

2014-NMSC-012, ¶ 45 (emphasis added).

The Court of Appeals had provided similar guidance:

We respectfully recommend that the Legislature revisit Section 30-6A-2 with the rapid developments in this digital age in mind. That section was enacted in 1984 and amended in 1993 and in 2001. Significant changes have developed and will continue to develop in technology that have raised and will continue to raise puzzling questions if the statute remains as written. Further, if prosecutors continue to charge unlawful possession for each image or based on each separate victim, convicted defendants can conceivably be sentenced to imprisonment for tens of years for one peer-to-peer download of images that ultimately are received, contained, stored, and possessed essentially as one group or unit in one computer.

2012-NMCA-043, ¶ 31 (emphasis added).

The Supreme Court specifically criticized a reading of the statute as allowing for precisely the sentencing disparity that this bill would codify.

We encounter another problem in determining the Legislature's intent when considering the sentencing disparities. A single count of possession under Section 30-6A-3(A) carries an eighteen-month basic sentence. ... The twenty-five counts in Ballard's case would result in a thirty-seven-and-a-half year basic sentence, and the sixty counts initially charged to Olsson would result in a ninety-year basic sentence. This punishment for possession of only two images would equal the minimum imprisonment sentence of three years for a defendant convicted of criminal sexual contact with a minor. See NMSA 1978, § 30-9-13(B) (2003). **We cannot conclude that the Legislature intended this level of disparity.**

Olsson/Ballard, 2014-NMSC-012, ¶ 30.

A similar analysis for the crime of distribution is currently pending in the Court of Appeals in the peer-to-peer context, where distribution is committed by simply having the files on one's computer where other network users can access them, without any agreement or interaction involved in the transfer of files. *See State v. Sena*, Ct. App. No. 33,889, (briefs completed June 19, 2015; not yet submitted to the Court).

Sentencing Disparities Must Be Addressed Legislatively

Sentencing disparities inherent to the single- and multi-image "visual print medium" definitions are exacerbated by the realities of modern technology. The Courts' stated policy concerns can provide guidance in updating the statute. Unfortunately, the

2015 bills' proposed amendments did not clarify the problematic *definitional* language, see **LFC-FIR** (AGO commentary), and in fact exacerbated the existing sentencing disparities.

While the bill's proponents assured House committee members that prosecutorial discretion was a sufficient safeguard against unreasonable sentencing, this is anathema to criminal justice principles rooted in constitutional notice requirements. Citizens are entitled to know what conduct is prohibited and what possible punishment would be faced for committing a crime. Even if charges are subsequently dropped or sentences are subsequently reduced, possession charged *per image* places extremely broad power in the hands of prosecutors at the charging phase, at which point the threat of hundreds of years in prison would make even an innocent defendant plead in the interest of reducing their exposure.

The proponents of the 2015 house bills offered complete reliance on prosecutorial discretion to ensure appropriate sentences, but assigning appropriate penalties is the sole purview of the Legislative branch. To avoid drastic variations from case to case and county to county, the *statute* must provide boundaries to ensure that similar conduct receives a similar penalty *exposure*. Only then may judges take into consideration individual characteristics that may warrant discretionary measures at sentencing. The proposed 2015 legislation had the potential for drastic variations across the state in how these cases are prosecuted and punished and placed overwhelming bargaining power in the hands of prosecutors. The *statute* must provide better guidance to provide notice and ensure consistency.

Manufacture by creation would still be image-by-image.

It is worth noting that the *Ballard* and *Olsson* opinions only addressed the possession provision and did not change the current law that manufacture by creation is still punished image-by-image under the current statute (the distribution scenario is currently pending in the appellate courts). See *Olsson/Ballard*, 2014 -NMSC- 012, ¶ 22 (citing *State v. Leeson*, 2011-NMCA-068, ¶ 17, 149 N.M. 823, 255 P.3d 401 (where the defendant actually took the original photographs, image-by-image charging was "readily discernible" from Subsection D)).

While this may seem inconsistent, the offenses are committed by very different conduct. When manufacturing by creating individual images or distributing by a one-on-one transaction, a person must separately intend to create or distribute each image and will do some physical act specific to the creation or distribution of each image created or distributed. Additionally, these offenses are much more likely to involve contact with or at least awareness of a particular child victim. Even with no legislative action, manufacture and distribution committed in these manners would continue to be punished image-by-image.

Nevertheless, there are also different ways of committing manufacture and distribution that carry a more “collective” culpability, and do not involve contact with children or a conscious intent as to each image.

As presented in the *Sena* case, distribution is frequently charged for simply leaving a computer on and walking away from it, when someone else then accesses one’s computer and downloads digital files from it. *Sena* asks whether one can be separately criminally liable for the individual acts of another person, even if one is guilty of *one* overarching “distribution” for having made materials available.

In 2008, the Court of Appeals interpreted the manufacture statute as including making a digital copy from a computer to an external hard drive. *State v. Smith*, 2009-NMCA-028, ¶ 15, 5 N.M. 757, 204 P.3d 1267. In light of *Smith*, there is reason to question image-by-image convictions and punishment when someone copies the contents of a hard drive or even a single folder containing multiple images to another hard drive, flash drive, or CD. There is a huge difference between copying an existing image and actually creating an image vis-à-vis direct interaction with and abuse of a child. Moreover, when a *whole folder* is copied, there is little to show the intent to make a copy of each and every individual file; the conduct and intent are generalized as to all files at once.

The questions raised by these scenarios remain unanswered by the Courts, but could be preemptively addressed by the Legislature with targeted amendments to the statute that account for the different ways of committing these crimes.

CONCLUSION: In light of modern technology, a new approach is good policy.

Unlike printed images, digital images take up no physical space and are not visible on a shelf. Defendants often download hundreds of images from the Internet at a time, and are therefore *much more likely* to possess large numbers of digital images than any other format, often in a single folder on their computer hard drive. It is worth noting that these defendants, once convicted, are required to register under SORNA, providing for continued monitoring for community safety long after completing their prison sentence. But, because each count is a felony carrying 1 ½ years in prison, image-by-image penalties create a potential prison sentence of hundreds of years for having one single file folder on a computer hard drive, a much longer sentence than defendants would face for having actual sexual *contact* with a child.

Possession of electronically downloaded digital images is a unique type of crime. There is no interaction with a victim; it is an anonymous crime committed without the depicted child’s awareness. Moreover, a person can be guilty of possession just by knowing that they have *some quantity* of images on their computer, but without having knowledge or intent particular to each and every image. To be convicted, a person need only have knowledge that the *hard drive itself* contains some quantity of child

pornography, and thus possesses them all *collectively*. The definitional amendment recommended above addresses this aspect of the modern crime. A more “collective” punishment scheme is appropriate.

Computer technology, Internet access, and digital storage capabilities have changed what these crimes look like. With digital files, one cannot actually *see* what one possesses unless and until each individual file is opened with a viewing program. This has changed the type of conduct involved, people’s awareness and intent as to each image, and therefore their culpability level. A different approach for punishing this type of behavior is appropriate. Clearly defining the different *methods* of committing these crimes, and punishing them differently in recognition of their differences, brings the statute into the Twenty-First Century, and helps make the penalty scheme more rational, and in the end, more just.