F I S C A L I M P A C T R E P O R T

SPONSOR HSCAC **ORIGINAL DATE** 2/27/15 **LAST UPDATED** 3/3/15 **HB** 440&HB251/HSCACS/aHJC

SHORT TITLE Child Porn Images as Separate Offenses **SB**

ANALYST A. Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	See Narrative					

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB 125, HJC Substitute for HB 142, HB 101, HB 132, HB 270, HB 508, HB 587

SOURCES OF INFORMATION
LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Public Defender Department (PDD)
Administrative Office of the District Attorneys (AODA)
New Mexico Sentencing Commission (NMSC)
Children, Youth and Families Department (CYFD)
Attorney General's Office (AGO)

SUMMARY

Synopsis of Bill

House Judiciary Committee amendment to HSCAC substitute to House Bills 440 and 251 changes "shall" to "may" in how individual prohibited sexual acts depicted in visual or print media are charged.

Synopsis of HSCAC substitute

House Safety and Civil Affairs Committee Substitute for House Bills 440 and 251 proposes to amend the Sexual Exploitation Act (Section 30-6A-2 NMSA 1978). It adds a simulation of any prohibited sexual act enumerated in the Act, adds "any single visual depiction of a prohibited sexual act to the definition of visual or print medium, clarifies imagery as being created or stored, makes the possession, distribution or manufacture of each separate depiction of a child under 18 years of age engaged in a prohibited sexual act a separate criminal offense. The bill includes an emergency clause.

FISCAL IMPLICATIONS

The AODA states that it is difficult to assess whether costs for the district attorneys will be reduced or if they will be increased because issues will still remain concerning what constitutes each "separate depiction" and what constitutes "an item of visual or print medium."

PDD states that enactment could have fiscal impact as the prospect of life prison sentences would create more impetus to go to trial and would most likely lead to numerous appeals. While it is likely that PDD would be able to absorb some cases under the proposed law, any increase in the number of prosecutions brought about by the cumulative effect of this and all other proposed criminal legislation would bring a concomitant need for an increase in indigent defense funding to maintain compliance with constitutional mandates.

SIGNIFICANT ISSUES

According to CYFD, the United States Supreme Court has found that the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance because of the psychological and physical effects has on children and families, especially when the abuse is permanently memorialized through pictures and videos. *See New York v. Ferber*, 458 U.S. 747, 757 (1982). Viewing and collecting images of children being sexually exploited contributes to the cycle of abuse. As the Court stated in *Ferber* "the most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing sever criminal penalties on persons selling, advertising, or otherwise **promoting** this product." *Ferber*, 458 at 760 (emphasis added). This bills intention of making each separate image a crime holds offenders accountable for their actions and recognizes that each child portrayed in these images is a victim along with their families.

AODA cites State v. Olsson, in which the New Mexico Supreme Court interpreted subsection A of the section 30-6A-3, which addresses possession of child pornography. Looking at the entire Sexual Exploitation of Children Act, Section 30-6A-1 *et seq*., the court found that the legislature had not clearly defined the unit of prosecution for the offense described in subsection A. Because the statutory language was ambiguous, and the history and purpose of the statute did not offer further clarity, the court looked at the defendants' conduct to see if the acts were separated by sufficient indicia of distinctness to justify multiple punishments. The court concluded that their acts were not sufficiently distinct. The defendants, who had multiple images of child pornography, were each punished for one count of possession.

According to AODA, although HSCAC Substitute for HB 440 amends Section 30-6A-3 to provide that for the crimes of possession, distribution or manufacture of child pornography, each separate depiction of a child under eighteen years of age engaged in a prohibited sexual act contained on an item of visual or print medium is a separate criminal offense, there will still be issues concerning what constitutes each "separate depiction" and what constitutes an "item of visual or print medium." Would possession of one video showing three prohibited acts be one crime or three? (Presumably, the video would be treated as "an item" of visual medium, and each separate depiction of a prohibited sexual act on that item would be a crime, so possession of this video would result in three charges.) Would manufacturing multiple copies of that video be one criminal act (only one medium is involved), or would the manufacturer be charged separately for each copy manufactured (because HB 440s defines "medium" to be a single visual depiction of a prohibited act, so each video is a separate "medium")? Would the manufacturer

be charged for three offenses for each copy of the video manufactured, because each copy showed three prohibited acts?

The AODA also adds that it is not clear whether CS/HB440&HB251 defines the unit of prosecution for Section 30-6A-3(C), which addresses intentionally causing or permitting a child to engage in a prohibited sexual act if that person knows, has reason to know or intends that the act may be recorded or performed publically. The bill only addresses the possession, distribution or manufacture of images. It does not appear to apply to causing or permitting a child to engage in a prohibited act.

PDD cites *State v. Ballard*, 2012-NMCA-043, ¶ 31, in which the Court of Appeals recommended that the legislature "revisit Section 30-6A-2 **with the rapid developments in this digital age in mind**." The Court was disturbed by the fact that the statute as written allowed for "imprisonment for tens of years for one peer-to-peer download of images that ultimately are…possessed essentially as one group or unit in one computer." *Id*.; *see also*, Caryssa Byrne Hessick, Disentangling Child Pornography from Child Sex Abuse, 88 Wash. U. L. Rev. 853, 860 ("modern practices have resulted in some defendants who possess child pornography receiving longer sentences than defendants who sexually abuse children"). Peer-to-peer downloads allow for numerous images to be downloaded at once.

According to PDD, the defendants in *State v. Olsson*, 2014 -NMSC- 012 and *State v. Ballard* offered alternative methods of creating multiple counts, as did the Court of Appeals. There are various alternative ways to define possession: by date of download or by how many hard drives or flash drives a defendant possesses, or various other methods, rather than by the image itself. Any of these could make for more proportional punishment and still act as a deterrent. Defendants would still be held accountable while avoiding potential life sentences.

The AGO has a slightly different view from the other agencies. It offers the following:

> The current versions of sections 30-6A-2 and 30-6A-3 were recently interpreted by the New Mexico Supreme Court to be "insurmountably ambiguous" relating to what constitutes an individual act. Practically, this meant that the possession of a single image of child pornography was penalized identically as the possession of multiple images. The Supreme Court recommended a revision of the statute to clarify the legislature's intent. This bill likely clarifies this statute by amending the definitions of "visual or print medium" to penalize any single visual depiction separately, as well as including a catch-all in subsection (H) of 30-6A-3.
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> In calling for legislative review and evaluating arguments made by the defense and state, the Supreme Court noted that possession causes equal or greater harm than the original manufacture because it further disseminates the original trespass and stated that a unitary conduct analysis for possession is not likely what the Legislature intended because a defendant would have no incentive to stop downloading child pornography after the first image.
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> The root problem with the pre-existing statute under the Supreme Court's analysis was the definition of "visual or print medium." This bill not only clarifies legislative intent in the body of the statute under subsection (H), but fixes the perceived ambiguity in the definition of "visual or print medium," by adding the phrase "any single visual depiction

of a prohibited sex act" under 30-6A-2 (B)(1) and (2) to the original language. It also adds the words "created or stored" to the definition, updating the original language to apply to offenders using a computer or electronic storage device to compile or develop a collection. The language under subsection (H) clarifies that **each** depiction of a child under eighteen years of age engaged in a prohibited sexual act contained on an item of visual or print medium shall be considered a distinct act and shall be charged as an individual act.

The clarification made by the substitute bill does not require prosecutors to charge multiple possessions of each visual depiction independently. Nor does it require the sentences of the possession of multiple visual depictions to be imposed consecutively. Prosecutors and courts appear to retain charging and sentencing discretion under the plain language of the bill.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HSCAC substitute for HB 440 and HB 251 relates to HB 125 (Communication of Certain Images to Children); HJC Substitute for HB 142 (Unauthorized Distribution of Sensitive Images); HB 101 (Sexual Exploitation of Children Penalties); HB 132 (Expand Voyeurism to Include Attempt to View); HB 270 (Sex Offender Definitions); HB 508 (Increase Commercial Sex Crime Penalties); HB 587 (Sentencing for Certain Felonies).

TECHNICAL ISSUES

AODA points out that the substitute does not include the amendment proposed by the original HB 251 that would address the unit of prosecution for the crime of intentionally causing or permitting a child to engage in a prohibited sexual act if the person knows, has reason to know or intends that the act may be recorded or performed publicly. HB 251 would have added: "For the purposes of this subsection, each separate image recorded or each act performed publicly shall be prosecuted as an individual criminal offense" (emphasis added). The substitute bill's new subsection H (taken from HB 440) describes the unit of prosecution when dealing with images, but does not address the unit of prosecution for public performance of prohibited acts.

OTHER SUBSTANTIVE ISSUES

PDD offers the following example as a way to show how the changes to the current law could be interpreted by different judges creating arbitrary sentencing. *Defendant A* may appear before *Judge X* with 300 images and receive concurrent sentences for a total sentence of 18 months. *Defendant B* may appear before *Judge Y* who might run all counts consecutively and the defendant could receive 450 years.

AOC opines that the substitute would clarify that the legislative intent is for each image and/or act that is possessed, distributed, or manufactured by an individual should be a separate and distinct criminal charge. With greater access to the internet and computers, an individual can download large volumes of illegal materials at one time. This bill would expand the language in the criminal statutes to allow for multiple charges, rather than a single penalty, for volumes of illegal material that is obtained at one time, or through one source. Several states have case law or similar statutes that permit multiple charges based on each image of child pornography. Legally, these laws make clear the intent that punishment should accumulate for each image.

ALTERNATIVES

PDD suggests what it considers a simple and direct solution would be to add digital storage devices (hard drives, CD-Rs and DVD-Rs, USB flash drives, etc.) to the statutory definition of "*visual or print medium*." This would mean one count per computer hard drive or other digital storage device *containing* these images. Thus if a person possesses their illegal 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. This approach is consistent with the statute's current use of "visual or print medium," as the item possessed and accounts for modern technology and the quantity differential happening in the digital age.

PDD also suggests other alternatives to address the quantity of *digital images* in particular, while avoiding excessively long prison sentences include (1) allowing for a separate count for possessing every X number of images (25, 50, 100), or (2) allowing for one-year enhancements for every X number of images (25, 50, 100) possessed. A separate subsection aggregating digital imagery in this way would be responsive to the appellate courts' concerns, outlined in ***State v. Olsson / Ballard***, (consolidated), 2014-NMSC-012, ¶ 45, 324 P.3d 1230.

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