To: New Jersey Law Revision Commission
From: Michael Fuccile, Legislative Law Clerk
Re: Child Erotica Provisions in N.J.S. 2C:24-4 – Constitutionality
Date: July 8, 2024

MEMORANDUM

Project Summary

In New Jersey, it is a crime to photograph, record, reproduce, or reconstruct a child "engaging in a prohibited sexual act," in the "simulation of such an act," or being portrayed in a "sexually suggestive manner."[1] This criminal offense is codified in N.J.S.A. 2C:24-4, and provides three definitions of "portray[ing] a child in a sexually suggestive manner" in subsections (a), (b) and (c).[2] Subsection (c) of the statute criminalizes "depict[ing] a child for the purpose of sexual stimulation or gratification of any person who may view the depiction where the depiction does not have serious literary, artistic, political, or scientific value."[3]

In *State v. Higginbotham*, the New Jersey Supreme Court addressed whether subsection (c) was unconstitutionally overbroad in violation of the First Amendment of the United States Constitution.[4] The *Higginbotham* defendant was found in possession of a journal that contained several innocuous pictures of a friend's daughter, to which he had added sexually graphic and explicit statements or stories detailing his sexual fantasies of the minor child.[5]

The Court held that subsection (c) was unconstitutionally overbroad because it had the potential to criminalize what would otherwise be constitutionally protected speech by capturing a large swath of material that is neither obscenity nor child pornography.[6]

Statute Considered

N.J.S. 2C:24-4 provides, in relevant part that:

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"Portray a child in a sexually suggestive manner" means:

> (a) to depict a child's less than completely and opaquely covered intimate parts, as defined in N.J.S.2C:14-1, in a manner that, by means of the posing, composition, format, or animated sensual details, emits sensuality with sufficient impact to concentrate prurient interest on the child; or

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[1] N.J. STAT. ANN. § 2C:24-4(b)(1) (West 2023).
[2] N.J. STAT. ANN. § 2C:24-4.
[3] N.J. STAT. ANN. § 2C:24-4(b)(1)(c).
[4] *State v. Higginbotham*, 257 N.J. 260, 267 (2024).
[5] *Id.* at 267-70.
[6] *Id.* at 267.

(b) to depict any form of contact with a child's intimate parts, as defined in N.J.S.2C:14-1, in a manner that, by means of the posing, composition, format, or animated sensual details, emits sensuality with sufficient impact to concentrate prurient interest on the child; or

(c) to otherwise depict a child for the purpose of sexual stimulation or gratification of any person who may view the depiction where the depiction does not have serious literary, artistic, political, or scientific value.[7]

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Legislative History

Prior to February 2018, an item depicting the sexual exploitation or abuse of a child was defined as an image that "depicts a child engaging in a prohibited sexual act or in the simulation of such an act."[8] In 2017, the Legislature amended N.J.S.A. 2C:24-4 to expand the definition to include an image that "portrays a child in a sexually suggestive manner."[9]

The Legislature amended the statute because of "changes in the child pornography industry which [we]re not adequately addressed by current law" and the lack of statutory coverage for "images that depict nearly naked, suggestively-posed, and inappropriately sexualized children."[10]

Background

In *Higginbotham*, the police investigated the defendant following a report that he had a journal with a young girl on the cover with disturbing and sexually explicit statements written over the photo.[11] The girl was the young daughter of defendant's friend.[12] The defendant told police that the journal was his way of expressing himself and he also admitted sending the captioned photos to others.[13]

The defendant was indicted on sixteen counts of child endangerment in violation of N.J.S. 2C:24-4 pursuant to "subsection (c) of the definition of 'portray a child in a sexually suggestive manner.'"[14] He moved to dismiss the indictment on the grounds that "subsection (c) was unconstitutionally vague and overbroad" and the trial court denied his motion.[15] The defendant was granted leave to appeal.[16]

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[7] N.J. STAT. ANN. § 2C:24-4 (emphasis added).
[8] N.J. STAT. ANN. § 2C:24-4(b)(1) (2017).
[9] S. L. & Pub. Safety Comm. Statement to S.B. 3219 (Jun. 15, 2017).
[10] *Id.*
[11] *Higginbotham*, 257 N.J. at 267.
[12] *Id.*
[13] *Id.*
[14] *Id*. at 266-67.
[15] *Id.* at 269.
[16] *Id.* at 270.

The Appellate Division explained that child erotica was protected speech under the First Amendment.[17] The Court *sua sponte* held that all three subsections in the child erotica amendment that define "to portray a child in a sexual manner" were unconstitutional because they could be construed to criminalize images that were neither pornography nor obscenity.[18]

The Appellate Division reasoned that the statute's definition of "[p]ortray a child in a sexually suggestive manner" is broader than the United States Supreme Court's definition of "obscenity," meaning that the statute could potentially prohibit conduct protected by the First Amendment.[19] The Court also concluded that even if the statute complied with the definition of "obscenity," the prohibition on viewing certain obscene material in private is also unconstitutional.[20] Finally, the Appellate Division rejected the State's argument that the defendant created "morphed" child pornography, which is prohibited by law, because the young girl's images were not edited.[21]

The State's petition to the New Jersey Supreme Court was granted for the sole purpose of addressing the constitutionality of subsection (c).[22] The Supreme Court declined to address the other subsections in N.J.S. 2C:24-4(b)(1) because the defendant was not charged under subsections (a) or (b) and did not challenge those subsections in either the trial court or the Appellate Division.[23]

Analysis

The New Jersey Supreme Court stated that child pornography is "categorically unprotected by the First Amendment."[24] "Obscenity," as defined by the United States Supreme Court, may be regulated if the regulation meets constitutional standards.[25] To determine whether subsection (c) passes constitutional muster, the Court looked at cases decided by the United States Supreme Court regarding the government's ability to restrict speech without violating the First Amendment.[26]

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[17] *Id.* at 270-71.
[18] *Id*. at 270 (holding unconstitutional "subsection (c), which defendant had challenged, but also subsections (a) and (b), which he had not").
[19] *State v. Higginbotham*, 475 N.J. Super. 205, 233-34 (App. Div. 2023), *aff'd as modified*, 257 N.J. 260 (2024) (noting that the definitions could criminalize: (1) innocuous pictures of children or teenagers in swimsuits on a beach; (2) "photographs taken for telehealth medical diagnostic purposes -- like a rash or other skin condition"; and (3) pictures of sporting events such as wrestling, cheerleading, gymnastics, or track and field).
[20] *Id.* at 233, 235-36, (citing *Stanley v. Georgia*, 394 U.S. 557, 560-61 (1969)).
[21] *Id*. at 238 (explaining that "morphed child pornography is created when one pastes the image of an actual child's face onto the body of another—usually an adult—to make it appear as though the child is engaged in a sex act").
[22] *Higginbotham*, 257 N.J. at 281.
[23] *Id*. at 266.
[24] *Id.* at 275.
[25] *Id.* at 274-75 ("Whereas states may constitutionally proscribe the distribution of obscene material, "mere possession [of obscene material] by the individual in the privacy of his own home" is constitutionally protected.") (citing *Stanley*, 394 U.S. at 568).
[26] *Id.* at 274-78.

Child Pornography and the First Amendment

In *Miller v. California*, the United States Supreme Court outlined a three-pronged approach to determine whether material is "obscene," and may be proscribed by the government.[27] Under *Miller*, material is obscene if (1) "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest"; (2) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and (3) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[28] A statute intended to regulate obscenity must satisfy all three elements of the *Miller* standard to withstand constitutional scrutiny.[29]

In *New York v. Ferber*, the U.S. Supreme Court determined that "the States are entitled to greater leeway in the regulation of pornographic depictions of children."[30] The Supreme Court has upheld statutes that define child pornography as the "portrayal of sexual conduct or sexual acts by children, which includes the lewd or lascivious exhibition of, or graphic focus on, a child's genitals or pubic area."[31] *Ferber* also emphasized, however, that "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection."[32]

In *Osborne v. Ohio*, the U.S. Supreme Court permitted the criminalization of viewing child pornography in one's own home, breaking with the traditional notion that the government may not restrict someone from viewing obscene material in private.[33] The *Osborne* Court explained that the child pornography market was largely driven underground after *Ferber*, making it difficult "to solve the child pornography problem by only attacking production and distribution."[34]

In *Ashcroft v. Free Speech Coalition*, the U.S. Supreme Court held that images that "do not involve, let alone harm, any children in the production process" do not implicate the same state interests as child pornography and therefore, must comply with the *Miller* "obscenity" standard to meet the constitutional requirements of the First Amendment.[35]

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[27] *Miller v. California*, 413 U.S. 15, 24 (1973).
[28] *Id.*
[29] *Higginbotham*, 257 N.J. at 271, 282.
[30] *New York v. Ferber*, 458 U.S. 747, 756 (1982). *See also Higginbotham*, 257 N.J. at 275-76 (*quoting Ferber*, 458 U.S. at 756-61) (explaining that (1) "states have a compelling interest in 'safeguarding the physical and psychological well-being' of children" and "preventing their sexual exploitation and abuse"; (2) the "distribution of child pornography is 'intrinsically related to the sexual abuse of children'" and constitutes a "permanent record" of abuse which causes "continuing harm by haunting the children in years to come"; and (3) it is "irrelevant" to the child-victim "whether the final product has 'literary, artistic, political, or social value'").
[31] *Higginbotham*, 257 N.J. at 282 (*citing Ferber*, 458 U.S. at 764, 751-53, 762).
[33] *Id*. at 764-65.
[33] *Osborne v. Ohio*, 495 U.S. 103, 106-07 (1990).
[34] *Id*. at 110.
[35] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 239-54 (2002).

Finally, in *United States v. Hansen*, the Supreme Court held that "a court may hold a law facially overbroad under the First Amendment '[i]f the challenger demonstrates that the statute 'prohibits a substantial amount of protected speech' relative to its 'plainly legitimate sweep.'"[36]

State v. Higginbotham

Against this backdrop, the New Jersey Supreme Court in *Higginbotham* addressed whether subsection (c) must comply with the *Miller* standard as banning "obscenity," rather than be treated as prohibiting child pornography and, if so, whether the subsection is unconstitutionally overbroad because it criminalizes material that is neither obscene nor child pornography.[37]

The State argued that subsection (c) was not overbroad "because 'properly construed,' it targets only child pornography."[38] The State contended that because of the use of the word "otherwise," subsection (c) is a "catch-all" clause.[39] As a catch-all, the State asserted that the limitations found in subsections (a) and (b) – that the images must "emit[ ] sensuality with sufficient impact to concentrate prurient interest on the child" and reference a child's "'intimate parts'" – should be read into subsection (c), as well.[40]

The Supreme Court disagreed, explaining that "otherwise" does not mean "in a similar manner" but rather means "in a different way or manner" or "in different circumstances" or "in other respects."[41] The Court also noted that if the Legislature's intention was to carry the language of "emit[ting] sensuality" over from subsection (a) to subsection (c), then there was no reason to include identical language in subsection (b).[42] Thus, the Court concluded the Legislature's omission was intentional.[43]

Because subsection (c) is not limited to the *Ferber* definition of child pornography by prohibiting images of a child's "less than completely covered intimate parts," "contact with a child's intimate parts," "sensuality," or "prurient interest,"[44] the Court analyzed subsection (c) using the *Miller* obscenity standard.[45]

The Court concluded that subsection (c), while incorporating *Miller's* third prong that "the depiction does not have serious literary, artistic, political, or scientific value," does not incorporate either of the first two prongs in the *Miller* standard.[46] The Court explained that, "where the only

[36] *United States v. Hansen*, 599 U.S. 762, 770 (2023).
[37] *Higginbotham*, 257 N.J. at 274-88.
[38] *Id*. at 284.
[39] *Id*. ("rel[ying] on what it calls the 'familiar canon of statutory construction that catchall clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated'").
[40] *Id*.
[41] *Id.* at 284-85.
[42] *Id.* at 285.
[43] *Id*.
[44] *Id*. at 283.
[45] *Id.* at 282-83 ("Nor is subsection (c) limited to material that legally constitutes child pornography.").
[46] *Id.* at 282.

limit is that the depiction lacks 'serious literary, artistic, political, or scientific value,' large swaths of protected material are conceivably ensnared."[47]

Consequently, the *Higginbotham* Court held that, "[b]ecause the application of subsection (c) to images that constitute neither obscenity nor child pornography is realistic, . . . and is substantially disproportionate to subsection (c)'s lawful sweep, . . . subsection (c) is substantially overbroad."[48]

Finally, the Court agreed with the State that "[s]ubsections (a) and (b) are independent of subsection (c), do not depend on subsection (c) for their meaning, and can stand on their own without subsection (c)."[49] Therefore, given the "presumption of severability" contained in N.J.S. 1:1-10,[50] the Court concluded that subsection (c) is severable because "the remainder of the statute, without the invalid provision, can 'form[ ] a complete act within itself.'"[51]

Pending Bills

There are currently seven pending bills that propose amendments to N.J.S. 2C:24-4, but none directly address the constitutionality of subsection (c).[52]

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[47] *Id.* (agreeing with the Appellate Division that the language of the subsection could be construed to criminalize photos of teens at the beach, certain sporting events, etc.).

[48] *Id.* at 282 (declining to address "the validity of subsections (a) or (b)" because the "[d]efendant was not charged under subsections (a) or (b)" nor did he "challenge subsections (a) or (b) before the trial court or the Appellate Division" and adding that "the State . . . has a 'compelling interest in protecting children not only from sexual and physical abuse, but also from severe emotional, psychological, and reputational harm'" and "that 'an image that associates a child with explicit sexual content ... can haunt the child for years'").

[49] *Id.* at 288.

[50] N.J. STAT. ANN. § 1:1-10 (West 2023) ("If any title, subtitle, chapter, article or section of the Revised Statutes, . . . shall be declared to be unconstitutional, . . . in whole or in part, by a court of competent jurisdiction, such title, subtitle, chapter, article, section or provision shall, to the extent that it is not unconstitutional, . . . be enforced and effectuated, and no such determination shall be deemed to invalidate or make ineffectual the remaining titles, subtitles, chapters, articles, sections or provisions.").

[51] *Higginbotham*, 257 N.J. at 281 (*citing Inganamort v. Borough of Fort Lee*, 72 N.J. 412, 423 (1977)).

[52] S.B. 976, 221st Leg., 2024 Sess. (Jan. 9. 2024) (identical to A.B. 1892) ("[p]rohibit[ing] deep-fake pornography and impos[ing] criminal and civil penalties for non-consensual disclosure"); S.B. 2652, 221st Leg., 2024 Sess. (Feb. 12, 2024) (identical to A.B. 3539) ("[r]evis[ing] statutory terms pertaining to sexual exploitation or abuse of children"); A.B. 4643, 221st Leg., 2024 Sess. (Jun. 25, 2024) ("[c]reat[ing] penalty for child endangerment via use of social media"); S.B. 2673, 221st Leg., 2024 Sess. (Feb. 12, 2024) ("[p]rovid[ing] for jurisdiction for prosecution for certain crimes against minors committed outside New Jersey"); A.B. 1022, 221st Leg., 2024 Sess. (Jan. 9, 2024) ("[c]larif[ying] that permitting sexual abusers to reside with a child constitutes endangering welfare of a child"); A.B. 1000, 221st Leg., 2024 Sess. (Jan. 9, 2024) ("[p]rovid[ing] that unlawful use, manufacture, or distribution of controlled dangerous substance by parent or caregiver in presence of child constitutes crime of endangering welfare of that child"); A.B. 3320, 221st Leg., 2024 Sess. (Jan. 9, 2024) (proposing the "Better Care Dog Act" which adds negligent or reckless dog supervision that results in the dog attacking a child to the child endangerment statute); A.B. 782, 221st Leg., 2024 Sess. (Jan. 9, 2024) ("[p]rovid[ing] that crimes committed outside the State under certain circumstances may be prosecuted in New Jersey"); A.B. 2509, 221st Leg., 2024 Sess. (Jan. 9, 2024) ("[r]evis[ing] child pornography law).

Although A.B. 2509 proposes significant changes to N.J.S. 2C:24-4, the statute set forth in the pending bill does not match the current statutory language in N.J.S. 2C:24-4. In particular, the definition of to "[p]ortray a child in a sexually suggestive manner" does not appear in the pending bill at all.

Conclusion

Staff requests authorization to conduct further research and outreach to determine whether N.J.S. 2C:24-4 would benefit from a modification to the child erotica provision to comply with the First Amendment, as discussed by the New Jersey Supreme Court in *State v. Higginbotham*.