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Child porn laws must change with times

NM high court needs to address issue of technology, penalties

The New Mexico Supreme Court recently provided a temporary fix for an antiquated law. Rapid changes in modern technology have vastly altered the way the crimes of possession and distribution of child pornography are committed, making it necessary to update the law to clarify how to charge and punish possession of digital files. But the need to temporarily cap it at one count is not a "loophole" to close; it is a stop-gap necessary to protect defendants' constitutional rights until the statute can be updated for the modern age.

These crimes used to involve photographs and VHS video tapes possessed in smaller numbers because they take up physical space. Now they are almost exclusively committed by uploading and downloading digital files — usually in bulk — through free, online filesharing programs. Without physical objects and because hundreds or more images can be transferred with a single click, the quantities of images possessed and distributed has increased exponentially. Thus, the courts have struggled with very important questions about criminal blameworthiness, and what punishment actually fits the crime of possession, as opposed to manufacture.

The New Mexico Supreme Court, in 2014, held that this modern reality of digital child pornography raised uncertainty about the Legislature's intent to impose image-by-image felony punishment, which can lead to absurdly harsh sentences. As a temporary fix, the court applied constitutional restrictions so that people who possess many images at once, in one location, without "distinct" criminal conduct, can only be punished for one felony, rather than dozens or hundreds. (The court's decision places no limits on charging multiple counts for manufacturing images.) The court asked the Legislature to revisit the statute to address how modern technology has changed the way this crime is often committed.

In response, a bill was introduced last session seeking to ensure that each image possessed would support a separate felony conviction. The Attorney General's Office stands in strong support of the measure. However, this bill is an oversimplified response to a complicated policy issue. Rather than addressing the court's concern about image-by-image charging for downloaded images, the bill seeks to adopt the very result the court sought to avoid, so that picture-possessors would face up to hundreds of years in prison, far longer than the sentence for actually sexually abusing a child, which is up to 18 years.

The bi l l's proponents assured lawmakers that individual prosecutors would not use the statute to charge hundreds of felonies, even though the bill made it possible. In other words, the attorney general's bill would let prosecutors decide how many decades in prison a defendant would face.

This is no solution at all.

Only the Legislature is constitutionally permitted to define what conduct constitutes a single crime or more than one, and to define the corresponding penalties. This is because relying entirely on prosecutorial discretion allows for huge variations from case to case. It also gives prosecutors an unfair advantage in plea negotiations; in most cases, they could charge hundreds of felony counts, then offer to dismiss all but a few if the person pleads guilty. It is this kind of fear-based plea bargaining that leads innocent people to plead guilty just to avoid the risk of life behind bars.

To be clear, an amendment to clarify the penalties for digital child pornography possession is not opposed. However, a person who downloads 50 images with one click does not deserve 37 years in prison longer than a person who downloads 25.

It is the cornerstone of our criminal justice system that the punishment should fit the crime. Simply because technology has evolved, people are now facing decades in prison for possessing pictures without being more "guilty," and without having any contact with children. The punishment should fit

the crime, and the relative harm in these cases simply does not justify the sentencing scheme proposed by House Bill 440.

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