Opinion No. 90-24

December 18, 1990

OPINION OF: HAL STRATTON, Attorney General

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TO: Honorable Mary L. Thompson, State Representative, 1915 La Jolla, Las Cruces, New Mexico 88005

QUESTIONS

1. May a state constitutionally proscribe the possession of child pornography?

2. If so, may such a law include all minors up to and including eighteen years of age?

CONCLUSIONS

1. Yes.

2. Yes, although the law may be more vulnerable to challenge in a state, like New Mexico, that generally treats eighteen year olds as adults.

ANALYSIS

1. The United States Supreme Court has answered affirmatively the question whether a state may constitutionally proscribe the possession of child pornography.

In general, obscene materials are not protected by the prohibition in the First Amendment to the United States Constitution against laws abridging the freedom of speech or of the press. Roth v. United States, 354 U.S. 476, 485 (1957). The Court has established guidelines to ensure that state regulation of obscenity does not extend to constitutionally protected expression, requiring that a "state offense ... be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1973).

Pornography depicting children need not be obscene to fall outside First Amendment protection. In New York v. Ferber, 458 U.S. 747, (1982), the Court addressed a state's ban on distributing child pornography. The Court decided that, because of a state's compelling interest in preventing child exploitation and abuse, child pornography was not protected by the First Amendment even if it was not obscene under guidelines established by the Court for pornography involving adults only. Id. at 763-64, 765 n.18. Accordingly, a state may subject child pornography to content-based regulation without

showing that the material appeals to the prurient interest of the average person or that sexual conduct depicted is portrayed in a patently offensive manner. Id. at 764.

After Ferber, several state courts determined that the principles enunciated in that case supported the constitutionality of state laws prohibiting possession of child pornography. See Ex parte Felton, 526 So.2d 638 (Ala. 1988); State v. Emond, 163 Ariz. 138, 786 P.2d 989 (Ariz. App. 1989); People v. Geever, 122 Ill.2d 313, 119 Ill. Dec. 341, 522 N.E.2d 1200, appeal dismissed, 488 U.S. 920 (1988); State v. Meadows, 28 Ohio St.3d 43, 28 O.B.R. 146, 503 N.E.2d 697 (1986); cert. denied, 480 U.S. 936 (1987); Savory v. State, 767 S.W.2d 242 (Tex. Ct. App. 1989); State v. Davis, 53 Wash. App. 502, 768 P.2d 499 (1989). See also United States v. Boffardi, 684 F. Supp. 1263, 1267-68 (S.D.N.Y. 1988) (construing a federal statute making it a crime to knowingly receive through interstate mail or commerce any visual depiction of a minor engaging in sexually explicit conduct), aff'd, 872 F.2d 1022 (2d Cir. 1989). The United States Supreme Court recently followed suit in Osborne v. Ohio, 495 U.S. ___, 109 L. Ed. 2d 98, 110 S. Ct. 1691 (1990), applying its decision in Ferber and upholding an Ohio law making it a crime to possess or view child pornography.

The constitutional challenges to Ohio's statute in Osborne were based on a previous Supreme Court decision holding that a state could not constitutionally outlaw the private possession of obscene material. Stanley v. Georgia, 394 U.S. 557 (1969). According to that decision, a ban on mere possession of obscene materials implicated the right of persons under the First Amendment guarantees of freedom of speech and press to "receive information and ideas, regardless of their social worth." 394 U.S. at 564. The prohibition also invaded the "fundamental... right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." Id.

The Court found that the interests underlying the prohibitions on child pornography at issue in Osborne sufficiently distinguished the case before it from Stanley.[1] While the prohibition in Stanley was premised on the state's asserted interest in protecting a person's mind from the effects of obscenity,[2] in Osborne "the State does not rely on a paternalistic interest in regulating Osborne's mind. Rather, Ohio has enacted § 2907.323(A)(3) in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children." 495 U.S. at ___, 109 L. Ed. 2d at 109, 110 S. Ct. at 1696. Quoting from Ferber, the Court observed:

It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." . . . The legislative judgment, as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.

Id. (quoting Ferber, 458 U.S. at 756-58). The Court also found reasonable the state's conclusion "that it will decrease the production of child pornography if it penalizes those

who possess and view the product, thereby decreasing demand." Id. Finally, the Court found other interests supporting the law:

First, ... the materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come. The State's ban on possession and viewing encourages the possessors of these materials to destroy them. Second, encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.

Id. at ___, 109 L. Ed. 2d at 110, 110 S. Ct. at 1697 (citations omitted).

In our opinion, Osborne firmly establishes a state's authority to enact laws prohibiting the possession of child pornography. In Ferber, however, the Supreme Court cautioned that

[t]here are ... limits to the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age. The category of "sexual conduct" proscribed must also be suitably limited and described.

...We note 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. As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant.

458 U.S. at 764-65 (emphasis in original).[3] A state's ban on possession, therefore, should encompass child pornography within the parameters established by the Court to ensure constitutionality.[4]

2. One of the necessary criteria identified in Ferber for statutes regulating child pornography is that the offense be limited to work visually depicting "sexual conduct by **children below a specified age**." 458 U.S. at 764 (emphasis added). There is no apparent reason why a state could not regulate child pornography depicting persons age nineteen and under, provided those persons qualified as children. In Osborne v. Ohio, for example, the Supreme Court rejected the claim that Ohio's statute prohibiting the possession of pornographic materials depicting a minor was unconstitutionally vague because it did not define the term "minor." The Court applied Ohio's general age of majority provisions stating that "a minor is anyone under eighteen years of age." 495 U.S. at ___, 109 L. Ed. 2d at 111 n.9, 110 S. Ct. at 1698 n.9. See also Campbell v. State, 709 P.2d 425 (Wyo. 1985) (term "child" in indecent liberties statute interpreted according to general statutes dealing with children that set the age of majority at

nineteen years). Child pornography statutes prohibiting visual reproductions of children under age eighteen are not unusual. See, e.g., New York v. Ferber, 458 U.S. at 1127 n.17 (stating that sixteen states' child pornography statutes define a child as a person under age eighteen); United States v. Freeman, 808 F.2d 1290 (8th Cir.) (upholding definition of minor in Child Protection Act as person under age eighteen), cert. denied, 480 U.S. 922 (1987); People v. Geever, 122 Ill.2d 313, 119 Ill. Dec. 341, 522 N.E.2d 1200 (1988) (reviewing statute prohibiting pornographic materials involving children under age eighteen); Freeman v. Commonwealth, 223 Va. 301, 288 S.E.2d 461 (1982) (finding constitutional a statute prohibiting production of sexually explicit visual material having as a subject a person less than eighteen years of age). A statute is not impermissible because it encompasses all children under eighteen, including those who are married, emancipated or treated as adults under some criminal statutes. People v. Ewen, 194 Ill.App.3d 404, 141 Ill.Dec. 433, 511 N.E.2d 426, cert. denied, ___ U.S. ___, 111 S. Ct. 149 (1990).

Conceivably, a child pornography statute would be open to challenge if it prohibited non-obscene depictions of persons generally considered adults. In New Mexico, for example, childhood legally ends at age eighteen. See, e.g., NMSA 1978, § 12-2-2(K) (Repl. Pamp. 1988) ("a person reaches his 'age of majority' on the first instant of his eighteenth birthday"). See also State v. Aguirre, 91 N.M. 672, 673, 579 P.2d 798, 799 (Ct. App.) (an eighteen year old is considered an adult for most purposes), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978); Weiland v. Vigil, 90 N.M. 148, 152, 560 P.2d 939, 943 (Ct. App.) (children eighteen years of age are considered adults), cert. denied, 90 N.M. 255, 561 P.2d 1348 (1977). An attempt in such states to include persons over seventeen within the group protected by a ban on possession of child pornography might be vulnerable to constitutional challenge, either on equal protection grounds,[5] see In re Appeal in Maricopa County Juvenile No. J-86509, 604 P.2d 641 (Ariz. 1979) (en banc) (statutory extension of juvenile court jurisdiction to persons over age eighteen results in a classification which discriminates between adults), cert. denied, 455 U.S. 967 (1980), or on the grounds that the reasons stressed in Osborne for upholding laws banning child pornography, based on protecting children, do not apply to persons generally considered adults.

Significantly, as used in New Mexico's Children's Code, NMSA 1978, §§ 32-1-1 to -53 (Repl. Pamp. 1989), a "child" is "an individual who is less than eighteen years old" and an "adult" is "eighteen years of age or older." Id. § 32-1-3(A), (B). An "abused child" includes a child who has been "sexually... exploited," defined, in part, as "allowing, permitting, encouraging or engaging a child in obscene or pornographic photographing or filming or depicting a child for commercial purposes as those acts are defined by state law." Id. § 32-1-3(M)(2)(b). Thus, New Mexico's legislature has determined in the Children's Code that children requiring special protection from exploitation through child pornography are persons under eighteen. See also State v. Lucero, 87 N.M. 242, 245, 531 P.2d 1215, 1218 (Ct. App.) (statute imposing stricter penalties for abusing children than for abusing adults was justified because "children, who are often times defenseless, are in need of greater protection than adults. A stricter penalty is one

means of attaining this greater degree of protection"), cert. denied, 87 N.M. 239, 531 P.2d 1212 (1975).

On the other hand, when reviewing equal protection challenges to a statute, courts presume that legislative acts are valid and normally subject them to a rational basis test. Richardson v. Carnegie Library Restaurant, Inc., 107 N.M. 688, 693, 763 P.2d 1153, 1158 (1988). Under the rational basis or minimum scrutiny test, a court will strike down a statutory classification only if it

is so devoid of rational support or serves no valid governmental interest, so that it amounts to mere caprice.... [T]he courts neither will inquire into the wisdom, policy, or justness of legislation, nor will they substitute their views for that of the legislature, but rather will uphold the statute if any state of facts reasonably can be conceived that will sustain the challenged classification.

Id.

In some equal protection cases, courts will subject a statute to closer scrutiny,[6] but a court faced with the issue likely would employ the rational basis test to evaluate the age categories in a child pornography statute. At least one court has stated that, because child pornography is not protected by the First Amendment, the definition of minor in a statute regulating such materials need only bear a rational relationship to a legitimate governmental interest. United States v. Freeman, 808 F.2d 1290, 1293 (8th Cir.), cert. denied, 480 U.S. 922 (1987). In addition, classifications based on age normally are upheld if they are reasonable and are not arbitrary. See Texas Woman's Univ. v. Chayklintaste, 530 S.W.2d 927, 928 (1975); 16B C.J.S. Constitutional Law § 684 (1985). See also City of Dallas v. Stanglin, 490 U.S. 19, 104 L. Ed. 2d 18, 109 S. Ct. 1591 (1989) (city ordinance restricting dance hall patrons to persons age fourteen to eighteen did not create suspect classifications or impinge on constitutionally protected rights and survived rational basis scrutiny under the equal protection clause); 43 C.J.S. Infants § 3 (1978) (generally, a state's legislature may prescribe a longer period of minority for some purposes than for others). Thus, while there is nothing inherently wrong with classifying an eighteen year old person as a child for purposes of a statute prohibiting the possession of child pornography, to withstand constitutional challenge in a state where eighteen year olds are generally considered adults such a statute should be supported by an articulable reasonable purpose.

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GENERAL FOOTNOTES

n1 As observed in Osborne, 495 U.S. at ___, 109 L. Ed. 2d at 109, 110 S. Ct. at 1696, the Supreme Court in Stanley declined "to express any opinion on statutes making criminal possession of other types of printed, filmed or recorded materials.... In such

cases, compelling reasons may exist for overriding the right of the individual to possess those materials." 394 U.S. at 568.

n2 Another reason advanced for the prohibition was "that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence." 394 U.S. at 566. The Court found "little empirical basis for that assertion" and counselled that the usual deterrents applied to prevent crime are education and punishment for violations of the law. Id. at 566-67. See also Osborne, 495 U.S. at ___, 109 L. Ed. 2d at 109 n.4, 110 S. Ct. at 1696 n.4.

n3 The Court also noted in Ferber that nudity, without more, is protected expression. 458 U.S. at 765 n.18. See also Osborne, 495 U.S. at ___, 109 L. Ed. 2d at 111, 110 S. Ct. at 1698.

n4 Current New Mexico law forbids "any person to intentionally ... possess with intent to distribute any visual or print medium depicting any prohibited sexual act or simulation of such act ... if one or more of the participants in that act is a child under sixteen years of age." NMSA 1978, § 30-6A-3 (Cum. Supp. 1990). The definitions of prohibited materials in the statute, id. § 30-6A-1 (Repl. Pamp. 1984), are similar to those found constitutional in Ferber. They also are similar to the descriptions of child pornography in federal law prohibiting a person from knowingly receiving any visual depiction transported in interstate commerce of a minor engaging in sexually explicit conduct, 18 U.S.C.A. §§ 2252, 2256 (West Supp. 1990), and which have been found constitutional. See, e.g., United States v. O'Malley, 854 F.2d 1085 (8th Cir. 1988).

n5 The equal protection clause of the United States Constitution prohibits a state from denying "to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. See also N.M. Const. art. II, § 18 ("No person shall... be denied equal protection of the laws").

n6 According to the New Mexico Supreme Court, a court will apply strict scrutiny when analyzing legislation that infringes fundamental constitutional rights or makes distinctions directed toward suspect classes. Richardson, 107 N.M. at 693, 763 P.2d at 1158. The Court noted that "[o]nly statutory classifications based on race, national origin, or alienage so far have been treated as suspect." Id. at 696, 763 P.2d at 1161. An intermediate or heightened scrutiny has been employed in cases addressing statutes that classify according to gender and illegitimacy. Id. at 693-94, 763 P.2d at 1158-59.