STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
APR 09 2018
SC Court of Appeals

---

Appeal from Richland County

R. Knox McMahon, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

MICHAEL SCOTT SIMMONS,

APPELLANT

APPELLATE CASE NO 2016-001975

---

# SUPPLEMENTAL RECORD ON APPEAL

---

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH
Assistant Attorney General
S.C. Bar No. 15608
P. O. Box 11549
Columbia, SC 29211
(803) 734-3727

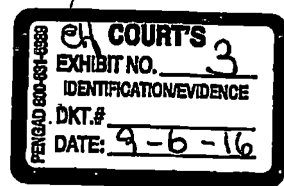
ATTORNEYS FOR RESPONDENT

# INDEX

INDEX ........ i

COURT'S EXHIBIT #3 (DEFENSE MOTION) ........ 1

CERTIFICATE OF COUNSEL ........ 15




1

| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF GENERAL SESSIONS |
|---|---|---|
| | ) | |
| COUNTY OF RICHLAND | ) | Indictment No. 2014GS4006677; 2016GS4001720-724 |
| State of South Carolina, | ) | |
| | ) | |
| v. | ) | **MOTION TO HOLD S.C. CODE 16-15-405(A) UNCONSISITUTIONALLY OVERBROAD** |
| Michael Scott Simmons, Defendant. | ) | |

**Introduction**

Defendant has been charged under S.C. Code 16-15-405 (herein 16-15-405) with Second Degree Exploitation of a Minor: "[a]n individual commits the offense of second degree sexual exploitation of a minor if, knowing the character or content of the material, he: (2) distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity or appearing in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation." S.C. Code Ann. § 16-15-405(A). The statute does not limit itself to materials that are obscene as defined by *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), however, and it is also worded in such an overly broad manner that it includes material that does not involve any actual children, as required by *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982). The statute punishes a substantial amount of protected free speech, and is for this reason unconstitutionally overbroad under *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

Under 16-15-405, a mildly racy production of Shakespeare's Romeo and Juliet would be illegal. The statute, at its broadest, prohibits any visual representation of "touching, in an act of apparent sexual stimulation... the clothed... breasts of a human female." S.C. Code Ann. § 16-15-375(5)(c). In Romeo and Juliet, Juliet was thirteen. ROMEO AND JULIET, act I, sc. 2, l. 9 ("She hath not seen the change of fourteen years"). If portrayed by young adult actors who looked the part, the recording of such a play would be a two to ten year felony in the state of South Carolina.

**I. Ashcroft clearly holds unconstitutional any statute that criminalizes child pornography produced without actual children, and which has no concern for obscenity**

16-15-405 has exactly the type of overbreadth that was held to be unconstitutional by the Supreme Court of the United States in *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002). Ashcroft arose after the federal child pornography statute had been modified to include any image which "is, *or appears to be*, of a minor engaging in sexually explicit conduct." Id at 241 (emphasis added). The Supreme Court ruled that it was unconstitutional for Congress to make illegal the production, transport or dissemination of images which appeared to be, but were actually not, minors engaging in sexual acts. *Ashcroft* at 239.

In holding the new statute unconstitutional, the Supreme Court focused on two prior free speech decisions: *New York v. Ferber,* 458 U.S. 747 (1982), which held that child pornography could be generally banned in order to protect children, and *Miller v. California,* 413 U.S. 15 (1973), which set out the constitutional definition for speech that is not protected due to being obscene. Specifically, the *Ashcroft* court held that

> By prohibiting child pornography that does not depict an actual child, the statute goes beyond *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), which distinguished child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process. See *id.,* at 758, 102 S.Ct. 3348. As a general rule, pornography can be banned only if obscene, but under *Ferber,* pornography showing minors can be proscribed whether or not the images are obscene under the definition set forth in *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

*Ashcroft v. Free Speech Coal.,* 535 U.S. 234, 240, 122 S. Ct. 1389, 1396, 152 L. Ed. 2d 403 (2002).

Because the statute in question "cover[ed] materials beyond the categories recognized in *Ferber* and *Miller*" the Court found "[t]he provision abridges the freedom to engage in a substantial amount of lawful speech. For this reason, it is overbroad and unconstitutional." *Ashcroft* at 256.

*Ashcroft* stands for the proposition that any child pornography statute which does not restrict itself to obscene material, and which includes representations that are created without actual children, is overbroad and unconstitutional.

**II. 16-15-405 has no concern for obscenity**

The Supreme Court defined one limit of pornography legislation by defining obscenity in *Miller v. California*:

> [W]e now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also 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, 93 S. Ct. 2607, 2614–15, 37 L. Ed. 2d 419 (1973).

This continues to be the governing standard for obscenity today. See for example *United States v. Whorley*, 550 F.3d 326 (4th Cir. 2008).

The South Carolina statute prohibiting child pornography in this case, 16-15-405, meets one of the prongs of Miller. 16-15-405 criminalizes material when "a reasonable person would infer the purpose is sexual stimulation." This meets the first *Miller* requirement: the trier of fact must find that the material, "taken as a whole, appeals to the prurient interest." *Miller* at 24. The other two prongs, however, are entirely absent from the statute. The statute makes no reference to whether a work "depicts or describes, *in a patently offensive way*, sexual conduct specifically defined by the applicable state law." *Id* at 24 (emphasis added). While there is a specific definition of the sexual conduct in 16-15-375(5), there is no point at which the statute restricts itself to patently offensive material. And, most importantly, there is no mention whatsoever of whether "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller* at 24.

The text of the full statute suggests that this omission is not accidental. 16-15-375, which contains the definitions to be used for the child pornography statutes, does include a clear obscenity standard. 16-15-375(1), the definition of "harmful to minors," reads, in full:

> (1) "Harmful to minors" means that quality of any material or performance that depicts sexually explicit nudity or sexual activity and that, taken as a whole, has the following characteristics:
>
> (a) the average adult person applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest of minors in sex; and
>
> (b) the average adult person applying contemporary community standards would find that the depiction of sexually explicit nudity or sexual activity in the material or performance is patently offensive to prevailing standards in the adult community concerning what is suitable for minors; and
>
> (c) to a reasonable person, the material or performance taken as a whole lacks serious literary, artistic, political, or scientific value for minors.

S.C. Code Ann. § 16-15-375(1)

This is, almost verbatim, the standard for obscenity laid out in *Miller*. This standard does not appear anywhere in 16-15-405. The fact that the legislature included a reference to the *Miller* obscenity standard in one part of the statute, but did not use that standard in 16-15-405, indicates that the statute "seeks to reach beyond obscenity, and it makes no attempt to conform to the Miller standard." *Ashcroft* at 240.

**III. 16-15-405 criminalizes material that appears to, but does not, involve children**

In *New York v. Ferber*, 458 U.S. 747 (1982), the Supreme Court confronted a New York statute which criminalized child pornography involving actual children, without reference to obscenity. The statute read "A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes or induces a child less than sixteen years of age." *Ferber* at 750. The Court accepted the case in order to answer the question: "To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?" *Ferber* at 753.

The *Ferber* Court identified five reasons why pornography involving actual children could in fact be restricted without referencing the obscenity statute. The Court weighed the well-being of the actual children abused in the creation of the pornography against the strong speech protections of the First Amendment. The consistent focus throughout *Ferber* is on "whether a child has been physically or psychologically harmed in the production of the work." *Id* at 761. The Court found that a broad prohibition on child pornography involving actual children was justified by the state's compelling interest in "safeguarding the physical and psychological well-being of a minor" was sufficient to overcome the substantial First Amendment burden. *Id* at 756.

One redeeming aspect that the Court notes, however, is that any literary, artistic, scientific, or political value that might be captured by representations of adolescent sexuality could be captured by works which appeared to, but did not actually, involve children. *Id* at 763 ("...if it were necessary for literary or artistic value, a person over the statutory age who perhaps

looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative.").

South Carolina's statute, 16-15-405, is not within the safe haven of *Ferber* because it does not restrict itself to criminalizing material which depicts actual children. 16-15-405 criminalizes material which contains "a visual representation of a minor." This raises the question of whether a "visual representation" includes materials which appear to be images of minors, but which were created without the abuse of any actual minors.

"Statutory construction must begin with the language of the statute... Where the language of the statute is unambiguous, the Court's inquiry is over, and the statute must be applied according to its plain meaning." *Jennings v. Jennings*, 401 S.C. 1, 4, 736 S.E.2d 242, 243–44 (2012) (internal citations omitted). See also *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 401 n. 4, 728 S.E.2d 477, 481 n. 4 (2012)("If legislative intent is clear as reflected in the statutory language, any public policy as promulgated by this Court must give way . . . . *"); Bentley v. Spartanburg County*, 398 S.C. 418, 426, 730 S.E.2d 296, 301 (2012)("[W]e are interpreters not legislators and are bound by the language of [the statute] as written.").

The Oxford English Dictionary gives the relevant definition of "representation" as "an image, likeness, or reproduction in some manner of a thing." *Representation, Oxford English Dictionary* (2nd Ed. 1989). Merriam Webster's Collegiate has the definition as "an artistic likeness or image." *Representation, Mirriam Webster's Collegiate Dictionary* (11th Ed. 2003). Internet dictionaries are in agreement: the Mirriam-Webster online dictionary has the relevant definition as: "a painting, sculpture, etc., that is created to look like a particular thing or person." *Representation, Mirriam-Webster Online Dictionary, available at* http://www.merriam-

webster.com/dictionary/representation. The online Oxford English Dictionary has "A depiction or portrayal of a person or thing, typically one produced in an artistic medium; an image, a model, a picture." *Representation, Oxford English Dictionary Online, available at* http://www.oed.com/view/Entry/162997.

Each of these definitions, as well as the common usage, includes material that is created to represent something, without the use of a physical original. The plain language of the statute includes a "likeness" of a minor engaged in sexual activity, or a "painting that is created to look like" a minor engaged in sexual activity, or a "portrayal of a person or thing... produced in an artistic medium" that represents a minor engaged in sexual activity. Interpreting the phrase "visual representation" to be limited to material using actual children would be a blunt distortion of the English language.

The core issue in *Ferber* was that the images were produced through the abuse of actual children. In *Ashcroft* the Supreme Court held that the federal statute was not in line with *Ferber* because "[t]he prohibition on 'any visual depiction' does not depend at all on how the image is produced." *Ashcroft* at 241. The same is true of the "visual representation" of 16-15-405(A).

The context of the statute, like the plain language, confirms that 16-15-405(A) applies to apparent as well as actual children. The definitions section of the statute, 16-15-375, defines "material" as "pictures, drawings, video recordings, films, digital electronic files, or other visual depictions or representations but not material consisting entirely of written words." This directly includes visual depictions that can be created without the use of actual children, such as drawings, digital electronic files, and "other visual depictions." It draws the line of what is not

included at text, which strongly suggests that anything short of a purely textual depiction is included in the statute as a visual depiction.

16-15-405 also includes 16-15-405(B), which reads: "In a prosecution pursuant to this section, the trier of fact may infer that a participant in sexual activity or a state of sexually explicit nudity depicted in material as a minor through its title, text, visual representations, or otherwise, is a minor." S.C. Code Ann. § 16-15-405. This is a fairly contorted provision, and it is difficult to discern precisely what it means. The operative language in the section is "may infer," which indicates that the trier of fact may, but is not required to, take into account a certain sort of context when making a factual determination. The purpose of the section seems to be to allow triers of fact to make findings on age without reference to direct and reliable sources such as birth certificates or witness interviews. This minimizes the burden on the state of showing one major element in the statute, and increases the likelihood of conviction for pornography created without the use of actual children. This section expands the limits of liability by increasing the scope of what a factfinder may consider.

The plain language of the statute is unambiguous, and the statutory context supports it: 16-15-405 includes both material that is a minor engaged in sexual activity, and also material that appears to be a minor engaged in sexual activity.

**IV. 16-15-405 is unconstitutional under *Ashcroft***

16-15-405 does not attempt to restrain criminal liability to materials that are obscene under *Miller*. 16-15-405 does not restrict itself to representations that involve actual children. The Supreme Court has held very clearly that any statute that "covers materials beyond the

categories recognized in *Ferber* and *Miller*" is "overbroad and unconstitutional." *Ashcroft* at 256. 16-15-405 is exactly such a statute.

The statute at issue in *Ashcroft* prohibited "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, that is, or appears to be, of a minor engaging in sexually explicit conduct." *Id* at 241. In describing the statute, the Court pointed out that:

> The prohibition on "any visual depiction" does not depend at all on how the image is produced. The section captures a range of depictions, sometimes called "virtual child pornography," which include computer-generated images, as well as images produced by more traditional means. For instance, the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology, a "picture" that "appears to be, of a minor engaging in sexually explicit conduct." The statute also prohibits Hollywood movies, filmed without any child actors, if a jury believes an actor "appears to be" a minor engaging in "actual or simulated ... sexual intercourse." § 2256(2).

*Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 241, 122 S. Ct. 1389, 1397, 152 L. Ed. 2d 403 (2002)

The South Carolina statute reads "An individual commits the offense of second degree sexual exploitation of a minor if, knowing the character or content of the material, he: (2) distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity or appearing in a state of

sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation." S.C. Code Ann. § 16-15-405(A). Like the statute in *Ashcroft*, this prohibits material without regard for how it is produced. It includes computer-generated images, as well as a painting depicting a scene from classical mythology, or a picture that appears to be, but is not, of a minor engaged in sexual activity. It criminalizes any Hollywood movie, filmed without child actors, where a jury might believe that the actor is below eighteen (18) years of age. South Carolina's child pornography statute, 16-15-405, prohibits the same material as the statute in *Ashcroft*, and has an identical disregard for *Miller*. 16-15-405 is unconstitutional under *Ashcroft*.

It appears that there has been no constitutional challenge to 16-15-405 in South Carolina in the wake of *Ashcroft*. Other states, however, did examine their statutes in light of the First Amendment. In Illinois, the child pornography statute at the time referred to "...a film, videotape, photograph, or other similar visual medium or reproduction or depiction by computer that is, or *appears to be,* that of a person, either in part, or in total, under the age of 18..." and the Illinois court noted that "[t]he parties seem to agree in their briefs that [the statute] is unconstitutional because its language is indistinguishable from the language of the CPPA invalidated in *Ashcroft.*" *People v. Alexander*, 204 Ill. 2d 472, 481, 791 N.E.2d 506, 512 (2003).

In states where child pornography challenges were upheld, it was invariably because the statutes specifically limited their scope to actual child pornography. *See Webb v. State*, 109 S.W.3d 580, 583 (Tex. App. 2003) ("Unlike the CPPA, however, the plain language of the[Texas] statute indicates that it prohibits only possession of material that depicts an actual child, not material that merely "appears" to depict a child."); *Com. v. Simone*, 63 Va. Cir. 216 (2003) (" Neither the Virginia Code section criminalizing possession of such material, nor the

definition of 'sexually explicit visual material,' refer to images that *appear to be* of children, as did the objectionable portions of the CPPA."); *State v. Huffman*, 2006-Ohio-1106, ¶ 29, 165 Ohio App. 3d 518, 528, 847 N.E.2d 58, 65, aff'd in part, appeal dismissed in part, 2007-Ohio-4553, ¶ 29, 114 Ohio St. 3d 433, 872 N.E.2d 1213 ("Unlike the CPPA provisions struck down in *Ashcroft*, the statute does not attempt to criminalize the possession of virtual child pornography."); *Ferrick v. State*, 217 P.3d 418, 420 (Alaska Ct. App. 2009) ("Seemingly, then, AS 11.61.127(a) is fully consistent with the ruling in *Free Speech Coalition*—in that the statute applies only to pornographic materials that were produced using real children under the age of 18."); *State v. Bacon*, No. CR030216984S, 2005 WL 758065, at *8 (Conn. Super. Ct. Feb. 28, 2005) ("General Statutes § 53a-193(13) and its definition of child pornography is not overbroad. It limits prosecutions to child pornography that is produced by using real children, depicted performing live sexual acts."); *People v. Campbell*, 94 P.3d 1186, 1190 (Colo. App. 2004) ("Unlike the statute in *Free Speech Coalition*, Colorado's sexual exploitation of children statute does not prohibit the making or possession of photographs that "appear[ ] to be" of a minor engaged in sexually explicit conduct.").

There is no doubt in any of these opinions that a statute like 16-15-405, which reaches material that only appears to be child pornography and which does not have any requirement for obscenity, is unconstitutional.

**V. The proper remedy for statutes that are unconstitutionally overbroad under the First Amendment is the invalidation of the full statute**

The general rule for facial challenges to statutes in criminal cases is that "[a] facial challenge to a legislative Act is the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697 (1987). *Salerno*, however, notes one major exception to this rule: a challenge of overbreadth under the First Amendment. *Id* at 745. Salerno cites to a footnote in a previous Supreme Court case, *Schall v. Martin*, 467 U.S. 253 (1984), which in turn cites to *New York v. Ferber*. Overbroad child pornography statutes are the paradigmatic example of statutes that are subject to facial overbreadth challenges under the First Amendment. The Supreme Court characterized *Ashcroft* as "a textbook example of why we permit facial challenges to statutes that burden expression." Ashcroft at 244.

The Supreme Court characterized the test for novel overbreadth claims, as well as the appropriate remedy, in *Virginia v. Hicks*, 539 U.S. 113, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003):

> "The showing that a law punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep suffices to invalidate all enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression."

*Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003) (internal citations omitted).

These inquiries can be fairly fact specific. *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 2917, 37 L. Ed. 2d 830 (1973) (" It remains a 'matter of no little difficulty' to determine when a law may properly be held void on its face and when 'such summary action' is inappropriate."). In the case at hand, however, the Supreme Court has already ruled, in *Ashcroft*, on a nearly identical federal statute. As there is precedence directly on point, no novel balancing test is required. If the statute includes pornography that is created without actual children, and does not conform with the obscenity standard of *Miller*, it is facially overbroad and the appropriate remedy is invalidation.

**Conclusion**

The South Carolina statute criminalizes conduct that is essentially identical to the conduct criminalized by the statute held unconstitutional in *Ashcroft*. 16-15-405 is unconstitutionally overbroad. Accordingly, the defendant moves the court to find 16-15-405(A) unconstitutional.

Respectfully submitted,

Robert L. Bank, Jr.
Assistant Public Defender

Columbia, South Carolina
This 6 day of September, 2016

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

This 9th day of April, 2018.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

This 9th day of April, 2018.

RECEIVED
APR 09 2018
SC Court of Appeals