



## **Reproduction of Child Pornography Statute**

September 23, 2014

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# Overview



- Background
- Issues Raised with Current Language
  - Should there be a “knowing” mens rea?
  - To what should “lascivious intent” refer?
- Inconsistency of Existing Va. Code § 18.2-381 with Existing Penalties
- Policy Options

# Background



- The Virginia statute that criminalizes the production, transmission, or display of child pornography is Va. Code § 18.2-374.1:1(C).
- “Any person who (i) reproduces by any means, including by computer, sells, gives away, distributes, electronically transmits, displays with lascivious intent, purchases, or possesses with intent to sell, give away, distribute, transmit, or display child pornography with lascivious intent or (ii). . .”

# Background



- Recently, two questions have been raised on how this particular subdivision should be interpreted.
- Additionally, a contradiction between statutes as to the penalty for this offense, and others in the Obscenity Article of Chapter 8 of Title 18.2 has been identified.

# Issues Raised: Mens Rea



- Subsection A of Va. Code § 18.2-374.1:1, which criminalizes simple possession of child pornography, requires a mens rea of “knowingly.”
- However, the word “knowingly” is not found in Subsection C.

# Issues Raised: Mens Rea



- Did the General Assembly intend for Subsection C to be a strict liability crime?
  - *Hypothetical*: A person receives a computer file that contains within it an encrypted child porn image. If the person does not know of the image's existence, and forwards the file to others, should he be guilty of the reproduction or electronic transmission of child pornography?

# Issues Raised: Lascivious Intent



- Subsection C of Va. Code § 18.2-374.1:1 first uses the words “displays with lascivious intent,” but later uses the words “display child pornography with lascivious intent.”
- Clearly, lascivious intent is required if one displays child pornography.
- However, an argument can be made that a strict statutory reading of all of the language in this subdivision requires a lascivious intent mens rea for all of the listed actions.

# Issues Raised: Lascivious Intent



- Subsection C begins with the subject of “Any person,” and follows this with a series of verbs.
- The object of all of these verbs, “child pornography,” is then given, but before the words “lascivious intent” are used for a second time.

# Issues Raised: Lascivious Intent



- Any person who:
  - Reproduces, sells, gives away, distributes, electronically transmits, displays with lascivious intent, purchases,
  - OR
  - Possesses with the intent to sell, give away, distribute, transmit or display
- Child pornography,
- With lascivious intent,
- Shall be punished. . . .

# Issues Raised: Lascivious Intent



- Did the General Assembly intend for the second prepositional phrase “with lascivious intent” to apply to all of the verbs?
  - If so, the first use of “lascivious intent” is a redundancy.
  - However, statutory language is customarily strictly construed against the Commonwealth.

# Va. Code § 18.2-381



- Va. Code § 18.2-381 makes a second or subsequent offense a Class 6 felony for all crimes under sections 18.2-374 through 18.2-379.
- This language, which pertains to obscenity offenses, comes from Title 18.1, and was carried over to Title 18.2.
- The obscenity offenses that this language applied to at the time of its enactment were all misdemeanors; since that time, Virginia has passed a number of child pornography statutes, that numerically occur between sections 18.2-374 and 18.2-379.

# Va. Code § 18.2-381



- As all of the child pornography offenses (except for a 1<sup>st</sup> offense simple possession) are Class 5 felonies or more severe, the language of Va. Code § 18.2-381 is in conflict with these heightened penalties.
- It is staff's recommendation that these discrepancies be fixed.

# Policy Options



- Should Subsection C of Va. Code § 18.2-374.1:1 have a “knowingly” mens rea added?

# Policy Options



- The words “lascivious intent” in Subsection C of Va. Code § 18.2-374.1:1:
  - Should the existing language be left as is?
  - Should the words “lascivious intent” be deleted from the Subsection?
  - Should the Subsection be rewritten so as to make clear that the requirement of “lascivious intent” applies to all of the actions contained in this criminal offense?

# Policy Options



- Should Va. Code § 18.2-381 be rewritten to eliminate the conflicts it creates in the Code?



# Discussion

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