

RESOLUTION 02-13-2008

DIGEST

Child Pornography: Enhancement of Sentence for Amount of Unlawful Matter

Adds Penal Code section 12022.96 to enhance the sentence for certain amounts of child pornography matter.

RESOLUTION COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution adds Penal Code section 12022.96 to enhance the sentence for certain amounts of child pornography matter. This resolution should be disapproved because the enhanced sentences are based on the quantity of images without regard to the number of victims.

Multiple images of a single victim do not make necessarily for a more serious crime or a greater threat of harm. The resolution provides for enhanced punishment based merely on the quantity of the material and not the nature of the material. It would enhance the punishment of a teenager who posts obscene images of himself on MySpace the same as an individual who posts images of an 8-year old child. Judges should be afforded as much sentencing flexibility as possible. If this resolution were enacted into law, a judge would be prevented from giving an 18-year old probation for posting images of his 17-year old girlfriend.

People v. Hertz (2007) 156 Cal.App.4th 398, cited by the proponent, prohibits multiple convictions based solely upon the number of images. The decision does not indicate that the quantity of images or the age of the victims of the images could not be utilized in aggravation under the current sentencing structure. If it is believed that these sentences are inadequate, then the sentencing ranges could be reviewed, rather than adding a mandatory enhancement. In addition, the sentences for these crimes already exceed those of drug dealers.

Unnecessary sentence enhancements increase the ever-growing pressures on the state prison population. Maintaining the present prison population and the need to create more prisons already seriously threaten the state budget. Addressing the problem of child pornography is important, but we must assure that individuals serve the proper time for their crime and no more and that our limited prison space is reserved for those situations in which it is most needed.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to add Penal Code section 12022.96 to read as follows:

1 §12022.96

2 (a) Any person convicted of a violation of section 311.1, 311.2(b), 311.2(c),
3 311.2(d), 311.3, or 311.11 shall receive an enhancement of 5 years in the state prison, in
4 addition to the sentence provided for the felony conviction, when the number of the
5 unlawful obscene matter pursuant to section 311.4 exceeds 20.

6 (b) Any person convicted of a violation of section 311.1, 311.2(b), 311.2(c),
7 311.2(d), 311.3, or 311.11 shall receive an enhancement of 10 years in the state prison in
8 addition to the sentence provided for the felony conviction when the number of unlawful
9 obscene matter pursuant to 311.4 exceeds 100.

10 (c) Unlawful obscene matter includes, but is not limited to, any film, filmstrip,
11 photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware,
12 computer software, computer floppy disc, data storage media, CD-ROM, or computer-
13 generated equipment or any other computer-generated image that contains or incorporates
14 in any manner, any film or filmstrip, the production of which involves the use of a person
15 under the age of 18 years personally engaging in or simulating sexual conduct.

16 (d) The existence of any fact which would bring a person under this section shall be
17 alleged in the information or indictment and either admitted by the defendant in open
18 court, or found to be true by the jury trying the issue of guilt or by the court where guilt is
19 established by plea of guilty or nolo contendere or by trial by the court sitting without a
20 jury.

21 (e) The court shall not strike a finding which would bring a defendant within the
22 provisions of this section.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS:

Existing Law: For a conviction of Penal Code section 311.11 provides a sentence of 1 year in county jail or state prison. The state prison range for this offense is 16 months, 2 years, or 3 years. In the case *People v. Hertzig* (Oct. 2007) 156 Cal.App.4th 398, the court held that the defendant who was in possession of 30 video images of child pornography was subject to only one conviction for possession of child pornography.

This Resolution: Would prohibit a court from granting probation to a defendant who possessed more than 20 images of child pornography and would require the courts to impose additional time in state prison when a jury finds that the defendant had possessed the specific number of unlawful images.

The Problem: Under *Hertzig*, it doesn't matter whether an individual possessed 10,000 images of child pornography. The maximum sentence is 3 years in state prison. The *Hertzig* court compared child pornography to a large quantity of marijuana, as well as possession of numerous blank checks. When the court made it's ruling, it also did not take into consideration that the pornography possessed depicted different victims. It is a miscarriage of justice to have a sentencing scheme for this type of offense that does not consider quantity. If the courts are not

going to allow separate counts for separate images of child pornography, then the legislature should amend the code to provide a sentencing enhancement for excessive amounts.

IMPACT STATEMENT:

This resolution does not affect any other law, statute or rule.

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RESPONSIBLE FLOOR DELEGATE: Donna L. Hollingsworth

COUNTERARGUMENTS

THE BAR ASSOCIATION OF SAN FRANCISCO

This resolution would increase the sentences for convictions of possession of child pornography. No one believes that child pornography is anything but evil. However, California's prisons are currently overflowing and the prison health care system is under federal court receivership. The cost of maintaining our prisons and building new ones is overwhelming the strained budget of the state and causing reductions in much needed programs of benefit of California's citizens regarding education, health care, and infrastructure, among others. In the absence of some genuine and critical need for enhanced prison sentences, the Conference should oppose this and other resolutions that will have the effect of adding population to our over-crowded prisons. Further, this resolution attempts to shift the balance of power between prosecutors and the courts by making the allegation of the enhancement strike-proof by the court. This power shift is unjustified. If a prosecutor wishes to stack up sentences, a defendant can be charged with a crime for each image possessed; but a judge at sentencing should have the power to determine if consecutive sentences are appropriate.

ORANGE COUNTY BAR ASSOCIATION

This resolution should be disapproved because it seeks to add enhanced punishment merely based upon the quantity of the obscene matter without regard for the character of the matter or the attendant circumstances of the underlying offense. The proposed enhancement does not permit a case by case analysis that should be made by a sentencing judge on all of the facts. Mandatory state prison may not be the just result under all circumstances. For instance, the court would be forced to enhance the sentence of an 18 year old who possessed 21 digital obscene photos of his 17 year old girlfriend the same as the individual who distributed 99 obscene photos of multiple children across the internet.

No one is making light of the seriousness of the problem of child pornography particularly in a digital age, but sentencing flexibility is necessary to promote justice.

People v. Hertz (2007) 156 Cal. App. 4th 398, cited by the proponent, only prohibited multiple convictions based upon the number of images. The decision did not suggest that quantity or

number of victims or age of the victims were not proper factors which could be considered in aggravation under the present sentencing scheme. If it is felt that the punishment for these offenses is inadequate, then the sentencing ranges of the section 311 series should be revisited rather than the addition of a mandatory enhancement.

SAN DIEGO COUNTY BAR ASSOCIATION

This proposal confuses multiplicity of victims with multiplicity of images. That is particularly important now that it is trivial to multiply images in the digital world. According to this resolution, a single act of molestation (which could result in hundreds of individual images) would be punished more severely than the possession of 5 individual images, each of which is evidence of a molestation of a separate victim. That seems fundamentally unfair. At present, we are punishing perversity of the possessor. This proposal changes that fundamental theory to punishment based on a commercial accomplice theory. The theory is that the child pornography trade exists because people buy or trade the material. Without customers the trade does not exist; in a way the customers “cause” the trade. To get new material to trade, new victims must be found and molested allowing the creation of many discrete images from a single vile act.

Rather than changing the fundamental theory *sub voce* it would be better to address the issue in the open. Declaring child pornography unlawful because it is the recorded evidence of a crime makes the theory clear. Increasing punishment for increasing numbers of victims and criminal incidents is obviously fair and just. While the names of the victims may be forever unknown it is not difficult to distinguish the separate victims or incidents within any particular set of material.