QUESTIONS PRESENTED

1. Did the trial court err in denying Zidel's motion to dismiss, where this State's child pornography statute, as authoritatively construed by this Court, violates the First and Fourteenth Amendments to the United States Constitution, and Part I, Article 22 of the State Constitution, because of its substantial overbreadth, or as applied to Zidel's conduct?

Issue preserved by motion to dismiss, App. A1,* the State's objection thereto, App. A8, the hearing on the motion, and the trial court's ruling. App. A20.

2. Did the trial court err in finding Zidel guilty, despite the lack of sufficient evidence?

Issue preserved by Zidel's argument, during a stipulated facts trial, that the court should find him not guilty because the evidence was insufficient. T. 43-44, 50.

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*References to the record are as follows:
"App." refers to the Appendix to this brief;
"T." refers to the transcript of the April 21, 2006 stipulated facts trial;
"MH." refers to the transcript of the March 13, 2006 hearing on Zidel's motion to dismiss;
"NOA" refers to the Notice of Appeal.

STATEMENT OF THE CASE

A Hillsborough County Grand Jury brought ten indictments against Marshall Zidel, each alleging that he committed the offense of possession of child pornography, contrary to RSA 649-A:3. App. A40-A49. Zidel moved to dismiss, making both facial and as-applied challenges to the constitutionality of RSA 649-A:3, and relying on his state and federal constitutional right to free speech. App. A1-A2. The State objected, App. A8, and the trial court convened a hearing. In a written ruling, the court (Lewis, J.), denied the motion. App. A20.

During the stipulated facts trial, counsel repeated some of his constitutional arguments, T. 38-42, but also argued that the statute should be construed so as to not reach Zidel's conduct, thereby entitling Zidel to be found not guilty. T. 43-44, 50. After the State nol prossed one count, Docket No. 2005-1901, the court found Zidel guilty of the nine remaining counts. T. 62. Subsequently, the court sentenced Zidel to serve one to seven years in the state prison. The court also sentenced Zidel to several suspended three and one-half to seven year terms. NOA 2. The court stayed its sentence pending this appeal. NOA 2.

STATEMENT OF THE FACTS

As this was a stipulated facts trial, the parties filed a joint statement of the facts. App. A33-A39. The State also made an offer of proof at the stipulated facts trial. T. 21-35. The following is a brief summary of those facts.

For many years, Marshall Zidel lived on the premises of Camp Young Judea, a camp for children, and performed work as a photographer for the camp. App. A34, A36. As part of his duties, Zidel photographed the campers and camp activities. At the end of a session, the camp would compile these photographs into a video scrapbook for the campers. App. A34. On July 4, 2005, Zidel provided three CD-ROMs to Kenneth Kornreich, the director of the camp, for the video scrapbook. App. A34.

Apparently by mistake, T. 37-38, one of the disks Zidel provided included sexually explicit images, along with original non-pornographic photographs of campers. App. A34-A35. Some of the file names suggested graphic sexual content, and two of the images incorporated a caption that described the scene depicted in graphic terms. App. A27-A34. …

With respect to all of the images referred to in the indictments, the parties stipulated that they consisted of "the head of a known actual person under the age of 16 juxtaposed onto the body of another person. Other than necks and heads,

there is no specific evidence that the images in question contain the body parts of actual children." App. A34.

Amherst Police Sergeant James Brace and Officer Ian Day-Lewis went to the camp and spoke with Zidel. App. A36. The trial court's order summarizes the interview as follows: "During this interview, the defendant indicated that he had given the disc containing the images to Kornreich, that the pictures were 'fakes,' that he had 'altered' the images, that 'he had placed faces onto bodies and bodies onto faces,' …, that the images were not on the Internet, and that the images were for his own 'personal fantasy.'" App. A21. The police obtained a search warrant, and subsequently brought the indictments based on the images that it seized. App. A37-A38.

SUMMARY OF THE ARGUMENT

The trial court erred in denying Zidel's facial challenge to the constitutionality of RSA 649-A:3, based on the First Amendment as construed by the Court in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), and New York v. Ferber, 458 U.S. 747 (1982), and based on Part I, Article 22 of the New Hampshire Constitution. This Court construed RSA 649-A:3 to reach images that appear to be child pornography in State v. Cobb, 143 N.H. 638 (1999), thereby rendering the statute substantially overbroad in the same manner that the federal law declared unconstitutional in Ashcroft was substantially overbroad.

Zidel also brings an as-applied challenge, contending that RSA 649-A:3 cannot be applied to his conduct, the private possession of virtual child pornography created through computer morphing, consistent with the state or federal constitutions. Under Ashcroft and Ferber, the category of child pornography is limited to images of actual children actually engaged in sexual activity. Moreover, even if the State could prosecute Zidel for distributing the materials he possessed, or for using them to solicit children as occurred in the Cobb case, the State cannot prosecute him for private possession of the materials.

Finally, in the event that the Court resolves the constitutional issues by construing RSA 649-A:3 narrowly so that

it does not reach Zidel's conduct, then this Court must vacate his convictions for lack of sufficient evidence.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING ZIDEL'S MOTION TO DISMISS, BECAUSE RSA 649-A:3, AS AUTHORITATIVELY CONSTRUED BY THIS COURT, IS UNCONSTITUTIONAL AS SUBSTANTIALLY OVERBROAD, AND AS APPLIED TO ZIDEL'S CONDUCT.

Zidel moved to dismiss, claiming that RSA 649-A:3 was unconstitutionally overbroad. App. A1. He claimed in the alternative that even if the statute was facially valid, application of the law to his conduct would violate his right to free speech. App. A2. In advancing these arguments, he relied on Part I, Articles 15 and 22 of the State Constitution, and on the First Amendment as interpreted by the United States Supreme Court in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), and New York v. Ferber, 458 U.S. 747 (1982).

The State objected, arguing that RSA 649-A:3 is not unconstitutionally overbroad, and that "the State can prosecute offenders who possess pornographic images that depict a child engaging in sexual activity regardless if the nude body is the child's." App. A9. The State argued that the statute had been so construed by this Court in State v. Cobb, 143 N.H. 638 (1999), and that the Cobb construction did not violate the First Amendment or Part I, Article 22. App. A13-A16. The trial court denied the motion to dismiss. The court erred.

Part I, Article 22 of the NH Constitution states: "Free speech and liberty of the press are essential to the security of

freedom in a state: They ought, therefore, to be inviolably preserved." The First Amendment, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech...." The State Constitution's free speech clause, adopted seven years prior to the ratification of the federal Bill of Rights, is at least as protective as the First Amendment. State v. Allard, 148 N.H. 702, 706 (2002); Appeal of Booker, 139 N.H. 337, 340 (1995).

Marshall's treatise on the State Constitution instructs that the right was based on a similar provision in the 1780 Massachusetts Constitution, but used stronger language, so that free speech must be "inviolably preserved" rather than "ought not ... be restrained." Susan E. Marshall, The New Hampshire State Constitution 85 (2004). The 1784 Constitution, however, left out those words "free speech"; they were added in 1968 by constitutional amendment so that the right extended to "[f]ree speech and the liberty of the press...." N.H. Const., Pt. I, Art. 22 (emphasis added), see Marshall, supra, at 85. According to both Marshall and Chief Justice Kenison, this relatively recent alteration was intended to be a mere clarification, not a substantive change in the meaning or scope of the constitutional right. See Marshall, supra, at 85 (citing the 1968 Voter's

Guide relating to the constitutional amendment); Bennett v. Thomson, 116 N.H. 453, 462 (1976)(Kenison, C.J., dissenting)(citing legislative history to 1968 amendment).

While the state and federal constitutional free speech provisions differ in their language and history, this Court has referred often to federal caselaw and doctrine when construing the scope of Part I, Article 22, if "only as an analytical aid." Allard, 148 N.H. at 706. Accordingly, while this brief intends to preserve separate and independent claims under each constitution, its discussion of the caselaw will necessarily involve both state and federal decisions.

A. RSA 649-A:3 is unconstitutionally overbroad.

Under both Article 22, and the First Amendment, a litigant may facially challenge a statute worded or construed in such a manner as to chill the exercise of a fundamental constitutional right, particularly that of free speech. State v. Brobst, 151 N.H. 420, 421-22 (2004); Ashcroft, 535 U.S. at 244. The overbreadth doctrine permits a litigant to "attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity." New York v. Ferber, 458 U.S. 747, 769 (1982).

"The purpose of the overbreadth doctrine is to protect those persons who, although their speech or conduct is constitutionally protected, "may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." Brobst, 151 N.H. at 421 (quoting Ferber, 458 U.S. at 768). In view of this purpose, a statute will not be facially invalidated unless its overbreadth is "real and substantial, judged in relation to the statute's plainly legitimate sweep." Brobst, 151 N.H. at 421.

Neither Article 22, nor the First Amendment, set forth an absolute right of free speech. Dover News v. City of Dover, 117 N.H. 1066, 1070-71 (1977). Rather, each allows for reasonable time, place, and manner restrictions that are content-neutral; id.; State v. Comley, 130 N.H. 688, 691 (1988); and each excludes from protection altogether certain narrow categories of speech. E.g., Opinion of the Justices, 121 N.H. 542, 546 (1981)("the government may ban commercial speech related to illegal activity" if "narrowly drawn"); Ashcroft, 535 U.S. at 245-46 ("freedom of speech ... does not embrace ... defamation, incitement, obscenity, and pornography produced with real children.").

The category of child pornography stands apart from that of obscenity in two significant respects. First, materials may not be classified as obscene unless they meet the three-part test of Miller v. California, 413 U.S. 15, 24 (1973).** Child pornography, by contrast, may be banned even if the materials do not satisfy that test. Ferber, 458 U.S. at 764-65.

Second, the mere private possession of obscene matter cannot constitutionally be made a crime. Stanley v. Georgia, 394 U.S. 557, 559 (1969). The private possession of child pornography, however, may be criminalized. Osborne v. Ohio, 495 U.S. 103 (1990). The Ashcroft Court explained this latter distinction: "'Given the importance of the State's interest in protecting the victims of child pornography,' the State was justified in 'attempting to stamp out this vice at all levels in the distribution chain.'" 535 U.S. at 250 (quoting Osborne, 495 U.S. at 110).

In removing all constitutional protection from the category of child pornography, the United States Supreme Court described the "prevention of sexual exploitation and abuse of children" as

** The test defines obscenity to consist only of materials "(1) which, taken as a whole, can be found to appeal to the prurient interest in sex by the average person applying contemporary community standards, (2) which depict or describe in a patently offensive way sexual conduct specifically defined by the applicable state law, as written or authoritatively construed, and (3) which, taken as a whole, do not have serious literary, artistic, political or scientific

a "government objective of surpassing importance." Ferber, 458 U.S. at 757.

> The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.

Ferber, 458 U.S. at 759 (footnote omitted)(emphasis added). For those reasons, the Ferber Court allowed for the criminalization of child pornography, as long as the state offense is "limited to works that visually depict sexual conduct by children below a specified age." Id. at 764 (Emphasis in original).

In so holding, the Court recognized the consequences of distinguishing child pornography from obscenity and placing it outside the protections of the First Amendment altogether -a work could contain "serious literary, artistic, political or scientific value" but nevertheless be banned if it included child pornography. Id. at 761. In justifying this dramatic step outside the existing obscenity law framework, the Court relied on both experience and pragmatic considerations. With

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value." State v. Harding, 114 N.H. 335, 338 (1974)(citing Miller v. California, 413 U.S. at 24).

respect to the former, the Court reasoned: "We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work." Ferber, 458 U.S. at 762-63.

More importantly for subsequent developments - and for the present case – the Court also considered the availability of alternative means of communicating the desired message:

> As a state judge in this case observed, 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.

Id. at 763 (Footnote omitted).

This Court has never considered whether Part I, Article 22 similarly excludes child pornography from the right of free speech generally, and from the obscenity requirements specifically. The legislature did, however, take note of the Ferber decision, amending the child pornography statute to eliminate the obscenity tests, and even citing Ferber in the preamble to the statute. RSA 649-A:1; see Cobb, 143 N.H. at 643 (describing the effects of the legislative amendments). In this appeal, Zidel does not dispute that Article 22 allows for a child pornography exception to free speech as described in the Ferber decision.

Twenty-four years after Ferber, Congress attempted to dramatically expand the scope of the child pornography laws by enacting the Child Pornography Prevention Act of 1996 (CPPA). 18 U.S.C. 2251 et seq.; Ashcroft, 535 U.S. at 239-42 (citing and discussing the statute and its predecessors). Section 2256(8)(B) of the CPPA 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." (Emphasis added).

The plaintiffs in Ashcroft brought a facial challenge against that provision, and another, even broader, section, that was discussed separately and is not relevant to this appeal. See Ashcroft, 535 U.S. at 242 (discussing 18 U.S.C. 2256(8)(D)). The plaintiffs prevailed; the United States Supreme Court invalidated both 2256(8)(B) and 2256(8)(D) as unconstitutionally overbroad in violation of the First Amendment. See id. at 244-56 (discussing and invalidating § 2256(8)(B); id. at 257-58 (invalidating § 2256(8)(D)).

A third provision of the CPPA, 18 U.S.C. 2256(C), was aimed at materials produced by "computer morphing" - the distortion of innocent pictures of children, using computer graphics or photographs of adult bodies engaging in sexual activity, to make

it appear that the children are engaged in sexual activity. Ashcroft, 535 U.S. at 242. Zidel's images fall within this category. The Ashcroft Court expressly did not consider the constitutionality of that provision. Id.

Based on the section of the Ashcroft opinion that invalidated § 2256(8)(B), the "appears to be" child pornography prohibition, RSA 649-A:3 cannot pass constitutional muster. Section 2256(8)(B) was aimed at images that "were produced without using any real children" – "created by using adults who look like minors or by using computer imaging...." Id. at 239-40. In finding § 2256(8)(B) overbroad, the Court held that it extended to a "significant universe" of content neither obscene, nor child pornography as defined in Ferber. "The statute proscribes the visual depiction of an idea -- that of teenagers engaging in sexual activity -- that is a fact of modern society and has been a theme in art and literature throughout the ages." Ashcroft, 535 U.S. at 246. The Court contrasted Ferber, which dealt not with a mere idea, but with the practical equivalent of physical evidence of abuse: "Where the images are themselves the product of child sexual abuse, Ferber recognized that the State had an interest in stamping it out without regard to any judgment about its content." Id. at 249 (citing Ferber, 458 U.S. at 761 n.12).

Because § 2256(8)(B) extended to pictures, films and other materials that merely "appeared to" depict a child engaging in sexual conduct, the Ashcroft Court held its overbreadth could extend to classic literary themes like that of the thirteen-year-old lovers of Romeo and Juliet, or of modern films that explicitly depict teenage sexuality such as Traffic and American Beauty, yet have significant literary or cultural value. Id. at 247-48. The Court expressed its concern that the statute could criminalize such productions without regard to the Miller standards: "Shakespeare may not have written sexually explicit scenes for the Elizabethan audience, but were modern directors to adopt a less conventional approach, that fact alone would not compel the conclusion that the work was obscene." Id. at 247.

This Court must declare RSA 649-A:3 unconstitutionally overbroad because it, like § 2256(8)(B) of the CPPA, has been construed to criminalize possession of materials that merely "appear to use actual children" engaging in sexual activity. Cobb, 143 N.H. at 644. The relevant section of RSA 649-A:3 states that a person commits a felony if he "[k]nowingly ... possesses or controls any visual representation of a child engaging in sexual activity...."[***] RSA 649-A:3(e). In Cobb,

[***] "Visual representation" is defined to include "any pose, play, dance or other performance, exhibited before an audience or reproduced

this Court construed the statute to extend to visual representations that did not involve any actual child engaging in sexual activity. 143 N.H. at 644.

Cobb had constructed "collages," id. at 642, described as follows: "adult nude bodies juxtaposed with fully clothed children; composite images containing the sexually immature bodies or body parts of children either depicted by themselves, with or without a face, or juxtaposed with the faces of adults or other children, some altered by the addition of hand-drawn pubic hair; and nude bodies that have been altered by the addition of children's heads." Id. Cobb argued that because the State had not proved that any of the images were produced by having a real child actually engage in sexual activity or by having a real child actually engage in a lewd exhibition of a child's genitals, the evidence was insufficient to prove his guilt. Id.

The legislature had declared in the statutory preamble that the "purpose" of the child pornography law was "to facilitate the prosecution of those who exploit children" "through their use as subjects in sexual performances." RSA 649-A:1. Nevertheless, this Court rejected Cobb's argument that he could not be convicted where no children were used as subjects in sexual performances. Id. at 644. Rather, this Court held that "[t]here

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in or designed to be reproduced in any book, magazine, pamphlet, motion

is no statutory requirement that the visual representation involve the use of an actual child." Id. Accordingly, based on this construction, the Court upheld Cobb's convictions.

The Cobb construction controls because when considering whether a state law is unconstitutionally overbroad, courts consider not only the text of the statute, but any authoritative construction provided by that State's highest Court. Ferber, 458 U.S. at 764 (for putative child pornography law to survive constitutional scrutiny, "the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed"); Cox v. State of New Hampshire, 312 U.S. 569, 575 (1941).

In light of the Cobb decision, RSA 649-A:3 is unconstitutionally overbroad because it covers much of the same field as did § 2256(8)(B). Both § 2256(8)(B) and RSA 649-A:3 extend to photographs and films that either actually depict, or "appear to depict", minors engaging in sexual activity. In upholding the sufficiency of the evidence against Cobb, this Court stated: "we see little meaningful distinction between sexually explicit material produced through the use of an actual child and such material that gives the appearance of having been produced through the use of an actual child." 143 N.H. at 644.

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picture film, photograph or picture." RSA 649-A:1.

That distinction, however, is precisely what led the United States Supreme Court to invalidate section 2256(8)(B) of the CPPA.

Since RSA 649-A:3 has been construed, just as 2256(8)(B), to encompass works that appear to depict minors engaging in sexual conduct, as well as actual minors actually engaging in sexual conduct, the statute reaches much of the same "universe" of content as that of 2256(8)(B). Ashcroft, 535 U.S. at 240. Thus, the "substantial overbreadth" requirement of the doctrine is satisfied, and this Court must declare RSA 649-A:3 unconstitutional under the state and federal constitutions.

B. Even if not substantially overbroad, the statute cannot be applied to Zidel's conduct without violating the state and constitutional free speech clauses.

Zidel also brings an as-applied challenge, contending that his state and constitutional rights to free speech are violated by the application of RSA 649-A:3 to his conduct, the private possession of virtual child pornography created through computer morphing. More specifically, the possession of images created by combining the head and shoulders of a real, existing child, with images of adult bodies, real or virtual, engaging in sexually explicit conduct.

Zidel's as-applied challenge is narrow; he does not claim that the state or federal constitutions preclude the government from criminalizing the distribution of such material. Indeed, had he knowingly distributed it, given the graphic, degrading, and indeed, repugnant nature of the images, it is possible that the State could have prosecuted him under the umbrella of existing obscenity laws. See RSA 650:1, IV (2006)(criminalizing only various means of distributing obscenity, not its mere possession); Ashcroft, 535 U.S. at 240 ("we may assume that the apparent age of persons engaged in sexual conduct is relevant to whether a depiction offends community standards. Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not.").

Rather, Zidel claims that, consistent with the First Amendment and Part I, Articles 15 and 22, he cannot be prosecuted for private possession of these images. Thus, Zidel's as-applied challenge lies at the intersection of three landmark cases: Ashcroft, Ferber, and Stanley v. Georgia.

Zidel's as-applied claim, certainly the federal constitutional aspect of it, is complicated by the following dicta in the Ashcroft opinion discussing a section of the CPPA that had not been challenged:

> Section 2256(8)(C) prohibits a more common and lower tech means of creating virtual images, known as computer morphing. Rather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity. Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in Ferber. Respondents do not challenge this provision, and we do not consider it.

535 U.S. at 242. Thus, the Ashcroft Court avoided the issue of whether a law aimed squarely at images akin to those possessed by Zidel could be enforced without violating the First Amendment, but in *dicta*, suggested that such a law would present a more difficult case. The State placed substantial reliance on this *dicta* in its opposition to Zidel's motion to dismiss, arguing that Ferber and Ashcroft, read together, allow for the criminalization of morphed images. App. A13-A18. However, the State's reading of these cases does not survive close scrutiny.

Notwithstanding the *dicta* discussed above, the overall set of rationales and principles relied upon by Ferber, and reinforced by Ashcroft's discussion of Ferber, support the narrow view that materials cannot be classified as child pornography unless children are involved in the production process - not the "post-production" process where images can be cut, pasted, and morphed - but the production process, the actual, sordid, filming

or photography of child sexual abuse. Indeed, the lengthy treatment that the Ashcroft Court afforded Ferber, and its successor decision, Osborne, lead inexorably to this conclusion, based on the following passages and quotations dispersed throughout Ashcroft:

a) Ferber "distinguished child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process" (Ashcroft, 535 U.S. at 240);

b) "Where the images are themselves the product of child sexual abuse, Ferber recognized that the State had an interest in stamping it out without regard to any judgment about its content." (Ashcroft, 535 U.S. at 249, citing Ferber, 458 U.S. at 761 n.12)(emphasis added);

c) "The production of the work, not its content, was the target of the statute. The fact that a work contained serious literary, artistic, or other value did not excuse the harm it caused to its child participants." (Ashcroft, 535 U.S. at 249)(emphasis added);

d) The "distribution", "sale", and "production" of child pornography are "'intrinsically related' to the sexual abuse of children" in part because as "a permanent record of a child's abuse, the continued circulation itself would harm the child who

had participated." (Ashcroft, 535 U.S. at 249, quoting Ferber, 438 U.S. at 759)(emphasis added).

e) "Ferber's judgment about child pornography was based upon how it was made, not on what it communicated" (Ashcroft, 535 U.S. at 250-51);

f) "In the case of material covered by Ferber, the creation of the speech is itself the crime of child abuse; the prohibition deters the crime by removing the profit motive" (Ashcroft, 535 U.S. at 254); and

g) "The [Osborne] Court ... anchored its holding in the concern for the participants, those whom it called the 'victims of child pornography.' It did not suggest that, absent this concern, other governmental interests would suffice." (Ashcroft, 353 U.S. at 250, quoting Osborne, 495 U.S. at 110).

Below, the State read Ashcroft and Ferber too narrowly, arguing that those cases only protect images created without the use of any child at all, by using youthful appearing adults, App. A11, or by creating wholly "virtual" images such as those rendered by computer graphics technology. MH. 37-38. This argument, however, misconstrues the scope of the "simulation" safety valve relied on by the Ferber Court.

The Ferber court actually referred to two alternative means of communicating the message: 1) use of youthful appearing

adults, and 2) "other means" of [s]imulation". Ferber, 458 U.S. at 763. In contemplating means of simulation "other" than youthful-appearing adults, it is inconceivable that the Ferber Court intended to refer to simulation by digital imagery as discussed in Ashcroft, given the primitive state of computer graphic technology at that time. A more reasonable interpretation would be that the Court contemplated means analogous to those used by Zidel - the same means used by Hollywood filmmakers at the time[****] - simulation by juxtaposition.

Most of the potential arguments against Zidel's as-applied challenge were addressed and ruled out by the Ashcroft Court. To summarize, the Court rejected the government's arguments that materials falling under that provision were "virtually indistinguishable" from child pornography; id. at 249; that accordingly "its objective of eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well"; id. at 254; that it may prove difficult to distinguish the real from the simulated beyond a reasonable doubt; id. at 254; that such materials indirectly harm children by "whet[ting] the appetite[] of pedophiles and

[****] A contemporaneous film that depicted teenage sexuality, "Blue Lagoon," used a "body double" for teen starlet Brooke Shields's nude scenes, according to IMDb.com. See http://www.imdb.com/title/tt0080453/, last visited on January 19, 2007.

encourag[ing] them to engage in illegal conduct"; id. at 253; and that child pornography was by definition without value, and therefore simulation should not be an available alternative. Id. at 251. The Court also indicated that the State's interest in preventing pedophiles from obtaining materials that they may use to attempt to solicit child victims is insufficient standing alone to sustain a ban:

> Osborne also noted the State's interest in preventing child pornography from being used as an aid in the solicitation of minors. [495 U.S.] at 111. The Court, however, anchored its holding in the concern for the participants, those whom it called the 'victims of child pornography.' Id. at 110. It did not suggest that, absent this concern, other governmental interests would suffice.

Ashcroft, 535 U.S. at 250.

With most of the available arguments rejected by the Ashcroft Court, the trial court relied on the State's interest in preventing psychological or reputational harm to the depicted children due to the "images serving as a 'lasting record ... of ... [them] seemingly engaged in sexual activity...." App. A29 (quoting Cobb. v. Coplan, 2003 WL 22888857 at 6 (D.N.H. Dec. 8, 2003).[*****] Zidel does not deny the legitimacy of this interest, and does not deny that his conduct caused real harm. This

[*****] Cobb v. Coplan, an unpublished opinion that denied Cobb's petition for habeas corpus, has no precedential value for a number of reasons, the most important being that it was decided based on a highly

justification is insufficient to sustain this prosecution, however, given the extent to which Ferber, Osborne and Ashcroft relied on the premise that children are abused during the production of child production, not merely harmed by its distribution, as discussed above.

Rather, Ashcroft, Ferber and Osborne, read together, mandate the conclusion that morphed images, that depict actual children but depict no children actually engaging in sexually activity, do not constitute child pornography. It appears that few federal prosecutors have believed otherwise; a 2003 law review article turned up no reported federal prosecutions pursuant to 18 U.S.C. 2256(8)(C), the computer morphing provision of the CPPA.****** Timothy J. Perla, Note, "Attempting to End the Cycle of Virtual Pornography Prohibitions," 83 Boston Univ. L. Rev. 1209, 1221 (2003). Counsel found one subsequent case, United States v. Bach, 400 F.3d 622 (8th Cir. 2005), but it involved the morphing of a child's head onto another child's naked, sexually aroused, body. Id. at 632. In sustaining that prosecution, the Bach Court noted that "there may well be instances in which the application of § 2256(8)(C) violates the First Amendment, but

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deferential standard of review that does not apply on direct review. See 2003 WL 22888857 at 6.

****** This, despite the fact that "[t]otal federal prosecutions of child pornography cases increased more than 452% from 1997 to 2004." United States v. Williams, 444 F.3d 1286, 1290 n.3 (11th Cir. 2006).

this is not such a case." Id. at 632. The Court further distinguished the type of morphing case represented by the case at bar: "This is not the typical morphing case in which an innocent picture of a child has been altered to appear that the child is engaging in sexually explicit conduct, for the lasciviously posed body is that of a child." Id.

Finally, to the extent that Ashcroft leaves the door open for prosecution for distribution of morphed images, based on the psychological/reputational harm interest relied upon by the State and trial court below, App. A15, A29, the private possession of the materials cannot cause such harm. The State did not suggest that Zidel intended to distribute these images, and he did not otherwise use them to facilitate the exploitation of children. Cobb, by contrast, tried to use his materials to lure children in a public park. Cobb, 143 N.H. at 641. Thus, the only non-production related interests supporting the criminalization of child pornography - the interests in avoiding psychological and reputational harm to children, and in preventing their use in the solicitation of children -- are simply not implicated when the law is directed not at distribution, or public use of materials, but at mere private possession.

Indeed, the application of the law to private possession of morphed images approaches a thought crime. There is no shadowy

child pornography distribution network involved here; Zidel avoided supporting or becoming involved with such networks altogether by his cut-and-paste approach. Recall that the Court described Osborne as being grounded upon the State's legitimate interest in "attempting to stamp out this vice at all levels in the distribution chain", Ashcroft, 535 U.S. at 250 (quoting 495 U.S. at 110); Zidel's conduct, however, was utterly disconnected from any distribution chain.

When it comes to conduct within one's own home, both the federal and State constitutions condemn the criminalization of thought. As the Court stated in Stanley v. Georgia:

> Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

394 U.S. at 556. Accordingly, based on the First and Fourteenth amendments as construed in Stanley v. Georgia, and based on Part I, Articles 15 and 22 of the State Constitution, Zidel contends that even if the government can prosecute distribution of morphed images, it cannot prosecute their private possession.

In conclusion, the State could likely prosecute distribution of some if not all of the images seized from Zidel, under its existing obscenity laws. RSA 650:1, IV (2006). It may be possible that the State could prosecute distribution of some if not all of those images, under RSA 649-A:3; or, the use of such images for solicitation as in the manner employed by Mr. Cobb. This Court need not decide those questions in this case. Under Ashcroft, Ferber and Stanley v. Georgia, however, the State may not prosecute private possession of such images. Accordingly, this Court must reverse.

II. THE TRIAL COURT ERRED IN DENYING ZIDEL'S MOTION TO DISMISS FOR LACK OF SUFFICIENT EVIDENCE.

Finally, there exists the possibility that the Court could overrule Cobb, adopt a more narrow construction of RSA 649-A:3 that does not extend to images such as those possessed by Zidel, and in that manner, uphold the statute against Zidel's facial and as-applied challenges. Brobst, 151 N.H. at 421 (otherwise overbroad statute can be saved if court "can supply a limiting construction... that narrows the scope of the statute to constitutionally acceptable applications.")(quotations omitted). If the Court takes that course, then it must reverse Zidel's convictions for lack of sufficient evidence. See T. 43-44, 50 (Zidel argues during stipulated facts trial that evidence does not support findings of guilt).

CONCLUSION

WHEREFORE, Mr. Zidel requests that this Court reverse.

Undersigned counsel requests fifteen minutes oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Theodore Lothstein, hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to the Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301, this 24th day of January, 2007.

_____
Theodore Lothstein

DATED: January 24, 2007