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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

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| DANNY PARKER, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | Case No. 2D09-3230 |
| |) | |
| STATE OF FLORIDA, |) | |
| |) | |
| Appellee. |) | |
| _____ |) | |

Opinion filed September 28, 2011.

Appeal from the Circuit Court for Polk
County; Donald G. Jacobsen, Judge.

James Marion Moorman, Public Defender,
and Deborah K. Brueckheimer, Assistant
Public Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Diana K. Bock, Assistant
Attorney General, Tampa, for Appellee.

LaROSE, Judge.

Danny Parker appeals his convictions and sentences for possession of
child pornography. See §§ 775.0847, 827.071(5), Fla. Stat. (2007). More specifically,
he challenges the trial court's denial of his motion to dismiss the information. We have
jurisdiction. See Fla. R. App. P. 9.140(b)(2)(A)(i). Mr. Parker's conduct, as we will

describe, is loathsome. But it escapes the grasp of the statute on which the State proceeds. Consequently, we must reverse.

Mr. Parker taught Sunday school. Over the years, he photographed many children. They posed innocently enough, much as in the style one would expect of a school photo, a yearbook, or a family scene. The innocence turned perverse. Mr. Parker cut the children's heads from some of his photographs and pasted them to photographs of bodies of nude or partially nude adult women. Some depicted the bodies of adult women engaged in sexual activity. None of the images are computer generated. In his motion to dismiss, Mr. Parker argued that mere possession of these photographs was not unlawful. The trial court denied the motion.

Pursuant to a negotiated plea, the State nolle prossed counts eleven through ninety of the information. Mr. Parker pleaded no contest to counts one through ten, reserving his right to appeal the denial of the dispositive motion to dismiss. The trial court sentenced Mr. Parker to sixty months in prison to be followed by ten years of sex offender probation. On appeal, we confront ten photographs that the State characterizes as child pornography.¹ We review issues involving statutory interpretation de novo. L.A.P. v. State, 62 So. 3d 693, 694 (Fla. 2d DCA 2011) (citing Mendenhall v. State, 48 So. 3d 740, 747 (Fla. 2010)).

Based on our decision in Stelmack v. State, 58 So. 3d 874 (Fla. 2d DCA 2010), and pursuant to the parties' stipulation, we reverse as to seven photographs

¹At its core, child pornography is "any image depicting a minor engaged in sexual conduct." § 775.0847(1)(b).

(counts 1, 2, 3, 5, 6, 7, and 10).² Those photographs depict lewd exhibition of an adult female's genitals with a child's head superimposed on an adult female body. Those photographs require no further discussion. After thoughtful consideration of the parties' briefs, listening to counsels' compelling presentations at oral argument, and conducting our own research, we can discern no basis on which to affirm the convictions and sentences based on three photographs that depict sexual activity (counts 4, 8, and 9). Stelmack compels reversal.

Stelmack involved photographs depicting heads of children attached to the bodies of nude adult women. None depicted sexual activity. To prove the crime of possession of child pornography, a person must " 'knowingly possess a photograph, . . . representation, or other presentation which, in whole or in part, he or she knows to include any sexual conduct by a child.' " 58 So. 3d at 875 (emphasis omitted) (quoting § 827.071(5)). As defined in section 827.071(1)(g), "sexual conduct" includes

"actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadoma[so]chistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed."

Stelmack, 58 So. 3d at 876 (emphasis omitted) (quoting § 827.071(1)(g)); accord § 775.0847(1)(f).

We determined in Stelmack that the only applicable conduct depicted was lewd exhibition of the genitals. 58 So. 3d at 876. But, we held that a conviction

²In ruling on the motion to dismiss, the trial court did not have the benefit of Stelmack; it issued subsequent to the trial court's order.

required exhibition by a child. Id. at 877. Because the Stelmack photographs contained only images of adult genitalia, there was no "sexual conduct by a child" and, consequently, no violation of section 827.071(5). Stelmack, 58 So. 3d at 876.

To be sure, the three remaining photographs before us are markedly different from those in Stelmack. Each depicts a child's head superimposed on a body of an adult female engaged in sexual intercourse, deviate sexual intercourse, or masturbation. The conduct falls within the scope of section 827.071(1)(g). But, whether the conduct is "actual" or, as the dissent suggests, "simulated," the conduct is that of an adult. The crudely constructed depictions, fortunately, leave no doubt that no child engaged in the sexual conduct. Accordingly, we cannot conclude that Mr. Parker possessed child pornography. The legislature's words constrain us.

It bears repeating that a person is guilty of possessing child pornography if he "knowingly possess[es] a photograph, . . . representation, or other presentation which, in whole or in part, he or she knows to include any sexual conduct by a child." § 827.071(5) (emphasis added). No matter how one parses the words, section 827.071 requires that the depicted sexual conduct be that of a child. The three photographs fail that test. The content of the three photographs offers us no meaningful basis on which to distinguish Stelmack. Without the sexual conduct of a child, the three photographs elude the statute's reach.

We are not persuaded by the dissent's effort to distinguish Stelmack: section 827.071(1)(g) extends to "actual" or "simulated" "sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadoma[so]chistic abuse," which include the conduct involved here, but excludes the word "simulated" for "lewd

exhibition of the genitals," an element of the offense of which Mr. Stelmack was convicted. We noted that distinction in Stelmack, but, in light of the record then before us, saw no need to discuss the constitutionality of a provision outlawing "simulated" sexual conduct. Id. at 876 n.2, 877. The dissent concludes that " 'simulated' sexual conduct by a child" includes composites made by attaching children's heads to adult female bodies engaged in sexual activity. Respectfully, we must disagree.

"Simulated" is "the explicit depiction of conduct . . . which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks." § 827.071(1)(i). The construction of "simulated" sexual conduct is explained in United States v. Williams, 553 U.S. 285, 297 (2008), where the Supreme Court construed the word "simulated" as applied to a "visual depiction" of a minor engaging in "sexually explicit conduct" under 18 U.S.C. § 2252A(a)(3)(B)(ii).³ According

³18 U.S.C. § 2252A provides:

Any person who . . . knowingly . . . advertises, promotes, presents, distributes, or solicits through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains . . . (ii) a visual depiction of an actual minor engaging in sexually explicit conduct . . . shall be punished as provided in subsection (b).

18 U.S.C. § 2252A(a)(3)(B)(ii).

18 U.S.C. § 2256(2)(A) defines "sexually explicit conduct" as follows:

"[S]exually explicit conduct" means actual or simulated . . . (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genital or pubic area of any person.

18 U.S.C. § 2256(2)(A)(i)-(v).

to the Court, "a reasonable viewer [must] believe that the actors actually engaged in that conduct on camera" and "although the sexual intercourse may be simulated, it must involve actual children." Williams, 553 U.S. at 297. Williams' analysis leads us to the same conclusion regarding Mr. Parker's depictions; no child engaged in simulated conduct and no reasonable viewer could believe so.

To the extent that legislative history is a guide, we note that in enacting section 827.071, the legislature apparently was concerned with the exploitation of children. The 1983 legislative staff summary explains that this legislation "is directed at two types of people—those who use children *in sexual performances* and those who, being the parent or guardian of the child, 'consent' to the child's participation *in such activities*." Stelmack, 58 So. 3d at 876-77 (quoting Fla. H.R. Comm. on Crim. Just., HB 148 (1983) Staff Analysis 2 (Apr. 14, 1983) (on file with comm.)).⁴ The titles given to the statute are also instructive. Chapter 827 is titled "Abuse of Children" and section 827.071 is titled, "Sexual performance by a child; penalties." We observed in Stelmack that the legislative history "reveals that it was aimed at preventing the exploitation of children in sexual performances." Stelmack, 58 So. 3d at 876.

This legislative history is not inconsistent with our polestar, the statutory language. No child performed a sexual act, actual or simulated. And, despite the

⁴The intent of this legislation is to facilitate the prosecution of persons who use or promote any *sexual performance by a child*, which is not necessarily obscene. A distinction is drawn between child abuse and pornography, with the focus on the child abuser. This legislation is directed at two types of people—those who use children *in sexual performances* and those who, being the parent or guardian of the child, "consent" to the *child's participation in such activities*. Fla. H.R. Comm. on Crim. Just., HB 148 (1983) Staff Analysis 2 (Apr. 14, 1983) (on file with comm.) (emphasis added).

dissent's conclusion that the packaging of the photographs appears to indicate an intention to display them, we must emphasize that the State did not charge Mr. Parker with distribution of or intent to distribute obscene photographs. See § 847.011(1)(a), Fla. Stat. (2007).⁵ Neither was he charged with violating section 827.071(4), which prohibits "possess[ion] with the intent to promote any photograph . . . which, in whole or in part, includes any sexual conduct by a child."⁶ Even if the State had charged Mr. Parker under section 827.071(4), conviction still would have required sexual conduct by a child. Possession of the photographs is the only crime charged. Although not binding on us, we recognize that the New Hampshire Supreme Court in State v. Zidel, 940 A.2d 255 (N.H. 2008), reached a similar result under a statute remarkably similar to section 827.071.

The dissent discusses federal cases involving First Amendment challenges to a broader federal child pornography statute, 18 U.S.C. § 2256(8)(C). The constitutionality of federal statutes is of little aid in interpreting the scope of section 827.071(5). Nevertheless, a brief overview of some of the federal authority demonstrates how the federal government has addressed the reach of child

⁵Chapter 847 covers obscene materials. See, e.g., § 847.011, Fla. Stat. (2007) (prohibiting (1) distribution or possession with intent to distribute obscene material including photographs and (2) possession of obscene materials without intent to distribute).

⁶Section 827.071 proscribes four levels of the offense of sexual performance by a child:

- (2) use of a child in a sexual performance, a second-degree felony;
- (3) promoting a sexual performance by a child, a second-degree felony;
- (4) possession with intent to promote "any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, includes any sexual conduct by a child," where possession of three or more copies is prima facie evidence of such intent, a second-degree felony; and
- (5) possession of an item described in (4), a third-degree felony.

pornography statutes. The federal statute defines "child pornography" as "any visual depiction . . . of sexually explicit conduct, where . . . [the] depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(C); see United States v. Bach, 400 F.3d 622 (8th Cir. 2005); United States v. Hotaling, 599 F. Supp. 2d 306 (N.D.N.Y. 2008). Before 1996, Congress defined child pornography as images created using actual children. 599 F. Supp. 2d at 309 (citing 18 U.S.C. § 2252 (1994 ed.)). The Child Pornography Prevention Action (CPPA) of 1996 added three other categories of prohibited conduct. Id. One of those was 18 U.S.C. § 2256(8)(C), which defined child pornography as "created, adapted, or modified to appear that an identifiable minor [was] engaging in sexually explicit conduct."

Bach reviewed a conviction under the CPPA for a 2001 charge of receiving child pornography as defined by § 2256(8)(C). Bach, 400 F.3d 622. There, the face of a well-known child actor was "skillfully inserted onto the body of [a] nude boy so that the resulting depiction appear[ed] to be a picture of [the child actor] engaging in sexually explicit conduct." Id. at 632. In affirming the conviction, the Eighth Circuit reasoned that Bach was "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. There was no question but that the depicted sexual conduct was that of a child. We assume that such a photograph certainly would fall within the scope of section 827.071(5).

In 2002, the Supreme Court struck down a different provision of the 1996 CPPA, 18. U.S.C. § 2256(8)(B), defining child pornography as any "visual depiction"

that "is, or appears to be, of a minor engaging in sexually explicit conduct." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 234 (2002). The Court held that it was constitutionally overbroad because it allowed prosecution for images produced without using actual children, including "realistic images of children who do not exist" created with advanced computer techniques. Id. at 240; see Hotaling, 599 F. Supp. 2d at 310. Ashcroft did not challenge § 2256(8)(C). In response to Ashcroft, Congress crafted new legislation. Hotaling, 599 F. Supp. 2d at 311.

The resulting PROTECT Act of 2003⁷ defines child pornography to include not only images of actual children engaged in sexually explicit conduct (18 U.S.C. § 2256(8)(A)), but also images created by computer that are "indistinguishable" from images of actual minors engaging in sexually explicit conduct (§ 2256(8)(B)) and images created or modified to appear as though an identifiable minor is engaged in sexually explicit conduct (§ 2256(8)(C)). Hotaling, 599 F. Supp. 2d at 311. Congress specifically removed the defense that no actual minor was involved in the production of the depiction. 18 U.S.C. § 2256(8)(C); Hotaling, 599 F. Supp. 2d at 316, 317. Apparently, Congress may have been motivated to prohibit morphed images that do not use a sexually explicit image of any child. S. Rep. No. 108-2, 2003 WL 33068, at *51 n.2 (2003); see Hotaling, 599 F. Supp. 2d at 312, 316-17.

Hotaling construed this latest evolution of the federal child pornography statutes in denying a motion to dismiss a charge of possession of child pornography. 599 F. Supp. 2d 306; see 18 U.S.C. § 2252A(a)(5)(B). The defendant was charged with possessing images in which heads of six identifiable minor females had been cut from

⁷Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act. Hotaling, 599 F. Supp. 2d at 307.

original nonpornographic images and pasted onto the bodies of unidentified nude females engaged in sexually explicit conduct. Hotaling, 599 F. Supp. 2d at 307-08. Under the PROTECT Act, child pornography is defined, as in Bach under the CPPA, by § 2256(8)(C), "visual depiction[s] . . . created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct." However, the new language of the Act eliminated any question of whether it criminalized images that did not depict actual children engaged in sexual conduct. The court ruled:

The statute defines child pornography as morphed images of "identifiable minors" engaged in sexually explicit activity. This requirement, together with an express exclusion of a defense for those who create such images without using actual children, leave no doubt the provision intends to criminalize the mere possession of pornographic images of children even when the images are morphed and no children actually engaged in the sexually explicit conduct depicted therein.

Hotaling, 599 F. Supp. 2d at 322.

As this overview demonstrates, Congress enacted child pornography legislation three times, in 1994, 1996, and 2003; each time it broadened the definition of child pornography. Section 827.071(5) requires that actual children engage in sexual conduct. As the federal experience reflects, if our legislature wants to follow Congress's example and prohibit the possession of the types of photographs involved here, we are confident that it can, and perhaps should, craft an appropriate statute.

Although the parties urge us to consider the First Amendment ramifications of section 827.071, we confine our analysis to the statutory language. Because our construction of it concludes that it does not apply to Mr. Parker's conduct, we have no occasion to decide whether its application to him is unconstitutional. Such

an analysis is unnecessary for our decision.⁸ See McKibben v. Mallory, 293 So. 2d 48, 51 (Fla. 1974) ("It is a fundamental principle that courts will not pass upon the constitutionality of a statute where the case before them may be disposed of upon any other ground.").

Reversed.

LENDERMAN, JOHN C., ASSOCIATE SENIOR JUDGE, Concur.
MORRIS, J., Dissents with opinion.

MORRIS, Judge, Concurring in part and dissenting in part.

Based on our decision in Stelmack, and pursuant to the parties' stipulation, I concur with the majority's decision to reverse the trial court's denial of Parker's motion to dismiss the information as to counts 1, 2, 3, 5, 6, 7, and 10 which feature pictures depicting lewd exhibition of genitalia without sexual activity. However, I do respectfully disagree with my learned colleagues as to that part of the majority opinion that reverses the judgments and sentences as to counts 4, 8, and 9 which depict photographs featuring sexual activity. With regard to these last three pictures, the majority feels bound by our opinion in Stelmack and also appears to feel constrained by the unartful legislative drafting of section 827.071(5) of the Florida Statutes (2007). I disagree, and I would affirm the trial court's order as it relates to these three photographs because they depict sexual activity.

Our decision in Stelmack dealt with photographs featuring the heads of children attached to the bodies of nude adult women. Unlike the three photographs

⁸At least one district court of appeal has held section 827.071(5) constitutional on its face. See State v. Beckman, 547 So. 2d 210 (Fla. 5th DCA 1989).

here, none of the photographs in Stelmack depicted sexual activity. As the majority opinion points out, in Stelmack, we opined that to prove the crime of possession of child pornography, a person must " 'knowingly possess a photograph, . . . representation, or other presentation which, in whole or in part, he or she knows to include any sexual conduct by a child.' " 58 So. 3d at 875 (emphasis omitted) (quoting § 827.071(5)). We then further noted that the definition of "sexual conduct" set forth in section 827.071(1)(g) included

"actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadoma[so]chistic abuse; *actual lewd exhibition of the genitals*; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed."

Stelmack, 58 So. 3d at 876 (quoting § 827.071(1)(g)). In Stelmack, we read section 827.071(1)(g) and 827.071(5) together, and we determined that a conviction based on lewd exhibition required actual lewd exhibition by a child. Thus, because the photographs in Stelmack contained images of adult genitalia, there was no violation of section 827.071(5). Stelmack, 58 So. 3d at 877. We explained that at most, the photographs depicted simulated lewd exhibition by a child. We pointed out that while the words "actual or simulated" were used to describe sexual intercourse and other sexual acts, the legislature did not use the word "simulated" to describe lewd exhibition of the genitals. Id. As a result, we concluded that the legislature intended to exclude simulated lewd exhibition of the genitals from the crime of possession of child pornography. Id.

The crux of this case rests on a crucial distinction from Stelmack. The three photographs at issue here contained children's heads superimposed on the bodies of adult females engaged in sexual activity consisting of sexual intercourse, deviate sexual intercourse, and masturbation. And section 827.071(1)(g) specifically prohibits "simulated sexual intercourse, deviate sexual intercourse, [or] masturbation." "Simulated" as defined in section 827.071(1)(i) "means the explicit depiction of conduct set forth in paragraph (g) which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks." The photographs here clearly contain an explicit depiction of the conduct set forth in paragraph (g). Because the statutory language is clear and unambiguous, I believe that we should give full effect to the plain meaning⁹ and hold that the three photographs in this case qualify as child pornography based on the definition of sexual conduct in section 827.071(1)(g).

Further, I believe that the holding in United States v. Bach, 400 F.3d 622 (8th Cir. 2005), is relevant and instructive here. In Bach, the government sought to prosecute Bach under the authority of 18 U.S.C. § 2256(8)(C), which prohibits composite images of child pornography as well as pictures which are "modified to appear that an identifiable minor is engaging in sexually explicit conduct." 400 F.3d at 629. The photograph at issue in Bach was a composite of a well-known child entertainer's face attached to another child's nude body. 400 F.3d at 625. The body portion of the photograph revealed that the child was sexually aroused. Id. In holding that the photograph came within the proscription of the federal statute, the court in Bach reasoned that

⁹See Polite v. State, 973 So. 2d 1107, 1111 (Fla. 2007) (noting that in determining legislative intent, courts must first look at statute's plain meaning).

[a]lthough there is no contention that the nude body actually is that of [the well-known child entertainer] or that he was involved in the production of the image, a lasting record has been created of [him], an identifiable minor child, seemingly engaged in sexually explicit activity. He is thus victimized every time the picture is displayed.

Id. at 632.

While I acknowledge that the federal statute is more carefully drafted and broader in nature than section 827.071(1)(g) and (5), I also believe that the photographs in counts 4, 8, and 9 fall squarely within the proscription set forth in section 827.071(1)(g) and (5), and because the photographs contain images of identifiable minor children, the same concerns that arose in Bach are present here. These photographs created a lasting record, and these real and identifiable children were victimized every time the photographs were viewed.

I likewise strongly disagree with my colleagues that prohibiting photographs such as the ones at issue here does not comport with legislative intent. In support of our decision in Stelmack, we described the legislative intent as being to " 'facilitate the prosecution of persons who use or promote any sexual performance by a child.' " Stelmack, 58 So. 3d at 877 (emphasis omitted) (quoting Fla. H.R. Comm. on Crim. Just., HB 148 (1983) Staff Analysis 2 (Apr. 14, 1983) (on file with comm.)). The legislature further indicated it was focused on child abusers versus pornography and thus the legislation was directed at people who use or promote the use of children in sexual performances as well as those who consent to the child's participation. Id. (citing id.).

I acknowledge that the three photographs at issue here did not involve actual sexual performance by a child. However, it is clear that the purpose of the

photographs is to promote sexual performance by a child. The photographs were packaged in photograph sleeves, much like a photograph album. The construction and manipulation of the photographs clearly appeased Parker's own need for sexual gratification, but I also believe that the packaging of the photographs in this manner appears to indicate an intention to display the photographs. Certainly this type of promotion of sexual performance by a child was intended to be prohibited by the legislature.

Although the majority decided this case without the necessity of addressing the constitutionality of 827.071, because I do not fully join in their opinion, I feel compelled to address this issue. In his brief, Parker argued that the holding in State v. Zidel, 940 A.2d 255 (N.H. 2008), supported his contention that section 827.071(5) is unconstitutional as applied to him. However, in United States v. Hotaling, 599 F. Supp. 2d 306 (N.D.N.Y. 2008), which was a case involving facts virtually identical to the case here under review, the court expressly rejected both the holding and rationale of Zidel.

In Zidel, the court held that where photographs of nude bodies do not actually depict body parts of children engaging in sexual activity, the image is not a product of sexual abuse and therefore the mere possession of such photographs does not constitute demonstrable harm to the child whose face is depicted. 940 A.2d at 263 (citing Ashcroft v. Free Speech Coalition, 535 U.S. 234, 249 (2002)). The Zidel court also cited Osborne v. Ohio, 495 U.S. 103, 111 (1990), for the proposition that "[t]he mere possession of morphed images depicting no victims of child pornography cannot 'haunt [] the children in years to come' since the children do not know of their existence

and did not participate in their production." Zidel, 940 A.2d at 263 (quoting Osborne, 495 U.S. at 111).

In rejecting the Zidel court's analysis, the district court in Hotaling explained:

Zidel overlooked Bach's recognition that [the well-known child entertainer] was harmed even though he had not actually engaged in the conduct depicted in the morphed photo. . . . The court in Zidel failed to recognize that Bach focused at least partly on the harm to [the well-known child entertainer], the child who had not engaged in sexually explicit activity, in rejecting the defendant's argument. Based on its failure to analyze properly the nuances of Bach and the particular facts before it in light of current federal law, Zidel reached the improvident conclusion that lack of actual sexual conduct on the part of the identifiable minor in a morphed image—if such image is merely possessed and not distributed by a defendant—renders it protected speech under the First Amendment. See Zidel, 940 A.2d at 264-65.

The Court notes that the holding of Zidel is at odds with every other federal and state court which has confronted, even indirectly, the constitutional question raised by the dicta in Ashcroft concerning statutes which impose criminal penalties for possession of morphed images of child pornography. . . .

Hotaling, 599 F. Supp. 2d at 319 (emphasis omitted). The district court then went on to hold that

the creation and possession of pornographic images of living, breathing and identifiable children via computer morphing is not "protected expressive activity" under the Constitution [because such] images "implicate the interests of real children" and are "closer" to the types of images placed outside the protection of the First Amendment in Ferber.¹⁰ Ashcroft, 535 U.S. at 242, 254.

Hotaling, 599 F. Supp. 2d at 321 (citation omitted).

¹⁰New York v. Ferber, 458 U.S. 747 (1982).

While Hotaling was also based on 18 U.S.C. § 2256(8)(C), the analysis contained therein is helpful for an analysis of section 827.071(1)(g) and (5). I interpret the phrase "simulated sexual intercourse" as set forth in the definition of sexual conduct in section 827.071(1)(g) to include morphed images (computer generated or otherwise) such as the ones at issue in this case. Thus because the Florida statute prohibits some types of morphed images—at least those involving certain kinds of simulated sexual activity—Hotaling is instructive on whether such images are protected by the First Amendment. I reject Parker's argument that Zidel should control the outcome of his case. Instead, I would align with Hotaling to the extent that it holds that where photographs depicting identifiable children are morphed with adult bodies engaged in sexual activity, such photographs are not protected by the First Amendment.¹¹

Accordingly, I would affirm in part, reverse in part, and remand.

¹¹See State v. Beckman, 547 So. 2d 210 (Fla. 5th DCA 1989).