

To: New Jersey Law Review Commission
From: Samuel Silver, John Cannel
Re: Endangering the Welfare of a Child – N.J.S. 2C:24-4(a)(1)
as discussed in *State v. Johnson*, 460 N.J. Super. 481 (Law Div. 2019).
Date: April 06, 2020

MEMORANDUM

Executive Summary

The term “sexual conduct” is not defined in New Jersey’s child endangerment statute.¹ The term, however, does appear in the context of behavior “which would impair or debauch the morals of the child.”²

Forty-two years after N.J.S. 2C:24-4 was enacted, in *State v. Johnson*, the Law Division considered whether sexually suggestive messages sent to a minor by way of social media constituted they type of sexual conduct that would impair or debauch the morals of a child.³

Statute Considered

N.J.S. 2C:24-1(a)(1) provides:

a. (1) Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who engages in **sexual conduct** which would **impair or debauch the morals of the child** is guilty of a crime of the second degree. Any other person who engages in conduct or who causes harm as described in this paragraph to a child is guilty of a crime of the third degree [...] [Emphasis added].

Background

In *State v. Johnson*, a high school senior (hereinafter J.T.), received a message via social media from the defendant who was a middle school guidance counselor at the same school.⁴ In this message, the defendant requested a partially nude photograph of the victim.⁵ Upon receipt of this message, J.T. blocked him on Instagram.⁶ In addition, she notified her guidance counselor that she received several messages from a male staff member via social media.⁷ As a result of these communications, J.T. began to feel uncomfortable.⁸ The defendant never admitted sending

¹ N.J.S. 2C:24-4(a)(1).

² *Id.*

³ *State v. Johnson*, 460 N.J. Super. 481 (Law Div. 2019).

⁴ *Id.* at 487.

⁵ *Id.*

⁶ *Id.* at 490, n.5. See also Instagram, <https://help.instagram.com/> (last visited Mar. 30, 2020).

⁷ *Id.* at 490.

⁸ *Id.* See also n.6.

messages to J.T.⁹

The defendant was charged, pursuant to a warrant, with endangering the welfare of a child under N.J.S. 2C:24-4(a)(1).¹⁰ Subsequently, the Grand Jury returned an indictment against the defendant based upon the probable cause presented in the warrant.¹¹ The defendant filed a motion seeking a dismissal of the indictment pursuant to New Jersey's de minimis infraction statute.¹² Pursuant to the requirements of the de minimis infractions statute, this matter was heard before the Assignment Judge.^{13, 14.}

Analysis

In New Jersey, an individual is guilty of endangerment if they engage in sexual conduct which would impair or debauch the morals of the child.¹⁵ For purposes of this statute, a "child" is defined as "any person under 18 years of age."¹⁶ In *State v. Johnson*, the trial court recognized that the term "sexual conduct" is not defined in New Jersey's Code of Criminal Justice.¹⁷

Despite the absence of a definition for the term "sexual conduct", the courts have determined that the statute does not require physical contact. In New Jersey, an individual can be convicted of child endangerment for showing explicit nude photographs to minors.¹⁸ In addition, sexual conversations have also been deemed a sufficient basis for a jury finding of "sexual conduct" within the meaning of N.J.S. 2C:24-4(a)(1).¹⁹ There is nothing in the child endangerment that requires that the sexual conduct occur in the physical presence of the victim.²⁰ Thus, the defendant's sexual conduct can be communicated via telephone.²¹

To endanger a child, the prohibited conduct must impair or debauch the morals of the child.²² The Court, in *Johnson*, determined that "[t]he plain language of the statute unambiguously indicated that the Legislature intended for the preeminent inquiry to be the effect of the conduct in question on **the** child."²³ The second element of the endangerment statute need not actually impair

⁹ *Id.* at 490.

¹⁰ *Id.* at 488.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* See N.J.S. 2C:2-11.

¹⁴ A discussion of the de minimis infraction statute exceeds the scope of the instant Memorandum. For a thoughtful discussion of the New Jersey's de minimis infractions statute, see *id.* at 490.

¹⁵ N.J.S. 2C:24-4(a)(1).

¹⁶ N.J.S. 2C:24-4(b)(1).

¹⁷ *State v. Johnson*, 460 N.J. Super. at 494.

¹⁸ *Id.* See *State v. Hackett*, 323 N.J. Super. 460, 472 (App. Div. 1999) (holding that "sexual conduct" includes showing nude or explicit photographs to children).

¹⁹ *Id.* See *State v. McInerney*, 428 N.J. Super. 432, 451 (App. Div. 2012) (holding that defendant's encouragement of boys to accept payment for reporting on sexual behavior directed by him was conduct clearly falling within the statute as that type of conduct would debauch their morals).

²⁰ *Id.* citing *State v. Maxwell*, 361 N.J. Super. 502, 518 (Law Div. 2001).

²¹ *Id.* See

²² N.J.S. 2C:24-4(a)(1).

²³ *State v. Johnson*, 460 N.J. Super. at 495.

or debauch the victim's morals to satisfy this standard.²⁴ The trial court observed that, "[t]he word 'would' signals the futurity of a likely event; it does not require the event's actual occurrence."²⁵

The Court in *State v. Johnson*, determined that the defendant sent a message to J.T. seeking a partially nude photograph constituted sexual conduct.²⁶ The Court found that, "[t]he message at issue was exactly the type of conduct that the statute was enacted to prohibit."²⁷ The Court then turned its attention to whether the defendant's conduct impaired or debauched the morals of the child.

The plain language of the statute requires prohibits conduct "which would impair or debauch the morals of the child."²⁸ In this case, the court determined that "the child," as set forth in the statute, referred to the victim, J.T.²⁹ In addition, the trial court acknowledged that the New Jersey Supreme Court has determined that the endangerment statute "prohibits conduct that would result in impairing or debauching of **an average child in the community**."³⁰ In rendering its decision, the trial court examined the impact of the defendant's conduct on both the victim and the "average child in the community."³¹

The Court determined that the defendant's message "impair[ed] or debauch[ed] J.T.'s morals."³² The Court concluded that J.T.'s "actions upon receipt of the message clearly and unequivocally indicated that she was so affected... [thus] J.T., 'the child' was harmed by the defendant's conduct."³³ Upon receiving the defendant's message, however, J.T. blocked the defendant from further communication and advised her guidance counselor of the defendant's conduct.³⁴ Objectively, J.T. appears to have demonstrated a firm, unimpaired sense of morality. Although the morals of the victim in this case do not appear to have been impaired or debauched, she is no less worthy of protection from the type of behavior engaged in by the defendant.

The Court then turned its analysis to the standard promulgated by the New Jersey Supreme Court. The trial court observed that, "[a] message from an adult guidance counselor at the same school as the student, seeking a partially nude photograph... would impair or debauch the morals of an average seventeen-year-old in the community."³⁵ This Court's analysis does not set forth how to determine whose morals are to be used as the baseline for determining the applicability of the child endangerment statute. In addition, the child endangerment statute does not define "impairing."

²⁴ *Id.* citing *State v. Hackett*, 166 N.J. 66, 80 (2001).

²⁵ *Id.*

²⁶ *Id.* at 499.

²⁷ *Id.* at 500.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* citing *State v. Hackett*, 166 N.J. 66, 80 (2001) (Emphasis added).

³¹ *Id.*

³² *Id.* at 501.

³³ *Id.*

³⁴ *Id.* at 490 and n.5.

³⁵ *Id.* at 501.

Ultimately, the trial court denied the defendant's motion to dismiss pursuant to the de minimis infractions statute, N.J.S. 2C:2-11.³⁶

Pending Legislation

There are currently seven pieces of legislation pending regarding N.J.S. 2C:24-4.³⁷ None address the issue presented in *State v. Johnson*.

Conclusion

Staff requests authorization to conduct additional research and outreach to determine whether the standard for determining whether a child has been endangered should be modified to better address the current realities facing minors.

³⁶ *Id.* at 502.

³⁷ A3344, 219th Leg., 1st Ann. Sess. (N.J. 2020) (clarifies that permitting sexual abusers to reside within a child constitutes endangering the welfare of a child); A2736, 219th Leg., 1st Ann. Sess. (N.J. 2020) (provides that crimes committed outside the State under certain circumstances may be prosecuted in New Jersey); A2760, 219th Leg., 1st Ann. Sess. (N.J. 2020) (provides that unlawful use, manufacture, or distribution of controlled dangerous substance by parent or caregiver in presence of child constitutes the crime of endangering welfare of that child); A2401, 219th Leg., 1st Ann. Sess. (N.J. 2020) (provides that allowing a dog to roam off of a leash in the presence of a child constitutes endangerment); S622, 219th Leg., 1st Ann. Sess. (N.J. 2020) (provides for jurisdiction for prosecution for certain crimes against minors committed outside New Jersey); and, A1795, 219th Leg., 1st Ann. Sess. (N.J. 2020) (revises child pornography law).