1999 SENATE BILL 83

March 16, 1999 – Introduced by Senators CLAUSING, BURKE, COWLES, DARLING, ROESSLER and ROSENZWEIG, cosponsored by Representatives GOETSCH, ALBERS, BOCK, MUSSER and RYBA. Referred to Committee on Judiciary and Consumer Affairs.

AN ACT ***to renumber and amend*** 948.05 (1) (c); and ***to amend*** 939.615 (1) (b) 1., 948.05 (2), 948.05 (3), 948.13 (1) (a) and 973.034 of the statutes; **relating to:** materials involving the sexual exploitation of a child.

Analysis by the Legislative Reference Bureau

Under current law, a person is guilty of sexual exploitation of a child who has not attained the age of 18 if the person does any of the following with knowledge of the character and content of the sexually explicit conduct involving the child: 1) employs, induces, entices or coerces any child to engage in sexually explicit conduct for the purpose of photographing, recording or displaying the conduct; 2) photographs, records or displays a child engaged in sexually explicit conduct; or 3) produces, performs in, profits from, promotes, sells or distributes any photograph, recording or other reproduction of a child engaging in sexually explicit conduct.

The Wisconsin Supreme Court has decided that part of the current law prohibitions against sexual exploitation of a child is unconstitutional. *State v. Zarnke*, __ Wis. 2d __ (No. 97–1664–CR, decided February 26, 1999). Specifically, the court struck down the prohibition against profiting from, promoting, selling or distributing material showing a child engaging in sexually explicit conduct. The court decided that to be held criminally responsible for sexual exploitation of a child the defendant must know that the child had not attained the age of 18. Although current law requires a prosecutor to prove that the child involved in the sexually explicit conduct is under the age of 18, current law does not require the prosecutor to prove that the defendant *knew* that the child is under the age of 18.

Current law does provide that a defendant charged with sexual exploitation of a child has a defense to the charge if the defendant had reasonable cause to believe that the child had attained the age of 18 and the child exhibited an official or apparently official document purporting to show that the child had attained the age of 18. However, the court found that it is virtually impossible for a defendant to prove the defense if he or she is charged with profiting from, promoting, selling or distributing material showing a child engaging in sexually explicit conduct because in such cases a defendant's conduct does not entail a personal meeting with the child during which the child could exhibit the document purporting to show his or her age. Thus, the court decided that the affirmative defense does not prevent a defendant in such cases from being convicted even though he or she did not know that the child was under the age of 18. In addition, the bill provides that when a person is charged with producing or performing in any photograph, recording or other reproduction of a child engaging in sexually explicit conduct, the prosecutor must prove that the defendant knew or had reason to know that the child is under the age of 18.

This bill remedies the constitutional infirmity in that part of the sexual exploitation law that was struck down in the *Zarnke* case. Under the bill, if a person is charged with profiting from, promoting, selling or distributing any photograph, recording or other reproduction of a child engaging in sexually explicit conduct, the prosecutor must prove that the defendant knew or had reason to know that the child is under the age of 18. In addition, the bill provides that when a person is charged with producing or performing in any photograph, recording or other reproduction of a child engaging in sexually explicit conduct, the prosecutor must prove that the defendant knew or had reason to know that the child is under the age of 18.

The bill also makes the following changes to the defense provided under current law for charges of sexual exploitation of a child:

1. The bill eliminates the defense entirely for a person charged with producing, performing in, profiting from, promoting, selling or distributing any photograph, recording or other reproduction of a child engaging in sexually explicit conduct. It is no longer appropriate to provide such a defense given the requirement under the bill that the prosecutor prove the defendant's knowledge of the child's age.

2. In those cases of sexual exploitation of a child in which the defense is still available, the bill eliminates the provision in current law that says a person has the defense only if the child exhibited an official or apparently official document purporting to show that the child had attained the age of 18. Thus, under the bill a person may establish the defense by showing that he or she had reasonable cause to believe that the child had attained the age of 18.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 939.615 (1) (b) 1. of the statutes is amended to read:

939.615 **(1)** (b) 1. A violation, or the solicitation, conspiracy or attempt to commit a violation, of s. 940.22 (2), 940.225 (1), (2) or (3), 948.02 (1) or (2), 948.025 (1), 948.05 (1) or (1m), 948.055 (1), 948.06, 948.07, 948.08, 948.11 (2) (a), 948.12 or 948.13.

SECTION 2. 948.05 (1) (c) of the statutes is renumbered 948.05 (1m) and amended to read:

948.05 **(1m)** ~~Produces~~ Whoever produces, performs in, profits from, promotes, imports into the state, reproduces, advertises, sells, distributes or possesses with intent to sell or distribute, any undeveloped film, photographic negative, photograph, motion picture, videotape, sound recording or other reproduction of a child engaging in sexually explicit conduct is guilty of a Class C felony if the person knows the character and content of the sexually explicit conduct involving the child and if the person knows or reasonably should know that the child engaged in the sexually explicit conduct has not attained the age of 18 years.

SECTION 3. 948.05 (2) of the statutes is amended to read:

948.05 **(2)** A person responsible for a child's welfare who knowingly permits, allows or encourages the child to engage in sexually explicit conduct for a purpose proscribed in sub. (1) (a)~~,~~ or (b) or ~~(c)~~ (1m) is guilty of a Class C felony.

SECTION 4. 948.05 (3) of the statutes is amended to read:

948.05 **(3)** It is an affirmative defense to prosecution for violation of ~~this section~~ sub. (1) (a) or (b) or (2) if the defendant had reasonable cause to believe that the child had attained the age of 18 years~~, and the child exhibited to the defendant, or the defendant's agent or client, a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that the child had~~

~~attained the age of 18 years~~. A defendant who raises this affirmative defense has the burden of proving this defense by a preponderance of the evidence.

SECTION 5. 948.13 (1) (a) of the statutes is amended to read:

948.13 **(1)** (a) A crime under s. 940.22 (2) or 940.225 (2) (c) or (cm), if the victim is under 18 years of age at the time of the offense, or a crime under s. 948.02 (1), 948.025 (1), 948.05 (1) or (1m), 948.06 or 948.07 (1), (2), (3) or (4).

SECTION 6. 973.034 of the statutes is amended to read:

973.034 Sentencing; restriction on child sex offender working with children. Whenever a court imposes a sentence or places a defendant on probation regarding a conviction under s. 940.22 (2) or 940.225 (2) (c) or (cm), if the victim is under 18 years of age at the time of the offense, or a conviction under s. 948.02 (1), 948.025 (1), 948.05 (1) or (1m), 948.06 or 948.07 (1), (2), (3) or (4), the court shall inform the defendant of the requirements and penalties under s. 948.13.

(END)