

SENATE HEARING SLIP

(Please Print Plainly)

DATE: 3/17/99

BILL NO. SB 83
OR

SUBJECT _____

(NAME) Matthew Frank
Department of Justice

(Street Address or Route Number)

(City and Zip Code)

(Representing)

Speaking in Favor:

Speaking Against:

Registering in Favor:

but not speaking:

Registering Against:

but not speaking:

Speaking for information only; Neither for nor against:

Please return this slip to a messenger PROMPTLY.

Senate Sergeant-At-Arms
State Capitol - B35 South
P.O.Box 7882
Madison, WI 53707-7882

SENATE HEARING SLIP

(Please Print Plainly)

DATE: 3/17/99

BILL NO. SB 83
OR

SUBJECT _____

(NAME) APPLE TEMPLETON
330B AUSTIN CT

(Street Address or Route Number)

(City and Zip Code) MADISON 53704

(Representing) SEN. ARCE CLAUSSING

Speaking in Favor:

Speaking Against:

Registering in Favor:

but not speaking:

Registering Against:

but not speaking:

Speaking for information only; Neither for nor against:

Please return this slip to a messenger PROMPTLY.

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Madison, WI 53707-7882

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BILL NO. SB 83
OR

SUBJECT _____

(NAME) Senator Brian Burke

(Street Address or Route Number)

(City and Zip Code)

(Representing)

Speaking in Favor:

Speaking Against:

Registering in Favor:

but not speaking:

Registering Against:

but not speaking:

Speaking for information only; Neither for nor against:

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State of Wisconsin



GARY R. GEORGE
SENATOR

TO: Members, Senate Committee on Judiciary and Consumer Affairs

FROM: Dan Rossmiller, Clerk
Senate Committee on Judiciary and Consumer Affairs

RE: Materials Relating to Items Scheduled for Hearing on March 17th

DATE: March 15, 1999

Attached please find four separate sets of items:

- 1) copies of the Statement of Economic Interests for the two gubernatorial appointees who are scheduled to appear before the committee on Wednesday.
- 2) a copy of a memo from our Legislative Council attorney, Ron Sklansky, detailing the provisions of Assembly Bill 76, which is also on the hearing agenda. In addition, please find a memo from Chris Tackett and Doug Johnson of the Wisconsin Merchants Federation expressing concerns about the bill.
- 3) a copy of LRB 2379/2, relating to materials involving the sexual exploitation of a child. (This is the draft relating to addressing the recent Wisconsin Supreme Court decision in State v. Zarnke, which found a portion of the state's child pornography statute to be unconstitutional.)
4. a copy of the amended hearing notice referencing the LRB number of the attached bill draft in item #3 above.

SB83

Tentative Hearing Appearance Schedule

Appointees

Maura McMahon

Spryo Condos

AB 62 (Relating to changing the name of a minor)

SB 72 (Relating to reestablishing the office of the public intervenor)

AB 76 (Relating to statements in connection with the ability of an electronic computing device... Y2K)

SB 6 (Trigger Locks)

SB 83 (Relating to sexual exploitation of a child.)



BRIAN BURKE

WISCONSIN STATE SENATOR

Senate Chair, Joint Committee on Finance

TESTIMONY OF SENATOR BRIAN BURKE SENATE COMMITTEE ON JUDICIARY & CONSUMER AFFAIRS Senate Bill 83

Sexual exploitation of children robs them of their innocence, destroying lives and weakening the social fabric of our society. Those who perpetuate the abuse by distributing child pornography must be held accountable for their actions.

Last month the Wisconsin Supreme Court in State v. Zarnke struck down as unconstitutional the portion of Wisconsin's child sexual exploitation law making it illegal to profit from, promote, sell or distribute child pornography. The court determined that the statute impermissibly allocated to the defendant the burden to prove he/she did not know the child portrayed in the materials was under the age of 18.

Under the law, a defendant could assert an affirmative defense to escape conviction. Distributors of child pornography could claim they had reasonable cause to believe the child was 18 and the child exhibited some apparently official documentation of age. However, distributors of child pornography rarely have any interaction with the victim and therefore are not in a position to have the child produce suitable documentary evidence of his or her majority, making it impossible to satisfy the defense.

The practical effect is that the accused can be convicted of distributing "child" pornography even though he or she did not have reason to know the person portrayed in the sexually explicit materials was a minor. This could have a chilling effect on free speech since distributors of constitutionally protected materials might engage in self-censorship for fear of prosecution. In this way, the court ruled the statute violates the free speech rights of the accused under the First Amendment of the United States Constitution and Article I, Section 3 of the Wisconsin Constitution.

Together with the Attorney General's Office and Senator Alice Clausing, I developed legislation to cure this constitutional defect in our law and safeguard our children.

With regard to those who produce, perform in, profit from, promote, sell or distribute child pornography, this legislation shifts the burden to the state to prove the accused knew or reasonably should know the minority of the child-victim depicted in the material at issue. This models the language of Section 948.12, Wis. Stats., prohibiting possession of child pornography.

To save our child exploitation statute from future challenges, the legislation also modifies the affirmative defense as it applies to (1) those responsible for a child's welfare who allow the child to engage in child pornography (2) those who record children engaged in sexually explicit conduct and (3) those who induce children to engage in such conduct. The bill abandons the requirement that an accused asserting the affirmative defense prove the child presented official documentation of age. Therefore, the defendant need only establish by a preponderance of the evidence that he/she had reasonable cause to believe the child was at least 18 years old.

I hope the Committee will act expeditiously on this important legislation to protect children and give back to prosecutors a weapon in fighting child exploitation.

TESTIMONY OF SENATOR ALICE CLAUSING
SENATE COMMITTEE ON JUDICIARY & CONSUMER AFFAIRS
Senate Bill 83

Thank you Chairman George and committee members for allowing me to give testimony on Senate Bill 83. This measure will protect children from sexual exploitation by closing a loophole and correcting the constitutional flaws in Wisconsin's 1987 child pornography law.

On February 26, the Wisconsin Supreme Court struck down a portion of child pornography law in the *State v Zarnke* case, ruling that the "affirmative defense" provision of the law was unconstitutional. The court decided that current statutes put the burden of proving that the pictured person was of legal age on those who distributed pornography. The court ruled that this "affirmative defense" could apply only to those categories of criminal activity in which it is reasonable to conclude that the defendant could have had the opportunity to meet the child depicted face-to-face and obtain the necessary proof.

In the *Zarnke* case, the defendant had downloaded and distributed pornography from the Internet. The court argued that the "affirmative defense" clearly did not apply to this case, since the defendant did not have the opportunity to meet the subjects of the pornography face-to-face.

SB 83 addresses these constitutional concerns by placing the burden on the state to prove that the accused knew or reasonably should have known the age of the person depicted in the pornography. This will not be difficult, as the age of the minor in question is seldom if ever in doubt in those cases where individuals are prosecuted for child pornography distribution.

There is a sense of urgency in passing SB 83. Until the child pornography law is fixed, it is effectively unenforceable leaving our most innocent citizens vulnerable to this heinous crime. After working closely with Attorney General Doyle and Senator Burke on SB 83, I am confident that this bill is constitutional, and ensures that Wisconsin's innocent children will be protected from predatory pornographers.

Assistant Attorney General Matt Frank is here today to attest to the constitutional soundness and importance of this bill, as well as answer any of your questions about the legal issues surrounding the *Zarnke* case and Wisconsin's child pornography law.

Please support SB 83 to make sure we have an enforceable child pornography statute on the books. Thank you for your consideration.