1999 DRAFTING REQUEST

Assembly Substitute Amendment (ASA-AB(LRBx2409/1))

Received: **03/10/99**

Received By: **olsenje**

Wanted: **As time permits**

Identical to LRB:

For: **Michael Huebsch (608) 266-0631**

By/Representing: **Bob**

This file may be shown to any legislator: NO

Drafter: **olsenje**

May Contact:

Alt. Drafters:

Subject: **Criminal Law - crimes agnst kids**

Extra Copies:

Pre Topic:

No specific pre topic given

Topic:

Sexual exploitation of a child

Instructions:

See Attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	olsenje 03/10/99	chanaman 03/11/99					
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FE Sent For:

<END>

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/?	olsenje	1 3/11 jcg	1/3 km 11	1s 3 km 11			

FE Sent For:

<END>

S 0019

Sub to 2409 for Rep. Huebsch

(1) (c) – prove knowledge

→ (3) applies to (b) (a) & (b)
delete doc. req

Olsen. Jefren

From: Delaporte, Robert
Sent: Wednesday, March 10, 1999 5:16 PM
To: Olsen, Jefren
Subject: FW: your revision in sec. 948.05

-----Original Message-----
From: Balistreri, Thomas J. [mailto:balistreritj@DOJ.STATE.WI.US]
Sent: Tuesday, March 09, 1999 4:00 PM
To: Delaporte, Robert
Subject: your revision in sec. 948.05

I agree with Jefren Olsen's comments. By eliminating the affirmative defense and requiring the state to prove the defendant's knowledge of the age of the child in all prosecutions for child pornography, we comply with State v. Zarnke, but we go beyond what the court said was necessary in that case. Of course, if the state has to prove that the defendant knew the age of the child, it makes it more difficult to convict in those cases than in those cases where the defendant has the burden to prove lack of knowledge of age as an affirmative defense.

Olsen, Jefren

From: Delaporte, Robert
Sent: Wednesday, March 10, 1999 5:16 PM
To: Olsen, Jefren

Sensitivity: Private

CORRESPONDENCE/MEMO

Department Of Justice

Date: March 5, 1999

To: Child Pornography Statute Contact Groupasdrffasdrff

From: Thomas J. Balistreri
Assistant Attorney General

Re: Revisions to § 948.05 in light of State v. Zarnke

In *State v. Zarnke* the Wisconsin Supreme Court, following an earlier decision of the United States Supreme Court, made clear that the state could not constitutionally allocate to defendants charged with distributing child pornography the burden of proving as an affirmative defense that they were unaware a person depicted in the material was a child. Rather, with respect to distributors, the state must bear the burden of proving as an element of the offense that the defendant knew or should have known a person depicted was a child. Thus, the court held Wis. Stat. § 948.05(1)(c) unconstitutional insofar as it allocated the burden of proving an affirmative defense to those charged with profiting from, promoting, importing, reproducing, advertising, selling, distributing or possessing with intent to sell or distribute child pornography.

Fixing this defect is fairly simple. It is only necessary to break out these activities from the rest of the statute into a separate section which also contains a requirement that the state prove as an element of the offense that the defendant knew or should have known that a person depicted in pornographic material was a child. The new section can use the wording of the element of scienter presently contained in Wis. Stat. § 948.12(3) (possessing child pornography), which the court appeared to approve in *Zarnke.*

As far as the activities prohibited by § 948.05(1)(a), (b) and (2), it is OK to place on the defendant, as the statute now does, an affirmative defense of lack of knowledge of the age of a child.

BUT, the court cast doubt on the validity of *the particular* affirmative defense set forth in § 948.05(3). It expressly reserved the question of whether the remainder of the statute was constitutional. It did not expressly say why it had this reservation, but it is reasonably inferable from its critical discussion of the affirmative defense that it feels this defense presently requires proof of facts which may be impossible to meet as a practical matter. And if few if any defendants could ever prove the affirmative defense, the statute is essentially converted into a strict liability offense which is constitutionally impermissible in the area of protected First Amendment expression.

Thus, I would also suggest that in order to avoid a repetition of the *Zarnke* situation, the statute should be amended now to avoid the court's problems with the affirmative defense. The portion of the defense which provides a defense only if the child exhibited some apparently official document purporting to show that he or she was an adult should be eliminated. Instead, the affirmative defense should require producers of child pornography to prove by whatever means they can that they had reasonable cause to believe that a child was an adult.

Specifically, I suggest the following. changes to the child pornography statute for the limited purpose of conforming it to constitutional requirements. I am not suggesting any purely cosmetic changes in the language of the statute at this time since that is not the purpose of this expedited revision.

Sections (l)(a) and (b) can remain the same.

Section (3) should be changed by deleting the Italicized portion of the phrase "affirmative defense to prosecution for violation of *this section,* " and substituting "sub. (I)(a), *(b) or* (2). "

Section (3) should be further changed to eliminate the language "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."

With these changes, § (3) would read, "It is an affirmative defense to prosecution for violation of sub. *(1)(a),(b) or* (2) if the defendant had reasonable cause to believe 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."

Present § (l)(c) should be made a separate section numbered (4), and amended by adding the scienter requirements presently found in sub. (1) and § 948.12(3). The new section would then read, with the added parts in Italics:

> *Whoever with knowledge of the character and content of the sexually explicit conduct involving the child, and with knowledge of or reason to know that the child engaged in sexually explicit conduct has not attained the age* of *18 years,* 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 Cfelony.*

In *Zarnke* I took the position that producing and performing in pornographic material could be included among those activities to which the affirmative defense could be applied. I have changed my mind after carefully reading the opinion. I have now concluded that people who engage in these activities are not necessarily in a position to have face-to-face contact with the child so they have an opportunity to ascertain the age of the child. I therefore believe that they should be included in the section where the state is required to prove scienter.

If we have a situation where a producer or performer clearly had an opportunity to learn and should have known that one of the actors was a child, we would have the option of either proving the element of scienter or charging the defendant as a party to the crime under § (l)(a) or (b), thereby imposing on him the burden to prove lack of knowledge as an affirmative defense.

Finally, because of these changes, § (2) should be amended to change the subsections it references. It

should be amended to delete the Italicized language in the phrase “for a purpose proscribed in *sub. (I)(a), (b) or* (c), ” and changed to read “for a purpose proscribed in ***sub. (I)(a), (b) or (4).*** ”

1999 **Date (time) needed** Thurs. 3/11 **LRB s** 0019 / 1

SUBSTITUTE AMENDMENT [TO A BILL]

JED : jg : ____

Use the appropriate components and routines developed for substitute amendments.

S (A) SUBSTITUTE AMENDMENT

TO 1999 SB (AB) _____ (LRB– 2409 / I)

AN ACT . . . [generate catalog] ***to repeal. . . ; to renumber. . . ; to consolidate and renumber. . . ; to renumber and amend . . . ; to consolidate, renumber and amend. . .; to amend. . . ; to repeal and recreate . . . ;*** and ***to create . . .*** of the statutes; **relating to:** . . . . . .

. . . . . .

. . . . . .

. . . . . .

. . . . . .

[NOTE: See section 4.02 (2) (br), Drafting Manual, for specific order of standard phrases.]

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

SECTION #.

1999 – 2000 LEGISLATURE

LRB-2379/2
JEO:jlg:km

1999 BILL

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 (l), (2) or (3), 948.02 (1) or (2), 948.025 (l), 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 (lm) and amended to read:

948.05 **(lm)** ~~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 (l), 948.025 (l), 948.05 (1) or (1m), 948.06 or 948.07 (l), (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 (l), 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)