

HOUSE COMMITTEE ON JUDICIARY

April 06, 2007 Hearing Room 357

MEMBERS PRESENT: Rep. Greg Macpherson, Chair
Rep. Jeff Barker, Vice-Chair
Rep. Gene Whisnant, Vice-Chair
Rep. Suzanne Bonamici
Rep. Kevin Cameron
Rep. Linda Flores
Rep. Betty Komp
Rep. Wayne Krieger
Rep. Tobias Read

VISITING MEMBERS: Senator Kate Brown
Rep. Andy Olson

STAFF PRESENT: Darian Stanford, Counsel
Bill Taylor, Counsel
Sara Campbell, Committee Assistant

HB 2843 & 3515 – PUBLIC HEARING

Tape 117A – Counter at 670

COUNSEL STANFORD: Thank you, Chairman Macpherson, and members of the committee. House Bill 2843, I'll deal with first. It arises out of a bi-partisan coalition from the House and Senate and to address problems related to pornography and children, and the luring of minors for sexual conduct and activity. It's primary purpose lies in the creation of two new crimes. Furnishing Sexually Explicit Material to a Child, which is a Class A misdemeanor, and Luring a Minor, which is a Class C felony. I've written the elements...the basic elements for furnishing up on the board up here, which I'm not sure if everybody can read, but Furnishing Sexually Explicit Material to a Child consists of the following elements. First of all, the defendant intentionally furnishes a child or intentionally permits a child to view...and a child is defined as under 13, so 12 or under...sexually explicit material and sexually explicit...that the defendant knows is

sexually explicit material. And sexually explicit material has a definition under 2843. It includes visual images of masturbation or sexual intercourse, genital-to-genital, oral-to-genital, anal-to-genital, or oral-to-oral contact, or the penetration of the vagina or rectum by an object. There is specific affirmative defenses set forth in 2843. Those include affirmative defenses for museum, school, or library employees acting in the scope of employment if the materials are for a sexual education or art education or for treatment and they are furnished by a parent, a guardian, an educator, or a treatment provider. A third affirmative defense, if the sexually explicit material is an incidental part of a non-offending whole and it serves some purpose other than titillation. Four, if the defendant had reasonable cause to believe that the victim was not a child; or five, if the defendant was less than three years older than the victim. It is not an affirmative defense if the victim is actually a law enforcement officer that is posing as a child. That's the crime of Furnishing, it's a Class A misdemeanor. The second crime is Luring of a Minor, and that's an important distinction. A Minor is defined as under 18, no longer a child. The crime of Luring a Minor consists of the following elements. First of all, the defendant furnishes to or uses with a minor; secondly, a visual representation or a verbal description or a narrative account of sexual account and the purpose was sexual gratification or to arouse or satisfy the sexual desires of the defendant or to induce the minor to engage in sexual conduct. The affirmative defenses for the crime of Luring which is a Class C felony are similar to those for the crime of furnishing, other than like the scope of employment defense. The definition of sexual conduct is the same essentially as for what sexually explicit material is, except that the conduct also includes touching of the genitals, the pubic regions, the buttocks, or the female breast. House Bill 2843 also

amends the existing crime of Sending Sexually Explicit Material to a Minor in a number of different ways, one of the most significant of which it specifically includes electronic transmissions. And then there is a lot of other sort of housekeeping and clean-up matters that House Bill 2843 entails, which I won't go into at this time. None of the crimes entail sex offender registration requirements presently. And I'll note on House Bill 2843, there is a Dash 1 amendment that literally arose out of a catch that Legislative Counsel's office made this morning, and they were able to get that amendment done and complete within about an hour's time. And it's a technical fix is all I will say about it. That's House Bill 2843.

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Tape 117A – Counter at 2486

SENATOR BROWN: Our objective here is to prevent child sexual abuse and predatory child sexual exploitation. The problem is that ORS 167.065 was held unconstitutional by prior court rulings, so our goal is to craft a statute that is constitutional. Representative Olson and I came together to do that. We had a number of partners, including folks from the D.A.'s office, Department of Justice, the Oregon Criminal Defense Lawyers, and the ACLU, and we spent many months grappling over the details of House Bill...it was LC 87 and became House Bill 2843. And at that, I'd like to turn it over to my colleague, Representative Andy Olson.

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Tape 117A, Counter at 2714

REP. OLSON: Thank you, Mr. Chair, and members of this committee for allowing us to hear this and move forward with 2843. And as Senator Brown shared, it

was interesting how we met together, but I just want to give you a little bit of history how we did move forward. And I don't want to spend a great deal of time on that because I do have a number of people that I've invited here to share with you this morning to give you a perspective of the harm at an early age for children, to share also the involvement and the harm that investigators see as a result of this issue, to see as Senator Brown mentioned doctors' and counselors' perspective regarding it, as well as prosecution. And then also someone that deals with victims as well afterwards as a result of it. So you're going to get a good sweeping view of exactly what we're after. But Deputy Todd Hargrove, he's an investigator with the Linn County Sheriff's Office, about a year and a half ago he approached me and asked me if there was something that we could do regarding this issue. And from that point forward then, I sat down and talked with Bill Taylor and the workgroup began at that point. And just as Senator Brown has mentioned of all those that participated in it...and there was a lot of people, let me tell you...and we met several times during the interim because our goal was to create some policy that would protect children and also at the same time provide a good tool for law enforcement out there regarding this. I have handed this around to you, but this was actually on the front cover. You have it from the Gazette Times out of Corvallis, but also the Democrat Herald had it. And this was on the front page of the Sunday paper that is shared through the whole mid-valley. And it was about I-porn. Actually what it is is what's happening right now on the I-pods and the porn that is downloaded and also sent over it. But it was extremely hardcore stuff that's going on, and the conversation...Dr. David Berg is a clinical psychologist and also a marriage-family therapy counselor over in Corvallis wasn't able to attend here...but he has a lot of his comments in the story. And I'd like to

just refer that to you. You know, basically at this point right now...this gives you an example of how much work we did during the whole interim time period and where we wanted to go with this thing. So you have, I think, the counsel shared with you...Darian Stanford did a good job going through just the main points of 2843. At this point right now, I'm just going to move through the group that I've asked to share with you and give you some evidence why this is a good Bill.

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Tape 118A – Counter at 174

MR. SLAUSON: Good morning, Chair Macpherson, members of the committee. I am Michael Slauson. I am with the Oregon Department of Justice. I am an Assistant Attorney General in the Organized Crime Section and I'm the prosecutor for the Internet Crimes Against Children Task Force. I had the privilege of testifying before this committee back on March 19th about solicitation of minors over the internet to commit sexual acts. I'm here to testify both on 2843 and 3515. And what I'd like to do is just talk with the committee briefly about how these Bills work together and how they work with current law. What 2843 does is it gets at conduct pretty early on in the stage of grooming; specifically, looking at sections dealing with learning. It's really the first process used by those who would offend children to lower their inhibitions to engage in sexual conduct at some later date. So what that does then is it gets at the most early conduct, the most...the first point of attack, if you will. What 3515 does is come in at sort of a later date. Okay, you've already sort of lowered the inhibitions of the kids. Now what you're going to do is actually solicit them for sex. Then in Oregon law what we have now, we don't cover that. We don't cover that kind of conduct directly. What

we have now is even a step one more removed from that which is an attempted crime. And then after that, we would of course have the completed crime. So both of what these Bills do is they cover conduct that is a gap in our current law. And they address the particular harm that is associated with that type of conduct as I mentioned that is not currently covered. With Senate Bill...or excuse me...House Bill 3515, I will say that the Department of Justice supports that concept generally as I mentioned the other day before this committee. And I'd also like to note that I've submitted written testimony on both of the Bills, and I'm happy to answer any questions that the committee might have about either one of them.

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Tape 118A – Counter at 689

MS. BURETA: Thank you. Chair Macpherson, members of the committee, my name is Jodie Bureta. I represent the Marion County District Attorney's Office. I'm here in support of House Bill 2843. I've been a prosecutor of child sex abuse crimes for the last 3-1/2 years. I was also a member of the committee that worked very hard to draft this Bill. I'm here today to tell you that prosecutors desperately need this tool in order to hold predators accountable in order to prevent children from being abused. A large portion of the cases that we get in every day involve both giving pornography to children and luring children through sexually explicit conversation, be it on-line, through text messaging, through e-mails. We've even had cases where these predators will leave notes for children outside their homes. This Bill would encompass all that sort of behavior. We see people giving pornography to children in order to groom them for later sexual abuse. We also see it used as an instrument of the abuse itself. Oftentimes,

especially in the sexual abuse of very young children, you see these predators using the pornography to show the children what acts to do in order to teach them what they would like to perform on them. This is often...this is always incredibly harmful to those kids. We also see those children are best able to articulate what they see in the movies or what they see in the pornography better than the abuse that happens to themselves. If that's all we're left with, we don't have a crime currently under Oregon law. We have children who are being exposed to this who are being forced to act out these things, and currently there is no accountability for the people who are doing it to them. In terms of luring the children, as I said before, they use all sorts of mechanisms to lure the children. They use it to groom, they use it to desensitize the kids, they use it sometimes just to stimulate the person themselves. They get some sort of sexual gratification in just presenting this conversation to children. We see this constantly. There's a huge gap in the law in terms of luring as it stands now. The only tool that prosecutors have is an attempt to commit some sort of sexual abuse. This is incredibly hard at a practical level as a trial attorney...incredibly hard to prove to a jury beyond a reasonable doubt that somebody is attempting to commit sex abuse merely by chatting on-line or engaging in sexually explicit conversation with them. As a practical matter, these crimes don't get charged because it is so difficult to prove. As it currently stands, we have to show a substantial step that somebody takes...we're forced to set up a meeting with the child, or we have to wait until actual abuse, hands-on abuse, is attempted in order to get these people held criminally accountable. This Bill takes care of that. It would allow us to stop this abuse in the grooming stage, hold people accountable while they are grooming the children while the harm is just starting to be done. We don't want to have to wait until abuse

physically occurs in order to catch these people and hold them accountable and protect these kids. I ask you to help give prosecutors the tool to hold these people accountable and to stop the abuse when it first starts in any grooming process. Thank you.

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Tape 118B – Counter at 1220

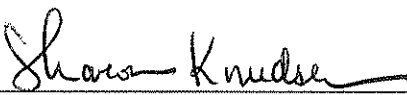
MR. FIDANQUE: Thank you, Mr. Chair. For the record, David Fidanque, Executive Director, ACLU of Oregon. We were part of the work group on House Bill 2843, and gave our commitment to being neutral on the Bill. But I need to modify that somewhat because of some communications we have had in the last couple of days with representatives of the Motion Picture Association and the Media Coalition. And I believe Ted Hughes is here on behalf of the Motion Picture Association and will be giving you a memo from the Media Coalition that was written by their Executive Director, David Horowitz, that raises substantial First Amendment concerns to House Bill 2843. And let me say...and I'm going to try to keep this very short...but as the Chair noted earlier, this is a very complicated area of the law. Oregon statutes dealing with furnishing obscene material to minors, which are generally in Chapter 167 of the ORS, date back most of them to the criminal code reform in the early 70's that was carried out by the Legislature, and some even earlier than that. There are some very quaint things in that Chapter of the ORS, including a definition of obscenities that refers to terms that are not polite in mixed company. So to say that these laws need to be revisited is probably the understatement of the decade. The work group was primarily concerned with trying to get at not so much the nature of the material, but what is done with the material, and what the purpose of providing the material to a minor is. Where you see that in House Bill 2843 at its purest

is in Section 3 of the Bill, the luring section. And there is consensus, I believe, on the part of all members of the work group that that provision needs to be enacted. There is a provision in Oregon law that the Oregon Department of Justice still believes is constitutional as it was revised I think in the 2003 session. However, as a practical matter...and that's the furnishing of obscene materials to minors law, which is one of the sections that would be repealed by House Bill 2843...the practical problem is that there isn't a D.A. in Oregon that is confident that law would be upheld on appeal because there are part of it that are clearly unconstitutional. And so the intent of the work group was to, by enacting Section 3 of House Bill 2843, to establish a clear bright line that when someone is furnishing material that...and I'm looking at the Bill now on Page 2...furnishes to a minor a visual representation or explicit verbal description of sexual conduct, which is relatively narrowly defined, and furnishes it for the purpose of inducing the minor to engage in sexual conduct or to arouse the person who is furnishing that material or to arouse the minor, that's clearly we believe...can be prohibited. I don't think there's anyone involved in the work group who had any qualms about Section 3 of this Bill. Some of us are much more nervous about Section 2. The ACLU agreed to be neutral despite some of our concerns about the possible unconstitutionality of Section 2. It's much, much narrower than existing law and represents a major improvement over existing law. There is another provision of the Bill that you're going to hear about, I think, from Mr. Hughes, which is Section 10 of the Bill. And that's the current statute that prohibits sending...in current law, sending obscene material to minors. Now this provision was added fairly late in the discussions of the work group. It wasn't subjected to the same kind of scrutiny as other parts of the Bill, and at the time it was added, no one

really thought about putting that through a First Amendment filter...First Amendment case law filter. And the Media Coalition has...I think their major concerns are with Sections 2 and 10. And frankly, Mr. Chair, I think their concerns are well placed. So let me just sum up by saying that our position on House Bill 2843 is somewhat in flux at this point until we can complete a thorough analysis of the First Amendment case law that the Media Coalition has brought to our attention and that Mr. Hughes will be bringing to your attention. But if you wanted to be cautious in this area of the law, my recommendation to the committee would be to focus on Section 3 and perhaps recognize that Sections 2 and 10 either should be taken out of the Bill or should be subjected to some more work.

I, Sharon Knudsen, do hereby certify that these HB 2843 Public Hearing Excerpts were tape recorded on April 6, 2007, supplied to me by the Oregon Department of Justice, and thereafter reduced to typewriting by me, and that the foregoing is an accurate and complete transcript to the best of my ability of such recorded proceedings.

IN WITNESS WHEREOF I have hereunto set my hand in the City of Albany, County of Linn, State of Oregon, this 19th day of May, 2008.



Sharon Knudsen
Court Transcriber