Testimony in Support of HB 2002 Regarding Sexual Exploitation of Children

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Good afternoon ladies and gentleman of the Judiciary Committee. My name is Mark Simpson. I am an Assistant District Attorney in Douglas County, Kansas. I specialize in the prosecution of crimes against children. I believe that passage of HB 2002 is vital to our ability to adequately protect children across this state from adults who would sexually exploit them. Thank you for your consideration of this important public safety issue.

The problem that HB 2002 addresses is that in Kansas, a person who possesses an image of a child in the nude for the purpose of sexual gratification when *the child is aware they are being photographed* is treated differently under the law than a person who possesses an image of a child in the nude for the purpose of sexual gratification *when the child is secretly recorded.* If the image is secretly attained, such as with a hidden camera, then the defendant faces much less serious penalties.

I first became aware of this issue in one of my cases when a 55 year old man secretly videotaped his girlfriend's 11 year old daughter in the nude while she was in the bathroom. Upon further investigation it was determined that the defendant recorded multiple other secret videos of the child in the nude. He told the police that he recorded the videos of the child for his own sexual gratification. This defendant had regular access to the 11 year old victim and he worked as an umpire for softball and girls volleyball.

As anyone would, I recognized this defendant as a threat to the children of our community and wanted to prosecute him to the fullest extent of the law. Unfortunately, our current statutes prevented me from prosecuting this person in a manner that is proportionate to his threat to the community and his crime against the 11 year old girl. Ultimately my case had to be dismissed so that Federal prosecutors could subject this defendant to harsher Federal penalties for his crimes.

The statute in Kansas that deals with child pornography is K.S.A. 21-5510 – Sexual Exploitation of a Child. The statute prohibits possession of images of a child engaged in sexually explicit conduct (K.S.A. 21-5510(a)(2)) and production, distribution, and manufacturing of images of a child engaged in sexually explicit conduct (K.S.A. 21-5510(a)(4)). "Sexually explicit conduct" includes "exhibition in the nude."

I read the Sexual Exploitation of a Child statute and thought that it would, and should, apply to the case I described. But, according to the Kansas Supreme Court, *secretly* recording a child in the nude is not considered "exhibition in the nude". In *State of Kansas v. Zabrinas,* 271 Kan. 422, 24 P.3d 77 (2001) the court ruled that "A child or infant in a harmless moment could never be considered to be so engaged [in exhibition in the nude]. It is clearly necessary that the child must have some understanding or at least be of an age where there could be some knowledge that they are exhibiting their nude bodies in a sexually explicit manner." *State v. Zabrinas*, 271 Kan. 422, 431, 24 P.3d 77, 85 (2001). The key word is "exhibition." The court found that "exhibition in the nude" implies some knowledge or understanding on the part of the victim.

This holding in *Zabrinas* was applied in *State v. Liebau,* 31 Kan.App. 2d 501, 67 P.3d 156 (2003). Liebau secretly recorded video of his step daughter in the nude in the bathroom. His conviction for sexual exploitation of a child was reversed because a child who is "unaware that she is being videotaped in the nude while using the bathroom, cannot be said to be engaging in sexually explicit conduct or an exhibition of nudity." *State v. Liebau,* 31 Kan.App. 2d 501,505, 67 P.3d 156 (2003).

These rulings are based on entirely on the courts' interpretation of "exhibition". The *Liebau* court noted "the defect is one which the legislature alone can correct." *State v. Liebau,* 31 Kan. App. at 501.

HB 2002 solves this problem by changing "exhibition in the nude" to "appearance in the nude" and by adding "with or without the knowledge of the victim". HB 2002 would make it illegal to possess, create or distribute images of a child in the nude, even when those images are secretly recorded, and the purpose is the sexual gratification of the offender or someone else. The only change to the statute is substituting "appearance" for "exhibition" and clarifying that a victim does not have to be aware they are being recorded or photographed.

This change is important for two reasons. First, possession or distribution of an image of a child in the nude *who is aware they are being video recorded* should not be treated differently than possession or distribution of a picture of a child in the nude *who is <u>not</u> aware they are being recorded.* Currently the first crime is Sexual Exploitation of a Child and the second is the less serious crime Breach of Privacy. Using a hidden camera to photograph a child in the nude with sexual intent is truly sexual exploitation of a child and it should be treated that way under the law.

Sexual exploitation of a child is a level 5 person felony, which is a presumptive prison offense. If a person creates or distributes child pornography depicting children under 14 years old then it is an off-grid offense subject to life without the possibility of parole for 25 years.

But, Breach of Privacy (K.S.A. 21-6101(a)(6)) is the applicable crime under current law when someone secretly records anyone, including a child, in the nude in a private location, regardless

of sexual intent. That crime is only a level 8 person felony and is presumptive probation for most defendants. Disseminating those images, regardless of the age of the victim, is a level 5 person felony.

This disparity in sentencing based *only* on the knowledge or awareness of the child does not make sense. A criminal should not benefit because he is clever enough to secretly record a child in the nude. A person who has pictures of children in the nude that were *secretly* recorded for the defendant's sexual gratification is just as dangerous as a person who has pictures of children in the nude for the sexual gratification of the defendant who *were aware* they were being recorded. The law should treat them the same.

Secondly, a person who secretly records a child in the nude for sexual purposes should automatically have to register as a sex offender, because that is what they are. Currently a person convicted of breach of privacy would only have to register if a special finding was made that the crime was sexually motivated. And then the registration would only be for 15 years compared to 25 years for possession of child pornography and lifetime registration for distribution or manufacture of child pornography. This needs to change.

Some have expressed concerns that this amendment might criminalize the innocent photography of children in the nude, such as a parent photographing a young child during bath time. This is incorrect. Such images are excluded because one element of Sexual Exploitation of a Child is sexual intent. Without sexual intent a person cannot be prosecuted for sexual exploitation of a child. This is true under current law and will remain true with the proposed amendment. *This amendment does not change anything regarding the sexual intent required.* The amendment merely adds covertly recorded images to the overtly recorded images of child pornography already criminalized as Sexual Exploitation of a Child. Concerns about criminalizing possession of images with innocent intent are unfounded and should not be a barrier to protecting our community from people who sexually exploit children.

I urge you to support HB 2002 to better protect the children of our State. Thank you for your time and your service to the people of Kansas.