

Approved _____
Date 2/28/85

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by REPRESENTATIVE JOE KNOPP at
Chairperson

3:30 ~~am~~/p.m. on February 14, 1985 in room 526-S of the Capitol.

All members were present except:

Representatives Adam, Bideau and Duncan were excused.

Committee staff present:

Jerry Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Mary Ann Torrence, Revisor of Statute's Office
Becca Conrad, Secretary

Conferees appearing before the committee:

Colonel Bert Cantwell, Superintendent, Kansas Highway Patrol
Omar Stavlo, Chief Law Enforcement for Kansas Fish and Game
Bob Cluster, Kansas Sheriff's Association
Tony DiPlacito, President of the Kansas Association of Chief of Police
Robert Schumaker, Kansas Policers' Association
Sheriff Marion Cox, Wabaunsee County Retired State Trooper
Ann Smith, District Attorney's Office
Commissioner Barnum, Youth Services of Social and Rehabilitation Services
Helen Stephens, Johnson County Child Abduction Sexual Abuse Task Force
Ron Smith, Kansas Bar Association

HB 2104 - Concerning the fish and game commission; relating to the powers and duties thereof.

Colonel Bert Cantwell, Superintendent, Kansas Highway Patrol, supported this bill. He stated that they quite often work with the Fish and Game people and with this bill the Fish and Game people could be involved with the local law enforcement.

Omar Stavlo, Chief Law Enforcement for Kansas Fish and Game, said they employ 71 full-time game protectors who are certified as law enforcement officers at the Kansas Law Enforcement Training Center, who undergo a 40 hour annual inservice training and a 320 hour training program. He said the Kansas Fish and Game assist the other law enforcement agencies at their request. He said there are numerous situations they run into which they have no legal authority to do anything about. He supported this bill.

Bob Cluster, Kansas Sheriff's Association, said at their meetings they voted to support this bill.

Tony DiPlacito, President of the Kansas Association of Chief of Police, talked in favor of this bill.

Robert Schumaker, Kansas Policers' Association, stated that their board voted to support HB 2104.

Sheriff Marion Cox, Wabaunsee County, retired State Trooper, said in his 28 years of working with Fish and Game he found most all of the Fish and Game employees to be competent and well trained. He said he totally supported this bill.

HB 2105 - Concerning crimes and punishments; relating to the crime of sexual exploitation of a child.

Representative Wagon pointed out that in this bill if a person is not sexually exploiting a child for a profit, it is not illegal. She said they would like to add the language shown in lines 44, 45 and 46.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,
room 526-S, Statehouse, at 3:30 ~~xxx~~ a.m./p.m. on February 14, 1985.

Representative Cloud pointed that SB 208 was very similar to HB 2105. He said SB 208 deals with possession of material for the intent to arouse or gratify the sexual desire of the child for the defender or both. This bill says that if you catch somebody even in the possession of this type of material, it would be illegal. Whereas HB 2105 deals only with the promoting aspect. He said that SB 208 would scratch HB 2105's line 43 which changes it so that you don't have to prove that it was being done for profit. He stated the other difference is in HB 2105, line 25 after "promoting", the language "or possessing" is added.

Ann Smith, District Attorney's office, said she was not particular about the language but just wanted it to be worded to make it a crime to possess this type of pornographic material.

Commissioner Barnum, Youth Services of SRS, presented testimony in support of HB 2105. Attachment No. 1 states further information concerning this bill.

Helen Stephens, Johnson County Child Abduction Sexual Abuse Task Force, spoke in support of HB 2105.

Ron Smith, Kansas Bar Association, supported HB 2105. He stated they might need an amendment in Section a or b or another subsection c to get at the essence of the user. He also said that line 43 could be moved up to the end of line 42. (1) would come after "means" in line 42 and (2) would stay the same.

HB 2190 - Concerning domestic relations; relating to change of venue in certain actions.

The Chairman gave an explanation of and reasons for sponsoring this bill. Representative Whiteman said she thought it would be better to have the venue changed to the town where the children are currently residing. Representative O'Neal pointed out that there will be instances where both parties of a divorce move to different locations and one decides to move back. He wondered how the jurisdiction would be decided in that situation. Representative Knopp said he did not think a change of venue should be made mandatory, but that the judges should have the option to have it transferred if desired.

The meeting was adjourned at 4:30 p.m.

13. Child Pornography and Child Prostitution

Recent Congressional inquiries have indicated that both the exploitation of children in pornography and the issue of child prostitution are critical problems that can be addressed at the state level. Traditionally, there have been significant obstacles to the effective investigation and prosecution of these cases because of the difficulties in enforcing particular state statutes.

The issue of child pornography is complex, involving both the issue of obscenity as well as the power of the First Amendment. Child prostitution has in some cases been a difficult crime to prevent because of relevant conduct that is not proscribed in the particular state law and because of the fact that many of these offenses are treated as misdemeanors or lesser crimes.

Because of the complexity of each issue and the wide variety of state laws impacting upon these crimes, the text of this section contains specific recommended principles for state legislation.

Child Pornography

New York v. Ferber In the summer of 1982, the United States Supreme Court decided a case, *New York v. Ferber*, 458 U.S. 747 (1982), that allowed the individual states to constitutionally regulate the production and distribution of material that depicts children engaged in sexual activity even when the material is not legally obscene. This opened the door for the federal government (the Child Protection Act of 1984, P.L. 98-292), as well as the states, to expand coverage of the proscribed conduct under the topic of child pornography. As a result, many states adopted legislation similar to Georgia's 1983 Sexual Exploitation of Children legislation (§16-12-100), which follows:

16-12-100. Sexual exploitation of children.

(a) As used in the Code section, the term:

(1) "Minor" means any person under the age of 18 years.

(2) "Performance" means any play, dance, or exhibit to be shown to or viewed by an audience.

(3) "Producing" means producing, directing, manufacturing, issuing, publishing, or advertising.

(4) "Sexually explicit conduct" means actual or simulated:

(A) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) Bestiality;

(C) Masturbation;

(D) Sadomasochistic abuse for the purpose of sexual stimulation; or

(E) Lewd exhibition of the genitals or pubic area of any person.

(5) "Visual or print medium" means any film, photograph, negative, slide, book, magazine, or other visual or print medium.

(b) (1) It is unlawful for any person knowingly to employ, use, persuade, induce, entice, or coerce any minor to engage in or assist any other person to

engage in any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct.

(2) It is unlawful for any parent, legal guardian, or person having custody or control of a minor knowingly to permit the minor to engage in or to assist any other person to engage in sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct.

(3) It is unlawful for any person knowingly to employ, use, persuade, induce, entice, or coerce any minor to engage in or assist any other person to engage in any sexually explicit conduct for the purpose of any performance.

(4) It is unlawful for any parent, legal guardian, or person having custody or control of a minor knowingly to permit the minor to engage in or to assist any other person to engage in sexually explicit conduct for the purpose of any performance.

(c) Any person who violates a provision of this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than three years nor more than 20 years or by a fine not more than \$20,000.00, or both.

Enactment of this kind of statute is significant for the following reasons:

1. It protects children by allowing sexually explicit conduct to be defined as, among other things, "masturbation," or the "lewd exhibition of the genitals or pubic area" of any person. This is significant because much trading and exchange in child pornography is done with "mere nudes," which may involve an exhibition of the genital area.
2. A child or minor is defined to be any person under the age of 18 years. This is significant because in many statutes the protection for children only extends to age 14 or 16.
3. The statute penalizes individuals who use or entice children to engage in sexually explicit conduct as well as parents or individuals having custody or control of a minor who knowingly permit the child to engage in this kind of activity.

The Georgia statute could be improved by what California (Penal Code, § 11166) did when it defined "sexual conduct" to include "exhibition of the genitals, pubic or rectal areas of any person for the purpose of sexual stimulation of the viewer." This definition would assist in covering many of the materials that are traded or exchanged in child pornography.

Of course, the additional provisions of the Penal Code in Georgia prohibit the *sale, loan, and exhibition* of this kind of child pornography.

Commercial Purpose A different kind of legislative improvement to restrict pornography was adopted by Colorado (1984, H.B. 1018). Colorado removed the requirement of a commercial purpose from the offense of sexual exploitation. This is critical because many of the transactions that occur in the world of child pornography are not done for commercial purposes or profit but rather as a straight exchange or trade.

Report by Processors A critical provision enacted by the State of California (Penal Code, § 11166) requires commercial film and photographic processors to report items that they observe in their professional capacity depicting a child under the age of 14 years engaged in the act of sexual conduct.

RICO It will be important for states to consider the use of the RICO (Racketeering Influenced Corrupt Organizations) provisions, which some states currently have and which allow for a judge or jury to be shown evidence of additional acts of a child pornography scheme. The RICO provisions are often used for such offenses as drug dealing, burglary, and car theft. The unique nature of child pornography means that the RICO provisions would give an added advantage to the investigation and prosecution

of these cases. Also, the provisions of these statutes often provide for seizure and forfeiture of the sources used to further the criminal activity.

Basic Principles It is recommended that any child pornography statute include provisions that will accomplish the following:

1. Cover the production, distribution, financing, and reproduction of such pornography, as well as pornographic modeling and performances in shows.
2. Provide for criminal penalties, regardless of whether the material is considered legally obscene.
3. Provide for criminal penalties regardless of whether or not there is any anticipation of profit or other commercial gain. Any distribution of child pornography should be prohibited.
4. Apply to all children through their eighteenth birthday.
5. Provide for the age of the child portrayed in the material to be established by expert testimony.
6. Include penalties for parents or custodians who knowingly allow their children to be used in child pornography.

Proof of Age of the Victim The State of New York has a law that allows the age of the child to be proved by an expert—for example, a physician or sociologist. This is critical because many times investigators have no knowledge of the identity of the child portrayed. That statute is as follows:

§263.25 Proof of age of child—When it becomes necessary for the purposes of this article to determine whether a child who participated in a sexual performance was under the age of sixteen years the court or jury may make such determination by any of the following: personal inspection of the child; inspection of a photograph or motion picture which constituted the sexual performance; oral testimony by a witness to the sexual performance as to the age of the child based upon the child's appearance; expert medical testimony based upon the appearance of the child in the sexual performance; and any other method authorized by any applicable provision of law or by the rules of evidence at common law.

Child Prostitution

Because of the extremely diverse nature and variety of state laws affecting child prostitution, this section will include principles that address some of the typical problems. Each state should consider legislation that accomplishes the following:

1. Creates a separate offense for aiding, assisting, or promoting the prostitution of children, which has criminal penalties greater than those for promoting prostitution generally.
2. Provides for specific penalties for parents, guardians, or custodians who knowingly permit their children to engage in prostitution.
3. Defines a child as anyone under the age of 18.
4. Eliminates any existing statutory language that may require the children involved in prostitution to be of "previously chaste character."
5. Makes the act of patronizing a child prostitute a criminal offense and provides greater penalties where younger children are involved.

Finally, runaway and homeless youth programs like New York's (§ 532) have provided alternatives to the children on the street who often turn to prostitution.