



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

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TO: Members, Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing

FR: Attorney General J.B. Van Hollen

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RE: Written Testimony in Support of 2009 Senate Bill 561

Chairperson Taylor, members of the Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing, thank you for the opportunity to testify today in support of Senate Bill 561. This bill furthers our goal in protecting our children who may become or who are victims of Internet sexual predators.

Public safety is my number one priority at the Department of Justice. As many on this Committee are aware, the Department of Justice – Division of Criminal Investigation coordinates the State’s Internet Crimes Against Children Task Force. We currently have over 130 local law enforcement affiliates in the task force from across the state - up from 22 when I first took office. Investigation of, prosecution of, and prevention of Internet crimes against children is and will continue to be my priority as Attorney General.

The responsibilities of the Internet Crimes against Children (ICAC) Task Force are many. DOJ provides investigative and prosecutorial assistance to police agencies and prosecutors, conducts investigations, refers cases to U.S. Attorneys and District Attorneys for prosecution, and in certain cases, for example where a district attorney has a conflict, prosecutes offenders. We provide training to law enforcement officers, prosecutors, parents, teachers, and other community members. Just last year alone, we hosted over 300 educational forums around the state. In addition, we foster continual statewide and regional coordination, collaboration, information sharing, networking, and service integration.

So how serious is the problem of Internet crimes against children? Over 22,000 unique internet protocol addresses - in Wisconsin alone - have downloaded child pornography. In addition, the Task Force, through undercover Internet investigations, continues to identify and apprehend people who use the Internet as a means to identify, groom, and solicit children for sexual activity.

Here's how this bill strengthens our fight against sexual predators.

The first part of the bill modifies the criminal "attempt" statute and, if enacted, would result in increasing the maximum possible penalty for the act of attempting to solicit a child online for sexual activity and the act of attempting to cause a child to view or listen to sexually explicit material. Under current law, attempts to commit those acts are punishable by one-half the maximum for the completed crime. The bill would make the maximum penalty for the "attempt" equal to that for the completed crime. Courts would retain discretion to sentence the offender as they see fit within the sentencing range.

The "use of a computer to facilitate a sex crime" is basically online child enticement. It occurs when, for example, an Internet predator communicates with a child, or a person they believe is a child, over the Internet for the purpose of enticing them to a face-to-face contact with the intent to have sexual contact or sexual intercourse with the child. To be found guilty, a predator must also undertake an act to effectuate that intent. That purposeful act usually takes the form of arranging a meeting place and travelling to the scene. These cases are often referred to as "traveler" cases. The completed crime is punishable as a Class C felony with a maximum term of imprisonment of 40 years, 25 years of which may be confinement. Under current law, an attempt to commit online child enticement is punishable by one-half of the penalty for the completed crime. While my office (and most prosecutors) take the position that the current statutory language permits prosecutors to charge a completed crime (and seek full penalties) even when the offender is communicating with an adult undercover officer, some prosecutors have felt obliged to charge such cases as "attempts" because the officer is not a child.

"Causing a child to view or listen to sexual activity" is a crime that is committed by one who intentionally causes a child to view or listen to sexually explicit conduct for the purposes of sexually gratifying himself or humiliating or degrading the child. It is common for Internet predators engaging in "chats" with children or undercover officers posing as children, to send the "child" sexually explicit images or videos of themselves or others and to request the same material from the child. This often takes the form of webcam displays of the offender exposing himself and/or sexually gratifying himself. A violation of this law is a Class H felony if the child is between 13 and 18 years of age and a Class F felony if the child is under the age of 13. Because this statute requires that a child be exposed to this material by the offender, providing it to an undercover officer online is only punishable as an attempt.

Commission of these crimes against actual children can only be detected by law enforcement if they are reported. Studies routinely show that most sex crimes, including most child sex crimes, go unreported. Moreover, some reported cases may not contain sufficient information to make for a prosecution. Undercover operations where an officer portrays himself or herself as a child are often the best way to stop online sex predators.

Let me provide a well-known example in the traveler context, a case that exemplifies online enticement. The Department of Justice – Division of Criminal Investigation received credible information showing that former Racine mayor Gary Becker was engaging in sexually explicit chat logs with children, or those who appeared to be children. What was known was his Internet

“handle.” Using this information, Becker was quickly identified in a live chat room environment by an online undercover Division of Criminal Investigation special agent. Becker planned a meeting for the purposes of having sexual contact with what he thought was an underage girl, he went to the meeting, and he was arrested, charged, and ultimately convicted. Without these undercover investigations, online predators like Becker would be free, and their online enticement would lead to the victimization of an untold number of children.

It is the right public policy to ensure that online predators are subject to the same maximum penalty whether the case is investigated by undercover officer or whether the case comes from a parent reporting the abuse of a child. The defendant’s conduct is the same. Make no mistake - those who are using the internet to engage solicit children for sexual purposes are not generally doing it for the first time when an officer is on the other end of such an encounter. Countless children may have already been victimized – and these operations are the best way to that predator again. Charging cases investigated by undercover officers as completed crimes follows the same logic that today allows the state to charge a drug trafficker with a completed crime even when his sale is to an undercover officer. Moreover, in the crimes against children code, an attempt to entice a child for sexual purposes in the physical world – the crime of child enticement – has always been punishable to the same extent as the completed act.

The second part of the bill relates to updating and clarifying the criminal discovery rules as it relates to the control of images or video depicting child pornography.

In criminal prosecutions, the government ordinarily maintains possession and control of contraband items. Therefore, the criminal defendant and his defense team have limited access to the actual contraband, for example, drugs or illegal weapons. Other evidence is made available to the defense, such as copies of reports, witness statements, and laboratory results.

Images or videos of children engaged in sexually explicit conduct are contraband by definition as it is illegal to possess, copy, or disseminate that material. Unfortunately, child pornography content, especially in digital form, has often been treated for the purpose of criminal discovery as merely “evidence” held by the State rather than as contraband. Defendants charged with possessing child pornography routinely seek copies of the material in discovery so that their retained computer forensic experts can review and analyze the digital material at their own private workplaces. The state has been ordered to copy and distribute this contraband material to defense attorneys or defense experts.

This legislation would amend the criminal discovery statute to specifically address the treatment of this particular brand of contraband. The bill creates a presumption that child pornography content will not be disseminated outside of government control unless the government cannot or does not make that material reasonably available to the defense team for inspection and analysis at a government facility. This proposal also provides a defendant with the opportunity to convince the court that defense access to the material outside of the government facility is necessary in that case. In sum, the legislation protects children while preserving the defendant’s ability to present a defense to the charges he faces.

The legislation's approach is new to the State, but it is not novel. This approach is modeled after a similar federal rule adopted in 2006 by the United State Congress (18 U.S.C. 3509(m)). That federal rule only governs practice in federal courts – including those in Wisconsin – but is not binding on state courts. Many federal courts have reviewed this rule against challenges from defendants and, without exception, those courts have pronounced it to be a constitutional balance between the defendant's right to prepare and present a defense and the government's legitimate interest in securing this contraband. This proposal strikes the same balance.

This specific statutory language regarding the control over this particularly repugnant form of contraband is justified in part by the unique nature of the contraband. Child pornography content in digital form can be easily copied and disseminated further, and thus should be controlled as tightly as possible, so as to minimize the risk of it being accidentally or intentionally re-produced or disseminated and, thereby, re-victimizing the children depicted. It must be remembered that “child pornography” is not just a picture – it is often the documentation of the sexual assault of a very real child victim.

Let me be clear. I am not suggesting that all, or even any, defense attorneys or private computer forensic experts would intentionally reproduce or disseminate this material or otherwise use it improperly. But there are examples in this state where prosecutors, courts, and defense counsel who have been given access to this kind of material have not treated it with the absolute security it should receive.

Twice in the last two years Department of Justice appellate lawyers had made requests from circuit court clerks for copies of the trial court record for appeal purposes. When they received the court records, the materials provided included unsealed copies of child pornography content that had been received by the court as exhibits. Our staff attorneys immediately made arrangements to secure those copies with law enforcement and to secure the court record. In another example, an attorney representing a defendant on appeal similarly received copies of the contraband images from a court, copied them himself, and mailed copies to his client in the Wisconsin State Prison system. Prison staff intercepted them before the inmate received the images. I don't want to think of what the prisoner would have done if prison staff had not been alert.

These examples underscore the potential for inadvertent dissemination of child pornography and support the notion that our law should specifically address the handling of this contraband by the courts in discovery to limit inadvertent dissemination. This legislation would specifically exempt these images from public records law all while requiring courts, law enforcement, and district attorneys to maintain custody of the material and not provide copies for distribution outside of their control.

Members, I wholeheartedly support this legislation. I want to thank Senator Julie Lassa and Representative Tony Staskunas for authoring this legislation and working with my office to develop it. I ask this Committee to support this bill. Thank you.