



ANDRÉ JACQUE

STATE SENATOR • 1ST SENATE DISTRICT

Phone: (608) 266-3512

Fax: (608) 282-3541

Sen.Jacque@legis.wi.gov

State Capitol • P.O. Box 7882

Madison, WI 53707-7882

*Testimony before the Senate Committee on Judiciary and Public Safety
State Senator André Jacque
May 7th, 2019*

Chairman Wanggaard and Members of the Senate Committee on Judiciary and Public Safety,

Thank you for holding this hearing and the opportunity to testify before you today in support of Senate Bill 68 and Substitute Amendment 1. Rep. Tusler and I introduced this legislation to combat a significant vulnerability within Wisconsin's child exploitation statutes at the request of prosecutors and Internet Crimes Against Children investigators.

Predators are using limited definitions of what is a sexually explicit video or image of children as a loophole, as present child pornography statutes only apply when the child is engaged in a sexual act. Investigators are now very commonly seeing predators taking images of nearly naked children in see-through clothing that are suggestively posed and inappropriately sexualized and intended for sexual gratification in order to get around charges for possession of child pornography.

To assist successful prosecution of these predators, the intent of this bill was, and is, to include "child erotica" as prohibited material under Wisconsin Statute § 948.12 (Possession of child pornography). The substitute amendment more simply accomplishes this goal while codifying existing case law and defining lewd exhibition of intimate parts as "the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts."

The Court also provided guidelines for determining whether or not a photograph is considered "lewd." Those guidelines have been incorporated into the substitute amendment as follows:

1. The photograph must visibly display the child's genitals or pubic area. Mere nudity is not enough.
2. The child is posed as a sex object. . . . The photograph is lewd in its "unnatural" or "unusual" focus on the juvenile's genitalia, regardless of the child's intention to engage in sexual activity or whether the viewer or photographer is actually aroused.

Additionally, in consultation with the DOJ's Internet Crimes Against Children Task Force, this substitute amendment will provide stronger footing for law enforcement to stand on when applying for, and defending, warrants searching for child pornography. With the State v. Petrone decision codified, prosecution of clear child pornography images uncovered from search warrants based off of images considered "child erotica" or other borderline images face much less of a risk of being thrown.

Please join us and our law enforcement stakeholders in supporting this legislation to help ensure prior and future efforts to stop predators seeking to continue sexually exploiting minors are truly effective. Thank you for your consideration of Senate Bill 68 and Substitute Amendment 1.



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May 7, 2019

To: Members, Senate Committee on Judiciary & Public Safety

From: Sen. Jacque 6-3512; Rep. Tusler

Subject: Substitute Amendment to Senate Bill 68

This memo explains substitute amendment LRB s0029/1 (pending introduction) to Senate Bill 68 (relating to: possession of child pornography and providing a penalty), which was heard in committee on March 26th.

The intent of this bill was, and is, to include “child erotica” as prohibited material under Wis. Stat. § 948.12 (Possession of child pornography). The substitute amendment more simply accomplishes this goal and codifies existing case law.

“Sexually explicit conduct,” the type of depiction currently prohibited in that statute, includes “lewd exhibition of intimate parts.”¹ The substitute amendment defines “lewd exhibition of intimate parts as “the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts.”² In *State v. Petrone*, 161 Wis. 2d 530, 468 N.W.2d 676 (1991), the State Supreme Court considered the definition of “sexually explicit conduct,” specifically, “[l]ewd exhibition of the genitals or pubic area of any person.”

The Court provided guidelines for determining whether or not a photograph is considered “lewd.” Those guidelines, incorporated into the substitute amendment, are:

First, the photograph must visibly display the child's genitals or pubic area. Mere nudity is not enough. Second, the child is posed as a sex object. . . . The photograph is lewd in its "unnatural" or "unusual" focus on the juvenile's genitalia, regardless of the child's intention to engage in sexual activity or whether the viewer or photographer is actually aroused. . . .³

¹ Wis. Stat. § 948.01 (7)(e).

² “Intimate parts” is defined in Wis. Stat. § 939.22(19).

³ *State v. Petrone*, 161 Wis. 2d 530, 561 (1991) (citations omitted).



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The substitute amendment incorporates this language to codify the *Petrone* decision and makes clear that child erotica is prohibited under Wis. Stat. § 948.12 (Possession of child pornography).⁴

Additionally, in consultation with the DOJ's Internet Crimes Against Children Task Force, we believe this substitute amendment will provide stronger footing for law enforcement to stand on when applying for, and defending, warrants searching for child pornography. Now, with the *Petrone* decision codified, prosecution of clear child pornography images uncovered from search warrants based off of images considered "child erotica" or other borderline images face much less of a risk of being thrown out as fruit of the poisonous tree.

Finally, a few committee members expressed concern that sexts or innocent, "baby in the bathtub" photos may be prosecuted as a result of enactment of SB 68. While those concerns are well-founded, we would like take the opportunity to reiterate and emphasize that sexts and "baby in the bathtub" photos may be subject to child pornography charges *under current law*. The bill, and substitute amendment, do not affect the prosecutorial discretion district attorneys currently enjoy. In fact, this definition may provide comfort to parents who have innocent photos of their children in the nude in their possession as the proposed definition of "lewd exhibition of intimate parts" requires the person be "posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." It is also important to note, as the State Supreme Court did in its *Petrone* decision, that a jury of one's peers and *common sense* is the ultimate arbiter in these cases.⁵

Thank you for thoughtful consideration. I hope we can count on your support for this substitute amendment and SB 68, as amended.

⁴ The *Petrone* guidelines were subsequently applied in a State Court of Appeals case directly implicating the child pornography statute. In *State v. Lala*, 2009 WI App 137, Lala appealed the trial court finding that the child depicted in the photos he possessed was engaging in sexually explicit conduct. The photos in *Lala* did "not provide a full opaque covering and [left] her intimate parts visible." *State v. Lala*, 2009 WI App 137 ¶15 (citation omitted). Citing the *Petrone* guidelines, the Court of Appeals upheld the photos as sexually explicit for the purposes of §948.12 (possession of child pornography).

⁵ See *Petrone*, *supra*, at 561 ("Last, the court may remind the jurors that they should use these guidelines to determine the lewdness of a photograph but they may use common sense to distinguish between a pornographic and innocent photograph.").



RON TUSLER

STATE REPRESENTATIVE • 3rd ASSEMBLY DISTRICT

**Testimony Before the
Senate Committee on Criminal Judiciary and Public Safety
on
Senate Bill 68
May 7, 2019**

Mr. Chairman and members of the Committee, thank you for the opportunity to testify on SB 68, relating to possession of child pornography and providing a penalty.

Child sex crimes are the most heinous, deplorable acts in our society. Our children are innocent and vulnerable members of our community. Unfortunately, there are those who seek to exploit children for their sexual gratification. In 2017 alone, the Internet Crimes Against Children Task Force made 537 arrests and Attorney General Kaul has signaled internet crimes against children are a top priority.¹

Under current law, it is illegal to possess or access materials of a child engaged in “sexually explicit conduct.”² Predators are attempting to exploit a gray area in law that this bill and substitute amendment LRB s0029/1 will clarify. Clear images of child pornography are easily identifiable, but images that may depict a child wearing transparent underwear revealing the child’s intimate parts are questionably illegal under current statutes (these images are frequently referred to as “child erotica”); law enforcement often comes across child erotica images but may not feel comfortable using those images as a basis for a search warrant.

The substitute amendment codifies existing case law which will shed light on this gray area of the law, bolster law enforcement in the course of child pornography investigations, and provide support to district attorneys when prosecuting child pornography cases.

“Lewd exhibition of intimate parts,” within the definition of “sexually explicit conduct,” would be defined as “the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts.”

In *State v. Petrone*, 161 Wis. 2d 530, 468 N.W.2d 676 (1991), the State Supreme Court considered the definition of “sexually explicit conduct,” specifically, “[l]ewd exhibition of the

¹ Mal Meyer, *Wisconsin's attorney general: Budget would support modern approaches to crime fighting*, News8000.com (Mar. 25, 2019), <https://www.news8000.com/news/wisconsin-s-attorney-general-budget-would-support-modern-approaches-to-crime-fighting/1062266946>.

² See Wis. Stat. § 948.12 (2017 – 18); see also Wis. Stat. § 948.01(7) (2017 – 18) (definition of “sexually explicit conduct”).

genitals or pubic area of any person.” The Court provided guidelines for determining whether or not a photograph is considered “lewd:”

First, the photograph must visibly display the child's genitals or pubic area. Mere nudity is not enough. Second, the child is posed as a sex object. . . . The photograph is lewd in its "unnatural" or "unusual" focus on the juvenile's genitalia, regardless of the child's intention to engage in sexual activity or whether the viewer or photographer is actually aroused. . . .³

The substitute amendment incorporates this language to codify the *Petrone* decision and makes clear that child erotica is prohibited under Wis. Stat. § 948.12 (Possession of child pornography).⁴

In consultation with the DOJ's Internet Crimes Against Children Task Force, we believe this substitute amendment (LRB s0029/1) will provide stronger footing for law enforcement to stand on when applying for, and defending, warrants searching for child pornography. Additionally, with the *Petrone* decision codified, prosecution of clear child pornography images uncovered from search warrants based off of child erotica images face less of a risk of being thrown out as *fruit of the poisonous tree* (a doctrine under the exclusionary rule that deems evidence inadmissible if it was obtained illegally).

Please join Senators Jacque and Taylor and Representative Crowley and me in clarifying our statutes and codifying the State Supreme Court's ruling to protect our children. Thank you for your time. I am happy to answer any questions.

³ *State v. Petrone*, 161 Wis. 2d 530, 561 (1991) (citations omitted).

⁴ The *Petrone* guidelines were subsequently applied in a State Court of Appeals case directly implicating the child pornography statute. In *State v. Lala*, 2009 WI App 137, Lala appealed the trial court finding that the child depicted in the photos he possessed was engaging in sexually explicit conduct. The photos in *Lala* did “not provide a full opaque covering and [left] her intimate parts visible.” *State v. Lala*, 2009 WI App 137 ¶15 (citation omitted). Citing the *Petrone* guidelines, the Court of Appeals upheld the photos as sexually explicit for the purposes of §948.12 (possession of child pornography).

Sheriff's Office
Brown County

2684 Development Drive
Green Bay, Wisconsin 54311
Phone: (920) 448-4200



Todd J. Delain
Sheriff

My Name is Jim Valley and I am a Lt. with the Brown County Sheriff's Office. I have been in Law Enforcement for approx. 23 years and have been working Internet Crimes against Children and Human Trafficking cases since 2001. As you know Commercial Sex Trafficking is an issue throughout the nation and Wisconsin. Law Enforcement has been working on this problem for many years.

I am speaking in support of SB 68/AB 71. This law will help close a loophole in the Child Pornography Statute. Imagine a child that is forced have photos taken of her/him. The photos are of her/him nude with her/him privates as a key focus of the picture. However she/he may have a dance ribbon in her/him hand and the photo is made to look like dancing or art. We all know the focus is on the child's privates and the images will be shared with others that are interested in the children. These images maybe actually shared over 100 thousand times in the next 3 months. Currently these images are not illegal. Why? Because she/he was not in the image engaged in sexually explicit conduct. However she is being shared and individuals are gratifying themselves by looking at her nude body. She cannot get these images back and will be a victim the rest of her life.

This bill helps change this. The individuals we are arresting that have these images are the ones currently sexually assaulting children and preying on them. Let's be honest this bill doesn't make bathtub pictures illegal or something similar that mom and dad take. We have to use common sense and the bill would require it to be portrayed in a sexually suggestive manner or imagery.

Just last month we investigated a male that stated he has been grooming and fantasizing having sex with his 12 year old neighbor. In an interview he stated he continues to have thoughts of sexually assaulting her. We are not the thought Police but this is concerning to keep our community safe. He consented to take his computers and we forensically went through them. He has close to 1 million images of child erotica. Images of females in a sexually suggestive manner but not in a sexually act. This is where he gets his drive from to assault kids. He knows the line he can't cross. Who are all these children that are posing naked for the camera? Currently in Wisconsin he can stare at them, share them, and even duplicate them and it's not illegal.

This bill was not written purely with the suspect in mind. This is about the victims out there. Our children have no say and can be victimized without penalty. They have to live the rest of their lives knowing these images and movies are out there. We have to do what's best for our children and take away these loop holes that allow these predators to continue to violate and victimize our children.

Thank You

Lt. Jim Valley
Brown County Sheriff's Office
920-448-6216