



LINN COUNTY SHERIFF'S OFFICE

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Oregon House Committee of Judiciary
HR343 1:30PM
RE: HB 3048

Chair Barker, and members of the Committee,

Thank you for allowing me the opportunity to speak before you today on House Bill 3048, which is what I believe a very straightforward bill.

House Bill 3048 is common sense legislation that gets to the very heart of what a state must do above all else - protect our children. However, as we all know too well, our children are vulnerable, preyed upon by those whom they trust, and far too many of our sons, daughters, nieces, nephews and grandchildren are the victims of heinous, senseless sexual victimization. As if the abuse of a child weren't enough, many criminals have taken to memorializing the sexual abuse, torture, rape and sodomy of defenseless children in digital images and videos. It is these digital files, these crime scene recordings of a child being exploited, that brings me in front of you today.

House Bill 3048 protects child victims of Oregon, the Pacific Northwest, across the United States, and around the globe, from additional, careless, unnecessary revictimization. In a pivotal finding from 1982, the United States Supreme Court stated, "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." (*New York v. Ferber* (1982) 458 U.S. 747, 755.) The Court went on in its opinion to state, "There is no question that child pornography represents a permanent record of the sexual exploitation of a child, which is only exacerbated by its duplication and distribution." (*New York v. Ferber, supra*, 458 U.S. at p. 759.)

Simply put, House Bill 3048 does three things; First, it codifies a practice of restricting possession of contraband images and videos of sexually explicit conduct involving minor children to law enforcement or the courts. Second, it recognizes and reaffirms the importance of due process and discovery for defendants accused of crimes involving such contraband evidence. And, third, it places Oregon alongside 16 other states in our great country to adopt language resembling the evidence and discovery provisions of The Adam Walsh Act, passed by the United States Congress and signed into law by President George W. Bush in 2006.

What is The Adam Walsh Act? The components of The Adam Walsh Act that are relevant to the Judiciary Committee's hearing today state generally that evidence containing contraband images and videos of child pornography shall remain in the custody of the Government or the court. Moreover, The Adam Walsh Act states a judge *shall deny* any request by the defense to copy, photograph, duplicate or otherwise reproduce material of this nature so long as the Government has made the material reasonably available.

House Bill 3048 is written using existing definitions from Oregon Revised Statute, except for the definition of "reasonably available", which it borrows from The Adam Walsh Act. Why will House Bill 3048 work, when passed out of this Committee and enacted as legislation? The reason is because law enforcement and prosecutors offices from around the State of Oregon are dedicated to ensuring its success, committed to continuing to allow defense experts and defense attorneys reasonable access to the contraband evidence while it remains under government control, and because House Bill 3048 does what every Oregonian expects their legislature and judicial system do – protect children, especially those most victimized.

As a detective tasked with spending 95% of my time investigating technology-facilitated child sex crimes in Linn County, Oregon, I can confirm that this is a much-needed legislative change. On one hand, several of our defense attorneys in the Linn and Benton County area have no problem with conducting a review of child pornography evidence at a law enforcement facility – in fact many times they simply set an appointment with me and have me walk them through my findings from my forensic examination. However,

In some cases the defense counsel may desire a more in-depth review, and seek copies of the evidence, of which images and videos memorializing the sexual abuse of a child or children are a critical part. Judges in both Linn and Benton County have, against the compelling argument of the prosecution, ordered that the defense be unnecessarily given copies of this evidence.

I say unnecessarily not because the defendant does not deserve, nor have absolute right to the best defense, but because as contraband, this evidence need only be made available to the defense and to defense expert testing and analysis. It must not be reproduced and freely distributed. In trial courts, and Circuit Courts of Appeal around the country, courts have recognized that such images should be properly viewed as contraband, such as narcotics, stolen property, or a weapon, rather than traditional documentary evidence. Furthermore, federal courts have held that the compelling interest in protecting the children depicted in the graphic images outweighed any countervailing interest by the defense in obtaining physical copies of those images, and that the defendant's constitutional rights were fully satisfied by simply having sufficient *access* to the materials.

It is unnecessary revictimization to the children already brutally violated to turn such contraband evidence over to anyone outside of the chain of custody of law enforcement. This is especially true because law enforcement agencies across this state can, are, and *must* continue under this law to provide reasonable access to the defense to review this evidence at a government facility while it remains in the custody and control of law enforcement.

As part of my job at the Linn County Sheriff's Office, I travel around the country teaching for the National District Attorney's Association. I have had the opportunity to teach many times with Justin Fitzsimmons, an expert prosecutor of child exploitation cases, and the evidence discovery process for child exploitation material is a frequent training block we cover. I have had the fortune of examining many defense motions seeking to compel discovery of child pornography evidence that have been filed around the country.

During my review of defense motions, I have learned that in many states, like Oregon currently, the frequent reasons why the defense *needs* this contraband evidence copied for their computer expert to review at their lab is that:

- it is inconvenient for the expert to review the material at a government facility
- it takes a long time to review, search and conduct an analysis,
- and, turning over the evidence under a protective order will suffice to protect the contraband from mishandling.

To those arguments I respond, "What about the inconvenience the child in those images and videos went through while being raped, molested and sodomized?" Furthermore, why are these defense experts able to comply implicitly in federal cases under which The Adam Walsh Act requires they conduct their review of the evidence at a government facility, and do so without any problem? However, when it is a state case, there all of a sudden exists extreme inconvenience, cost, and impedance? In addition, the unfortunate reality is that protective orders similar to the language in the Dash 1 Amendment have already shown they don't work to prevent malpractice and mishandling of contraband evidence, as this committee will hear (or has heard) today. The right answer for contraband evidence is to retain it under law enforcement and court control, while allowing reasonable access to it for the defense.

The United States Supreme Court observed in their 2002 decision for *Ashcroft v. Free Speech Coalition* that, "As a permanent record of a child's abuse, the continued circulation [of child pornography] itself would harm the child who had participated. Like a defamatory statement, each new publication ... would cause new injury to the child's reputation and emotional well-being." (*Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 249.)

Child pornography is so pernicious that every abused child so depicted is further victimized by each subsequent duplication and distribution of the contraband image, even within the context of criminal discovery. At the end of the day, this bill protects children, without impeding on a defendant's due process rights. Don't the children of Oregon deserve that protection?

I implore the Committee to pass House Bill 3048 out favorably to the floor, and see to its enactment. Thank you!

Respectfully,



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