S240156

SUPREME COURT
FILED

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Jorge Navarrete Clerk

Deputy

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA

DON L. MATHEWS, MICHAEL L. ALVAREZ and WILLIAM OWEN
Plaintiffs and Appellants,

v.

XAVIER BECERRA and JACKIE LACEY
Defendants and Respondents.

On Review From The Court Of Appeal For the Second Appellate District,
Division Two
2nd Civil No. B265900
After An Appeal From the Superior Court of Los Angeles County
Honorable Michael L. Stern, Judge
Case Number BC573135

MOTION FOR JUDICIAL NOTICE

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Attorneys for Defendant-Respondent
JACKIE LACEY

MOTION FOR JUDICIAL NOTICE

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT.

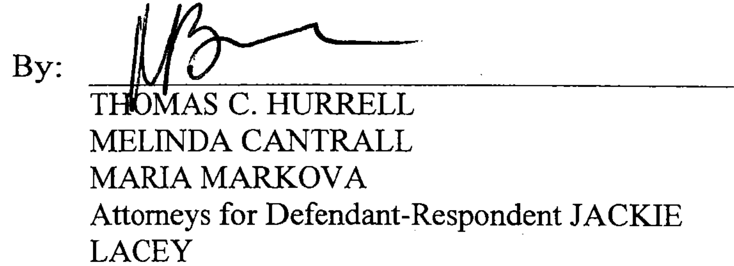
Pursuant to Rule 8.252 of the California Rules of Court, and to Evidence Code sections 452 and 459, defendant and respondent, Jackie Lacey, through her counsel, requests this Court to take judicial notice of the following documents:

1. Final text of AB 2709 (Vicencia), attached hereto as Exhibit A.
2. AB 1775 (Melendez), Senate Committee on Public Safety Report, June 10, 2014, attached hereto as Exhibit B.
3. AB 1775 (Melendez), Senate Rules Committee Report, June 23, 2014, attached hereto as Exhibit C.
4. Opinion Of The Office Of Legal Counsel, Duty to Report Suspected Child Abuse Under 42 U.S.C. § 13031, 2012 OLC Lexis 6, attached hereto as Exhibit D.
5. AB 1775, Office of Assembly Floor Analysis, attached hereto as Exhibit E.
6. AB 295, California Assembly, Bill Analysis, attached hereto as Exhibit F.

This motion for judicial notice is based on the following points and authorities.

DATED: August 31, 2017

HURRELL CANTRALL LLP

By: 

THOMAS C. HURRELL
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MARIA MARKOVA
Attorneys for Defendant-Respondent JACKIE LACEY

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE COURT MAY TAKE JUDICIAL NOTICE OF THE FINAL TEXT OF A.B. 2709, THE LEGISLATIVE COMMITTEE REPORTS, AND THE OPINION OF THE OFFICE OF LEGAL COUNSEL.

California Rules of Court, Rule 8.252 provides the means for judicial notice on appeal. The rule provides in subdivision (a)(2) that the motion must state:

> (A) Why the matter to be noticed is relevant to the appeal; (B) Whether the matter to be noticed was presented to the trial court and, if so, whether judicial notice was taken by that court; (C) If judicial notice of the matter was not taken by the trial court, why the matter is subject to judicial notice under Evidence Code section 451, 452, or 453; and (D) Whether the matter to be noticed relates to the proceedings occurring after the order or judgment that is the subject of the appeal.

(Cal. Rules of Court, Rule 8.252(a)(2).)

In conjunction with its concurrently filed responding brief, respondent asks this Court to take judicial notice of (1) Final text of AB 2709 (Vicencia); (2) AB 1775 (Melendez), Senate Committee on Public Safety Report, June 10, 2014; (3) AB 1775 (Melendez), Senate Rules Committee Report, June 23, 2014; (4) Opinion Of The Office Of Legal Counsel, Duty to Report Suspected Child Abuse Under 42 U.S.C. § 13031,

2012 OLC Lexis 6; (5) AB 1775, Office of Assembly Floor Analysis; and (6) AB 295, California Assembly Bill Analysis.

A. <u>The Documents are Relevant to the Determination of Plaintiffs' Appeal.</u>

The final text of AB 2709 (Vicencia) is relevant to this Court's review because it shows legislative intent as the Legislature amended Penal Code section 11165, the precursor to Penal Code section 11165.1, to expand the definition of "child abuse" to include "sexual exploitation" to combat the growing issue of child pornography in 1984. Penal Code section 11165.1 was enacted three years later in 1987.[1]

The legislative committee reports are relevant this Court's review as petitioners/plaintiffs (hereinafter, plaintiffs) claim that the right to privacy of psychotherapy patients extends to the viewing of online child pornography. This argument is squarely in conflict with the Legislature's intent and purpose for enacting AB 1775, which is to "ensure that reporting requirements related to internet child pornography are defined to reflect modern technology." (See Exhibit B, AB 1775 (Melendez), Senate

[1] *In re: Ulysses D. v. Walter D.* (2004) 121 Cal.App.4th 1092, 1097 [18 Cal.Rptr.3d 430] states that former Penal Code section 11165 is now section 11165.1, confirming that the same legislative intent to expand the definition of "child abuse" to include "sexual exploitation" applied to Penal Code section 11165.1.

Committee on Public Safety Report, June 10, 2014.) Moreover, the Legislature's intent and purpose for enacting AB 1775 was to clarify whether mandated reporters should report the downloading or streaming of child pornography, as they are required to with the printing and copying of such material. (See Exhibit C, AB 1775 (Melendez), Senate Rules Committee Report, June 23, 2014.) By clarifying the duty to report accessing child pornography, whether it is in hard copy or digital form, the state has provided a rational basis to combat the legitimate interest of stemming the tide of child pornography. As further illustration of this rational basis, it is noteworthy that AB 1775 passed without opposition on both the Senate and Assembly Floors. (See Exhibit E, AB 1775, Office of Assembly Floor Analysis.) Finally, the legislative history and Assembly Floor Analysis of AB 295 is relevant to show the Legislature's intent in enacting and amending Penal Code section 311.3 (titled "Sexual Exploitation of Children"), which is specifically incorporated in the language of the challenged Penal Code section 11165.1(c). (See Exhibit F, AB 295, California Assembly Bill Analysis.)

Plaintiffs also allege that there is no reasonable likelihood that the children victims depicted in child pornography are in California and can be identified and protected by the state. However, the Opinion of The Office of Legal Counsel rebuts this contention by stating the following: "[w]hile some child pornography may be the work of professionals and thus difficult

to link to specific identifiable children, other such images are homemade recordings of sexually abusive acts 'committed against young neighbors or family members, and therefore traceable through law enforcement investigation to a protected child or children. [Citations].'" (See Exhibit D, Opinion Of The Office Of Legal Counsel, Duty to Report Suspected Child Abuse Under 42 U.S.C. § 13031, 2012 OLC Lexis 6, 28-30.) Thus, the final text of AB 2709, the legislative committee reports, and Opinion of the Office of Legal Counsel are relevant to this Court's review.

Reference to the final text of AB 2709, the legislative committee reports, and the Opinion of the Office of Legal Counsel is a necessary part of rebutting plaintiffs' contentions on review before this Court. Defendant respectfully requests that judicial notice be taken of the final text of AB 2709, the legislative committee reports, and the Opinion of the Office of Legal Counsel.

B. The Majority Of The Matters For Which Defendant Seeks Judicial Notice Were Presented to the Courts Below.

The following documents were presented to the trial court: AB 1775 (Melendez), Senate Committee on Public Safety Report, June 10, 2014; AB 1775 (Melendez), Senate Rules Committee Report, June 23, 2014; Opinion Of The Office Of Legal Counsel, Duty to Report Suspected Child Abuse Under 42 U.S.C. § 13031, 2012 OLC Lexis 6; and AB 1775, Office of Assembly Floor Analysis. The trial court did not expressly rule on

defendant's request for judicial notice, however, it is noteworthy that the matters are subject to compulsory judicial notice under Evidence Code sections 452 and 453.

These legislative committee reports and Opinion of the Office of Legal Counsel were presented to and considered by the appellate court in its ruling affirming the trial court's decision, which sustained respondent's demurrer without leave to amend. The final text of AB 2709 was also presented to the appellate court. On March 8, 2016, the Court of Appeal granted defendant's request to take judicial notice of the aforementioned documents.

The matters set forth in the aforementioned documents relate to proceedings occurring prior to the July 29, 2015 judgment, which is the ultimate subject of the instant review. Finally, the matters are subject to judicial notice under Evidence Code section 451, 452, or 453 as detailed below.

C. Official Acts of Legislative and Executive Departments.

Defendant Lacey requests this Court to take judicial notice of the following documents: The final text of AB 2709 (Vicencia); AB 1775 (Melendez), Senate Committee on Public Safety Report, June 10, 2014; AB 1775 (Melendez), Senate Rules Committee Report, June 23, 2014; AB 1775, Office of Assembly Floor Analysis; and AB 295 California

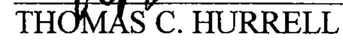
Assembly Bill Analysis. These documents include the final text of an Assembly Bill and legislative committee reports and, as such, constitute official acts of the California Legislature, for which judicial notice is proper. (See Evid. Code, §§ 452, subd. (c), 459, subd. (a); see also *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31-38 [34 Cal.Rptr.3d 520] (the court specifically listed reports by the Assembly Committee on Public Safety, Senate Rules Committee, and Office of Assembly Floor Analyses as documents constituting cognizable legislative history for purposes of judicial notice).)

The Opinion of the Office of Legal Counsel regarding the Duty to Report Suspected Child Abuse Under 42 U.S.C. § 13031 was prepared by the U.S. Department of Justice and, therefore, is judicially noticeable as an official act of the executive branch of the United States under Evidence Code section 452(c). (Evid. Code, §§ 452, subd. (c).) Moreover, Evidence Code section 452(h) permits judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452(h).) Here, not only is the Opinion of the Office of Legal Counsel a document from a judicial department of the United States, its contents are not reasonably subject to dispute and sets forth facts capable of accurate and ready determination by resort to sources

whose accuracy cannot be reasonably questioned. (See *id.*)

DATED: August 31, 2017

HURRELL CANTRALL LLP

By: 

THOMAS C. HURRELL
MELINDA CANTRALL
MARIA MARKOVA
Attorneys for Defendant-Respondent JACKIE LACEY

[PROPOSED] ORDER GRANTING JUDICIAL NOTICE

IT IS HEREBY ORDERED that the Motion for Judicial Notice of respondent JACKIE LACEY is granted. The Court shall judicially notice the following documents, which are attached to the Motion for Judicial Notice:

(1) Final text of AB 2709 (Vicencia), attached hereto as Exhibit A.

(2) AB 1775 (Melendez), Senate Committee on Public Safety Report, June 10, 2014, attached hereto as Exhibit B.

(3) AB 1775 (Melendez), Senate Rules Committee Report, June 23, 2014, attached hereto as Exhibit C.

(4) Opinion Of The Office Of Legal Counsel, Duty to Report Suspected Child Abuse Under 42 U.S.C. § 13031, 2012 OLC Lexis 6, attached hereto as Exhibit D.

(5) AB 1775, Office of Assembly Floor Analysis, attached hereto as Exhibit E.

(6) AB 295, California Assembly Bill Analysis, attached hereto as Exhibit F.

DATED: __________, 2017

____
Chief Justice

Assembly Bill No. 2709

CHAPTER 1613

An act to amend Sections 11107, 11165, and 11170 of the Penal Code, and to amend Section 326 of the Welfare and Institutions Code, relating to child abuse reporting, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 29, 1984. Filed with Secretary of State September 30, 1984.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2709, Vicencia. Child abuse reporting.

(1) Existing law requires certain persons to make a report of a known or suspected instance of child abuse to a child protective agency.

This bill would express findings and declarations of the Legislature relative to child abuse and would require the Department of Justice to automate its Child Abuse Central Registry, as specified. The bill would appropriate $200,000 from the General Fund for that purpose.

(2) Existing law defines the term "sexual assault" as a form of child abuse which is the subject of specified reporting requirements. Existing law also requires daily reports by each sheriff or police chief executive to the Department of Justice of any instance of suspected sexual exploitation of a child, as defined.

This bill would instead define the term "sexual abuse" as a form of child abuse for those reporting purposes, comprising either "sexual assault" as previously defined or "sexual exploitation" as defined in the bill. The bill would delete the requirement of daily reporting by each sheriff or police chief executive to the Department of Justice of suspected sexual exploitation of a child. The bill would also revise the definition of "severe neglect" and "general neglect" as forms of child abuse for those reporting purposes to include failure to provide adequate medical care; it also would delete licensed day care workers from the definition of "child care custodian" and add to that definition licensees and employees of a community care facility for children.

(3) Existing law requires a child protective agency to make specified information obtained from the Department of Justice available to a medical practitioner, child custodian, or guardian ad litem who reports suspected child abuse.

This bill would revise this provision to apply to a medical practitioner, child custodian, guardian ad litem, or specified appointed counsel who reports suspected child abuse, thereby imposing a state-mandated local program.

(4) This bill also would make additional changes in Section 11165 of the Penal Code, contingent upon the enactment of AB 2702 and

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SB 1124, as specified.

(5) Article XIII B of the California Constitution and Sections 2231 and 2234 of the Revenue and Taxation Code require the state to reimburse local agencies and school districts for certain costs mandated by the state. Other provisions require the Department of Finance to review statutes disclaiming these costs and provide, in certain cases, for making claims to the State Board of Control for reimbursement.

This bill would provide that no appropriation is made by this act for the purpose of making reimbursement pursuant to the constitutional mandate or Section 2231 or 2234, but would recognize that local agencies and school districts may pursue their other available remedies to seek reimbursement for these costs.

This bill would provide that, notwithstanding Section 2231.5 of the Revenue and Taxation Code, this act does not contain a repealer, as required by that section; therefore, the provisions of the act would remain in effect unless and until they are amended or repealed by a later enacted act.

(6) The bill also would take effect immediately as an urgency statute.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 11107 of the Penal Code is amended to read:

11107. Each sheriff or police chief executive shall furnish all of the following information to the Department of Justice on standard forms approved by the department:

Daily reports of those misdemeanors and felonies that are required to be reported by the Attorney General including, but not limited to, forgery, fraud-bunco, bombings, receiving or selling stolen property, safe and commercial burglary, grand theft, child abuse, homicide, threats, and offenses involving lost, stolen, found, pledged, or pawned property.

The reports required by this section shall describe the nature and character of each such crime and note all particular circumstances thereof and include all additional or supplemental data. The Attorney General may also require that the report shall indicate whether or not the submitting agency considers the information to be confidential because it was compiled for the purpose of a criminal investigation of suspected criminal activities. The term "criminal investigation" includes the gathering and maintenance of information pertaining to suspected criminal activity.

SEC. 2. Section 11165 of the Penal Code is amended to read:

11165. As used in this article:

(a) "Child" means a person under the age of 18 years.

(b) "Sexual abuse" means sexual assault or sexual exploitation as defined by the following:

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(1) "Sexual assault" means conduct in violation of one or more of the following sections of this code: Section 261 (rape), 264.1 (rape in concert), 285 (incest), 286 (sodomy), subdivision (a) or (b) of Section 288 (lewd or lascivious acts upon a child under 14 years of age), 288a (oral copulation), 289 (penetration of a genital or anal opening by a foreign object), or 647a (child molestation).

(2) "Sexual exploitation" refers to any of the following:

(A) Conduct involving matter depicting a minor engaged in obscene acts in violation of Section 311.2 (preparing, selling, or distributing obscene matter) or subdivision (a) of Section 311.4 (employment of minor to perform obscene acts).

(B) Any person who knowingly promotes, aids or assists, employs, uses, persuades, induces, or coerces a child, or any parent or guardian of a child under his or her control who knowingly permits or encourages a child to engage in, or assist others to engage in, prostitution or to either pose or model alone or with others for purposes of preparing a film, photograph, negative, slide, or live performance involving obscene sexual conduct for commercial purposes.

(C) Any person who depicts a child in, or who knowingly develops, duplicates, prints, or exchanges, any film, photograph, videotape, negative, or slide in which a child is engaged in an act of obscene sexual conduct, except for those activities by law enforcement and prosecution agencies and other persons described in subdivisions (c) and (e) of Section 311.3.

(c) "Neglect" means the negligent treatment or the maltreatment of a child by a person responsible for the child's welfare under circumstances indicating harm or threatened harm to the child's health or welfare. The term includes both acts and omissions on the part of the responsible person.

(1) "Severe neglect" means the negligent failure of a person having the care or custody of a child to protect the child from severe malnutrition or medically diagnosed nonorganic failure to thrive. "Severe neglect" also means those situations of neglect where any person having the care or custody of a child willfully causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered, as proscribed by subdivision (d), including the intentional failure to provide adequate food, clothing, shelter, or medical care.

(2) "General neglect" means the negligent failure of a person having the care or custody of a child to provide adequate food, clothing, shelter, medical care, or supervision where no physical injury to the child has occurred.

For the purposes of this chapter, a child receiving treatment by spiritual means as provided in Section 16509.1 of the Welfare and Institutions Code or not receiving specified medical treatment for religious reasons, shall not for that reason alone be considered a neglected child. An informed and appropriate medical decision

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made by a parent or guardian after consultation with a physician or physicians who have examined the minor does not constitute neglect.

(d) "Willful cruelty or unjustifiable punishment of a child" means a situation where any person willfully causes or permits any child to suffer, or inflicts thereon, unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered.

(e) "Corporal punishment or injury" means a situation where any person willfully inflicts upon any child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition.

(f) "Abuse in out-of-home care" means a situation of physical injury on a child which is inflicted by other than accidental means, or of sexual abuse or neglect or the willful cruelty or unjustifiable punishment of a child, as defined in this article, where the person responsible for the child's welfare is a foster parent or the administrator or an employee of a public or private residential home, school, or other institution or agency.

(g) "Child abuse" means a physical injury which is inflicted by other than accidental means on a child by another person. "Child abuse" also means the sexual abuse of a child or any act or omission proscribed by Section 273a (willful cruelty or unjustifiable punishment of a child) or 273d (corporal punishment or injury). "Child abuse" also means the neglect of a child or abuse in out-of-home care, as defined in this article.

(h) "Child care custodian" means a teacher, administrative officer, supervisor of child welfare and attendance, or certificated pupil personnel employee of any public or private school; an administrator of a public or private day camp; a licensee, an administrator, or an employee of a community care facility licensed to care for children; headstart teacher; a licensing worker or licensing evaluator; public assistance worker; employee of a child care institution, including, but not limited to, foster parents, group home personnel and personnel of residential care facilities; a social worker or a probation officer.

(i) "Medical practitioner" means a physician and surgeon, psychiatrist, psychologist, dentist, resident, intern, podiatrist, chiropractor, licensed nurse, dental hygienist, or any other person who is currently licensed under Division 2 (commencing with Section 500) of the Business and Professions Code.

(j) "Nonmedical practitioner" means a state or county public health employee who treats a minor for venereal disease or any other condition; a coroner; a paramedic; a marriage, family, or child counselor; or a religious practitioner who diagnoses, examines, or treats children.

(k) "Child protective agency" means a police or sheriff's department, a county probation department, or a county welfare

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department.

(*l*) "Commercial film and photographic print processor" means any person who develops exposed photographic film into negatives, slides, or prints, or who makes prints from negatives or slides, for compensation. The term includes any employee of such a person; it does not include a person who develops film or makes prints for a public agency.

SEC. 2.2. Section 11165 of the Penal Code is amended to read:

11165. As used in this article:

(a) "Child" means a person under the age of 18 years.

(b) "Sexual abuse" means sexual assault or sexual exploitation as defined by the following:

(1) "Sexual assault" means conduct in violation of one or more of the following sections of this code: Section 261 (rape), 264.1 (rape in concert), 285 (incest), 286 (sodomy), subdivision (a) or (b) of Section 288 (lewd or lascivious acts upon a child under 14 years of age), 288a (oral copulation), 289 (penetration of a genital or anal opening by a foreign object), or 647a (child molestation).

(2) "Sexual exploitation" refers to any of the following:

(A) Conduct involving matter depicting a minor engaged in obscene acts in violation of Section 311.2 (preparing, selling, or distributing obscene matter) or subdivision (a) of Section 311.4 (employment of minor to perform obscene acts).

(B) Any person who knowingly promotes, aids or assists, employs, uses, persuades, induces, or coerces a child, or any parent or guardian of a child under his or her control who knowingly permits or encourages a child to engage in, or assist others to engage in, prostitution or to either pose or model alone or with others for purposes of preparing a film, photograph, negative, slide, or live performance involving obscene sexual conduct for commercial purposes.

(C) Any person who depicts a child in, or who knowingly develops, duplicates, prints, or exchanges, any film, photograph, videotape, negative, or slide in which a child is engaged in an act of obscene sexual conduct, except for those activities by law enforcement and prosecution agencies and other persons described in subdivisions (c) and (e) of Section 311.3.

(c) "Neglect" means the negligent treatment or the maltreatment of a child by a person responsible for the child's welfare under circumstances indicating harm or threatened harm to the child's health or welfare. The term includes both acts and omissions on the part of the responsible person.

(1) "Severe neglect" means the negligent failure of a person having the care or custody of a child to protect the child from severe malnutrition or medically diagnosed nonorganic failure to thrive. "Severe neglect" also means those situations of neglect where any person having the care or custody of a child willfully causes or permits the person or health of the child to be placed in a situation

such that his or her person or health is endangered, as proscribed by subdivision (d), including the intentional failure to provide adequate food, clothing, shelter, or medical care.

(2) "General neglect" means the negligent failure of a person having the care or custody of a child to provide adequate food, clothing, shelter, medical care, or supervision where no physical injury to the child has occurred.

For the purposes of this chapter, a child receiving treatment by spiritual means as provided in Section 16509.1 of the Welfare and Institutions Code or not receiving specified medical treatment for religious reasons, shall not for that reason alone be considered a neglected child. An informed and appropriate medical decision made by a parent or guardian after consultation with a physician or physicians who have examined the minor does not constitute neglect.

(d) "Willful cruelty or unjustifiable punishment of a child" means a situation where any person willfully causes or permits any child to suffer, or inflicts thereon, unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered.

(e) "Corporal punishment or injury" means a situation where any person willfully inflicts upon any child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition.

(f) "Abuse in out-of-home care" means a situation of physical injury on a child which is inflicted by other than accidental means, or of sexual abuse or neglect or the willful cruelty or unjustifiable punishment of a child, as defined in this article, where the person responsible for the child's welfare is a foster parent or the administrator or an employee of a public or private residential home, school, or other institution or agency.

(g) "Child abuse" means a physical injury which is inflicted by other than accidental means on a child by another person. "Child abuse" also means the sexual abuse of a child or any act or omission proscribed by Section 273a (willful cruelty or unjustifiable punishment of a child) or 273d (corporal punishment or injury). "Child abuse" also means the neglect of a child or abuse in out-of-home care, as defined in this article.

(h) "Child care custodian" means a teacher, administrative officer, supervisor of child welfare and attendance, or certificated pupil personnel employee of any public or private school; an administrator of a public or private day camp; a licensee, an administrator, or an employee of a community care facility licensed to care for children; headstart teacher; a licensing worker or licensing evaluator; public assistance worker; employee of a child care institution, including, but not limited to, foster parents, group home personnel and personnel of residential care facilities; a social worker or a probation officer.

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(i) "Medical practitioner" means a physician and surgeon, psychiatrist, psychologist, dentist, resident, intern, podiatrist, chiropractor, licensed nurse, dental hygienist, any other person who is currently licensed under Division 2 (commencing with Section 500) of the Business and Professions Code, or a psychological assistant registered pursuant to Section 2913 of the Business and Professions Code.

(j) "Nonmedical practitioner" means a state or county public health employee who treats a minor for venereal disease or any other condition; a coroner; a paramedic; a marriage, family, or child counselor; or a religious practitioner who diagnoses, examines, or treats children.

(k) "Child protective agency" means a police or sheriff's department, a county probation department, or a county welfare department.

(*l*) "Commercial film and photographic print processor" means any person who develops exposed photographic film into negatives, slides, or prints, or who makes prints from negatives or slides, for compensation. The term includes any employee of such a person; it does not include a person who develops film or makes prints for a public agency.

SEC. 2.4. Section 11165 of the Penal Code is amended to read:

11165. As used in this article:

(a) "Child" means a person under the age of 18 years.

(b) "Sexual abuse" means sexual assault or sexual exploitation as defined by the following:

(1) "Sexual assault" means conduct in violation of one or more of the following sections of this code: Section 261 (rape), 264.1 (rape in concert), 285 (incest), 286 (sodomy), subdivision (a) or (b) of Section 288 (lewd or lascivious acts upon a child under 14 years of age), 288a (oral copulation), 289 (penetration of a genital or anal opening by a foreign object), or 647a (child molestation).

(2) "Sexual exploitation" refers to any of the following:

(A) Conduct involving matter depicting a minor engaged in obscene acts in violation of Section 311.2 (preparing, selling, or distributing obscene matter) or subdivision (a) of Section 311.4 (employment of minor to perform obscene acts).

(B) Any person who knowingly promotes, aids, or assists, employs, uses, persuades, induces, or coerces a child, or any parent or guardian of a child under his or her control who knowingly permits or encourages a child to engage in, or assist others to engage in, prostitution or to either pose or model alone or with others for purposes of preparing a film, photograph, negative, slide, or live performance involving obscene sexual conduct for commercial purposes.

(C) Any person who depicts a child in, or who knowingly develops, duplicates, prints, or exchanges, any film, photograph, videotape, negative, or slide in which a child is engaged in an act of

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obscene sexual conduct, except for those activities by law enforcement and prosecution agencies and other persons described in subdivisions (c) and (e) of Section 311.3.

(c) "Neglect" means the negligent treatment or the maltreatment of a child by a person responsible for the child's welfare under circumstances indicating harm or threatened harm to the child's health or welfare. The term includes both acts and omissions on the part of the responsible person.

(1) "Severe neglect" means the negligent failure of a person having the care or custody of a child to protect the child from severe malnutrition or medically diagnosed nonorganic failure to thrive. "Severe neglect" also means those situations of neglect where any person having the care or custody of a child willfully causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered, as proscribed by subdivision (d), including the intentional failure to provide adequate food, clothing, shelter, or medical care.

(2) "General neglect" means the negligent failure of a person having the care or custody of a child to provide adequate food, clothing, shelter, medical care, or supervision where no physical injury to the child has occurred.

For the purposes of this chapter, a child receiving treatment by spiritual means as provided in Section 16509.1 of the Welfare and Institutions Code or not receiving specified medical treatment for religious reasons, shall not for that reason alone be considered a neglected child. An informed and appropriate medical decision made by a parent or guardian after consultation with a physician or physicians who have examined the minor shall not constitute neglect.

(d) "Willful cruelty or unjustifiable punishment of a child" means a situation where any person willfully causes or permits any child to suffer, or inflicts thereon, unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered.

(e) "Corporal punishment or injury" means a situation where any person willfully inflicts upon any child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition.

(f) "Abuse in out-of-home care" means a situation of physical injury on a child which is inflicted by other than accidental means, or of sexual abuse or neglect or the willful cruelty or unjustifiable punishment of a child, as defined in this article, where the person responsible for the child's welfare is a foster parent or the administrator or an employee of a public or private residential home, school, or other institution or agency.

(g) "Child abuse" means a physical injury which is inflicted by other than accidental means on a child by another person. "Child abuse" also means the sexual abuse [illegible] or any act or omission

LEGISLATIVE INTENT SE

proscribed by Section 273a (willful cruelty or unjustifiable punishment of a child) or 273d (corporal punishment or injury). "Child abuse" also means the neglect of a child or abuse in out-of-home care, as defined in this article.

(h) "Child care custodian" means a teacher, administrative officer, supervisor of child welfare and attendance, or certificated pupil personnel employee of any public or private school; an administrator of a public or private day camp; a licensee, an administrator, or an employee of a community care facility licensed to care for children; headstart teacher; a licensing worker or licensing evaluator; public assistance worker; employee of a child care institution, including, but not limited to, foster parents, group home personnel and personnel of residential care facilities; a social worker or a probation officer.

(i) "Medical practitioner" means a physician and surgeon, psychiatrist, psychologist, dentist, resident, intern, podiatrist, chiropractor, licensed nurse, dental hygienist, or any other person who is currently licensed under Division 2 (commencing with Section 500) of the Business and Professions Code, or any emergency medical technician I or II, or paramedic, or other person certified pursuant to Division 2.5 (commencing with Section 1797) of the Health and Safety Code.

(j) "Nonmedical practitioner" means a state or county public health employee who treats a minor for venereal disease or any other condition; a coroner; a marriage, family, or child counselor; or a religious practitioner who diagnoses, examines, or treats children.

(k) "Child protective agency" means a police or sheriff's department, a county probation department, or a county welfare department.

(*l*) "Commercial film and photographic print processor" means any person who develops exposed photographic film into negatives, slides, or prints, or who makes prints from negatives or slides, for compensation. The term includes any employee of such a person; it does not include a person who develops film or makes prints for a public agency.

SEC. 2.6. Section 11165 of the Penal Code is amended to read:

11165. As used in this article:

(a) "Child" means a person under the age of 18 years.

(b) "Sexual abuse" means sexual assault or sexual exploitation as defined by the following:

(1) "Sexual assault" means conduct in violation of one or more of the following sections of this code: Section 261 (rape), 264.1 (rape in concert), 285 (incest), 286 (sodomy), subdivision (a) or (b) of Section 288 (lewd or lascivious acts upon a child under 14 years of age), 288a (oral copulation), 289 (penetration of a genital or anal opening by a foreign object), or 647a (child molestation).

(2) "Sexual exploitation" refers to any of the following:

(A) Conduct involving matter depicting a minor engaged in

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obscene acts in violation of Section 311.2 (preparing, selling, or distributing obscene matter) or subdivision (a) of Section 311.4 (employment of minor to perform obscene acts).

(B) Any person who knowingly promotes, aids, or assists, employs, uses, persuades, induces, or coerces a child, or any parent or guardian of a child under his or her control who knowingly permits or encourages a child to engage in, or assist others to engage in, prostitution or to either pose or model alone or with others for purposes of preparing a film, photograph, negative, slide, or live performance involving obscene sexual conduct for commercial purposes.

(C) Any person who depicts a child in, or who knowingly develops, duplicates, prints, or exchanges, any film, photograph, videotape, negative, or slide in which a child is engaged in an act of obscene sexual conduct, except for those activities by law enforcement and prosecution agencies and other persons described in subdivisions (c) and (e) of Section 311.3.

(c) "Neglect" means the negligent treatment or the maltreatment of a child by a person responsible for the child's welfare under circumstances indicating harm or threatened harm to the child's health or welfare. The term includes both acts and omissions on the part of the responsible person.

(1) "Severe neglect" means the negligent failure of a person having the care or custody of a child to protect the child from severe malnutrition or medically diagnosed nonorganic failure to thrive. "Severe neglect" also means those situations of neglect where any person having the care or custody of a child willfully causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered, as proscribed by subdivision (d), including the intentional failure to provide adequate food, clothing, shelter, or medical care.

(2) "General neglect" means the negligent failure of a person having the care or custody of a child to provide adequate food, clothing, shelter, medical care, or supervision where no physical injury to the child has occurred.

For the purposes of this chapter, a child receiving treatment by spiritual means as provided in Section 16509.1 of the Welfare and Institutions Code or not receiving specified medical treatment for religious reasons, shall not for that reason alone be considered a neglected child. An informed and appropriate medical decision made by parent or guardian after consultation with a physician or physicians who have examined the minor shall not constitute neglect.

(d) "Willful cruelty or unjustifiable punishment of a child" means a situation where any person willfully causes or permits any child to suffer, or inflicts thereon, unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of the child to be placed in a situation

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such that his or her person or health is endangered.

(e) "Corporal punishment or injury" means a situation where any person willfully inflicts upon any child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition.

(f) "Abuse in out-of-home care" means a situation of physical injury on a child which is inflicted by other than accidental means, or of sexual abuse or neglect or the willful cruelty or unjustifiable punishment of a child, as defined in this article, where the person responsible for the child's welfare is a foster parent or the administrator or an employee of a public or private residential home, school, or other institution or agency.

(g) "Child abuse" means a physical injury which is inflicted by other than accidental means on a child by another person. "Child abuse" also means the sexual abuse of a child or any act or omission proscribed by Section 273a (willful cruelty or unjustifiable punishment of a child) or 273d (corporal punishment or injury). "Child abuse" also means the neglect of a child or abuse in out-of-home care, as defined in this article.

(h) "Child care custodian" means a teacher, administrative officer, supervisor of child welfare and attendance, or certificated pupil personnel employee of any public or private school; an administrator of a public or private day camp; a licensee, an administrator, or an employee of a community care facility licensed to care for children; headstart teacher; a licensing worker or licensing evaluator; public assistance worker; employee of a child care institution including, but not limited to, foster parents, group home personnel and personnel of residential care facilities; a social worker or a probation officer.

(i) "Medical practitioner" means a physician and surgeon, psychiatrist, psychologist, dentist, resident, intern, podiatrist, chiropractor, licensed nurse, dental hygienist, or any other person who is currently licensed under Division 2 (commencing with Section 500) of the Business and Professions Code, any emergency medical technician I or II, paramedic, or other person certified pursuant to Division 2.5 (commencing with Section 1797) of the Health and Safety Code, or a psychological assistant registered pursuant to Section 2913 of the Business and Professions Code.

(j) "Nonmedical practitioner" means a state or county public health employee who treats a minor for venereal disease or any other condition; a coroner; a marriage, family, or child counselor; or a religious practitioner who diagnoses, examines, or treats children.

(k) "Child protective agency" means a police or sheriff's department, a county probation department, or a county welfare department.

(*l*) "Commercial film and photographic print processor" means any person who develops exposed photographic film into negatives, slides, or prints, or who makes prints from negatives or slides, for compensation. The term includes any employee of such a person; it

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does not include a person who develops film or makes prints for a public agency.

SEC. 3. Section 11170 of the Penal Code is amended to read:

11170. (a) The Department of Justice shall maintain an index of all preliminary reports of child abuse submitted pursuant to Section 11169. The index shall be continually updated by the department and shall not contain any reports that are determined to be unfounded. The department may adopt rules governing recordkeeping and reporting pursuant to this article.

(b) The Department of Justice shall immediately notify a child protective agency which submits a report pursuant to Section 11169, or a district attorney who requests notification, of any information maintained pursuant to subdivision (a) which is relevant to the known or suspected instance of child abuse reported by the agency. A child protective agency shall make that information available to the reporting medical practitioner, child custodian, guardian ad litem appointed under Section 326, or counsel appointed under Section 318 of the Welfare and Institutions Code, if he or she is treating or investigating a case of known or suspected child abuse.

When a report is made pursuant to subdivision (a) of Section 11166, the investigating agency shall, upon completion of the investigation or after there has been a final disposition in the matter, inform the person required to report of the results of the investigation and of any action the agency is taking with regard to the child or family.

SEC. 4. Section 326 of the Welfare and Institutions Code is amended to read:

326. For the purposes of Child Abuse Prevention and Treatment Act grants to states (Public Law 93-247), in all cases in which there is filed a petition based upon alleged neglect or abuse of the minor, or in which a prosecution is initiated under the Penal Code arising from neglect or abuse of the minor, the probation officer or a social worker who files a petition under this chapter shall be the guardian ad litem to represent the interests of the minor in proceedings under this chapter, unless the court shall appoint another adult as guardian ad litem. However, the guardian ad litem shall not be the attorney responsible for presenting evidence alleging child abuse or neglect in judicial proceedings. No bond shall be required from any guardian ad litem acting under this section.

SEC. 5. (a) The Legislature finds and declares that child abuse is a serious problem, as evidenced by the fact that the number of cases reported to the Attorney General each year pursuant to Section 11170 of the Penal Code has increased over 900 percent from 1974 through 1983. One of the major problems in treating and preventing child abuse is the need to quickly and accurately identify cases, which frequently involve family members or other individuals in close relationship to the victim.

(b) The Child Abuse Central R ovided by Section 11170 LEGISLATIVE INTENT SER

of the Penal Code is an important source of information assisting local law enforcement officials and child protective agencies in identifying, apprehending, and prosecuting child abusers.

(c) The Department of Justice shall automate its Child Abuse Central Registry and shall develop criteria to periodically purge registry entries during the automation process.

SEC. 6. The sum of two hundred thousand dollars ($200,000) is hereby appropriated from the General Fund to the Department of Justice for the purpose of automating the Child Abuse Central Registry pursuant to Section 5 of this act.

SEC. 6.5. (a) Section 2.2 of this bill incorporates amendments to Section 11165 of the Penal Code proposed by both this bill and AB 2702. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 1985, but this bill becomes operative first, (2) each bill amends Section 11165 of the Penal Code, and (3) this bill is enacted after AB 2702, in which case Section 11165 of the Penal Code, as amended by Section 2 of this bill, shall remain operative only until the operative date of AB 2702, at which time Section 2.2 of this bill shall become operative, in which case Sections 2.4 and 2.6 of this bill shall not become operative.

(b) Section 2.4 of this bill incorporates amendments to Section 11165 of the Penal Code proposed by both this bill and SB 1124. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 1985, but this bill becomes operative first, (2) each bill amends Section 11165 of the Penal Code, and (3) this bill is enacted after SB 1124, in which case Section 11165 of the Penal Code, as amended by Section 2 of this bill, shall remain operative only until the operative date of SB 1124, at which time Section 2.4 of this bill shall become operative, in which case Sections 2.2 and 2.6 of this bill shall not become operative.

(c) Section 2.6 of this bill incorporates amendments to Section 11165 of the Penal Code proposed by this bill, AB 2702, and SB 1124. It shall only become operative if (1) all three bills are enacted and become effective on or before January 1, 1985, but this bill becomes operative first, (2) all three bills amend Section 11165 of the Penal Code, and (3) this bill is enacted after AB 2702 and SB 1124, in which case Section 11165 of the Penal Code, as amended by Section 2 of this bill, shall remain operative only until the operative date of AB 2702 and SB 1124, at which time Section 2.6 of this bill shall become operative, in which case Sections 2.2 and 2.4 shall not become operative.

SEC. 7. Notwithstanding Section 6 of Article XIII B of the California Constitution and Section 2231 or 2234 of the Revenue and Taxation Code, no appropriation is made by this act for the purpose of making reimbursement pursuant to these sections. It is recognized, however, that a local agency or school district may [illegible] remedies to obtain reimbursement available to it under Chapter 3 (commencing with Section 2201) of Part 4 of Divisi...

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of that code.

SEC. 8. Notwithstanding Section 2231.5 of the Revenue and Taxation Code, this act does not contain a repealer, as required by that section; therefore, the provisions of this act shall remain in effect unless and until they are amended or repealed by a later enacted act.

SEC. 9. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to automate the Child Abuse Central Registry as soon as possible, it is necessary that this act go into immediate effect.

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SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2013-2014 Regular Session

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AB 1775 (Melendez)
As Amended May 13, 2014
Hearing date: June 10, 2014
Penal Code
AA:mc

CHILD ABUSE:

MANDATORY REPORTING

HISTORY

Source: California Association of Marriage and Family Therapists

Prior Legislation: None

Support: California District Attorneys Association; California State Sheriffs' Association; Child Abuse Prevention Center; Board of Behavioral Sciences; California Psychological Association; Los Angeles District Attorney's Office

Opposition: None known

Assembly Floor Vote: Ayes 75 - Noes 0

KEY ISSUE

SHOULD CERTAIN DEFINITIONS IN THE MANDATORY CHILD ABUSE REPORTING LAWS BE UPDATED TO REFLECT MODERN TECHNOLOGY?

PURPOSE

The purpose of this bill is to update the definition of "sexual exploitation" in the mandated child abuse reporting law with respect to visual depictions of children in obscene sexual conduct to reflect modern technology, as specified.

(More)

Current law establishes the Child Abuse and Neglect Reporting Act ("CANRA"), which generally is intended to protect children from abuse and neglect. (Penal Code § 11164.)

Current law generally requires mandated child abuse and neglect reporters to make a report to a specified agency "whenever the mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect." (Penal Code § 11166 (a).)

Current law defines "sexual abuse" to mean sexual assault or sexual exploitation, as specified. (Penal Code § 11165.1.) Included in the definition of "sexual exploitation is the following:

> Any person who depicts a child in, or who knowingly develops, duplicates, prints, or exchanges, any film, photograph, video tape, negative, or slide in which a child is engaged in an act of obscene sexual conduct, except for those activities by law enforcement and prosecution agencies and other persons described in subdivisions (c) and (e) of Section 311.3. (Penal Code § 11165.1(c)(3).)

This bill would revise this definition to add the following characterizations:

> A person who depicts a child in, or who knowingly develops, duplicates, prints, downloads, streams, accesses through any electronic or digital media, or exchanges, a film, photograph, videotape, video recording, negative, or slide in which a child is engaged in an act of obscene sexual conduct, except for those activities by law enforcement and prosecution agencies and other persons described in subdivisions (c) and (e) of Section 311.3. (emphasis added.)

This bill would make additional, purely technical revisions to this section.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the last several years, severe overcrowding in California's prisons has been the focus of evolving and expensive litigation relating to conditions of confinement. On May 23, 2011, the United States Supreme Court ordered California to reduce its prison population to 137.5 percent of design capacity within two years from the date of its ruling, subject to the right of the state to seek modifications in appropriate circumstances.

Beginning in early 2007, Senate leadership initiated a policy to hold legislative proposals which could further aggravate the prison overcrowding crisis through new or expanded felony prosecutions. Under the resulting policy, known as "ROCA" (which stands for "Receivership/ Overcrowding Crisis Aggravation"), the Committee held measures that created a new felony, expanded the scope or penalty of an existing felony, or otherwise increased the application of a

felony in a manner which could exacerbate the prison overcrowding crisis. Under these principles, ROCA was applied as a content-neutral, provisional measure necessary to ensure that the Legislature did not erode progress towards reducing prison overcrowding by passing legislation, which would increase the prison population.

In January of 2013, just over a year after the enactment of the historic Public Safety Realignment Act of 2011, the State of California filed court documents seeking to vacate or modify the federal court order requiring the state to reduce its prison population to 137.5 percent of design capacity. The State submitted that the, ". . . population in the State's 33 prisons has been reduced by over 24,000 inmates since October 2011 when public safety realignment went into effect, by more than 36,000 inmates compared to the 2008 population . . . , and by nearly 42,000 inmates since 2006 . . . ." Plaintiffs opposed the state's motion, arguing that, "California prisons, which currently average 150% of capacity, and reach as high as 185% of capacity at one prison, continue to deliver health care that is constitutionally deficient." In an order dated January 29, 2013, the federal court granted the state a six-month extension to achieve the 137.5 % inmate population cap by December 31, 2013.

The Three-Judge Court then ordered, on April 11, 2013, the state of California to "immediately take all steps necessary to comply with this Court's . . . Order . . . requiring defendants to reduce overall prison population to 137.5% design capacity by December 31, 2013." On September 16, 2013, the State asked the Court to extend that deadline to December 31, 2016. In response, the Court extended the deadline first to January 27, 2014, and then February 24, 2014, and ordered the parties to enter into a meet-and-confer process to "explore how defendants can comply with this Court's June 20, 2013, Order, including means and dates by which such compliance can be expedited or accomplished and how this Court can ensure a durable solution to the prison crowding problem."

The parties were not able to reach an agreement during the meet-and-confer process. As a result, the Court ordered briefing on the State's requested extension and, on February 10, 2014, issued an order extending the deadline to reduce the in-state adult institution population to 137.5% design capacity to February 28, 2016. The order requires the state to meet the following interim and final population reduction benchmarks:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and
- 137.5% of design bed capacity by February 28, 2016.

If a benchmark is missed the Compliance Officer (a position created by the February 10, 2016 order) can order the release of inmates to bring the State into compliance with that benchmark.

In a status report to the Court dated May 15, 2014, the state reported that as of May 14, 2014, 116,428 inmates were housed in the State's 34 adult institutions, which amounts to 140.8% of design bed capacity, and 8,650 inmates were housed in out-of-state facilities.

The ongoing prison overcrowding litigation indicates that prison capacity and related issues concerning conditions of confinement remain unresolved. While real gains in reducing the prison population have been made, even greater reductions may be required to meet the orders of the federal court. Therefore, the Committee's consideration of ROCA bills –bills that may impact the prison population – will be informed by the following questions:

- Whether a measure erodes realignment and impacts the prison population;
- Whether a measure addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a bill corrects a constitutional infirmity or legislative drafting error;
- Whether a measure proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy; and,
- Whether a bill addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy.

COMMENTS

1. Stated Need for This Bill

The author states in part:

> This bill will amend the Child Abuse and Neglect Reporting Act to include "downloading" and "streaming" as part of its definition of "sexual exploitation" to ensure the reporting requirements related to internet child pornography are defined to reflect modern technology. This bill will further ensure the protection of children from the proliferation of sexual exploitation through internet child pornography as well as possibly other forms of sexual abuse.
>
> Currently, many mandated reporters, psychotherapists included, are confused on whether they should report the downloading or streaming of child pornography, as they are required to with the printing or copying of such materials.
>
> . . . In the absence of specific language allowing mandatory reports to be made for the "downloading" or "streaming" of child pornography, the Child Abuse and Neglect Reporting Act, as it reads, may be inadequate to protect against sexual exploitation of children. . . .

2. <u>What This Bill Would Do</u>

This bill would update the definition of "sexual exploitation" in the mandated child abuse reporting law with respect to visual depictions of a child in obscene sexual conduct to reflect modern technology.

****

SENATE RULES COMMITTEE
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 651-1520 Fax: (916) 327-4478

THIRD READING

Bill No: AB 1775
Author: Melendez (R)
Amended: 5/13/14 in Senate
Vote: 21

SENATE PUBLIC SAFETY COMMITTEE: 6-0, 6/10/14
AYES: Hancock, Anderson, De León, Knight, Liu, Steinberg
NO VOTE RECORDED: Mitchell

SENATE APPROPRIATIONS COMMITTEE: Senate Rule 28.8

ASSEMBLY FLOOR: 75-0, 4/24/14 (Consent) - See last page for vote

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SUBJECT: Child Abuse: mandatory reporting

SOURCE: California Association of Marriage and Family Therapists

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DIGEST: This bill updates the definition of "sexual exploitation" in the mandated child abuse reporting law with respect to visual depictions of children in obscene sexual conduct to reflect modern technology, as specified.

ANALYSIS:

Existing law:

1. Establishes the Child Abuse and Neglect Reporting Act, which generally is intended to protect children from abuse and neglect.

2. Requires mandated child abuse and neglect reporters to make a report to a specified agency "whenever the mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or

CONTINUED

observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect."

3. Defines "sexual abuse" to mean sexual assault or sexual exploitation, as specified. Included in the definition of "sexual exploitation" is the following:

   Any person who depicts a child in, or who knowingly develops, duplicates, prints, or exchanges, any film, photograph, video tape, negative, or slide in which a child is engaged in an act of obscene sexual conduct, except for those activities by law enforcement and prosecution agencies and other [specified] persons.

This bill:

1. Revises the definition of sexual exploitation by adding the following characterizations:

   A person who depicts a child in, or who knowingly develops, duplicates, prints, downloads, streams, accesses through any electronic or digital media, or exchanges, a film, photograph, videotape, video recording, negative, or slide in which a child is engaged in an act of obscene sexual conduct, except for those activities by law enforcement and prosecution agencies and other specified persons.

2. Makes additional, purely technical revisions.

Comments

The author states in part:

> This bill will amend the Child Abuse and Neglect Reporting Act to include "downloading" and "streaming" as part of its definition of "sexual exploitation" to ensure the reporting requirements related to internet child pornography are defined to reflect modern technology. This bill will further ensure the protection of children from the proliferation of sexual exploitation through internet child pornography as well as possibly other forms of sexual abuse.
>
> Currently, many mandated reporters, psychotherapists included, are confused on whether they should report the downloading or streaming of child pornography, as they are required to with the printing or copying of such materials.

CONTINUED

... In the absence of specific language allowing mandatory reports to be made for the "downloading" or "streaming" of child pornography, the Child Abuse and Neglect Reporting Act, as it reads, may be inadequate to protect against sexual exploitation of children. ...

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: Yes

SUPPORT: (Verified 6/20/14)

California Association of Marriage and Family Therapists (source)
Board of Behavioral Sciences
California District Attorneys Association
California Psychological Association
California State Sheriffs' Association
Child Abuse Prevention Center
Los Angeles District Attorney's Office

ASSEMBLY FLOOR: 75-0, 4/24/14
AYES: Achadjian, Alejo, Allen, Ammiano, Atkins, Bigelow, Bloom, Bocanegra, Bonilla, Bonta, Bradford, Brown, Buchanan, Ian Calderon, Campos, Chau, Chávez, Chesbro, Conway, Cooley, Dababneh, Dahle, Daly, Dickinson, Donnelly, Eggman, Fong, Fox, Frazier, Beth Gaines, Garcia, Gatto, Gomez, Gonzalez, Gordon, Gorell, Grove, Hagman, Hall, Roger Hernández, Holden, Jones, Jones-Sawyer, Levine, Linder, Logue, Lowenthal, Maienschein, Medina, Melendez, Mullin, Muratsuchi, Nestande, Olsen, Pan, Patterson, Perea, V. Manuel Pérez, Quirk, Quirk-Silva, Rendon, Ridley-Thomas, Rodriguez, Salas, Skinner, Stone, Ting, Wagner, Waldron, Weber, Wieckowski, Wilk, Williams, Yamada, John A. Pérez
NO VOTE RECORDED: Gray, Harkey, Mansoor, Nazarian, Vacancy

JG:k 6/23/14 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** **END** ****

OPINION OF THE OFFICE OF LEGAL COUNSEL

Duty to Report Suspected Child Abuse Under 42 U.S.C. § 13031

Under 42 U.S.C. § 13031--a provision of the Victims of Child Abuse Act of 1990--all covered professionals who learn of suspected child abuse while engaged in enumerated activities and professions on federal land or in federal facilities must report that abuse, regardless of where the suspected victim is cared for or resides.

The fact that a patient has viewed child pornography may "give reason to suspect that a child has suffered an incident of child abuse" under the statute, and a covered professional is not relieved of an obligation to report the possible abuse simply because neither the covered professional nor the patient knows the identity of the child depicted in the pornography.

2012 OLC LEXIS 6

May 29, 2012

ADDRESSEE:
[*1]

MEMORANDUM OPINION FOR THE GENERAL COUNSEL

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS

OPINIONBY: SEITZ

OPINION:

Section 13031 of title 42, a provision in the Victims of Child Abuse Act of 1990 ("VCAA" or "Act"), Pub. L. No. 101-647, tit. II, § 226, *104 Stat. 4789, 4806,* requires persons engaged in certain activities and professions on federal lands or in federal facilities to report "facts that give reason to suspect that a child has suffered an incident of child abuse" if they learn such facts in the course of their professional activities. Failure to make a report required by section 13031 could subject such persons to criminal penalties. *See 18 U.S.C. § 2258* (2006). You have raised two questions about the scope of section 13031. *See* Letter for the Honorable Eric Holder, Attorney General, from Will A. Gunn, General Counsel, Department of Veterans Affairs (Nov. 9, 2009) ("VA Letter").

First, you have asked whether section 13031's reporting requirement is limited to situations in which the suspected victim of child abuse is cared for or resides on federal land or in a federal facility. We conclude that it is not. Instead, under [*2] the VCAA, all persons who learn of suspected child abuse (as defined by the Act) while engaged in the enumerated activities and professions on federal land or in federal facilities must report that abuse, regardless of where the suspected victim is cared for or resides. We recognize that the scope of some of the statutory language may be ambiguous, and that narrower readings of the reporting requirement find some support in certain of the statute's provisions. But we believe that section 13031, read as a whole and in light of its purpose, is best interpreted broadly.

Second, you have inquired whether the VCAA's reporting obligation is triggered when a person covered by section 13031 learns that a patient under his or her care has viewed child pornography, even if the person does not know, and

has no reason to believe the patient knows, the identity of the child or children depicted in the pornography. We conclude that the fact that a patient has viewed child pornography may be a "fact[] . . . giv[ing] reason to suspect that a child has suffered an incident of child abuse" under section 13031, and that the statute does not require a covered professional to possess knowledge of the [*3] identity of an affected child in order for the reporting duty to apply.

We have concluded that the interpretive questions you have raised can be resolved using ordinary tools of statutory construction, so we have not applied the rule of lenity even though the VCAA provides for criminal penalties. We note, however, that a person who fails to make a report required by section 13031 will not necessarily be subject to criminal penalties under the statute. The criminal penalty provision contains no explicit *mens rea* requirement, and thus one would almost certainly be inferred. *See United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994).* While we need not decide what *mens rea* would apply, a court construing section 13031 might well require a defendant to have known that a report was legally required before imposing criminal liability for a failure to report. Such a reading would, among other things, address any concern about imposing criminal liability on persons who lacked clear notice that the failure to report in their particular circumstances was unlawful.

I.

Congress enacted the VCAA, including section 13031, as title II of the Crime [*4] Control Act of 1990. Pub. L. No. 101-647, §§ 201-255, *104 Stat. at 4792-4815.* Section 13031 requires persons on "Federal land or in a federally operated (or contracted) facility" who are engaged in certain activities--individuals the statute calls "[c]overed professionals"--to report suspected incidents of child abuse. *42 U.S.C. § 13031*(a)-(b) (2006). Specifically, section 13031(a) provides that

> [a] person who, while engaged in a professional capacity or activity described in subsection (b) of this section on Federal land or in a federally operated (or contracted) facility, learns of facts that give reason to suspect that a child has suffered an incident of child abuse, shall as soon as possible make a report of the suspected abuse to the agency designated under subsection (d) of this section.

Id. § 13031(a). n1

n1 Subsection (b) provides:

> Persons engaged in the following professions and activities are subject to the requirements of subsection (a) of this section:
>
> > (1) Physicians, dentists, medical residents or interns, hospital personnel and administrators, nurses, health care practitioners, chiropractors, osteopaths, pharmacists, optometrists, podiatrists, emergency medical technicians, ambulance drivers, undertakers, coroners, medical examiners, alcohol or drug treatment personnel, and persons performing a healing role or practicing the healing arts.
> >
> > (2) Psychologists, psychiatrists, and mental health professionals.
> >
> > (3) Social workers, licensed or unlicensed marriage, family, and individual counselors.
> >
> > (4) Teachers, teacher's aides or assistants, school counselors and guidance personnel, school officials, and school administrators.
> >
> > (5) Child care workers and administrators.

(6) Law enforcement personnel, probation officers, criminal prosecutors, and juvenile rehabilitation or detention facility employees.

(7) Foster parents.

(8) Commercial film and photo processors.

42 U.S.C. § 13031(b).
[*5]

Section 13031(d) directs the Attorney General to designate the agency or agencies to which the reports described in subsection (a) should be made. It states:

For all Federal lands and all federally operated (or contracted) facilities in which children are cared for or reside, the Attorney General shall designate an agency to receive and investigate the reports described in subsection (a) of this section. By formal written agreement, the designated agency may be a non-Federal agency. When such reports are received by social services or health care agencies, and involve allegations of sexual abuse, serious physical injury, or life-threatening neglect of a child, there shall be an immediate referral of the report to a law enforcement agency with authority to take emergency action to protect the child. All reports received shall be promptly investigated, and whenever appropriate, investigations shall be conducted jointly by social services and law enforcement personnel, with a view toward avoiding unnecessary multiple interviews with the child.

Id. § 13031(d) (2006).

Consistent with this directive, the Attorney General has issued a regulation designating the agencies authorized [*6] to receive and investigate reports of child abuse submitted under section 13031(a). That rule, which appears as 28 C.F.R. § 81.2 (2010), provides:

Reports of child abuse required by *42 U.S.C. 13031* shall be made to the local law enforcement agency or local child protective services agency that has jurisdiction to investigate reports of child abuse or to protect child abuse victims in the land area or facility in question. Such agencies are hereby respectively designated as the agencies to receive and investigate such reports, pursuant to *42 U.S.C. 13031*(d), with respect to federal lands and federally operated or contracted facilities within their respective jurisdictions, provided that such agencies, if non-federal, enter into formal written agreements to do so with the Attorney General, her delegate, or a federal agency with jurisdiction for the area or facility in question. If the child abuse reported by the covered professional pursuant to *42 U.S.C. 13031* occurred outside the federal area or facility in question, the designated local law enforcement agency or local [*7] child protective services agency receiving the report shall immediately forward the matter to the appropriate authority with jurisdiction outside the federal area in question.

Att'y Gen. Order No. 2009-96, *61 Fed. Reg. 7704* (Feb. 29, 1996).

Under section 13031, "the term 'child abuse' means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child." *42 U.S.C. § 13031*(c)(1)(2006). Section 13031 further explains that

the term 'sexual abuse' includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.

Id. § 13031(c)(4) (2006). "[T]he term 'exploitation' means child pornography or child prostitution." *Id.* § 13031(c)(6) (2006).

Two other provisions in section 13031 are also relevant. Section 13031(e) provides that "[i]n every federally operated (or contracted) facility, and on all federal lands, a standard written reporting form, with instructions, [*8] shall be disseminated to all mandated reporter groups," and makes clear as well that although "[u]se of the form shall be encouraged, . . . its use shall not take the place of the immediate making of oral reports . . . when circumstances dictate." *Id.* § 13031(e). Section 13031(h) provides that "[a]ll individuals in the occupations listed in subsection (b)(1) of this section who work on Federal lands, or are employed in federally operated (or contracted) facilities, shall receive periodic training in the obligation to report, as well as in the identification of abused and neglected children." *Id.* § 13031(h).

Finally, in section 226(g)(1) of the VCAA, *codified as amended at 18 U.S.C. § 2258,* Congress criminalized the failure to report child abuse as mandated by *42 U.S.C. § 13031.* The criminal provision states:

> A person who, while engaged in a professional capacity or activity described in subsection (b) of section 226 of the Victims of Child Abuse Act of 1990 *[42 U.S.C. § 13031]* on Federal land or in a federally operated (or contracted) facility, learns of [*9] facts that give reason to suspect that a child has suffered an incident of child abuse, as defined in subsection (c) of that section, and fails to make a timely report as required by subsection (a) of that section, shall be fined under this title or imprisoned not more than 1 year or both.

18 U.S.C. § 2258. When the VCAA was originally enacted, the offense was a Class B misdemeanor punishable by six months of imprisonment, *id.* § 226(g)(1), *104 Stat. at 4808; 18 U.S.C. § 3581*(b)(7) (1988), but in 2006, Congress amended *18 U.S.C. § 2258* by raising the maximum punishment from six months to one year of imprisonment. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 209, *120 Stat. 587, 615.* Other than this change, Congress has amended neither *18 U.S.C. § 2258* nor *42 U.S.C. § 13031* since it enacted the provisions in 1990.

II.

A.

We first consider the circumstances under which covered professionals must report suspected [*10] child abuse under the VCAA. n2 We conclude that, although no interpretation of section 13031 perfectly reconciles all of its provisions, section 13031 is best read to impose a reporting obligation on all persons who, while engaged in the covered professions and activities on federal lands or in federal facilities, learn of facts that give reason to suspect that child abuse has occurred, regardless of where the abuse might have occurred or where the suspected victim is cared for or resides. In reaching this conclusion, we considered the construction of section 13031 that you propose, as well as two other readings that would narrow the reporting obligation. As explained below, while all of these narrowing constructions find support in certain provisions of the statute, they are also in significant tension with other parts of section 13031, leading us to conclude that section 13031 "'as a whole'" is best read to impose the broad reporting obligation described above. *See United States v. Atlantic Research Corp., 551 U.S. 128, 135 (2007)* (quoting *King v. St. Vincent's Hospital, 502 U.S. 215, 221 (1991)).*

n2 In preparing our opinion, we considered views provided by your office, the Department of Justice's Criminal Division, the Department of Defense, the Department of State, and the Attorney General's Advisory Council. *See* E-mail for Jeannie S. Rhee, Deputy Assistant Attorney General, Office of Legal Counsel ("OLC"), from Alexandra Gelber, Criminal Division (Jan. 15, 2010 10:15 AM); E-mail for Jeannie S. Rhee, Deputy Assistant Attorney General, OLC, from John Casciotti, Office of General Counsel, Dep't of Defense (Feb. 26, 2010 5:02 PM); E-mail for Jeannie S. Rhee, Deputy Assistant Attorney General, OLC, from Robert Choo, Office of the Legal Adviser, Dep't of State (July 21, 2010 2:35 PM); E-mail for Cristina M. Rodriguez, Deputy Assistant Attorney General, Benjamin Mizer, Senior Counsel, and Matthew Roberts, Senior Counsel, OLC, from Carter Stewart, United States Attorney for the Southern District of Ohio (Feb. 3, 2012 6:45 PM). We also solicited the opinion of the Department of Health and Human Services, which indicated that it "has no view about the interpretation advanced by the Veterans Administration." E-mail for Jeannie S. Rhee, Deputy Assistant Attorney

General, OLC, from Elizabeth J. Gianturco, Senior Advisor to the General Counsel, Dep't of Health and Human Servs. (Apr. 21, 2010 2:16 PM).

[*11]

Section 13031(a) sets forth the reporting requirement that is the VCAA's core directive. It provides that a covered professional engaged in a covered activity "on Federal land or in a federally operated (or contracted) facility" who "learns of facts that give reason to suspect that a child has suffered an incident of child abuse, shall as soon as possible make a report of the suspected abuse to the agency designated under subsection (d) of this section." *42 U.S.C. § 13031*(a). On its face, this is a broad provision: It applies to covered professionals on all federal lands and in all federal facilities and requires a report as soon as possible no matter where the suspected child victim resides, is cared for, or may have been abused. The express incorporation of subsection (d), however, gives rise to doubt about the scope of subsection (a)'s reporting requirement, because subsection (d) appears to require the Attorney General to designate an agency to receive reports only "[f]or all Federal lands and all federally operated (or contracted) facilities in which children are cared for or reside." *Id.* § 13031(d) (emphasis added). The central question, [*12] then, is whether the cross-reference to subsection (d) limits subsection (a)'s otherwise broad language, and if so, in what way. n3

n3 We assume for purposes of this opinion, as do you, that the phrase "in which children are cared for or reside" modifies both "Federal lands" and "federally operated (or contracted) facilities." VA Letter at 2 ("subsection (d) provides for designation . . . of agencies to receive and investigate reports for Federal reservations in which children are cared for or reside"). The Attorney General's regulations do not address the issue, 28 C.F.R. pt. 81 (2010), nor do any of the submissions we received.

You suggest that it would be reasonable to read the reporting requirement as applying "only with regard to suspected abuse of children residing or cared for on Federal lands and in federally operated and contracted facilities," because "*42 U.S.C. § 13031*(a) requires reporting only to agencies as designated under subsection (d), and subsection (d) provides for designation only of agencies to receive and investigate reports for Federal reservations in which children are cared for or reside." VA Letter at 2. In other [*13] words, you maintain that, because subsection (d) specifies agencies to receive reports only for "Federal lands and . . . facilities in which children are cared for or reside," *42 U.S.C. § 13031*(d), Congress intended to require reports only for suspected abuse of children who reside or are cared for on federal lands or in federal facilities. Moreover, it might be argued that when the Attorney General designates an agency to receive reports for Federal lands and facilities in which children are not cared for and do not reside, he is not making designations "under" subsection (d), because that provision expressly addresses designations only for federal lands and facilities "in which children are cared for or reside." *Id.* This construction of section 13031, in your view, would appropriately align the location of the suspected child victims with subsection (d)'s designation of agencies to receive reports.

This interpretation is not without some force, but we believe it is inconsistent with other subsections of section 13031 and with the statute viewed in its entirety. *See Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989)* [*14] ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). As noted above, Congress phrased subsection (a) using broad language that contains no limitation on the federal lands or facilities in which reporting is required, and no residence-based limitation on the suspected child victims whose potential abuse can give rise to a reporting obligation. *42 U.S.C. § 13031*(a). In fact, section 13031 as a whole is devoid of any language that explicitly limits the suspected child victims whose potential abuse triggers the reporting requirement.

If Congress had intended to limit the scope of the VCAA's reporting requirement in the significant manner you propose, an isolated cross-reference to subsection (d) would have been an obscure and backhanded way to do so. *Cf. Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 170-71 (1971)* ("To accept the Board's reasoning that the union's § 302(c)(5) responsibilities dictate the scope of the § 8(a)(5) collective bargaining obligation [*15] would be to allow the tail to wag the dog."). Subsection (d) is entitled "[a]gency designated to receive report and action to be taken," and purports to address only the agencies to which reports must be made, not the professionals who must make reports or the children who may be the subject of reports. Nothing in subsection (d) expressly narrows the scope of potential child victims covered by the reporting requirement. *Cf. Comm'r of Internal Rev. v. Clark, 489 U.S. 726, 739 (1989)* ("In construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision.").

Indeed, subsection (d) does not say that the Attorney General may only designate agencies to receive reports for Federal lands and facilities "in which children are cared for or reside." *42 U.S.C. § 13031*(d). It simply specifies that the

Attorney General "shall designate an agency to receive and investigate" reports for such lands and facilities, saying nothing about what the Attorney General should do with respect to other Federal lands [*16] and facilities. *Id.* And in implementing this authority, the Attorney General has in fact specified reporting locations for all covered professionals who learn of any covered abuse while engaged in their profession or activity on any federal land or facility, not solely abuse connected to lands or facilities where children are cared for or reside. *See* 28 C.F.R. § 81.2.

The broad reading of the reporting requirement gains further support from two other provisions in the VCAA that unambiguously apply to all federal lands and facilities, not just those where children are cared for or reside. Subsection (e) requires dissemination of a standard written reporting form to "all mandated reporter groups" "[i]n every federally operated (or contracted) facility, and on all Federal lands." *42 U.S.C. § 13031*(e). In other words, reporting forms must be disseminated not only to federal lands and facilities where children are cared for or reside, but to all federal lands and facilities. This provision thus appears to presume that mandated reporter groups exist in every federally operated or contracted facility and on all federal lands. This presumption, [*17] in turn, strongly suggests that Congress intended to require the reporting of abuse discovered by covered professionals in the course of their covered activities on all federal lands and in all federal facilities, not simply abuse that occurs on the lands and in the facilities where children are cared for or reside.

Subsection (h) embodies a similar premise. That provision, entitled "[t]raining of prospective reporters," requires "periodic training in the obligation to report, as well as in the identification of abused and neglected children," for "[a]ll individuals in the occupations listed in subsection (b)(1) of this section who work on Federal lands, or are employed in federally operated (or contracted) facilities." *42 U.S.C. § 13031*(h). Again, this provision appears to assume that all individuals who work in the listed occupations on all federal lands and in all federal facilities--not solely those where children are cared for or reside--might encounter suspected abuse that must be reported. This further suggests that Congress intended to require covered professionals working on *all* federal lands and in *all* federal facilities to report [*18] suspected abuse, because the across-the-board training requirement otherwise would serve no clear purpose.

The broad reading of the reporting requirement is also consistent with the scope of subsection (b). Subsection (b)'s specific list of relevant professions and activities echoes the mandatory reporter provisions of numerous state laws requiring the reporting of abuse. *Compare 42 U.S.C. § 13031*(b) (list set forth *supra* note 1) *with* Child Welfare Information Gateway, Dep't of Health & Human Servs., *Mandatory Reporters of Child Abuse and Neglect: Summary of State Laws* 2 (Apr. 2010) ("*Summary of State Laws*"), *available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.pdf (last visited Nov. 7, 2012). The reporting requirement, as defined in subsections (a) and (b), focuses on the nature of the covered professional's employment activity, not the place where the child victim is cared for or resides. Indeed, many of the covered professionals--such as film processors, coroners, and ambulance drivers--would likely learn of suspected child abuse in circumstances that provide no indication whether the child [*19] victim is cared for or resides on federal lands or in a federal facility.

The VCAA's legislative history also reflects a congressional intent to enact a far-reaching reporting obligation that would protect as many victims of suspected child abuse as possible. Senator Biden, a co-sponsor of the legislation, called it a "sweeping title aimed at mak[ing] our criminal justice system more effective in cracking down on child abusers, and more gentle in dealing with the child abuse victims." 136 Cong. Rec. 36,312 (1990); *see also id.* at 16,240 (statement of Sen. Biden) ("[Y]ou, the innocent bystander, you, the third party, you have a legal obligation to report when you observe or have reason to believe that an abuse of an innocent child takes place."); *id.* at 16,238 (statement of co-sponsor Sen. Reid) ("A critical step in protecting our children is to identify child victims . . . before it is too late. My proposed bill of rights requires certain professionals to identify who they suspect are victims of abuse and neglect.").

As we recognize above, our interpretation of the statute does not reconcile perfectly all of the statute's parts, specifically subsection (a)'s cross-reference [*20] to subsection (d). Read in context, however, we think subsection (d) need not and should not be construed to limit either the scope of the reporting requirement under subsection (a) or the Attorney General's authority to designate agencies to receive the required reports. Such an interpretation would be in marked tension with the breadth of subsection (a)'s terms, the requirements of subsections (e) and (h), the scope of subsection (b), and the general evidence of Congress's intent.

The two additional narrowing constructions we identified also fail to make better sense of the statute than the broad reading we have adopted. We first considered whether the reporting requirement should be limited to situations involving children who had been abused on federal lands or facilities. But under this reading, as under your suggested reading, we would have to conclude that Congress acted to limit the apparently broad reporting requirement set forth in subsection (a) through the oblique mechanism of a cross-reference to subsection (d). What is more, this reading, too, would

make it difficult to explain the breadth of the mandated training and provision of forms on all federal lands and in all [*21] federal facilities in subsections (e) and (h) and the scope of covered professionals in subsection (b). Further, and significantly, this reading would narrow the class of children whose suspected abuse could give rise to a required report, despite the fact that *no* provision in the statute--including subsection (d)--addresses the location of the suspected abuse.

We also considered a third alternative reading--one that would require reporting only from covered professionals who engage in the specified professions and activities on federal lands or in federal facilities where children are cared for or may have been abused. This construction, too, would rest on a presumption that Congress intended to limit the scope of the reporting obligation through a single cross-reference to subsection (d). Further, it would be in particularly sharp tension with subsections (e) and (h), which require training and distributing reporting forms on *all* federal lands and in *all* federal facilities, not just where children are cared for or reside. This reading would also produce an anomalous result--a professional's obligation to report facts giving reason to suspect that a child unconnected [*22] with federal lands or facilities had been abused would turn on the apparently unrelated question whether other children happened to be cared for or reside on the lands or in the facility where the professional works. In our judgment, these difficulties make this interpretation less coherent than the broad reading we have given the statute.

We therefore conclude that the best reading of section 13031 as a whole is that a covered professional is required to report suspected child abuse discovered while engaged in the professions or occupations specified in subsection (b) on federal lands or in federal facilities. n4

n4 This interpretation of the reporting requirement is consistent with the law of most States. "All States, the District of Columbia, [and all U.S. territories] have statutes identifying persons who are required to report child maltreatment under specific circumstances," and, in most States, the list of individuals with reporting obligations closely resembles the list of covered professionals in section 13031. *Summary of State Laws* at 1-2. In fact, some jurisdictions require *all* persons, not just certain professionals, to report suspected child abuse. *Id.* at 3. Thus, many, if not all, covered professionals who learn of suspected child abuse on federal lands or in federal facilities would also be required to report under state laws. Covered professionals should therefore consult relevant state law to ensure that they are fully informed about the scope of their legal reporting requirements.

[*23]

B.

We next consider whether "the mere knowledge that a patient has viewed child pornography [would] trigger a covered professional's duty to report the suspected child abuse, even if he or she does not know the identity of the child or children depicted and has no reason to believe the patient knew their identity." VA Letter at 2. n5 In raising this question, you point to language in a later part of subsection (d) providing that, when reports required by subsection (a) are "received by social services or health care agencies, and involve allegations of sexual abuse, serious physical injury, or life-threatening neglect of a child, there shall be an immediate referral of the report to a law enforcement agency with authority to take emergency action to protect the child." *42 U.S.C. § 13031*(d) (emphasis added). Based on subsection (d)'s reference to "the" child, you note that, while it is clear that "the [reporting] requirement applies when the identity of an abused child can be determined by the covered provider so that the law-enforcement agency with jurisdiction can be identified, . . . it is less clear . . . that it applies when that is not [*24] the case." VA Letter at 2. n6 We conclude, however, that the text of the statute covers the situation you describe.

n5 As we have noted, section 13031(b) subjects a wide range of individuals to the reporting duty of subsection (a), including physicians, pharmacists, school officials, detention facility employees, and commercial film and photo processors. *See supra* note 1 (quoting *42 U.S.C. § 13031*(b)). Those covered professionals thus may learn of possible child abuse from a variety of individuals besides those commonly referred to as "patients." For simplicity, however, we use the term "patient" as shorthand for any person from whom a covered professional may learn of potential child abuse.

n6 Similarly, the Department of Defense states that its relevant policy "does not contemplate that the statute applies in a situation where the patient merely blurts out that he has an addiction to child pornography." Instead, under its policy, reporting would be required in contexts where the patient "is drawn to a particular child," "knows the identity or whereabouts of a child depicted in the pornography," "help[s] to produce the pornography," or in other contexts where "there is an identifiable child or identifiable children that could be the subject of action by the child protective agency." E-mail for Jeannie S. Rhee, Deputy Assistant Attorney General, Office of

Legal Counsel, from John Casciotti, Office of General Counsel, Dep't of Defense (Feb. 26, 2010 5:02 PM). The Department of State "does not have a formal position or policy addressing whether the reporting requirement is triggered when a covered professional learns that someone has viewed child pornography, but the professional does not know the identity of the child or children depicted and has no reason to believe that the viewer knows their identities." E-mail for Jeannie S. Rhee, Deputy Assistant Attorney General, Office of Legal Counsel, from Robert Choo, Office of the Legal Adviser, Dep't of State (July 21, 2010 2:35 PM). It recognizes, however, that this situation "may trigger other actions including the enforcement of child pornography laws, if applicable, or internal discipline." *Id.*

[*25]

The text of subsection 13031(a) imposes a reporting duty on a covered professional "who, while engaged in a professional capacity or activity described in subsection (b) . . . , learns of facts that give reason to suspect that a child has suffered an incident of child abuse." *42 U.S.C. § 13031*(a). "[C]hild abuse," in turn, is defined as "the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child." *Id.* § 13031(c)(1). The statute further provides that "the term 'sexual abuse' includes the employment [or] use . . . of a child to engage in . . . sexual exploitation of children," and that "the term 'exploitation' means child pornography or child prostitution." *Id.* § 13031(c)(4)-(6). Under these definitions, covered professionals must report suspected abuse if they learn of facts giving reason to suspect that a child "has suffered an incident of [employment or use to engage in child pornography]," n7 or "has suffered an incident of [child pornography]."

n7 The substitution in the text is not completely straightforward, in that the statute defines "exploitation"--without any qualification--to include "child pornography or child prostitution," but defines "sexual abuse" to include "rape, molestation, prostitution, or other form[s] of sexual exploitation of children." *Compare 42 U.S.C. § 13031*(c)(6) (definition of "exploitation") *with id.* § 13031(c)(4) (definition of "sexual abuse"). We do not think, however, that the statute intends to draw a strong distinction between "exploitation" and "sexual exploitation." The latter phrase is not a defined term. And the statute in other respects seems to treat the two terms as essentially interchangeable. In particular, the definition of "sexual abuse" expressly provides that "prostitution . . . of children" is a form of "sexual exploitation of children," and the definition of "exploitation" similarly provides that "child prostitution" is a form of "exploitation." *Id.* § 13031(c)(4)-(6).

[*26]

Although section 13031 does not define the term "child pornography," it is defined elsewhere in the U.S. Code as "any visual depiction, . . . whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where--(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is . . . of a minor engaging in sexually explicit conduct; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct." *18 U.S.C. § 2256*(8) (2006). n8 This definition is consistent with dictionary definitions of child pornography. *See, e.g., Black's Law Dictionary* 1279 (9th ed. 2009) (defining "child pornography" as "[m]aterial depicting a person under the age of 18 engaged in sexual activity").

n8 Other definitions in section 13031, including the definition of "sexually explicit conduct"--a concept closely related to "child pornography," as the definition quoted above makes clear--track definitions in the same section (chapter 110) of the criminal code. *Compare 42 U.S.C. § 13031*(c)(5) (2006) *with 18 U.S.C. § 2256*(2) (2006).

[*27]

Under these definitions, child pornography is not a specific action or set of actions, but an end product, a particular kind of visual depiction that is "made or produced." *18 U.S.C. § 2256*(8). It is thus not entirely clear what it means "to engage in child pornography," or for "a child" to have "suffered an incident of" child pornography. Notably, however, certain other forms of "child abuse" in section 13031 are also defined as end results rather than actions. "[P]hysical injury," for example, is defined to include, among other things, "lacerations, fractured bones, burns, [and] internal injuries." *42 U.S.C. § 13031*(c)(2). And it is relatively straightforward to conclude that a child has "suffered an incident of" lacerations or fractured bones if the child has been subjected to physical abuse that results in those injuries. We think it is similarly clear that, whatever else the phrase may include, a person has "engage[d] in child pornography" if that person has produced or created pornographic images of children, and that "a child has suffered an incident of" child pornography if that child has been made [*28] the subject of pornographic images. The pornography is "a permanent

record" of the abusive conduct of creating a pornographic image of a child. *See New York v. Ferber, 458 U.S. 747, 759 (1982).*

Based on this analysis, we conclude that a covered professional who learns that a patient under his or her care has viewed child pornography may be aware of "facts that give reason to suspect that a child"--the subject of the specific pornographic images viewed by the patient--"has suffered an incident of child abuse." *42 U.S.C. § 13031*(a).

We do not believe a covered professional in such a situation is relieved of an obligation to report such facts simply because he or she does not know or have reason to know, or have reason to believe a patient knows, the identity of the child depicted in the pornography. Section 13031(a) and (d) does not require, either expressly or by implication, that a covered professional (or his or her patient) know the identity of the child or children abused in order to have a reporting obligation. We generally "'resist reading words or elements into a statute that do not appear on its face.'" *Dean v. United States, 556 U.S. 568, 572 (2009)* [*29] (quoting *Bates v. United States, 522 U.S. 23, 29 (1997)).* Moreover, imposing a requirement that the victim's identity be known would be in tension with Congress's protective purpose. *See, e.g.*, 136 Cong. Rec. at 36,312 (noting that the statute would "make [the] criminal justice system more effective in cracking down on child abusers").

Even assuming that the statute's references to "a child" in section 13031(a) and (d) limit the reporting requirement to situations involving "a" specific, potentially identifiable child, that limitation provides no basis for imposing the additional prerequisites to reporting that the covered professional know or have reason to believe his or her patient knows the identity of a child depicted in pornography the patient admits to viewing. Pornography may well involve "a" specific, potentially identifiable child even if neither covered professionals nor their patients know the child's identity. Even if covered professionals (or their patients) do not know the identity of any children depicted in pornography viewed by a patient, a report may lead authorities to specific, identifiable children. While some child pornography [*30] may be the work of professionals and therefore difficult to link to specific identifiable children, other such images are homemade recordings, taken in domestic contexts, of sexually abusive acts "committed against young neighbors or family members," and therefore traceable through law enforcement investigation to a particular child or children. Philip Jenkins, *Beyond Tolerance: Child Pornography on the Internet* 82 (2001); *see also* Richard Wortley & Stephen Smallbone, Cmty. Oriented Policing Servs., Dep't of Justice, Problem-Oriented Guides for Police, Problem-Specific Guides Series No. 41, *Child Pornography on the Internet* 9 (2006), *available at* http://www.cops.usdoj.gov/Publications/e04062000.pdf (last visited Nov. 7, 2012) ("[M]ore commonly, amateurs make records of their own sexual abuse exploits, particularly now that electronic recording devices such as digital cameras and web cams permit individuals to create high quality, homemade images.").

For the same reasons, section 13031(d)'s statement that, in certain circumstances, social services or health care agencies must refer reports of suspected child abuse "to a law enforcement agency with authority to take [*31] emergency action to protect *the child*," *42 U.S.C. § 13031*(d) (emphasis added), should not be read to restrict the reporting obligation to situations in which covered professionals know the identity of the children who are the victims of suspected abuse. This law-enforcement referral requirement applies not to covered professionals, but to the "social services or health care agencies" that receive reports of suspected child abuse. *Id.* The statute expressly contemplates that the agency receiving the report, not the covered professional, must ascertain which law enforcement agency is "authori[zed] to take emergency action to protect the child." *Id.* And although the referral requirement could be read to reflect an assumption that these agencies generally will know the identity of the child in need of protection, the requirement also could be satisfied by identifying a law enforcement agency with authority to initiate an investigation to ascertain the identity and location of the suspected victim..

We therefore conclude that the fact that a patient has viewed child pornography may constitute a "fact[] that give[s] reason to suspect that a [*32] child has suffered an incident of child abuse" under section 13031, and that a covered professional is not relieved of the obligation to report such a fact simply because the identity of the injured child is unknown.

C.

As noted, the VCAA provides for criminal penalties. *18 U.S.C. § 2258.* When interpreting a statute's civil provision, the violation of which is also subject to criminal sanction, the rule of lenity may be invoked to resolve ambiguity in the provision. *See Leocal v. Ashcroft, 543 U.S. 1, 11-12 & n.8 (2004); United States v. Thompson/Center Arms Co., 504 U.S. 505, 517-18 & n.10 (1992)* (plurality opinion). Here, however, we resolved both of the interpretive questions you presented without employing the rule of lenity, because we concluded that the provisions at issue did not present

any "grievous ambiguity or uncertainty" that could not be addressed by applying ordinary tools of statutory construction. *Muscarello v. United States, 524 U.S. 125, 139 (1998)* (internal quotation marks and citations omitted).

We recognize, however, that the statutory [*33] trigger for the reporting requirement--the learning of "facts that give reason to suspect that a child has suffered an incident of child abuse"--is extremely broad. For example, the statute's text does not appear to require either that the suspected abuse have occurred recently or that there be a direct connection between the facts and a particular perpetrator of or witness to abuse. Thus, a doctor's duty to report conceivably could be triggered by a patient's revelation that his neighbor confided that he was abused as a child some decades ago, a patient's revelation that acquaintances long ago had viewed child pornography, or a patient's expression of amazement that he had learned from the Internet that child abuse or child pornography was far more prevalent than he had previously believed. n9 Because failures to report may be criminally prosecuted, courts may be concerned about the uncertain breadth of the suspected abuse that may be subject to section 13031's reporting requirement, particularly when combined with the ambiguities discussed in Parts II.A and II.B.

n9 We do not consider here whether other aspects of the language quoted in the text above, or of language elsewhere in the statute, might limit its application in some such situations. A court might also adopt a narrowing construction of the statutory trigger for the reporting requirement to avoid notice concerns. *See Skilling v. United States, 130 S. Ct. 2896, 2931 (2010).*

[*34]

You have not asked us to define the boundaries of the phrase "facts that give reason" to suspect child abuse or to discuss the application of *18 U.S.C. § 2258*, but we note that covered professionals who fail to make a report required by the statute may not always be criminally liable for their failure to do so. Significantly, although the VCAA's criminal penalty provision lacks an express *mens rea* requirement, courts generally "interpret[] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *X-Citement Video, Inc., 513 U.S. at 70.* n10 Courts deciding whether to impose criminal penalties on a covered professional for failing to file a report would have to decide (i) whether to construe *18 U.S.C. § 2258* to impose a *mens rea* requirement, and (ii) if they do so, what the required *mens rea* is. And while for some statutes, courts have required only that a defendant have knowledge of the "facts that make his conduct illegal," *Staples, 511 U.S. at 605,* for others, courts [*35] have required that a defendant know that his or her conduct was "unauthorized or illegal" before criminal liability could be imposed, particularly where failure to impose such a requirement would "criminalize a broad range of apparently innocent conduct." *Liparota v. United States, 471 U.S. 419, 426, 434 (1985).* Here, a court concerned about ordinary citizens' ability to decipher the contours of the abuse that must be reported, or about the statute's punishment of a failure to act rather than an affirmative act, might be inclined to adopt this kind of heightened *mens rea* requirement. *See Skilling, 130 S. Ct. at 2927-28* (noting that a "'criminal offense'" must be defined "'with sufficient definiteness that ordinary people can understand what conduct is prohibited'") (quoting *Kolender v. Lawson, 461 U.S. 352, 357 (1983)); id.* at 2933 (noting that a "*mens rea* requirement" can help "blunt[] . . . notice concern[s]"); *Lambert v. California, 355 U.S. 225, 228 (1957)* (holding that due process requires that a person who is "wholly passive and unaware of any [*36] wrongdoing" must have notice of a registration requirement before she may be held criminally liable).

n10 As the Supreme Court has explained, the presumption that a statute contains a *mens rea* requirement even when that requirement is not explicit in the statutory text is consistent with the rule of lenity. *See Liparota v. United States, 471 U.S. 419, 427-28 (1985).* Inferring a *mens rea* requirement is, however, a distinct practice from applying the rule of lenity, and the Court has suggested that lenity principles may not apply in determining the degree of *mens rea* that is required. *See Staples v. United States, 511 U.S. 600, 619 n.17 (1994).*

III.

In sum, any person who, while engaged in a professional capacity or activity described in subsection (b) of section 13031 on any federal land or in any federally operated (or contracted) facility, learns of "facts that give reason to suspect that a child has suffered any incident of child abuse" must report the suspected abuse to a designated agency. The fact that a patient has viewed child pornography may "give reason to suspect that a child has suffered an [*37] incident of child abuse" under the statute, and a covered professional is not relieved of an obligation to report the possible abuse simply because neither the covered professional nor the patient knows the identity of the child depicted in the pornography. As described, however, a covered professional's failure to file a required report will not necessarily result in criminal liability.

VIRGINIA A. SEITZ

Assistant Attorney General

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Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawSeparation of PowersExecutive ControlsCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsDomestic OffensesChildrenElementsFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & Neglect

CONCURRENCE IN SENATE AMENDMENTS
AB 1775 (Melendez)
As Amended May 13, 2014
Majority vote

ASSEMBLY:	75-0	(April 24, 2014)	SENATE:	35-0	(July 3, 2014)

Original Committee Reference: PUB. S.

SUMMARY: Provides that knowingly downloading, streaming, or accessing material, including a video recording, in which a child is engaged in an act of obscene sexual conduct, except as specified, is sexual exploitation for the purpose of mandated reporting by specified individuals under the Child Abuse and Neglect Reporting Act (CANRA).

The Senate amendments provide that the streaming or accessing through electronic or digital media of material in which a child is engaged in an act of obscene sexual conduct is sexual exploitation for the purpose of mandated reporting under CANRA.

EXISTING LAW:

1) Requires a mandated reporter to make a report to a specified agency whenever the mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child who the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect. Requires the mandated reporter to make an initial report to the agency immediately or as soon as is practicably possible by telephone and to prepare and send, fax, or electronically transmit a written follow-up report thereof within 36 hours of receiving the information concerning the incident. Authorizes the mandated reporter to include with the report any non-privileged documentary evidence the mandated reporter possesses relating to the incident.

2) Punishes as a misdemeanor any mandated reporter who fails to report an incident of known or reasonably suspected child abuse or neglect as required with up to six months confinement in a county jail, a fine of $1,000, or by both that imprisonment and fine. States that if a mandated reporter intentionally conceals his or her failure to report an incident known by the mandated reporter to be abuse or severe neglect, as specified, the failure to report is a continuing offense until a specified agency discovers the offense.

3) Defines "child" under CANRA as a person under the age of 18 years.

4) Defines, for purposes of CANRA, "child abuse or neglect" to include physical injury or death inflicted by other than accidental means upon a child by another person, sexual abuse as defined, neglect as defined, the willful harming or injuring of a child or the endangering of the person or health of a child as defined, and unlawful corporal punishment or injury as defined. States that "child abuse or neglect" does not include a mutual affray between minors or an injury caused by reasonable and necessary force used by a peace officer acting within the course and scope of his or her employment as a peace officer.

5) Defines "sexual abuse" to mean sexual assault or sexual exploitation as these terms are defined.

6) States that "sexual exploitation" refers to any of the following:

   a) Conduct involving matter depicting a minor engaged in obscene acts in violation of state law with respect to:

      i) The preparing, selling, or distributing of obscene matter; and

      ii) The employment or use of a minor to perform prohibited acts.

   b) Any person who knowingly promotes, aids, assists, employs, uses, persuades, induces, or coerces a child, or any person responsible for a child's welfare as specified, who knowingly permits or encourages a child to engage in, or assists others to engage in, prostitution or a live performance involving obscene sexual conduct, or to either pose or model alone or with others for purposes of preparing a film, photograph, negative, slide, drawing, painting, or other pictorial depiction, involving obscene sexual conduct; and

   c) Any person who depicts a child in, or who knowingly develops, duplicates, prints, or exchanges, any film, photograph, videotape, negative, or slide in which a child is engaged in an act of obscene sexual conduct, except for those activities by law enforcement, prosecution agencies, and other described persons.

7) Provides that volunteers of public or private organizations, except a volunteer of a Court Appointed Special Advocate program, whose duties require direct contact with and supervision of children are not mandated reporters but are encouraged to obtain training in the identification and reporting of child abuse and neglect and are further encouraged to report known or suspected instances of child abuse or neglect to a specified agency.

8) Strongly encourages employers to provide their employees who are mandated reporters with training in the duties imposed by CANRA. States that this training shall include training in child abuse and neglect identification and training in child abuse and neglect reporting and that whether or not employers provide their employees with training in child abuse and neglect identification and reporting, the employers are required to provide their employees who are mandated reporters with a statement that informs the employee that he or she is a mandated reporter and informs the employee of his or her reporting obligations and of his or her confidentiality rights.

9) Encourages public and private organizations to provide their volunteers whose duties require direct contact with and supervision of children with training in the identification and reporting of child abuse and neglect.

10) Provides that neither the physician-patient privilege nor the psychotherapist-patient privilege applies to information reported pursuant to CANRA in any court proceeding or administrative hearing.

FISCAL EFFECT: According to the Senate Appropriations Committee, pursuant to Senate Rule 28.8, negligible state costs.

COMMENTS: According to the author, "AB 1775 will further ensure the protection of children from the proliferation of sexual exploitation through internet child pornography. The State Legislature has a duty to ensure it does everything within its power to make certain the most vulnerable of our society, our children, are protected."

Please see the policy committee analysis for a full discussion of this bill.

Analysis Prepared by: Shaun Naidu / PUB. S. / (916) 319-3744

FN: 0004095

CA B. An., A.B. 295 Assem., 8/23/1996

California Bill Analysis, Assembly Floor, 1995-1996 Regular Session, Assembly Bill 295

August 23, 1996
California Assembly
1995-1996 Regular Session

CONCURRENCE IN SENATE AMENDMENTS

AB 295 (Baldwin)

As Amended August 23, 1996

Majority vote

ASSEMBLY: 58-9 (June 2, 1996) SENATE: 24-0 (August 27, 1996)

Original Committee Reference: PUB. S.

SUMMARY: Amends specified child pornography statutes to expressly apply to depictions on computer discs and various other forms of visual depiction. Requires commercial film processors to report to law enforcement agencies if they observe a photograph sexually depicting a person under the age of 16, rather than under the age of 14 as in present law. Provides various defenses.

The Senate amendments:

1) With respect to the sale, distribution, possession, and forfeiture of obscene matter; with the sexual exploitation of a child; employment or use of a minor to perform prohibited acts; possession or control of matter that depicts minor engaging or simulating sexual conduct; forfeiture of matter depicting minor engaging in or simulating sexual conduct, this bill provides that these provisions apply to any representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film, filmstrip.

2) Add affirmative defenses to any child pornography crime:

a) It would not be a violation for a person or entity solely to provide access or connection to or form a facility, system or network over which that person has no control, provided that the person or entity has no relationship with any person actively involved in the creation, editing or knowing distribution of the prohibited material.

b) An employer would not be criminally liable for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his or her employment or agency and the employer has knowledge of, authorizes, or ratifies the conduct.

c) It would be a defense to prosecution for both a crime and a civil action based on a violation of the obscenity and pornography laws that a person has taken reasonable, effective and appropriate actions in good faith to restrict or prevent the transmission of, or access to, a prohibited communication.

3) Provide that a commercial film and photographic print processor who has knowledge of or observes a film, photograph, videotape, negative, or slide depicting a child under the age of 16 years engaged in an act of sexual conduct to report the instance of suspected child abuse to a law enforcement agency.

4) Express the Legislature's approval of the holding in People v. Cantrell, 7 Cal.App. 4th 523, that, for the purposes of the chapter relating to obscene matter, matter that "depicts a person under the age of 18 years personally engaging in personally stimulating sexual conduct" is limited to visual works that depict that conduct.

5) Incorporate additional changes to Penal Code Sections 311.2 and 311.3, proposed by AB 1734 (Frusetta) and AB 1881 (Machado), to be operative if this bill and one or both of the other bills are enacted and become effective on or before

January 1, 1997, and this bill is enacted last.
6) Incorporate additional changes to Penal Code Sections 311.4 and 311.11, proposed by AB 1881, to be operative if this bill and AB 1881 are both enacted and become effective on or before January 1, 1997, and this bill is enacted last. One such provision is a "Three Strikes" exemption.

7) Delete the provision which provided that this bill shall only become operative if AB 1881 was passed and enacted.

FISCAL EFFECT: According to the Assembly Appropriations Committee analysis, probable General Fund costs in excess of $150,000 for enforcement and incarceration. Unknown, but potentially major costs to local governments for enforcement. Crimes and infractions disclaimer.

EXISTING LAW:
1) Defines obscene "matter" as any book, magazine, newspaper, or other printed or written material, or any picture, drawing, photograph, motion picture, or other pictorial representation, or any statue or other figure, or any recording, transcription, or mechanical, chemical, or electrical reproduction, or any other article, equipment, machine, or material. Matter also means live or recorded telephone messages.
2) Requires commercial film and photographic print processors who have knowledge of or observe an image of a child under the age of 14 years engaged in an act of sexual conduct, to report the incident to law enforcement.
3) Provides that every person who knowingly sends or causes to be sent, or brings or causes to be brought, in California for sale or distribution, or in California possesses, prepares, publishes, produces, develops, duplicates or prints, with intent to distribute, exhibit to, or to exchange with a person 18 years of age or older, or who offers to distribute, distributes or exhibits matter, knowing that the matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct is guilty of a misdemeanor and shall be punished by imprisonment in the county jail for up to one year and or by a fine of $2,000. If the person has been previously convicted of a violation of this subsection, he/she is guilty of a felony.
4) Provides that every person who knowingly sends or causes to be sent, or brings or causes to be brought, in California for sale or distribution, or in California possesses, prepares, publishes, produces, develops, duplicates or prints, with intent to distribute, exhibit to, or exchange with a person 18 years of age or older, or who offers to distribute, distributes or exhibits matter, knowing that the matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct, as defined by Penal Code Section 311.4, is guilty of a felony.
5) Provides that a person is guilty of sexual exploitation of a child when he or she knowingly develops, duplicates, prints or exchanges any file, photograph, video tape, negative or slide in which a person under the age of 18 years is engaged in an act of sexual conduct. If convicted, the defendant shall be punished by a fine of not more than $2,000 and/or by imprisonment in county jail for not more than one year. If such person has been previously convicted of a violation of Penal Code Section 311.3(a) or any section in this chapter, he/she shall be punished by imprisonment in state prison.
6) Provides that every person who, with knowledge that a person is a minor, or who, while in possession of any facts on the basis of which he or she should reasonably know that the person is a minor, hires, employs or uses the minor to do or assist in any of the acts described in Penal Code Section 311.2 is, for a first offense, is guilty of a misdemeanor. If the person has previously been convicted, he or she shall be punished according to Penal Code Section 311.9 and may be fined in an amount not to exceed $50,000.

7) Provides that every person who, with knowledge that a person is a minor under the age of 18 years, or who, while in possession of any facts on the basis of which he or she should reasonably know that the person is a minor under the age of 18 years, knowingly promotes, employs, uses, persuades, induces or coerces a minor under the age of 18 years, or any parent or guardian of a minor under the age 18 years under his or her control who knowingly permits the minor, to engage in or assist others to engage in either posing or modeling alone or with others for purposes of preparing a film, photograph, negative, slide or live performance involving sexual conduct by a minor under the age of 18 years alone or with other persons or animals, for commercial purposes, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six or eight years.
8) Provides that every person who knowingly possesses or controls any matter, the production of which involves the use of a person under 18 years old, knowing that the matter depicts a person under the age of 18 personally engaging in or simulating sexual conduct, as defined, shall be punished by imprisonment in county jail for up to one year and/or a fine for $2,500.
9) Provides that matter which depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct, as defined, and which is in the possession of any city, county, city and county, or state official or agency is subject to forfeiture, as specified.

10) Provides that "Sexual conduct" is defined as sexual intercourse, oral copulation, anal intercourse, anal oral copulation, masturbation, bestiality, sexual sadism, sexual masochism, penetration of the vagina or rectum by any object in a lewd or lascivious manner, exhibition of the genitals, pubic, or rectal area for the purpose of sexual stimulation of the viewer, and as any lewd or lascivious act committed upon or with a child's body, with the intent arousing or appealing to the lust, passions, or sexual desires of the adult or child.

AS PASSED BY THE ASSEMBLY, this bill:
1) Added data storage media, CD-ROM, computer-generated equipment or any other computer-generated image or audio representation, to the definition of "matter" as it applies to obscene matter.
2) Raised the age of child sexual conduct that needs to be reported from 14 to 18.
3) Was joined with AB 1881 so that this bill would only become operative if AB 1881 of the 1995-96 Legislative Session was chaptered and became effective on or before January 1, 1996.

BACKGROUND: According to the author, this bill will ensure effective prosecution of existing obscenity laws by expressly including computers to the definition of obscene matter.

Pedophiles often use child pornography as a "teaching tool" in their molestations. Pornographic material depicting children involved in sexual activities is frequently utilized to sexually stimulate the molester, desensitize children and educate them to the desire of the molester, blackmail children into silence, and facilitate the molestation of additional children.

ARGUMENTS IN SUPPORT: Supporters argue that this measure is necessary to bring California's law against obscene matter up to date with respect to the advent and use of new technologies.

ARGUMENTS IN OPPOSITION: Opponents argue that this bill attempts to extend the obscenity laws into the evolving world of cyberspace. Extending existing laws to the evolving and expanding information superhighway raises many complicated constitutional and policy implications.

Analysis prepared by: Martin Gonzalez / apubs / (916) 445-3268

FN 029642

CA B. An., A.B. 295 Assem., 8/23/1996

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 300 South Grand Avenue, Suite 1300, Los Angeles, California 90071.

On August 31, 2017, I served true copies of the following document(s) described as **MOTION FOR JUDICIAL NOTICE on** the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY FEDEX: I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 31, 2017, at Los Angeles, California.

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SERVICE LIST
Don L. Mathews, et al. v. Kamala D. Harris, et al.
Case No. BC573135

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