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CRIMES AND OFFENSES Offenses Against Public Health and Morals: Change Certain Provisions Relating to Sexual Offenses, Pimping, and Sexual Battery; Include Depiction of any Portion of a Minor's Body Part in the Prohibition Against Sexual Exploitation of Children

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CRIMES AND OFFENSES

Offenses Against Public Health and Morals: Change Certain Provisions Relating to Sexual Offenses, Pimping, and Sexual Battery; Include Depiction of any Portion of a Minor's Body Part in the Prohibition Against Sexual Exploitation of Children

CODE SECTIONS:	O.C.G.A. §§ 16-6-11, -22.1, 16-12-100, -100.2 (amended)
BILL NUMBER:	HB 462
ACT NUMBER:	216
GEORGIA LAWS:	2003 Ga. Laws 573
SUMMARY:	The Act criminalizes transporting a person for the purpose of prostitution. It raises the punishment for sexual battery against a child under the age of 16 from a misdemeanor to a felony. It adds language criminalizing the depiction of a minor's body part engaged in any sexually explicit conduct. Finally, the Act substantially amends the Code language relating to computer pornography, obscene Internet contact with a child, and child exploitation prevention.
EFFECTIVE DATE:	June 2, 2003

History

Previously, Code section 16-6-11, the anti-pimping statute, stated that directing someone to a place for the purposes of prostitution was an act punishable by law.¹ This language left a loophole open where, for example, a taxicab company could legally transport people for the purposes of prostitution, so long as there were no directions given.²

1. See 1970 Ga. Laws 236, § 2, at 237 (formerly found at O.C.G.A. § 16-6-11 (1999)).

2. See Telephone Interview with Sen. David Adelman, Senate District No. 42 (May 13, 2003) [hereinafter Adelman Interview].

The child exploitation statutes, which dealt with sexual battery, computer pornography, and obscene Internet contact with a child, were problematic because of the different punishments applied in the Georgia state courts versus the federal courts.³ During the 2002 Georgia General Assembly, a bill was proposed and passed the Senate unanimously; however, the House did not have time to address it.⁴ That bill was proposed again in the 2003 session as SB 51, but the sponsor of the bill, Senator Bill Hamrick of the 30th district, learned of another bill, HB 462, that also addressed all the concerns of his bill and more.⁵ HB 462 addressed the issue of morphing and would have changed several Code sections that SB 51 did not address.⁶ Therefore, he supported the more comprehensive HB 462 to the exclusion of SB 51.⁷

HB 462 and SB 51 both addressed the discrepancy between Georgia law, where these crimes were misdemeanors, and federal law, where these crimes were felonies.⁸ An undercover task force called “Innocent Images,” a combination of state and federal agencies, was already operating and apprehending predators on the Internet.⁹ Unfortunately, because Georgia treated the crimes as misdemeanors, the task force prosecuted all of its cases in the federal courts.¹⁰ This created a tremendous burden on the federal courts, which Senator Hamrick hoped to alleviate by making the punishment in the Georgia courts equivalent to the punishment in the federal courts.¹¹

Another concern was “morphing,” which is taking images of a child and combining them with legal sexually explicit images of adults.¹² Lawmakers were concerned that this was a legal version of child pornography, because there was no actual sexual exploitation of

3. See Interview with Sen. Bill Hamrick, Senate District No. 30 (Apr. 22, 2003) [hereinafter Hamrick Interview].

4. See Interview with Sen. David Shafer, Senate District No. 48 (Apr. 3, 2003) [hereinafter Shafer Interview].

5. See Telephone Interview with Rep. Mike Boggs, House District No. 145 (May 15, 2003) [hereinafter Boggs Interview]; Hamrick Interview, *supra* note 3.

6. See Hamrick Interview, *supra* note 3.

7. See *id.*

8. See *id.*; see also Shafer Interview, *supra* note 4.

9. See Hamrick Interview, *supra* note 3.

10. See *id.*

11. See *id.*

12. See Boggs Interview, *supra* note 5.

a child involved in making the images.¹³ The U.S. Supreme Court recently decided *Ashcroft v. Free Speech Coalition*,¹⁴ where the Court could have addressed the issue of morphing but declined to do so, leaving the issue open.¹⁵

HB 462

Introduction

HB 462 was originally drafted as a joint effort between Representative Mike Boggs of the 145th district and Georgia Attorney General Thurbert Baker after they realized that they were both working on similar concerns.¹⁶ As originally introduced, HB 462 would have provided for an amendment to Code section 16-6-4, as well as changes to Code sections 16-12-100 and 16-12-100.2.¹⁷

The bill, as introduced, would have added language to Code section 16-6-4, requiring a three-year mandatory sentence for crimes of child molestation and aggravated child molestation.¹⁸ To address the issue of morphing, the bill would have added language to Code section 16-12-100 relating to “portion[s] of a minor’s body.”¹⁹ Because the U.S. Supreme Court had not ruled on the issue, Representative Boggs felt fairly comfortable clarifying the law to prevent morphing.²⁰ The original bill would have raised the punishment in Code section 16-12-100.2 to a felony for using, or attempting to use, an Internet or on-line service to “seduce, solicit, lure or entice . . . a child.”²¹ This change comports with federal law and could alleviate the number of cases brought in a federal court.²² It also would have created the crime of “obscene Internet contact with a

13. *See id.*

14. *See* 535 U.S. 234 (2002).

15. *See* Boggs Interview, *supra* note 5. The statute at issue in the case had a provision regarding morphing, but that section was not being challenged. Because it was not before the Court, the Supreme Court declined to comment on the issue. *See Ashcroft*, 535 U.S. at 242.

16. *See* Boggs Interview, *supra* note 5.

17. *See* HB 462, as introduced, 2003 Ga. Gen. Assem.

18. *See id.*

19. *See id.*; Boggs Interview, *supra* note 5.

20. *See* Boggs Interview, *supra* note 5.

21. *Compare* 1999 Ga. Laws 232, § 2, at 233 (formerly found at O.C.G.A. § 16-12-100.2 (1999)), with HB 462, as introduced, 2003 Ga. Gen. Assem.

22. *See* Hamrick Interview, *supra* note 3.

child,” which the bill defined as a person having contact with a child or someone who that person believes is a child via a computer on-line service or Internet service.²³

The Defense Bar opposed HB 462, as introduced, because of the mandatory three-year sentence proposed in section 1.²⁴ Microsoft also expressed concerns about the liability of an Internet Service Provider (“ISP”) under the new computer pornography and obscene Internet contact statutes.²⁵

House Consideration

The Speaker sent the bill to the House Judiciary Committee, which offered a substitute.²⁶ The House Committee removed the mandatory sentencing language in the bill relating to Code section 16-6-4.²⁷ The House Committee instead added a section that would have amended Code section 16-6-22.1, making it a felony for a person to commit sexual battery against a child under the age of 16.²⁸ The House Committee left the rest of the bill unchanged.²⁹ HB 462, as substituted, passed the House on March 27, 2003, by a hand vote of 111 to 0.³⁰

23. See HB 462, as introduced, 2003 Ga. Gen. Assem. Internet service includes but is not limited to a local bulletin board service, Internet chat room, e-mail, or on-line messaging service, and the contact involves any matter containing explicit verbal descriptions or narrative accounts of sexually explicit nudity, sexual conduct, sexual excitement, or sadomasochistic abuse that is intended to arouse or satisfy the sexual desire of either the child or the person. *Id.*

24. See Boggs Interview, *supra* note 5.

25. See *id.*

26. See HB 462 (HCS), 2003 Ga. Gen. Assem.; State of Georgia Final Composite Status Sheet, HB 462, Apr. 25, 2003.

27. Compare HB 462, as introduced, 2003 Ga. Gen. Assem., with HB 462 (HCS), 2003 Ga. Gen. Assem.

28. Compare HB 462, as introduced, 2003 Ga. Gen. Assem., with HB 462 (HCS), 2003 Ga. Gen. Assem.

29. Compare HB 462, as introduced, 2003 Ga. Gen. Assem., with HB 462 (HCS), 2003 Ga. Gen. Assem.

30. See Georgia House of Representatives Voting Record, HB 462 (Mar. 27, 2003).

Senate Consideration

After introduction in the Senate, HB 462 was assigned to the Senate Judiciary Committee, which favorably reported the bill on April 11, 2003.³¹ On the Senate floor, the bill underwent minor revisions via two amendments.³² Senator Robert Lamutt of the 21st district proposed the first amendment to add the ISP liability protections Microsoft requested.³³ The amendment provided that “[n]o owner or operator of a public computer on-line service, Internet service, or local bulletin board service shall be held liable on account of any action taken in good faith in providing the aforementioned services.”³⁴ Senator Lamutt proposed this amendment to clarify that once an ISP became aware of a problem and moved to correct it, the ISP could not be held liable.³⁵

In an attempt to clarify the law and close any potential loopholes the “directing” language caused, the second floor amendment would have amended the anti-pimping statute to expressly criminalize transporting a person for the purpose of prostitution.³⁶ Additionally, the amendment would have changed the language from “knowing” to “knows or should know” that “the direction or transportation is for the purpose of prostitution.”³⁷ Senator David Adelman of the 42nd district proposed this amendment as part of a continuing effort to implement strong anti-pimping legislation.³⁸ Both amendments passed unanimously and without opposition.³⁹ HB 462, as amended, passed the Senate unanimously by a vote of 51 to 0 on April 22, 2003, and went back to the House.⁴⁰ The House passed the bill, as

31. See State of Georgia Final Composite Status Sheet, HB 462, Apr. 25, 2003.

32. Compare HB 462 (HCS), 2003 Ga. Gen. Assem., with HB 462 (SFA), 2003 Ga. Gen. Assem.

33. Compare HB 462 (HCS), 2003 Ga. Gen. Assem., with HB 462 (SFA), 2003 Ga. Gen. Assem.

34. HB 462 (SFA), 2003 Ga. Gen. Assem.

35. See Audio Recording of Senate Proceedings, Apr. 22, 2003, at http://www.georgia.gov/00/channel/0,2141,4802_6107105,00.html [hereinafter Senate Audio].

36. See Adelman Interview, *supra* note 2. Compare 1970 Ga. Laws 236 (formerly found at O.C.G.A. § 16-6-11 (1999)), with HB 462 (SFA), 2003 Ga. Gen. Assem.

37. See HB 462 (SFA), 2003 Ga. Gen. Assem.

38. See Senate Audio, *supra* note 35.

39. See *id.* Senator Lamutt’s amendment passed by a vote of 40 to 0, and Senator Adelman’s amendment passed by a vote of 42 to 0. *Id.*

40. See State of Georgia Final Composite Status Sheet, HB 462, Apr. 25, 2003; Georgia Senate Voting Record, HB 462 (Apr. 22, 2003).

amended by the Senate, unanimously on April 25, 2003, the last day of the legislative session, by a vote of 168 to 0.⁴¹

The Act

Section 1 of the Act amends the anti-pimping statute, Code section 16-6-11, to criminalize not only directing a person for the purposes of prostitution but also transporting them for that purpose.⁴² It also amends the knowledge requirement from “knowing” to “knows or should know,” thus closing another possible loophole.⁴³ Section 1.1 amends the sexual battery statute, Code section 16-6-22.1.⁴⁴ The revised section makes sexual battery against a child under 16 years-of-age a felony.⁴⁵

Section 2 of the Act amends Code section 16-12-100, which criminalizes the sexual exploitation of children.⁴⁶ It adds the language “or a portion of a minor’s body” after “minor” throughout the statute.⁴⁷ The drafters added this language to combat the practice of morphing.⁴⁸

Section 3, which amends Code section 16-12-100.2, also combats morphing by defining a child as a person “[w]ho was a child at the time the visual depiction was created, adapted, or modified, or whose image as a child was used in creating, adapting, or modifying the visual depiction.”⁴⁹ This section also creates the crime of “obscene Internet contact with a child.”⁵⁰ Finally, section 3 of the Act changes the punishment for certain crimes listed in Code section 16-12-100.2

41. See Georgia House of Representatives Voting Record, HB 462 (Apr. 25, 2003); Audio Recording of House Proceedings, Apr. 25, 2003, at http://www.georgia.gov/00/channel/0,2141,4802_6108105,00.html.

42. Compare 1968 Ga. Laws 1249, § 1 (formerly found at O.C.G.A. § 16-6-11 (1999)), with O.C.G.A. § 16-6-11 (Supp. 2003).

43. Compare 1968 Ga. Laws 1249, § 1 (formerly found at O.C.G.A. § 16-6-11 (1999)), with O.C.G.A. § 16-6-11 (Supp. 2003).

44. Compare 1990 Ga. Laws 1003, § 2 (formerly found at O.C.G.A. § 16-6-22.1 (1999)), with O.C.G.A. § 16-6-22.1 (Supp. 2003).

45. See O.C.G.A. § 16-6-22.1 (Supp. 2003).

46. Compare 1983 Ga. Laws 1437, § 1 (formerly found at O.C.G.A. § 16-12-100 (2002)), with O.C.G.A. § 16-12-100 (Supp. 2003).

47. See O.C.G.A. § 16-12-100 (Supp. 2003).

48. See Boggs Interview, *supra* note 5.

49. O.C.G.A. § 16-12-100.2 (Supp. 2003).

50. See *id.*

from a misdemeanor to a felony.⁵¹ This change allows the Georgia courts to punish predators captured by the Innocent Images task force as severely as if they were prosecuted in the federal courts.⁵²

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51. Compare 1999 Ga. Laws 233, § 2 (formerly found at O.C.G.A. § 16-12-100.2 (2002)), with O.C.G.A. § 16-12-100.2 (Supp. 2003).

52. See Boggs Interview, *supra* note 5; Hamrick Interview, *supra* note 3.