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H.B. No. 236

A BILL TO BE ENTITLED

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AN ACT

relating to the punishment for the offense of obscenity and to certain consequences related to convictions for certain sex offenses.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 43.23, Penal Code, is amended by amending Subsections (b) and (d) and adding Subsections (h), (i), and (j) to read as follows:

(b) Except as provided by Subsection (h), an [An] offense under Subsection (a) is a state jail felony.

(d) Except as provided by Subsection (h), an [An] offense under Subsection (c) is a Class A misdemeanor.

(h) The punishment for an offense under Subsection (a) is increased to the punishment for a felony of the third degree and the punishment for an offense under Subsection (c) is increased to the punishment for a state jail felony if it is shown on the trial of the offense that obscene material that is the subject of the offense visually depicts activities described by Section 43.21(a)(1)(B) engaged in by:

(1) a child younger than 18 years of age at the time the image of the child was made;

(2) an image that to a reasonable person would be virtually indistinguishable from the image of a child younger than 18 years of age; or

1 (3) an image created, adapted, or modified to be the
2 image of an identifiable child.

3 (i) In this section, "identifiable child" means a person,
4 recognizable as an actual person by the person's face, likeness, or
5 other distinguishing characteristic, such as a unique birthmark or
6 other recognizable feature:

7 (1) who was younger than 18 years of age at the time
8 the visual depiction was created, adapted, or modified; or

9 (2) whose image as a person younger than 18 years of
10 age was used in creating, adapting, or modifying the visual
11 depiction.

12 (j) An attorney representing the state who seeks an increase
13 in punishment under Subsection (h)(3) is not required to prove the
14 actual identity of an identifiable child.

15 SECTION 2. Section 12.42(c)(2), Penal Code, is amended to
16 read as follows:

17 (2) A defendant shall be punished by imprisonment in
18 the institutional division for life if:

19 (A) the defendant is convicted of an offense:

20 (i) under Section 22.021 or 22.011, Penal
21 Code;

22 (ii) under Section 20.04(a)(4), Penal Code,
23 if the defendant committed the offense with the intent to violate or
24 abuse the victim sexually; or

25 (iii) under Section 30.02, Penal Code,
26 punishable under Subsection (d) of that section, if the defendant
27 committed the offense with the intent to commit a felony described

1 by Subparagraph (i) or (ii) or a felony under Section 21.11 or
2 22.011, Penal Code; and

3 (B) the defendant has been previously convicted
4 of an offense:

5 (i) under Section 43.25 or 43.26, Penal
6 Code, or an offense under Section 43.23, Penal Code, punishable
7 under Subsection (h) of that section;

8 (ii) under Section 21.11, 22.011, 22.021,
9 or 25.02, Penal Code;

10 (iii) under Section 20.04(a)(4), Penal
11 Code, if the defendant committed the offense with the intent to
12 violate or abuse the victim sexually;

13 (iv) under Section 30.02, Penal Code,
14 punishable under Subsection (d) of that section, if the defendant
15 committed the offense with the intent to commit a felony described
16 by Subparagraph (ii) or (iii); or

17 (v) under the laws of another state
18 containing elements that are substantially similar to the elements
19 of an offense listed in Subparagraph (i), (ii), (iii), or (iv).

20 SECTION 3. Section 25.08(c), Penal Code, is amended to read
21 as follows:

22 (c) An offense under this section is a felony of the third
23 degree, except that the offense is a felony of the second degree if
24 the actor commits the offense with intent to commit an offense under
25 Section 43.25.

26 SECTION 4. Sections 43.25(a)(2) and (7), Penal Code, are
27 amended to read as follows:

1 (2) "Sexual conduct" means sexual contact, actual or
2 simulated sexual intercourse, deviate sexual intercourse, sexual
3 bestiality, masturbation, sado-masochistic abuse, or lewd
4 exhibition of the genitals, the anus, or any portion of the female
5 breast below the top of the areola.

6 (7) "Deviate sexual intercourse" and "sexual contact"
7 have the meanings assigned [~~has the meaning defined~~] by Section
8 43.01.

9 SECTION 5. Section 43.25(f), Penal Code, is amended to read
10 as follows:

11 (f) It is an affirmative defense to a prosecution under this
12 section that:

13 (1) [~~the defendant, in good faith, reasonably believed~~
14 ~~that the child who engaged in the sexual conduct was 18 years of age~~
15 ~~or older,~~

16 [~~(2)~~] the defendant was the spouse of the child at the
17 time of the offense;

18 (2) [~~(3)~~] the conduct was for a bona fide educational,
19 medical, psychological, psychiatric, judicial, law enforcement, or
20 legislative purpose; or

21 (3) [~~(4)~~] the defendant is not more than two years
22 older than the child.

23 SECTION 6. Subchapter B, Chapter 43, Penal Code, is amended
24 by adding Section 43.27 to read as follows:

25 Sec. 43.27. DUTY TO REPORT. (a) For purposes of this
26 section, "visual material" has the meaning assigned by Section
27 43.26.

1 (b) A business that develops or processes visual material
2 and determines that the material may be evidence of a criminal
3 offense under this subchapter shall report the existence of the
4 visual material to a local law enforcement agency.

5 SECTION 7. Article 59.01(2), Code of Criminal Procedure, is
6 amended to read as follows:

7 (2) "Contraband" means property of any nature,
8 including real, personal, tangible, or intangible, that is:

9 (A) used in the commission of:

10 (i) any first or second degree felony under
11 the Penal Code;

12 (ii) any felony under Section 15.031(b),
13 21.11, 38.04, Subchapter B of Chapter 43, [~~43.25, or 43.26~~] or
14 Chapter 29, 30, 31, 32, 33, 33A, or 35, Penal Code; or

15 (iii) any felony under The Securities Act
16 (Article 581-1 et seq., Vernon's Texas Civil Statutes);

17 (B) used or intended to be used in the commission
18 of:

19 (i) any felony under Chapter 481, Health
20 and Safety Code (Texas Controlled Substances Act);

21 (ii) any felony under Chapter 483, Health
22 and Safety Code;

23 (iii) a felony under Chapter 153, Finance
24 Code;

25 (iv) any felony under Chapter 34, Penal
26 Code;

27 (v) a Class A misdemeanor under Subchapter

1 B, Chapter 365, Health and Safety Code, if the defendant has been
2 previously convicted twice of an offense under that subchapter; or

3 (vi) any felony under Chapter 152, Finance
4 Code;

5 (C) the proceeds gained from the commission of a
6 felony listed in Paragraph (A) or (B) of this subdivision or a crime
7 of violence; or

8 (D) acquired with proceeds gained from the
9 commission of a felony listed in Paragraph (A) or (B) of this
10 subdivision or a crime of violence.

11 SECTION 8. Articles 62.01(5) and (6), Code of Criminal
12 Procedure, are amended to read as follows:

13 (5) "Reportable conviction or adjudication" means a
14 conviction or adjudication, regardless of the pendency of an
15 appeal, that is:

16 (A) a conviction for a violation of Section 21.11
17 (Indecency with a child), 22.011 (Sexual assault), 22.021
18 (Aggravated sexual assault), or 25.02 (Prohibited sexual conduct),
19 Penal Code;

20 (B) a conviction for a violation of Section 43.05
21 (Compelling prostitution), 43.25 (Sexual performance by a child),
22 or 43.26 (Possession or promotion of child pornography), Penal
23 Code, or a conviction for a violation of Section 43.23 (Obscenity),
24 Penal Code, if the offense is punishable under Subsection (h) of
25 that section;

26 (C) a conviction for a violation of Section
27 20.04(a)(4) (Aggravated kidnapping), Penal Code, if the defendant

1 committed the offense with intent to violate or abuse the victim
2 sexually;

3 (D) a conviction for a violation of Section 30.02
4 (Burglary), Penal Code, if the offense is punishable under
5 Subsection (d) of that section and the defendant committed the
6 offense with intent to commit a felony listed in Paragraph (A) or
7 (C);

8 (E) a conviction for a violation of Section 20.02
9 (Unlawful restraint), 20.03 (Kidnapping), or 20.04 (Aggravated
10 kidnapping), Penal Code, if the judgment in the case contains an
11 affirmative finding under Article 42.015;

12 (F) the second conviction for a violation of
13 Section 21.08 (Indecent exposure), Penal Code;

14 (G) a conviction for an attempt, conspiracy, or
15 solicitation, as defined by Chapter 15, Penal Code, to commit an
16 offense listed in Paragraph (A), (B), (C), (D), or (E);

17 (H) an adjudication of delinquent conduct:

18 (i) based on a violation of one of the
19 offenses listed in Paragraph (A), (B), (C), (D), or (G) or, if the
20 order in the hearing contains an affirmative finding that the
21 victim or intended victim was younger than 17 years of age, one of
22 the offenses listed in Paragraph (E); or

23 (ii) for which two violations of the
24 offense listed in Paragraph (F) are shown;

25 (I) a deferred adjudication for an offense listed
26 in:

27 (i) Paragraph (A), (B), (C), (D), or (G); or

1 (ii) Paragraph (E) if the papers in the case
2 contain an affirmative finding that the victim or intended victim
3 was younger than 17 years of age;

4 (J) a conviction under the laws of another state,
5 federal law, the laws of a foreign country, or the Uniform Code of
6 Military Justice for an offense containing elements that are
7 substantially similar to the elements of an offense listed under
8 Paragraph (A), (B), (C), (D), (E), or (G);

9 (K) an adjudication of delinquent conduct under
10 the laws of another state, or federal law, or the laws of a
11 foreign country based on a violation of an offense containing
12 elements that are substantially similar to the elements of an
13 offense listed under Paragraph (A), (B), (C), (D), (E), or (G);

14 (L) the second conviction under the laws of
15 another state, federal law, the laws of a foreign country, or the
16 Uniform Code of Military Justice for an offense containing elements
17 that are substantially similar to the elements of the offense of
18 indecent exposure; or

19 (M) the second adjudication of delinquent
20 conduct under the laws of another state, or federal law, or the
21 laws of a foreign country based on a violation of an offense
22 containing elements that are substantially similar to the elements
23 of the offense of indecent exposure.

24 (6) "Sexually violent offense" means any of the
25 following offenses committed by a person 17 years of age or older:

26 (A) an offense under Section 21.11(a)(1)
27 (Indecency with a child), 22.011 (Sexual assault), or 22.021

1 (Aggravated sexual assault), Penal Code;

2 (B) an offense under Section 43.25 (Sexual
3 performance by a child), Penal Code;

4 (C) an offense under Section 20.04(a)(4)
5 (Aggravated kidnapping), Penal Code, if the defendant committed the
6 offense with intent to violate or abuse the victim sexually;

7 (D) an offense under Section 30.02 (Burglary),
8 Penal Code, if the offense is punishable under Subsection (d) of
9 that section and the defendant committed the offense with intent to
10 commit a felony listed in Paragraph (A) or (C) of Subdivision (5);
11 or

12 (E) an offense under the laws of another state,
13 federal law, the laws of a foreign country, or the Uniform Code of
14 Military Justice if the offense contains elements that are
15 substantially similar to the elements of an offense listed under
16 Paragraph (A), (B), (C), or (D).

17 SECTION 9. Article 62.0101(a), Code of Criminal Procedure,
18 is amended to read as follows:

19 (a) The department is responsible for determining for the
20 purposes of this chapter whether an offense under the laws of
21 another state, federal law, the laws of a foreign country, or the
22 Uniform Code of Military Justice contains elements that are
23 substantially similar to the elements of an offense under the laws
24 of this state.

25 SECTION 10. Articles 62.021(a) and (c), Code of Criminal
26 Procedure, are amended to read as follows:

27 (a) This article applies to a person who:

1 (1) is required to register as a sex offender under:

2 (A) the laws of another state with which the
3 department has entered into a reciprocal registration agreement;
4 [~~or~~]

5 (B) federal law or the Uniform Code of Military
6 Justice; or

7 (C) the laws of a foreign country; and

8 (2) is not otherwise required to register under this
9 chapter because:

10 (A) the person does not have a reportable
11 conviction for an offense under the laws of the other state, federal
12 law, the laws of the foreign country, or the Uniform Code of
13 Military Justice containing elements that are substantially
14 similar to an offense requiring registration under this chapter; or

15 (B) the person does not have a reportable
16 adjudication of delinquent conduct based on a violation of an
17 offense under the laws of the other state, [~~or~~] federal law, or the
18 laws of the foreign country containing elements that are
19 substantially similar to an offense requiring registration under
20 this chapter.

21 (c) The duty to register for a person described by
22 Subsection (a) expires on the date the person's duty to register
23 would expire under the laws of the other state or foreign country
24 had the person remained in that state or foreign country, under
25 federal law, or under the Uniform Code of Military Justice, as
26 applicable.

27 SECTION 11. Article 62.12(a), Code of Criminal Procedure,

1 as amended by Chapters 211 and 1297, Acts of the 77th Legislature,
2 Regular Session, 2001, is reenacted and amended to read as follows:

3 (a) The duty to register for a person ends when the person
4 dies if the person has a reportable conviction or adjudication,
5 other than an adjudication of delinquent conduct, for:

6 (1) a sexually violent offense;

7 (2) an offense under Section 25.02, 43.05(a)(2), or
8 43.26, Penal Code, or an offense punishable under Section 43.23(h),
9 Penal Code;

10 (3) an offense under Section 21.11(a)(2), Penal Code,
11 if before or after the person is convicted or adjudicated for the
12 offense under Section 21.11(a)(2), Penal Code, the person receives
13 or has received another reportable conviction or adjudication,
14 other than an adjudication of delinquent conduct, for an offense or
15 conduct that requires registration under this chapter; or

16 (4) an offense under Section 20.02, 20.03, or 20.04,
17 Penal Code, or an attempt, conspiracy, or solicitation to commit
18 one of those offenses, if:

19 (A) the judgment in the case contains an
20 affirmative finding under Article 42.015, [~~as added by Chapter~~
21 ~~1193, Acts of the 76th Legislature, Regular Session, 1999,~~] or for a
22 deferred adjudication, the papers in the case contain an
23 affirmative finding that the victim or intended victim was younger
24 than 17 years of age; and

25 (B) before or after the person is convicted or
26 adjudicated for the offense under Section 20.02, 20.03, or 20.04,
27 Penal Code, the person receives or has received another reportable

1 conviction or adjudication, other than an adjudication of
2 delinquent conduct, for an offense or conduct that requires
3 registration under this chapter.

4 SECTION 12. (a) The change in law made by this Act applies
5 only to an offense committed on or after the effective date of this
6 Act. For purposes of this section, an offense is committed before
7 the effective date of this Act if any element of the offense occurs
8 before the effective date.

9 (b) An offense committed before the effective date of this
10 Act is covered by the law in effect when the offense was committed,
11 and the former law is continued in effect for that purpose.

12 SECTION 13. The change in law made by this Act in amending
13 Articles 62.01, 62.0101, and 62.021, Code of Criminal Procedure,
14 applies to a person subject to registration under Chapter 62, Code
15 of Criminal Procedure, for an offense or conduct committed before,
16 on, or after the effective date of this Act.

17 SECTION 14. This Act takes effect September 1, 2003.