



**CRIME OF CHILD PORNOGRAPHY:
REVISE**

**House Bill 5296 (Substitute H-2)
Sponsor: Rep. Gene DeRossett**

**House Bill 5297 with committee
amendment
Sponsor: Rep. Michael Bishop**

**Committee: Criminal Justice
First Analysis (3-20-02)**

THE APPARENT PROBLEM:

Despite years of criminalizing the possession, distribution, and creation of child pornography, the problem persists. In addition, technical advances are being utilized to increase circulation of child pornographic materials and make it harder to detect offenders. Just this week, federal investigators released information on a ring that used e-mail to circulate pornographic materials involving minors. According to news accounts, "Operation Candyman" exposed an e-mail ring that involved about 7,000 computer addresses – the vast majority of those within the U.S. Suspects already arrested or under investigation include adults whose employment puts them in daily contact with children – two priests, a school bus driver, a teacher's aide at a preschool and day care center, a child photographer, Little League baseball coaches, a registered foster-care parent, and several law enforcement officers.

Child pornography is not a victimless crime. Besides the emotional or physical harm done to the children who are forced, coerced, or enticed into posing for the pictures, research shows a strong correlation between the viewing of child pornography and the act of child molestation. For those and other reasons, it is important to have laws that are adequate to stem the crime of child pornography and to punish offenders.

Recently, several weaknesses in the state's laws regarding child pornography have been identified. One weakness is that Michigan is one of a dozen states that still makes possession of child pornographic materials a misdemeanor; the majority of states designate it as a felony offense. Further, as computer technology has developed, so have pornographers' attempts to circumvent the law. Current law needs to be expanded to cover so-called "virtual" materials (computer-generated or altered

pictures) of minors engaging in prohibited acts. Further, the current definition of "child" as it relates to child pornography has led to some confusion in the courts as to who bears the burden of proving that an individual depicted in pornographic materials meets the statutory definition of a child.

Legislation has been offered to address these concerns.

THE CONTENT OF THE BILLS:

The bills would clarify the definition of "child" for the purposes of child pornography, increase the penalty for possession of child pornography, expand the prohibition to include "virtual" child pornography, and include the crime of possessing child pornography in the sentencing guidelines. The bills would take effect July 1, 2002. Specifically, the bills would do the following:

House Bill 5296 would amend the Michigan Penal Code (MCL 750.145c). The bill would clarify the definition of "child" to mean a person who was less than 18 years of age; however, the bill would specify that it would be an affirmative defense to a prosecution under the child pornography laws that the alleged child was a person who was emancipated by operation of law under Section 4(2) of the Emancipation of Minors Act (MCL 722.4), as proven by a preponderance of the evidence. [An emancipation occurs by operation of law when: 1) a minor is legally married; 2) a person reaches the age of 18; 3) during the period of time a minor is on active duty with the U.S. armed forces; 4) during the period of time a minor is in the custody of a law enforcement agency for the purposes of consenting to emergency medical treatment or routine medical care

House Bills 5296 and 5297 (3-20-02)

and the parent or guardian cannot be reached; and 5) during the period of time a minor is a prisoner in a facility operated by the Department of Corrections (DOC) or a youth correctional facility operated by the DOC or a private vendor for the purposes of consenting to his or her own preventive health care or medical care.]

In addition, the offense of possessing any child sexually abusive material would be increased from a misdemeanor offense to a felony. The term of imprisonment would be increased from not more than one year to not more than four years. The fine would remain the same at not more than \$10,000. Currently, it is prohibited to possess materials that the person knows, has reason to know, or should reasonably be expected to know is of a child, or the person had not taken reasonable precautions to determine the age of the child in the materials. The bill would expand the prohibition to include child sexually abusive material that included or is intended to appear to include a child or convey the impression that the material included a child. Similar provisions would be added to the prohibition on persuading or coercing a child to engage in a child sexually abusive activity and to the prohibition on distributing or promoting any child sexually abusive material or child sexually abusive activity.

Further, the definition of “child sexually abusive material” would be expanded to include any depiction, whether made or produced by electronic, mechanical, or other means and would include – in addition to what is currently in the law – pictures, videos, and computer or computer-generated images or pictures which were of a child or which appeared to include a child, or conveyed the impression that the depiction included a child engaging in a listed sexual act, as well as a computer or computer storage device containing such a photograph or computer-generated image and any reproduction or copy of such picture, video, computer, or computer-generated image.

House Bill 5297 would amend the Code of Criminal Procedure (MCL 777.16g) to specify that child sexually abusive activity or possession of child sexually abusive materials would be a Class F felony against a person with a statutory maximum term of imprisonment of four years. The bill would also make several technical corrections to statutory citations for child abuse crimes.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

The bills are needed for several reasons. First of all, Michigan is in the minority of states which still makes possession of child pornographic materials a misdemeanor. In light of recent research that shows a strong relation between the viewing of child porn and engaging in child molestation, it is imperative that the penalty be increased. The bills would make it a felony to knowingly possess any child sexually abusive materials and would increase the term of imprisonment to a maximum of four years.

Additionally, the definition of “child sexually abusive material” needs to be expanded to include any depiction of illicit acts by minors created or produced by electronic, mechanical, or other means so that it encompasses computer-generated images and pictures and those materials that appear to include a child or are meant to convey the impression that the depiction includes a child. This would circumvent the argument that a computer altered or generated picture of a child is not really a child and therefore not subject to the law’s penalties. It is important to send a clear message that even so-called “morphed” pictures of children will be dealt with seriously.

Further, the current definition of “child” as it relates to child pornography has caused some confusion in the courts. Under the current language, some courts have thrown out cases if the prosecutor couldn’t prove that the minor depicted in the materials was *not* a minor emancipated by operation of law. The problem is that a minor depicted in pornographic material may not be identifiable as to name, location, etc.; if a prosecutor cannot put a name to a picture, it is impossible for that prosecutor to prove that the minor meets the definition of a child and isn’t married or in the military. It is hard to imagine that the legislative intent of the law included creating a loophole by which suspects could evade prosecution. House Bill 5296 would close this loophole by creating an affirmative defense. Under the bill, a defendant could offer an affirmative defense to a child pornography charge by proving by a preponderance of the evidence that the person depicted in the material *was* emancipated by operation of law.

The bills are good public policy and are necessary to provide adequate protection for the state’s children.

Against:

House Bill 5296 would expand the definition of “child sexually abusive material” to include materials that appear to include a child, or that convey the impression that the depiction includes a child. This language would also be added to provisions pertaining to distributing or promoting child porn; persuading, inducing, enticing, or coercing a child to engage in illicit acts; and possessing child pornographic materials. Some feel that this language is overly broad. In defending against a charge on this language, the defense could maintain that this provision is so broad as to make it impossible to determine if it would indeed encompass the actions of the defendant. If the intent is to prevent the circumvention of the laws via computer “morphing” of images of children, the bill should be narrowly focused – such as by specifying that the bill would pertain to images of children that had been altered by any means, including being digitally altered.

POSITIONS:

The Prosecuting Attorneys Association of Michigan (PAAM) supports the bills. (3-19-02)

The Michigan Family Forum supports the bills. (3-19-02)

Analyst: S. Stutzky

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.