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SFA**BILL ANALYSIS**

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House Bill 5296 (Substitute H-3 as passed by the House)
House Bill 5297 (Substitute H-1 as passed by the House)
Sponsor: Representative Gene DeRossett (House Bill 5296)
Representative Michael Bishop (House Bill 5297)
House Committee: Criminal Justice
Senate Committee: Judiciary

Date Completed: 12-3-02

CONTENT

House Bill 5296 (H-3) would amend the Michigan Penal Code to do all of the following:

- **Expand the scope of violations concerning involvement in child sexually abusive activity or material, by including circumstances in which the offender knew or should have known that a depiction appeared to include a child or did not take reasonable precautions to determine the child's age, and expanding the definition of "child sexually abusive material" to depictions that appeared to include a child.**
- **Increase the penalty for knowingly possessing child sexually abusive material.**
- **Specify that it would be an affirmative defense that the alleged child was emancipated by law.**
- **Provide that, if a defendant proposed to offer evidence to establish that a depiction appearing to include a child was not created using a depiction of any part of an actual person under the age of 18, he or she would have to file and serve upon the prosecuting attorney a notice of that intent.**

House Bill 5297 (H-1) would amend the Code of Criminal Procedure to include possession of child sexually abusive material in the sentencing guidelines. A violation would be a Class F felony against a person, with a statutory maximum sentence of four years' imprisonment, as proposed in House Bill 5296 (H-3). The bill is tie-barred to House Bill 5296.

The bills include an effective date of December 1, 2002.

A more detailed description of House Bill 5296 (H-3) follows.

Scope of Violations, Penalty, & Definitions

Scope. Persuading, inducing, enticing, coercing, causing, or knowingly allowing a child to engage in a child sexually abuse activity for the purpose of producing any child sexually abusive material, or arranging for, producing, making, or financing, or attempting, preparing, or conspiring to arrange for, produce, make, or finance any child sexually abusive activity or child sexually abusive material, is a felony punishable by up to 20 years' imprisonment, a maximum fine of \$100,000, or both. The violation and penalty apply if the offender knows, has reason to know, or should reasonably be expected to know that the child was a child or the offender has not taken reasonable precautions to determine the age of the child. Under the bill, the

violation and penalty also would apply if the offender knew, had reason to know, or should reasonably be expected to know that the child sexually abusive material included a child or that the depiction constituting the material appeared to include a child.

It is a felony, punishable by up to seven years imprisonment, a maximum fine of \$50,000, or both, to distribute or promote, or finance the distribution or promotion of, or receive for the purpose of distributing or promoting, or conspire, attempt, or prepare, to distribute, receive, finance, or promote any child sexually abusive material or child sexually abusive activity. The violation and penalty apply if the offender knows, has reason to know, or should reasonably be expected to know that the child is a child. Under the bill, the violation and penalty also would apply if the offender knew, had reason to know, or should reasonably be expected to know that the child sexually abusive material included a child or that the depiction constituting the child sexually abusive material appeared to include a child, or the offender had not taken reasonable precautions to determine the age of the child.

Currently, possession of any child sexually abusive material is a misdemeanor punishable by up to one year's imprisonment, a maximum fine of \$10,000, or both, if the offender knows, has reason to know, or should reasonably be expected to know that the child is a child or has not taken reasonable precautions to determine the age of the child. Under the bill, the possession violation would be a felony punishable by up to four years' imprisonment and/or a maximum fine of \$10,000, and also would apply if the offender knew, had reason to know, or should reasonably be expected to know that the child sexually abusive material included a child or that the depiction appeared to include a child.

Definitions. Currently, "child sexually abusive material" means a developed or undeveloped photograph, film, slide, electronic visual image, computer diskette, or sound recording of a child engaging in a listed sexual act; a book, magazine, or other visual or print medium containing such a photograph, film, slide, electronic visual image, or sound recording; or any reproduction, copy, or print of such a photograph, film, slide, electronic visual image, book, magazine, other visual or print medium, or sound recording.

Under the bill, that term would mean any depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, video, electronic visual image, computer diskette, computer or computer-generated image, or picture, or sound recording that was of a child or appeared to include a child engaging in a listed sexual act; a book, magazine, computer, computer storage device, or other visual or print or printable medium containing such a photograph, picture, film, slide, video, electronic visual image, computer, or computer-generated image, or picture, or sound recording; or any reproduction, copy, or print of such a photograph, picture, film, slide, video, electronic visual image, book, magazine, computer, computer-generated image, other visual or print or printable medium, or sound recording.

Under the bill, "appears to include a child" would mean that the depiction appeared to include, or conveyed the impression that it included, a person who was less than 18 years of age, and the depiction either was created using a depiction of any part of an actual person under 18 or, if all of the following applied, was not created using a depiction of any part of an actual person under 18:

- The average individual, applying "contemporary community standards", would find the depiction, taken as a whole, appealed to the "prurient interest".
- The reasonable person would find the depiction, taken as a whole, lacked serious literary, artistic, political, or scientific value.
- The depiction depicted or described a listed sexual act in a patently offensive way.

Under the bill, "contemporary community standards" would mean the customary limits of candor and decency in this State at or near the time of the alleged violation. "Prurient interest" would mean a shameful or morbid interest in nudity, sex, or excretion.

Under the Penal Code, "child sexually abusive activity" means a child engaging in a listed sexual act. "Listed sexual act" includes various activities defined in the Code's child sexually abusive activity or material provisions.

Affirmative Defense

Under the bill, it would be an affirmative defense to a prosecution for involvement in child sexually abusive activity or material that the alleged child was a person who was emancipated by operation of law, as proven by a preponderance of the evidence. (Under the emancipation of minors Act, emancipation occurs by operation of law when a minor is validly married; when a person reaches 18 years of age; during the period a minor is on active military duty; and, for purposes of consenting to medical care, when a minor is in the custody of a law enforcement agency or the Department of Corrections and the parent or guardian cannot be located.)

Notice of Defense

If a defendant in a prosecution for involvement in child sexually abusive activity or material proposed to offer in his or her defense evidence to establish that a depiction that appeared to include a child was not, in fact, created using a depiction of any part of an actual person under 18, the defendant would have to file and serve upon the prosecuting attorney a written notice of the intention to offer that defense. The notice would have to be offered at the time of arraignment or within 15 days after arraignment, but not less than 10 days before the trial, or at another time that the court directed. The notice would have to contain, as particularly as known to the defendant or his or her attorney, the names of witnesses to be called to establish that defense. The defendant's notice would have to include specific information as to the facts that established that the depiction was not, in fact, created using a depiction of any part of an actual person under 18. Failure to file a timely notice pursuant to the bill would preclude a defendant from offering the defense.

MCL 750.145c (H.B. 5296)
777.16g (H.B. 5297)

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bills would have an indeterminate fiscal impact on State and local government.

There are currently no Statewide data on misdemeanors, which would indicate how many offenders are convicted of knowingly possessing any child sexually abusive material. Current offenders may be sentenced to probation or incarceration in a local facility. Local units incur the costs for both probation and incarceration, which varies by county from \$27 to \$65 per day. Under the bills, the violation would be changed from a misdemeanor to a Class F felony for which the sentencing guideline minimum sentencing range is 0-3 months to 17-30 months. Offenders whose sentences were in the lower end of the sentencing range would receive probation or incarceration in a local facility. Local units still would incur the cost of incarceration. The costs of felony probation, however, would be incurred by the State at an average cost of \$4.38 per day. Offenders who received sentences in the upper end of the sentencing range would be incarcerated in a State prison, at an average cost to the State of \$25,000.

Expanding the circumstances in which felonies occur also could result in additional convictions,

subject to the current penalties.

Fiscal Analyst: Bethany Wicksall

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.