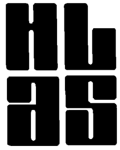

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CRIME OF CHILD PORNOGRAPHY: REVISE

House Bill 5296 as passed by the House
Sponsor: Rep. Gene DeRossett

House Bill 5297 as passed by the House
Sponsor: Rep. Michael Bishop

Committee: Criminal Justice
Second Analysis (11-5-02)

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. Earlier this year, 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.

In August, Operation Hamlet, a probe that included the U.S. Customs Service, the Justice Department, the Danish national police, and various U.S. attorneys' offices, uncovered another child porn ring operating on the Internet. News accounts reported that at least 45 children were abused and exploited by the ring, some by their own parents who were ring members. Thirty-seven of these children were U.S. citizens residing in the U.S.; their ages ranged from two to fourteen.

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. Also, 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.

Further, as computer technology has developed, so have pornographers' attempts to circumvent the law. Computers can now be used to digitally alter images of children, for example, transferring images of children onto other images so as to make it appear that the children are engaged in a sexually explicit act. Moreover, computer simulations can create very real looking images of children engaging in prohibited acts. Since child pornography laws pertain to the use of actual children, many feel that the laws need to be expanded to cover images of real children that have been altered and also to cover the materials that can now be wholly generated by computer technology. Complicating the issue, however, is the recent Supreme Court decision that struck down two provisions of the federal Child Pornography Prevention Act. The provisions in question would have covered computer generated or altered images of children, but were held to be unconstitutional due to being so overbroad they would have captured materials not considered to be pornographic. (For more information, see *BACKGROUND INFORMATION*).

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, allow a defense on the grounds that a depiction did not include any part of an actual child, and include the crime of possessing child pornography in the sentencing guidelines. The bills would take effect December 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 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 a child or that the depiction constituting the child sexually abusive material appears to include a child. Similar provisions would be added to the prohibition on persuading or coercing a child to engage in a child sexually abusive activity for the purpose of producing child sexually abusive material and to the prohibition on distributing or promoting any child sexually abusive material or child sexually abusive activity.

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 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.

The bill would define the phrase "appears to include a child" as meaning that the depiction appeared to include, or conveyed the impression that it included, a person less than 18 years of age and the depiction met either of the following conditions:

• It was created using a depiction of any part of an actual person under the age of 18.

• It was not created using a depiction of any part of an actual person under the age of 18, but all of the following apply to that depiction: 1) The average individual, applying contemporary community standards, would find the depiction, taken as a whole, appealed to the prurient interest; 2) the reasonable person would find the depiction, taken as whole, lacked serious literary, artistic, political, or scientific value; and, 3) the depiction depicts or describes a listed sexual act in a patently offensive way.

"Prurient interest" would be defined as a shameful or morbid interest in nudity, sex, or excretion. "Contemporary community standards" would mean the customary limits of candor and decency in this state at or near the time of the alleged violation of the bill.

Further, if a defendant who had been charged under this provision proposed to offer, in his or her defense, evidence to establish that a depiction appearing to include a child had not been created using a depiction of any part of an actual person under the age of 18, the defendant would have to file and serve upon the prosecuting attorney of record a notice in writing of the intention to offer that defense. The notice would have to be given at the time of the arraignment on the information, within 15 days after arraignment but not

less than 10 days before the trial of the case, or at such other time as the court directs. The notice would have to contain, as particularly as was known to the defendant or the defendant's attorney, the names of witnesses to be called in behalf of the defendant to establish that defense. The defendant's notice would also 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 the age of 18. Failure to file a timely notice in conformance with the bill would preclude a defendant from offering this defense.

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 is tie-barred to House Bill 5296.

BACKGROUND INFORMATION:

In 1973, the landmark Supreme Court ruling in *Miller* v *California*, 413 US 15, held that obscene material is not protected by the First Amendment; that such material can be regulated by the states where such works, "taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value" (p. 24); and that the community standards of a particular state, rather than a national standard, can be used by a jury in determining whether the work, taken as a whole, appealed to the prurient interest. In *Miller*, the Supreme Court recognized that some speech does indeed fall outside of First Amendment protection: however, the court also limited a state's power to regulate obscenity to those works meeting the criteria detailed above.

Nine years later, a case was brought before the Supreme Court that dealt with the issue of child pornography. In *New York* v *Ferber*, 458 US 747 (1982), the respondent, a bookstore owner, had been convicted of violating a state statute that prohibited the promotion of a sexual performance by a child under 16 years of age by distributing material that depicted such a performance. In particular, the respondent had been found guilty of selling films that depicted young boys masturbating. The Supreme Court ruled in *Ferber* that, for several reasons, states may enjoy greater leeway in the regulation of pornographic depictions of children than the standard for obscenity in *Miller* would allow. The reasons enumerated in the court decision are: 1) the court had previously upheld various state laws (meaning that the laws did not violate the First Amendment) prohibiting the use of children as subjects for pornographic materials due to the harmful effects to the physiological, emotional, and mental health of the child; 2) that the *Miller* standard for obscenity "is not a satisfactory solution to the child pornography problem" because the question of whether or not a child was harmed – mentally or physically - in the process of making the work "bears no connection" to the obscenity test under *Miller*; 3) since an economic motive is provided by the advertising and selling of child pornography, those activities are thus an integral part of the production of such materials – which is an activity illegal nationwide; 4) there is little value in permitting live performances or photographic reproductions of children engaged in lewd sexual conduct; and 5) that "recognizing and classifying child pornography as a category of material outside the protection of the First Amendment" is not incompatible with earlier Supreme Court decisions.

In addition, the *Ferber* court held that the New York statute described a category of material the production and distribution of which was not entitled to First Amendment protection. The court also held, therefore, that there was nothing unconstitutionally "under-inclusive" about the statute – meaning that the state was not barred from prohibiting the distribution of child pornographic materials within the state that were produced outside of the state.

Further, the respondent had asserted that the New York statute was unconstitutional on the grounds that it was so overbroad as to forbid the distribution of material with serious "literary, scientific, or educational value" (e.g., medical textbooks) or the distribution of material that would not "threaten the harms sought to be combated by the State". By applying various principles from other court decisions, the *Ferber* court held that the New York statute was not substantially overbroad; therefore it wasn't necessary to consider its application to material that did not depict sexual conduct of a type that New York could restrict and still be consistent with the First Amendment. In short, the court ruled that the New York statute did not violate the First Amendment protection of free speech.

For more than a decade, these two Supreme Court decisions have provided the legal framework for the construction of state and federal statutes prohibiting obscene materials and child pornographic materials. In 1996, Congress enacted the Child Pornography

Prevention Act (CPPA). The CPPA amended the federal criminal code (18 U.S.C. 2256) to define "child pornography" as meaning "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, 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, or appears to be, of a minor engaging in sexually explicit conduct; (c) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or (d) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct". The CPPA also added a definition of "identifiable minor" and included "data stored on computer disk or by electronic means which is capable of conversion into a visual image" in the definition of "visual depiction". Further, the CPPA increased penalties for child sexual exploitation; amended the federal Privacy Protection Act to permit searches and seizures where the offense involved child pornography, the sexual exploitation of children, or the sale or purchase of children; and added a section (18 U.S.C. 2252A) prohibiting certain activities relating to material constituting or containing child pornography.

Shortly after the enactment of the CPPA, several lawsuits challenging the constitutionality of certain provisions were filed in federal court. In four of the cases, the federal appeals courts upheld the CPPA as being constitutional. However, in a suit brought primarily by a trade association of publishers of adult pornographic materials, the Court of Appeals for the Ninth Circuit found that two of the provisions contained in the definition of "child pornography" violated the First Amendment due to being overbroad. The case was appealed to the U.S. Supreme Court and on April 16, 2002, the Supreme Court upheld the appeals court's ruling.

Specifically, *Ashcroft* v *Free Speech Coalition* (No. 00795, 2002) held that two provisions contained in the definition of child pornography [Section 2256 (8)(B) – "such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct" – and Section 2256(8)(D) – "such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct"] are unconstitutional because they are so overbroad as to encompass speech that is eligible for protection under the First Amendment. In coming to their respective decisions, both the appeals court and the Supreme Court found the CPPA to be overbroad because it banned material that was neither obscene (as set forth in *Miller*) nor produced by the exploitation of real children (as established in *Ferber*). In particular, the phrases "appears to be" and "conveys the impression" were viewed by the justices as being vague to the point of encompassing even pieces such as the play *Romeo and Juliet* and the film *American Beauty* because they hint at sexual behaviors involving minors (albeit there are no actual depictions of sexual acts with minors) even though both are considered to have literary and artistic value.

Further, in *Ferber*, the court acknowledged that a person could use a young looking adult to portray a child in a film or picture if it were necessary for literary or artistic value, and that simulation could provide another alternative to the restrictions of a state statute banning child pornographic materials because the use of either a young-looking adult or a simulation of a child did not result in actual mental or physical harm to a real child. Therefore, the recent Supreme Court ruling highlighted the fact that the two CPPA provisions in question expressly forbade an alternative to using real children that had been previously allowed.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, there are no data to indicate how many additional felony prosecutions might be made possible by the bills, but to the extent that additional convictions were obtained, the bills could generate increased costs for state or local correctional systems, or both, depending on circumstances. (11-5-02)

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.

Further, the current definition of "child" as it relates it 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. 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. Similar phrasing in the 1996 Child Pornography Prevention Act was recently struck down by the Supreme Court as unconstitutional because it was so overly broad that it would capture many pieces of literature, art, films, and scientific materials that are not obscene. Though the bill as passed by the House attempts to address the concerns raised by the Supreme Court, it still may not be enough to protect First Amendment rights. If the intent of the legislation is to prevent the circumvention of the child pornography laws via computer "morphing" of images of children, the bill should be even more narrowly focused – such as by specifying that the bill would pertain to images of real children that had been altered by any means, including being digitally altered.

Response:

First of all, it is important to point out that many media reports regarding the constitutionality of the CPPA were misleading. Many reports simply stated that the CPPA had been struck down. This is untrue, as the majority of the CPPA still stands; only two portions of the definition of "child pornography" were struck down due to being overly broad in scope. As it stands, the CPPA definition of "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where (1) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; or (2) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. These provisions should still cover a wide range of "morphed" images of children contained in pornographic materials.

Though the bill would still prohibit materials that appear to include a child, as passed by the House it does define the term to fit within the obscenity test of *Miller* and to restrict the scope of the prohibition so as to fit the criteria established by *Ferber*. It should be remembered that the pertinent portions of the CPPA were declared unconstitutional because the language was so vague and broad that the law applied to materials outside the scope of *Miller* and *Ferber*. The bill, however, clearly restricts the purview of the bill so as not to include materials that have serious social, political, artistic, or scientific value. As always, it will be up to the courts to decide if a picture of a child that was altered or "morphed" to depict a sexual act, or that was wholly computer generated, would meet the *Ferber* test.

Against:

It is not clear whether the bill, in outlawing computer generated pornographic materials, could withstand constitutional challenges. When applying House Bill 5296 to an individual, the test would still appear to be whether, as in *Ferber*, an actual child was harmed mentally or physically in the production or the distribution of the materials. The *Ferber* decision allows for alternative means to be used so that actual children are not harmed; for instance, the practice of using young adults in place of children or by using simulations. The remaining provisions of the CPPA appear to include only materials that use actual children or that alter images of real children to seem like the children are engaging in sexually explicit acts.

The bill, however, still seems to be stretching the ban to include simulations – such as wholly computer generated images – if the image appeared to be of a child. Though the bill includes the *Miller* test for obscenity (the material is found, by applying contemporary community standards, to appeal to the

prurient interest; lacks serious literary, artistic, political, or scientific value; and depicts or describes, in a patently offensive way, a prohibited sexual act), it still would appear to outlaw an alternative to using real children that has previously been supported by the Supreme Court.

The *Ferber* court opined that the wide latitude states enjoy in restricting child pornographic materials is because the production and distribution of such materials harms children physically when the materials are being made and mentally through the distribution. Simulations, on the other hand, do not harm an actual child in the making or distribution of the materials; therefore the court found them to be an acceptable alternative. It is argued by many that viewing even simulations of children engaged in sexually explicit acts feeds the lusts of pedophiles or enables pedophiles to victimize children by convincing them, through viewing the simulations, that such acts are "normal". However, the court wrote in *Ashcroft* v *Free Speech Coalition* that "the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct." When looked at in this light, the bill's provision to ban wholly simulated material may still be seen by some as a First Amendment infringement. Perhaps a reasonable starting point would be to target those simulations or computer altered depictions that used, as a basis, an actual child.

Response:

Ferber was decided in 1982. Since then, computer technology has advanced tremendously. The technological capabilities to manufacture simulated pornography that existed in 1982 are a poor cousin to what computers can do in the present. Indeed, some computer simulations are virtually indistinguishable from actual images. Though the Supreme Court's decision in *Ferber* included a discussion on the acceptability of using simulation as an alternative to using actual children, it is time to reevaluate that line of thinking in light of the technological advancements and use of the Internet to promote and distribute child pornography.

A compelling argument to rethink the reasoning behind the *Ashcroft* decision is that several of the Supreme Court justices disagreed with the recent ruling. In her dissenting opinion, Justice O'Connor quotes from the legislative findings enacted by Congress in the CPPA: "[T]he danger to children who are seduced and molested with the aid of child sex pictures is just as great when the child pornographer or child molester uses visual depictions of child sexual activity produced wholly or in part by electronic, mechanical, or other means, including by computer, as when the material consists of unretouched photographic images of actual children engaging in sexually explicit conduct." Therefore, where she agrees that the CPPA's prohibition on the use of youthful-looking adults in child pornography appears to violate the First Amendment, she writes that she would "uphold the ban on pornographic depictions that appear to be of minors so long as it is not applied to youthful-adult pornography."

Chief Justice Rehnquist, who also wrote a dissenting opinion, felt that the CPPA could be construed "to prohibit only the knowing possession of materials actually containing visual depictions of real minors engaged in sexually explicit conduct, or computer generated images virtually indistinguishable from real minors engaged in sexually explicit conduct." He went on to write that possession of materials "containing only suggestive depictions of youthful looking adult actors need not be so included." In conclusion, Justice Rehnquist writes that he "would construe the CPPA in a manner consistent with the First Amendment, reverse the Court of Appeals judgment, and uphold the statute in its entirety."

Though a dissenting opinion does not carry the weight of being law, it is considered to be persuasive. Dissenting opinions have been used to support arguments to reverse or modify previous court rulings. The Supreme Court has already held that states have greater leeway to structure laws to combat child pornography because of the great harm caused to children and the states' rights and duties to protect children. Therefore, a carefully structured state statute, that is sufficiently restrictive to not capture materials that clearly are eligible for First Amendment protection, may be able to pass Supreme Court scrutiny in the near future.

POSITIONS:

The Prosecuting Attorneys Association of Michigan (PAAM) supports the bills. (10-30-02)

The Michigan Family Forum supports the bills. (10-30-02)

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.