

**REPRINT**

**SUBSTITUTE FOR**

**HOUSE BILL NO. 5296**

(As passed the House, June 27, 2002)

(As passed the Senate, December 11, 2002)

A bill to amend 1931 PA 328, entitled  
"The Michigan penal code,"  
by amending section 145c (MCL 750.145c), as amended by 1994  
PA 444.

**THE PEOPLE OF THE STATE OF MICHIGAN ENACT:**

1       Sec. 145c. (1) As used in this section:

2       (A) "APPEARS TO INCLUDE A CHILD" MEANS THAT THE DEPICTION  
3 APPEARS TO INCLUDE, OR CONVEYS THE IMPRESSION THAT IT INCLUDES, A  
4 PERSON WHO IS LESS THAN 18 YEARS OF AGE, AND THE DEPICTION MEETS  
5 EITHER OF THE FOLLOWING CONDITIONS:

6       (i) IT WAS CREATED USING A DEPICTION OF ANY PART OF AN  
7 ACTUAL PERSON UNDER THE AGE OF 18.

8       (ii) IT WAS NOT CREATED USING A DEPICTION OF ANY PART OF AN  
9 ACTUAL PERSON UNDER THE AGE OF 18, BUT ALL OF THE FOLLOWING APPLY  
10 TO THAT DEPICTION:

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1 (A) THE AVERAGE INDIVIDUAL, APPLYING CONTEMPORARY COMMUNITY  
2 STANDARDS, WOULD FIND THE DEPICTION, TAKEN AS A WHOLE, APPEALS TO  
3 THE PRURIENT INTEREST.

4 (B) THE REASONABLE PERSON WOULD FIND THE DEPICTION, TAKEN AS  
5 A WHOLE, LACKS SERIOUS LITERARY, ARTISTIC, POLITICAL, OR SCIEN-  
6 TIFIC VALUE.

7 (C) THE DEPICTION DEPICTS OR DESCRIBES A LISTED SEXUAL ACT  
8 IN A PATENTLY OFFENSIVE WAY.

9 (B) ~~-(a)-~~ "Child" means a person who is less than 18 years  
10 of age, ~~and is not~~ SUBJECT TO THE AFFIRMATIVE DEFENSE CREATED  
11 IN SUBSECTION (6) REGARDING PERSONS emancipated by operation of  
12 law. ~~as provided in section 4(2) of Act No. 293 of the Public~~  
13 ~~Acts of 1968, as amended, being section 722.4 of the Michigan~~  
14 ~~Compiled Laws.~~

15 (C) ~~-(b)-~~ "Commercial film or photographic print processor"  
16 means a person or his or her employee who, for compensation,  
17 develops exposed photographic film into movie films, negatives,  
18 slides, or prints; makes prints from negatives or slides; or  
19 duplicates movie films or videotapes.

20 (D) "CONTEMPORARY COMMUNITY STANDARDS" MEANS THE CUSTOMARY  
21 LIMITS OF CANDOR AND DECENCY IN THIS STATE AT OR NEAR THE TIME OF  
22 THE ALLEGED VIOLATION OF THIS SECTION.

23 (E) ~~-(c)-~~ "Erotic fondling" means touching a person's  
24 clothed or unclothed genitals, pubic area, buttocks, or, if the  
25 person is female, breasts, or if the person is a child, the  
26 developing or undeveloped breast area, for the purpose of real or  
27 simulated overt sexual gratification or stimulation of 1 or more

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1 of the persons involved. Erotic fondling does not include  
2 physical contact, even if affectionate, that is not for the pur-  
3 pose of real or simulated overt sexual gratification or stimula-  
4 tion of 1 or more of the persons involved.

5 (F) ~~-(d)-~~ "Erotic nudity" means the lascivious exhibition of  
6 the genital, pubic, or rectal area of any person. As used in  
7 this subdivision, "lascivious" means wanton, lewd, and lustful  
8 and tending to produce voluptuous or lewd emotions.

9 (G) ~~-(e)-~~ "Listed sexual act" means sexual intercourse,  
10 erotic fondling, sadomasochistic abuse, masturbation, passive  
11 sexual involvement, sexual excitement, or erotic nudity.

12 (H) ~~-(f)-~~ "Masturbation" means the real or simulated touch-  
13 ing, rubbing, or otherwise stimulating of a person's own clothed  
14 or unclothed genitals, pubic area, buttocks, or, if the person is  
15 female, breasts, or if the person is a child, the developing or  
16 undeveloped breast area, either by manual manipulation or  
17 self-induced or with an artificial instrument, for the purpose of  
18 real or simulated overt sexual gratification or arousal of the  
19 person.

20 (I) ~~-(g)-~~ "Passive sexual involvement" means an act, real or  
21 simulated, that exposes another person to or draws another  
22 person's attention to an act of sexual intercourse, erotic fond-  
23 ling, sadomasochistic abuse, masturbation, sexual excitement, or  
24 erotic nudity because of viewing any of these acts or because of  
25 the proximity of the act to that person, for the purpose of real  
26 or simulated overt sexual gratification or stimulation of 1 or  
27 more of the persons involved.

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1           (J) "PRURIENT INTEREST" MEANS A SHAMEFUL OR MORBID INTEREST  
2 IN NUDITY, SEX, OR EXCRETION.

3           (K) ~~(h)~~ "Child sexually abusive activity" means a child  
4 engaging in a listed sexual act.

5           (l) ~~(i)~~ "Child sexually abusive material" means ANY DEPI-  
6 CTION, WHETHER MADE OR PRODUCED BY ELECTRONIC, MECHANICAL, OR  
7 OTHER MEANS, INCLUDING a developed or undeveloped photograph,  
8 PICTURE, film, slide, VIDEO, electronic visual image, computer  
9 diskette, COMPUTER OR COMPUTER-GENERATED IMAGE, OR PICTURE, or  
10 sound recording WHICH IS of a child OR APPEARS TO INCLUDE A CHILD  
11 engaging in a listed sexual act; a book, magazine, COMPUTER, COM-  
12 PUTER STORAGE DEVICE, or other visual or print OR PRINTABLE  
13 medium containing such a photograph, PICTURE, film, slide, VIDEO,  
14 electronic visual image, COMPUTER, OR COMPUTER-GENERATED IMAGE,  
15 OR PICTURE, or sound recording; or any reproduction, copy, or  
16 print of such a photograph, PICTURE, film, slide, VIDEO, elec-  
17 tronic visual image, book, magazine, COMPUTER, OR  
18 COMPUTER-GENERATED IMAGE, OR PICTURE, other visual or print OR  
19 PRINTABLE medium, or sound recording.

20           (M) ~~(j)~~ "Sadomasochistic abuse" means either of the  
21 following:

22           (i) Flagellation or torture, real or simulated, for the pur-  
23 pose of real or simulated sexual stimulation or gratification, by  
24 or upon a person.

25           (ii) The condition, real or simulated, of being fettered,  
26 bound, or otherwise physically restrained for sexual stimulation  
27 or gratification of a person.

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1       (N) ~~(K)~~ "Sexual excitement" means the condition, real or  
2 simulated, of human male or female genitals in a state of real or  
3 simulated overt sexual stimulation or arousal.

4       (O) ~~(I)~~ "Sexual intercourse" means intercourse, real or  
5 simulated, whether genital-genital, oral-genital, anal-genital,  
6 or oral-anal, whether between persons of the same or opposite sex  
7 or between a human and an animal, or with an artificial genital.

8       (2) A person who persuades, induces, entices, coerces,  
9 causes, or knowingly allows a child to engage in a child sexually  
10 abusive activity for the purpose of producing any child sexually  
11 abusive material, or a person who arranges for, produces, makes,  
12 or finances, or a person who attempts or prepares or conspires to  
13 arrange for, produce, make, or finance any child sexually abusive  
14 activity or child sexually abusive material is guilty of a  
15 felony, punishable by imprisonment for not more than 20 years, or  
16 a fine of not more than \$100,000.00, or both, if that person  
17 knows, has reason to know, or should reasonably be expected to  
18 know that the child is a child OR THAT THE CHILD SEXUALLY ABUSIVE  
19 MATERIAL INCLUDES A CHILD OR THAT THE DEPICTION CONSTITUTING THE  
20 CHILD SEXUALLY ABUSIVE MATERIAL APPEARS TO INCLUDE A CHILD, or  
21 that person has not taken reasonable precautions to determine the  
22 age of the child.

23       (3) A person who distributes or promotes, or finances the  
24 distribution or promotion of, or receives for the purpose of dis-  
25 tributing or promoting, or conspires, attempts, or prepares to  
26 distribute, receive, finance, or promote any child sexually  
27 abusive material or child sexually abusive activity is guilty of

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1 a felony, punishable by imprisonment for not more than 7 years,  
2 or a fine of not more than \$50,000.00, or both, if that person  
3 knows, has reason to know, or should reasonably be expected to  
4 know that the child is a child OR THAT THE CHILD SEXUALLY ABUSIVE  
5 MATERIAL INCLUDES A CHILD OR THAT THE DEPICTION CONSTITUTING THE  
6 CHILD SEXUALLY ABUSIVE MATERIAL APPEARS TO INCLUDE A CHILD, OR  
7 THAT PERSON HAS NOT TAKEN REASONABLE PRECAUTIONS TO DETERMINE THE  
8 AGE OF THE CHILD. This subsection does not apply to the persons  
9 described in section 7 of ~~Act No. 343 of the Public Acts of~~  
10 ~~1984, being section 752.367 of the Michigan Compiled Laws~~ 1984  
11 PA 343, MCL 752.367.

12 (4) A person who knowingly possesses any child sexually abu-  
13 sive material is guilty of a ~~misdemeanor~~ FELONY punishable by  
14 imprisonment for not more than ~~1 year,~~ 4 YEARS or a fine of not  
15 more than \$10,000.00, or both, if that person knows, has reason  
16 to know, or should reasonably be expected to know the child is a  
17 child OR THAT THE CHILD SEXUALLY ABUSIVE MATERIAL INCLUDES A  
18 CHILD OR THAT THE DEPICTION CONSTITUTING THE CHILD SEXUALLY ABU-  
19 SIVE MATERIAL APPEARS TO INCLUDE A CHILD, or that person has not  
20 taken reasonable precautions to determine the age of the child.  
21 This subsection does not apply to any of the following:

22 (a) A person described in section 7 of ~~Act No. 343 of the~~  
23 ~~Public Acts of 1984~~ 1984 PA 343, MCL 752.367, or to a commercial  
24 film or photographic print processor acting pursuant to subsec-  
25 tion ~~-(6)-~~ (8).

26 (b) A police officer acting within the scope of his or her  
27 duties as a police officer.

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1 (c) An employee or contract agent of the department of  
2 social services acting within the scope of his or her duties as  
3 an employee or contract agent.

4 (d) A judicial officer or judicial employee acting within  
5 the scope of his or her duties as a judicial officer or judicial  
6 employee.

7 (e) A party or witness in a criminal or civil proceeding  
8 acting within the scope of that criminal or civil proceeding.

9 (f) A physician, psychologist, limited license psychologist,  
10 professional counselor, or registered nurse licensed under the  
11 public health code, ~~Act No. 368 of the Public Acts of 1978,~~  
12 ~~being sections 333.1101 to 333.25211 of the Michigan Compiled~~  
13 ~~Laws~~ 1978 PA 368, MCL 333.1101 TO 333.25211, acting within the  
14 scope of practice for which he or she is licensed.

15 (g) A social worker registered in this state under article  
16 ~~16 of the occupational code, Act No. 299 of the Public Acts of~~  
17 ~~1980, being sections 339.1601 to 339.1610 of the Michigan~~  
18 ~~Compiled Laws~~ 15 OF THE PUBLIC HEALTH CODE, 1978 PA 368,  
19 MCL 333.16101 TO 333.18838, acting within the scope of practice  
20 for which he or she is registered.

21 (5) Expert testimony as to the age of the child used in a  
22 child sexually abusive material or a child sexually abusive  
23 activity is admissible as evidence in court and may be a legiti-  
24 mate basis for determining age, if age is not otherwise proven.

25 (6) IT IS AN AFFIRMATIVE DEFENSE TO A PROSECUTION UNDER THIS  
26 SECTION THAT THE ALLEGED CHILD IS A PERSON WHO IS EMANCIPATED BY

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1 OPERATION OF LAW UNDER SECTION 4(2) OF 1968 PA 293, MCL 722.4, AS  
2 PROVEN BY A PREPONDERANCE OF THE EVIDENCE.

3 (7) IF A DEFENDANT IN A PROSECUTION UNDER THIS SECTION PRO-  
4 POSES TO OFFER IN HIS OR HER DEFENSE EVIDENCE TO ESTABLISH THAT A  
5 DEPICTION THAT APPEARS TO INCLUDE A CHILD WAS NOT, IN FACT, CRE-  
6 ATED USING A DEPICTION OF ANY PART OF AN ACTUAL PERSON UNDER THE  
7 AGE OF 18, THE DEFENDANT SHALL AT THE TIME OF THE ARRAIGNMENT ON  
8 THE INFORMATION OR WITHIN 15 DAYS AFTER ARRAIGNMENT BUT NOT LESS  
9 THAN 10 DAYS BEFORE THE TRIAL OF THE CASE, OR AT SUCH OTHER TIME  
10 AS THE COURT DIRECTS, FILE AND SERVE UPON THE PROSECUTING ATTOR-  
11 NEY OF RECORD A NOTICE IN WRITING OF HIS OR HER INTENTION TO  
12 OFFER THAT DEFENSE. THE NOTICE SHALL CONTAIN, AS PARTICULARLY AS  
13 IS KNOWN TO THE DEFENDANT OR THE DEFENDANT'S ATTORNEY, THE NAMES  
14 OF WITNESSES TO BE CALLED IN BEHALF OF THE DEFENDANT TO ESTABLISH  
15 THAT DEFENSE. THE DEFENDANT'S NOTICE SHALL INCLUDE SPECIFIC  
16 INFORMATION AS TO THE FACTS THAT ESTABLISH THAT THE DEPICTION WAS  
17 NOT, IN FACT, CREATED USING A DEPICTION OF ANY PART OF AN ACTUAL  
18 PERSON UNDER THE AGE OF 18. FAILURE TO FILE A TIMELY NOTICE IN  
19 CONFORMANCE WITH THIS SUBSECTION PRECLUDES A DEFENDANT FROM  
20 OFFERING THIS DEFENSE.

21 (8) ~~—(6)—~~ If a commercial film or photographic print proces-  
22 sor reports to the local prosecuting attorney his or her knowl-  
23 edge or observation, within the scope of his or her professional  
24 capacity or employment, of a film, photograph, movie film, video-  
25 tape, negative, or slide depicting a person that the processor  
26 has reason to know or reason to believe is a child engaged in a  
27 listed sexual act; furnishes a copy of the film, photograph,



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1 movie film, videotape, negative, or slide to the prosecuting  
2 attorney; or keeps the film, photograph, movie film, videotape,  
3 negative, or slide according to the prosecuting attorney's  
4 instructions, both of the following shall apply:

5 (a) The identity of the processor shall be confidential,  
6 subject to disclosure only with his or her consent or by judicial  
7 process.

8 (b) If the processor acted in good faith, he or she shall be  
9 immune from civil liability that might otherwise be incurred by  
10 his or her actions. This immunity extends only to acts described  
11 in this subsection.

12 (9) ~~-(7)-~~ This section applies uniformly throughout the  
13 state and all political subdivisions and municipalities in the  
14 state.

15 (10) ~~-(8)-~~ A local municipality or political subdivision  
16 shall not enact ordinances, nor enforce existing ordinances,  
17 rules, or regulations governing child sexually abusive activity  
18 or child sexually abusive material as defined by this section.

19 Enacting section 1. This amendatory act takes effect December  
20 1, 2002.