

No. 138668

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IN THE  
MICHIGAN SUPREME COURT

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PEOPLE OF THE STATE OF MICHIGAN,

*Plaintiff-Appellee*

v.

BRIAN LEE HILL,

*Defendant-Appellant*

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ON APPEAL FROM THE COURT OF APPEALS  
(Sawyer, P.J., Servitto and M.J. Kelly, JJ)  
Court of Appeals No. 281055  
Muskegon County Circuit Court No. 2004-051083-FH

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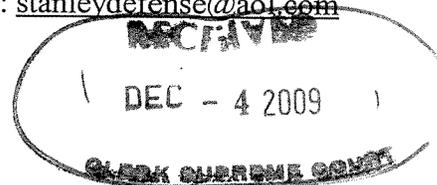
**BRIEF OF APPELLANT**

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**ORAL ARGUMENT REQUESTED**

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## **STATEMENT OF JURISDICTION**

This Court has jurisdiction pursuant to MCR 7.301(A)(2). The Appellant filed a timely Application for Leave to Appeal. On October 14, 2009, this Court granted the Application and directed the Appellant to brief at least three specific issues related to the Court of Appeals' interpretation of MCL 750.145c(2) and (4).

## **STATEMENT OF QUESTIONS INVOLVED**

I. WHETHER A PERSON WHO DOWNLOADS CHILD SEXUALLY ABUSIVE MATERIAL FROM THE INTERNET OR WHO BURNS A CD-R OF CHILD SEXUALLY ABUSIVE MATERIAL THAT HE HAS DOWNLOADED FROM THE INTERNET, FALLS WITH THE SCOPE OF MCL 750.145c(2) WHICH CRIMINALIZES "MAK[ING] OR PRODUC[ING] CHILD SEXUALLY ABUSIVE MATERIAL AND UNDER WHAT CIRCUMSTANCES?

The Appellant answers this question "no" as to Appellant's facts.

The trial court answered this question "yes" as to Appellant's facts.

The Court of Appeals answered this question "yes" as to Appellant's facts.

The People answered this question "yes" as to Appellant's facts.

II. HOW THE COURT OF APPEALS INTERPRETATION OF MCL 750.145c(2) INTERACTS WITH THE PROHIBITION IN MCL 750.145c(4) ON THE POSSESSION OF CHILD SEXUALLY ABUSIVE MATERIALS?

The Appellant states that the Court of Appeals opinion elevates every violation of MCL 750.145c to a 20 year felony as long as the Internet is used to acquire the image(s).

The trial court did not address this question.

The Court of Appeals did not address this question.

The People's position is unknown.

III. WHETHER THE COURT OF APPEALS INTERPRETATION OF "MAKES" HAS LEGAL CONSEQUENCES FOR OTHER CRIMINAL

OFFENSES THAT INVOLVE DOWNLOADING MATERIAL FROM THE INTERNET?

The Appellant answers this question “yes.”

The trial court did not address this issue.

The Court of Appeals did not address this issue.

The People’s position is unknown.

IV. WHETHER THE TRIAL COURT’S AND THE COURT OF APPEALS’ INTERPRETATIONS OF MCL 750.145c(2) AND c(4), VIOLATE THE MICHIGAN AND FEDERAL CONSTITUTIONS AND, AS APPLIED TO THE APPELLANT’S FACTS, MAKES MCL 750.145c(2) VOID FOR VAGUENESS.

The Appellant answers this question “yes.”

The trial court would answer this question “no.”

The Court of Appeals answered this question “no.”

The People answer this question “no.”

**OVERVIEW OF THE CASE**

The Appellant had downloaded images of child sexually abusive material from the Internet. Such images are readily available on the Internet either from pay sites or from sites that do not charge the viewer. Such images are also available from many Internet groups where the group members share a common interest in child sexually abusive materials. Much of the available child sexually abusive material originates from outside of the United States.

In addition to downloading, the Appellant burned a number of images onto CD-Rs. The computer and the CD-Rs were kept in the privacy of the Appellant’s home. He did not share the images with others. The images were discovered during the investigation of an unrelated

offense.

The Appellant was charged with making or producing child sexually abusive materials in violation of MCL 750.145c(2). This is a 20 year felony as is the related computer crime. MCL 752.796. The Appellant sought to quash those charges on the grounds that the Appellant had at most possessed the materials in violation of MCL 750.145c(4). Possession is a 4 year felony. The related computer crime is a 7 year felony. MCL 750.796.

The trial court denied the motion, and the Appellant took an interlocutory appeal to the Michigan Court of Appeals. The Court of Appeals affirmed the trial court in a published opinion. *People v. Hill*, 269 Mich App 505, 716 N.W.2d 301 (2006).

### **CONCISE STATEMENT OF FACTS AND PROCEEDINGS**

The Appellant was tried to the bench. He was convicted , and he was sentenced to 51-240 months. The Appellant again appealed. The Appellant asked the panel to reconsider its prior decision or to submit the 4 versus 20 year issue to a conflict panel. The panel refused both requests and deemed the 2006 *Hill* opinion to be the law of the case. *People v. Hill*, 2009 WL 416790 (2009) (an unpublished per curiam opinion).

On October 14, 2009, this Court granted the Appellant's Application and directed the Appellant to brief at least three specific issues.

### **STATEMENT OF FACTS**

#### **A. The Preliminary Examination**

The preliminary examination was held before the Honorable Michael L. Nolan on December 7, 2004.

At the outset of the hearing, the prosecutor informed the Court that the People were

adding two counts of eavesdropping, two counts of sexually abusive material, and five counts “related to the five photos from the Internet”. ( p.53a<sup>1</sup>). Detective Dean Lohman testified that he had participated in the execution of a search warrant at the Appellant’s home. ( pp. 54a-55a). Detective Lohman had advised that Appellant that the police had information that he may have been taping people using his bathroom. ( p. 55a). The Appellant was cooperative and pointed out a CD player which had a camera inside. ( pp. 56a-57a). The Appellant admitted that exchange students would have been taped. (p. 57a). The images were transmitted back to a television in the Appellant’s bedroom. (p. 58a).

The Appellant told the witness where the recorded tapes could be found. ( pp. 58a-59a). The witness identified 3 exhibits as being the tapes that the witness had located. ( pp. 59a-61a). There were approximately 50 video tapes in total. (p. 61a).

The witness then testified that he and the Appellant had discussed child pornography. ( p. 61a). This discussion related to CD-Rs<sup>2</sup> located in the Appellant’s bedroom. ( p. 62a). The witness had observed approximately 50 CD-Rs. ( p. 62a). When the witness asked the Appellant what might be on the CD-Rs, the Appellant allegedly responded minors, teens, and pre-teens. (pp. 62a-63a). The Appellant reportedly acknowledged that he had downloaded material from the Internet and transferred that data to the CD-Rs. (p. 76a). This process involved copying material from the Internet onto the CD-R. (p. 77a)<sup>3</sup>. The original material remained on the

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<sup>1</sup>The citation is to the relevant page in the appendix

<sup>2</sup> As the Court of Appeals noted, “CD-R” stands for “compact disc–recordable”.

<sup>3</sup> The Court of Appeals explained that the term “burn” includes recording data on to a compact disk.

Internet site. (p. 77a).

The People then exhibited 5 photographs which allegedly contained child pornography. (pp. 63a-64a). These photographs were charged in counts 4-6 and 10-11. *Id.* The computer related counts were counts 12-16. *Id.* The witness identified a CD-R (a computer disk) and testified that such disks are purchased blank. (p. 64a). Information can then be downloaded and burned onto the CD-R. (p. 64a). The exhibits were found in a stack of disks located in the Appellant's bedroom. (TR, pp. 64a-65a).

The witness described how he had accessed the CDR to obtain the still pictures offered as both exhibits and as a basis for counts 4-6 and 10-11. (pp. 65a-72a). The witness identified each CD-R and the related picture that had been taken from the CD-R. *Id.*

According to the witness, the Appellant told him that he had visited Russian web sites and had downloaded the alleged child pornography. (pp.72a-73a)<sup>4</sup>. Some of the downloads were saved as M-Peg files (videos) . (pp. 73a-74a. The images were primarily of males. (p. 74a).

The witness testified that he had looked at 22 of the 50 CD-Rs and had observed approximately 3,000 images of potential child pornography. (p. 74a). Five videos had been opened which apparently showed 12-13 year old males engaging in sex acts. (p. 75a).

The People then moved for a bind-over on all 16 counts. (p. 78a). The People acknowledged that there was an age problem as to counts 1-3. (p. 78a). There was no such issue as to the eavesdropping counts because age was not a factor in that statute. (p. 78a).

The bind over on counts 4-6 and 10-11 were sought based on the photos and the

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<sup>4</sup> The Court of Appeals explained that "download" means "to transfer (software or data) from a computer to a smaller computer or peripheral device".

corresponding CD-Rs. (p. 78a). The People argued that the Appellant created or produced child sexually abusive material by burning images onto blank CD-Rs. (pp. 79a-80a).

The defense argued that counts 1-3 should not be bound over because of the lack of proof of the witness's age at the time that the videos were made. ( p. 80a). The defense also argued that all that happened was a transference of data and that the defendant did not create, produce, or manufacture the images at issue. ( pp. 80a-81a).

The District Court bound the Appellant over on all of the counts which related to child pornography. (p. 81a).<sup>5</sup>

### **B. The Motion to Quash**

The Motion to Quash argued that the People had at most earned a bind over on possession, in violation of MCL 750.145c(4)( a 4 year felony).<sup>6</sup> The statute charged, MCL 750.145c(2), makes it a 20 year felony to commit certain acts. Specifically:

A person who **persuades, induces, entices, coerces, causes, or knowingly allows a child to engage** in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or a person who **arranges for, produces, makes, or finances**, or a person who attempts to arrange for, produce, make, or finance child sexually abusive material is guilty of a felony, punishable by imprisonment for not more than 20 years , or a fine of not more than \$100,000.00 or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting child sexually abusive material appears to include a child, or that person has not taken

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<sup>5</sup> The trial court granted a motion to quash on several of the counts on the grounds that the age of the person allegedly video taped was not established. The remaining counts ( which are the subject of this appeal) are those counts relating to the alleged downloading of child pornography from the Internet.

<sup>6</sup> By making this argument, the Appellant was not admitting guilt. Rather, he was admitting that using a probable cause standard, a bind over on the lesser charges would likely pass muster.

reasonable precautions to determine the age of the child. (Emphasis added).

By contrast, the possession statute, MCL 750.145(c)(4), makes it a 4 year felony to possess such material.<sup>7</sup> Specifically:

A person who **knowingly possesses** any child sexually abusive material is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$10,000.00 or both, if the person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child or that person has not taken reasonable precautions to determine the age of the child. (Emphasis added).

There is an intermediate 7 year felony which makes it a crime to distribute, promote, or finance the distribution or promotion of child sexually abusive material. MCL 750.145c(3). This provision of the statute was recently addressed by this Court in *People v. Tombs*, 472 Mich 446, 697 N.W.2d 494 (2005).

The statutory construction arguments made by the Appellant were very similar to the issues and analysis used by this Court. In *Tombs*, this Court concluded that the statute required criminal intent and that the act of an ex-employee of returning a company computer which contained images of child pornography was not promotion or distribution of child pornography.

### C. The Trial Court's Decision

The trial court denied the Appellant's Motion to Quash. The components of its decision were:

1. The trial court acknowledged that MCL 750.145c "establishes three groups of (and three penalties for) illegal behaviors relating to child sexually abusive materials". (Opin. P. 1);
2. The trial court acknowledged that there were no allegations that the Appellant had

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<sup>7</sup> Prior to March 31, 2003, simple possession was punished as a misdemeanor.

himself made or produced the materials at issue. (Opin., p. 2);

3. Testimony at the preliminary examination indicated that CD-Rs were purchased blank and that material was downloaded onto the CD-Rs from the Internet. (Opin. P. 2);

4. The trial court correctly stated that the standard of review for this type of question is *de novo*. (Opin. P. 2);

5. The trial court framed the issue in terms of whether the act of downloading the image “constitutes the ‘making’ or ‘production’ of such materials”. (Opin. P. 2);

6. The trial court consulted the dictionary for definitions of the word “make”. (Opin., p. 2);

7. The dictionary definition included “to cause to exist, occur, or appear; create; to fit, intend or destine by, or as if by creating; to bring into form by forming, shaping, or altering material”; to put together from components”. (Opin. P. 2);

8. The trial court concluded that the Appellant had made the CD-Rs because something existed after he downloaded the images that did not exist before: CD-Rs with images on them. (Opin. Pp. 2-3);

9. In the trial court’s opinion, the crime was committed “when the person clicks the mouse to reproduce the image onto the CD-R” (Opin. P.3);

10. The trial court rejected the Appellant’s arguments that the statute is void for vagueness or that he did not have sufficient criminal intent. (Opin. P. 3);

11. At the threshold, the trial court acknowledged the holding of this Court in *Tombs*. The trial court opined, however, that the issue of criminal intent was for the jury and that there was enough evidence of intent to sustain the bind over. (Opin. P. 3, n. 2);

12. The trial court then opined that there are three reasons to burn a CD (Opin. P. 3);

13. The first two are “to preserve the record from some computer malfunction or virus, and/or to create additional space on the hard drive”. ( Opin, p.3);

14. The third reason “could be to make the material more mobile—to share it or distribute it with friends or anyone else”. (Opin. P. 3)<sup>8</sup>;

15. The trial court opined that by creating something that didn’t previously exist, the Appellant had brought his conduct within the statute. (Opin. P. 3);

16. The trial court rejected what it termed policy arguments on the grounds that those arguments should be decided by the Legislature and not the Court. (Opin. Pp. 3-4);

17. The trial court concluded that one can possess child pornography without having a piece of paper or a physical document. (Opin. P. 4);

18. For that reason, the Court concluded that one could be guilty of simple possession without making anything else. (Opin. P. 4).

The Appellant sought interlocutory review from the Court of Appeals. Leave to appeal was granted. Ultimately, the Court of Appeals concluded that downloading the images constituted making or producing images and that the 20 year felony charges were thus appropriate. The reasoning used by the Court of Appeals is discussed *infra* in connection with each individual argument.

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<sup>8</sup> There was no evidence that the Appellant had shared or transported the CD-Rs that were found in his home.

## ARGUMENT

I. A PERSON WHO DOWNLOADS CHILD SEXUALLY ABUSIVE MATERIAL FROM THE INTERNET OR WHO BURNS A CD-R OF CHILD SEXUALLY ABUSIVE MATERIAL THAT HE HAS DOWNLOADED FROM THE INTERNET, DOES NOT FALL WITH THE SCOPE OF MCL 750.145c(2) WHICH CRIMINALIZES “MAK[ING] OR PRODUC[ING] CHILD SEXUALLY ABUSIVE MATERIAL, UNLESS THE PERSON HAD ACTUAL CONTACT WITH A REAL CHILD AT TIME THAT THE MAKING OR PRODUCING OCCURRED..

**Preservation:** The issue is fully preserved because it was presented to the trial court and to the Court of Appeals.

**Standard of Review:** Issues of statutory interpretation, including the scope of a penal statute are reviewed *de novo*. *E.g.*, *People v. Morey*, 461 Mich 325, 603 N.W.3d 250 (1999); *People v. Koonce*, 466 Mich 515, 648 N.W.2d 153 (2002); *People v. Stone*, 463 Mich 558, 621 N.W.2d 702 (2001).

**Legal Principles: A. Statutes Involved:** MCL 750.145c(2) reads in relevant part as follows:

A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or a person who arranges for, produces, makes, finances, or a person who attempts or prepares or conspires to arrange for, produce, make, or finance any child sexually abusive activity or child sexually abusive material is guilty of a felony punishable by imprisonment for not more than 20 years

MCL 752.796 is entitled “use of computers to commit a crime”. MCL 752.796(1) makes it clear that the statute contemplates an underlying crime. The computer is merely a specific means used to commit the underlying crime. MCL 752.797 supports this interpretation because the penalty for violating MCL 752.796 is directly linked to the statutory penalty for the underlying crime.

MCL 750.145c(4) by contrast criminalizes possession of child sexually abusive material.

**B. Prior Cases re: Child Sexually Abusive Materials.** The issue in this case is whether MCL 750.145c(2) criminalizes possession of child pornography by a private individual who was not involved in the creation of the original images, who was not in the business or creating or distributing child pornography, who did not in fact distribute the child pornography to any other person, and who could have been charged under Michigan's possession statute, MCL 750.145(c)(4). The Appellant's position that the answer to this question should be "no." The Court of Appeals reached a contrary conclusion. *People v. Hill*, 269 Mich App 505, 716 N.W.2d 301 (2006), reaffirmed by *People v. Hill*, 2009 WL 416790 (2009).

A review of the cases makes it clear that no published Michigan appellate case, prior to the decisions now being appealed to this Court, provided legal support for a prosecution of possession of child pornography pursuant to MCL 750.145c(2). Rather, those cases were consistent with the historical tiered approach to punishing those connected with child pornography: 1) Harshest penalties for those that were involved with the original creation of the images; 2) Middle punishment for those that distributed the images to others; and 3) Least punishment for those who were the end users who merely possessed images created and distributed by others.

For example, in *People v. Hack*, 219 Mich App 299, 556 N.W.2d 187 (1996), the defendant, then seventeen years of age, personally videotaped a three year old female who was forced to perform fellatio on her one-year-old male cousin. As to the child sexually abusive

material charge, the Court of Appeals focused on the definition of the word “produce” in the statute for the purpose of determining whether the defendant’s conduct fell within its ambit.

The Court of Appeals stated that if a word is not defined in the statute, every word should be “accorded its plain and ordinary meaning, taking into account the context in which the words are used”, citing MCL 8.3 and *People v. Lee*, 447 Mich 552, 526 N.W.2d 882 (1994). The dictionary definition of “produce” was “to bring into existence” or “to create”.

In *Hack*, it was undisputed that the defendant created the videotape of the children performing sexual acts. Thus, the Court of Appeals concluded that the defendant had produced the video tape for purposes of the statute. The Court of Appeals further concluded that distribution was not required, because the purpose of the statute, in part, was to protect children, citing *People v. Ward*, 206 Mich App 38, 520 N.W.2d 363 (1994). Thus, mere production was within the scope of the most-serious prong of the statute.

In *People v. Pitts*, 216 Mich App 229, 548 N.W.2d 688 (1996), the defendant was bound over for violating MCL 750.145c(2). The complainant, then 16 years of age, testified that she and a man named Cox had decided to have sexual intercourse. The couple went with the defendant to Cox’s house. When they discovered that Cox’s mother was at home, the group went to the defendant’s house. Cox and the complainant went to the basement area of the defendant’s home where they had sexual relations.

Unbeknownst to the complainant, the defendant had made a video tape of the couple having sexual relations.. He then showed the tape to others for entertainment.

At issue was the phrase “knowingly allows”. The Court of Appeals started with familiar principles of statutory construction and concluded that the statute was unambiguous. Applying

those principles, the Court of Appeals concluded that there was nothing in the statute that restricted its application to a parent or someone else who was responsible for the care of the child. The Court of Appeals rejected an argument trying to link the child sexually abusive material statute to the Child Protection Law (a statute which spoke in terms of parental and caregiver responsibility). The Court of Appeals concluded that the statutes were not in pari materia with each other because the aim of the two statutes were distinct and unconnected. The Court of Appeals remarked that if “there is a shortcoming in the language of the statute, it is for the Legislature to correct”. 216 Mich App at 234. This decision was correct because the defendant had created the child pornography.

In *People v. Harmon*, 248 Mich App 522, 640 N.W.2d 314 (2002), the defendant was convicted for making child sexually abusive materials. The evidence at the bench trial showed that the defendant took nude photographs of two 15 year old girls with a digital camera. The photographs were taken at a studio at the defendant’s home. The Court of Appeals concluded that the statute applied, that four convictions were appropriate based upon four separate photographs, and that the defendant had not taken sufficient precautions to determine the age of the females before he took the pictures. Again, the defendant had created the child pornography.

In *People v. Riggs*, 237 Mich App 584, 604 N.W.2d 68 (2000), the defendant video-taped and photographed several children. The children’s parents consented to the photo sessions. The defendant modified two of the video tapes. One tape was modified so that a loop played showing the child’s genitalia. The child’s face was not shown. A second tape was modified to replay several sections which showed the children playing and exposing themselves. The modification was merely a copy of the original and there were no modifications to the tape which emphasized

the genitalia of the children. The Court of Appeals concluded that the first tape contained child sexually abusive material. Specifically, the alteration of a benign image of a nude child to produce erotic nudity fell within the conduct proscribed by the statute. By contrast, the second tape showed innocent child nudity. The replay was at normal speed and did not emphasize any particular part of the child's body. As a result, that tape did not contain images of child sexually abusive material.

Two early cases had addressed the constitutionality of MCL 750.145c(2) and upheld convictions against constitutional challenge. In *People v. Gezelman*, 202 Mich App 172, 507 N.W.2d 744 (1993), the Court of Appeals held that the definition of erotic nudity involving children was not overbroad. The facts of the case are not clearly set forth, although the arguments suggest that the defendant had taken nude pictures of a child. In *People v. Heim*, 206 Mich App 439, 522 N.W.2d 675 (1994), the defendant on two occasions had taken pictures of his 16 year old niece's exposed breasts for the purpose of making pornographic material. On appeal, the defendant challenged the statute as being constitutionally void for vagueness. The Court of Appeals rejected that challenge, concluding that the statute gave fair notice that taking photographs of a 16 year old's bare breasts for the purpose of making pornography was within its scope.

In sum, the published Michigan authority on child sexually abusive activity, prior to the instant case, has applied the 20 year statute only in cases involving a defendant who personally and originally created the images which were at issue.

**C. General Principles of Statutory Interpretation:** Statutory construction, e.g., the scope of a particular statute, is a question of law. *E.g., Stozicki v. Allied Paper Co.*, 464 Mich

257, 627 N.W.2d 293 (2000). The purpose of statutory construction is to ascertain legislative intent that may be reasonably inferred from the words of the statute. *E.g., Wickens v. Oakwood Healthcare Sys.*, 465 Mich 53, 631 N.W.2d 686 (2001). A Court is to give effect to the intent of the Legislature. *E.g., Erb Lumber v. Gidley*, 234 Mich App 387, 594 N.W.2d 81 (1999); *People v. Morey*, 461 Mich 325, 603 N.W.2d 250 (1999).

In the absence of a definition, each word and phrase is to be given its ordinary meanings; a dictionary may be consulted if necessary. *E.g., Oakland County Road Comm'n v. Michigan Property and Casualty*, 456 Mich 590, 575 N.W.2d 751 (1998); *Koontz v. Ameritech Service, Inc.*, 466 Mich 304, 645 N.W.2d 34 (2002). A Court must give effect to every word to avoid interpretations that will make some part of the statute either surplusage or nugatory. *E.g., Wickens v. Oakwood Healthcare Sys.*, 465 Mich 53, 631 N.W.2d 686 (2001); *Gebhardt v. O'Rourke*, 444 Mich 535, 510 N.W.2d 900 (1994).

In determining the meaning of a phrase, the Court should consider not only the meaning of the phrase, but its placement and purpose in the statutory scheme. *E.g., Bailey v. United States*, 516 U.S. 137 (1995). The fair and natural import of the terms should be used considering the subject matter of the law. *E.g., People ex rel Twitchell v. Blodgett*, 13 Mich 127 (1865).

If the statute is unambiguous, the statute speaks for itself and judicial construction is not allowed. *E.g., Huggett v. Dep't of Natural Resources*, 464 Mich 711, 629 N.W.2d 915 (2001). A Court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *E.g., Roberts v. Mecosta General Hospital*, 466 Mich 57, 642 N.W.2d 663 (2002). It is only when the statute is ambiguous, that a Court may look outside of the statute to ascertain its meaning. *E.g., Turner v. Auto Club Ins.*

*Ass'n*, 448 Mich 22, 588 N.W.2d 681 (1995); *Luttrell v. Dept. of Corrections*, 421 Mich 93, 365 N.W.2d 74 (1984).

D. ***People v. Tombs***. This Court recently examined MCL 750.145c(3). *People v. Tombs*, 472 Mich 446, 697 N.W.2d 494 (2005), overruled on other grounds by *People v. Nyx*, 479 Mich 112, 734 N.W.2d 548 (2007). The issues were whether the statute required criminal intent and the scope of the words “distribution” and “promoting”.

In *Tombs*, the defendant was employed by Comcast. As part of his employment, he was issued a laptop computer. The evidence showed that when an employee left Comcast, the company would routinely erase the computer’s hard drive and reformat it for use by another employee.

The defendant had downloaded child pornography onto the company laptop. He had hidden the files so that the presence of child pornography on the computer was not evident. The defendant quit Comcast and returned the computer. The evidence showed that the defendant expected that the hard drive would be erased and that the child pornography files would not be discovered.

Contrary to expectations, an employee examined the contents of the hard drive and located the child pornography. The defendant was charged with a number of offenses. The appellate focus was on the defendant’s conviction for violating MCL 750.145c(3). That statute punishes the distribution, promotion, or financing of child pornography.

The People’s trial theory was that the defendant had distributed child pornography by returning the computer to his former employer. The defendant’s defense was that he didn’t intend to distribute the pornography because he didn’t intend for anyone to see or find the

pornography.

The Court of Appeals concluded that the conviction must be reversed. The components of that Court's analysis were:

A. This Court began with the canons of statutory construction;

B. The word "distribution" is not defined in the statute. There are a number of dictionary definitions, indicating that there is no single, common meaning for the word;

C. The People argued for a broad definition of the word. The defendant argued that the word should be defined in terms of whether the defendant had the intent to disseminate the child sexually abusive material;

D. The Court of Appeals reasoned that the purpose of the statute was to prevent dissemination of child sexually abusive material in Michigan;

E. The Court of Appeals cited *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), a case which interpreted the federal child pornography statutes. The United States Supreme Court concluded that a mens rea requirement had to be read into the statute. Otherwise the statute could criminalize a broad range of innocent conduct;

F. The Court of Appeals concluded that there must be an intent to disseminate the materials to others to eliminate constitutional doubt; and

G. Because there was no evidence that the defendant intended that anyone would see or receive child sexually abusive material, the Court of Appeals concluded that the evidence was insufficient and that the conviction should be reversed.

The People appealed to this Court which affirmed the decision of the Court of Appeals. *People v. Tombs*, 472 Mich 446, 697 N.W.2d 494 (2005), overruled on other grounds by *People*

*v. Nyx*, 479 Mich 112, 734 N.W.2d 548 (2007). The components of this Court’s analysis were:

A. This Court began by noting that strict liability is not favored and criminal statutes are thus usually construed to require criminal intent;

B. This Court analyzed a number of United States Supreme Court cases which held that criminal intent was required even though the applicable statute was silent about whether intent was an element of the offense. *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994); *Staples v. United States*, 511 U.S. 600 (1994); *Morissette v. United States*, 342 U.S. 246 (1952);

C. The People had argued that because the defendant had obtained the pornography from the Internet that his possession was equivalent to promotion;

D. This Court rejected that argument and concluded that promotion was not the same as possession. Specifically, this Court noted that the Legislature had provided for graduated offenses and punishments regarding child sexually abusive materials. “The Legislature expressly separated the crimes of production of child sexually abusive material, distribution or promotion of the material, and simple possession. It would not have made the distinction had it intended to equate mere possession with promotion”. 472 Mich at 464;

E. This Court went on to state that “[i]f the Legislature would have wanted end-users of the material to be guilty of promoting such material merely because they possess it, MCL 750.145c(4) would have included promotion”. 472 Mich at 464-465;

G. “Alternatively, the Legislature would have equated possession with both distribution and promotion in MCL 750.145c(3) instead of creating a separate provision for possession in section 145c(4). The statute on its face makes the mere possession of child sexually abusive material a different and less severe offense than either distribution or promotion of the material”.

472 Mich at 465.

H. This Court applied these principles to the facts of the case and concluded that there was insufficient evidence to establish that the defendant had the criminal intent to promote child pornography. This Court emphasized that there was a significant difference between having the simple intent to return the laptop computer to a former employer and having criminal intent to distribute child sexually abusive material hidden on that laptop.

F. **What Other States have Done.** In an effort to assist this Court with what appears to be an issue of relative first impression, the Appellant has examined statutes in all 50 states which deal with various components of child pornography, ranging from the creation of child pornography, distribution, possession for commercial purposes, and simple possession. Attached to this Application is a state-by-state analysis for this Court's information.

The statutory analysis demonstrates the following:

1. At the threshold, it has long been recognized that child pornography is a hybrid industry composed first of producers who directly exploit the child physically to create a pornographic product. A second component of the industry is made up of close association of manufacturers, retailers, and distributors who cultivate and perpetuate the child pornography market. Some commentators have advocated that regulation of both aspects must be dealt with individually and harmonized to meaningfully deter child sexexploitation. The final component consists of individuals who acquire child pornography for personal reasons. These individuals typically have had no contact with the child portrayed and no knowledge of the child's identity or the events which led to the creation of the child pornography. *E.g., Protection of Children From Use in Pornography*, 13 U.Mich J.L. Ref 295 (1979); *Preying on Playgrounds, The*

*Sexploitation of Children in Pornography and Prostitution*, 5 Pepp.L.Rev. 809 (1970); *See, also, People v. Cochran*, 28 Cal. 4<sup>th</sup> 396, 48 P.3d 1148 (2002); *Freeman v. Commonwealth*, 223 Va. 301, 288 S.E.2d 461 (1982); *United States v. Goodwin*, 674 F.Supp. 1211 (E.D.Va. 1987).

2. The States have responded in a widely different fashion to the regulation of child pornography. Not every state initially prescribed the simple possession of child pornography. For example, in 1990, the United States Supreme Court noted that only 19 states had criminalized the possession of child pornography. *Osborne v. Ohio*, 495 U.S. 103 (1990). (Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Illinois, Kansas, Minnesota, Missouri, Nebraska, Nevada, Ohio, Oklahoma, South Dakota, Texas, Utah, Washington, and West Virginia).

3. Since 1990, a number of states have amended their statutes to criminalize simple possession and/or possession of child pornography with the intent to distribute;

4. As demonstrated by the attached summary, the wording of the statutes are very clear and unambiguous, i.e. if a state intended to criminalize simple possession of child pornography, it did so unequivocally. Statutory interpretation is not required. As further demonstrated by the attached summary, a number of states have separately criminalized each phase of the child pornography industry, ranging from original creation to ultimate distribution.

Michigan has in fact done exactly that.. MCL 750.145c(2) deals with the creation of child pornography. MCL 750.145c(3) deals with the distribution and promotion of child pornography. MCL 750.145c(4) deals with the knowing possession of child pornography. Michigan's statutory structure is thus consistent with the statutory schemes used in a number of other states;

5. A few states have criminalized financiers. However, the term “finances” is only criminal when the original creation of the child pornography or the transportation of a minor for purposes of creating child pornography is involved. The defendant has located no state that has treated the purchase of a membership on a website that contains child pornographic images as creation, distribution, or promotion of child pornography. The defendant’s position is supported by the fact that while the word “finances” appears in the statutes relating to creation and distribution, the word is omitted from the section criminalizing possession.

6. Several states speak specifically in terms of the Internet. Several states, in the context of simple possession or possession with the intent to distribute, speak specifically in terms of using the Internet to obtain images. No state criminalizes the downloading of images without specifically linking that conduct to knowing possession of child pornography. Said differently, the means by which the child pornography is obtained is not itself a separate crime unless the defendant has actual contact with the child for purposes of creating child pornography or is involved in the distribution process.

7. In 1990, Michigan was not one of the states that criminalized simple possession of child pornography. Rather, Michigan’s statute was a predecessor version of MCL 750.145c (2).

That statute then read:

A person who commercially distributes or promotes or finances the distribution or promotion of or receives for the purpose of commercially distributing, or promoting, or conspires, attempts or prepares to so distribute, receive, finance, or promote any child abusive commercial material or child abusive commercial activity is guilty of a felony...

8. Although Michigan has since amended MCL 750.145c(2), it did not add language which would clearly bring simple possession of child pornography by a person who was neither

involved with the children, the original creation of the child pornography, or its commercial or private distribution within its ambit. Rather, these subsequent amendments increased the penalty and made some relatively minor modifications to the wording of the statute.

Simple possession was criminalized in MCL 750.145c(4) and is a 4 year rather than a 20 year felony. Before its recent amendment, possession was deemed a misdemeanor.

The Appellant would note that the New Mexico Supreme Court is considering the same issue that is now before this Court. Specifically, in *State v. Smith*, 145 N.M. 757, 204 P.3d 1267 (2008), the New Mexico appellate court, interpreting a New Mexico statute, held that copying of digital images to portable storage units created a new digital copy of the prohibited image. This was deemed “manufacturing,” as that term was used in the New Mexico statute. The New Mexico Supreme Court had granted review and the case remains pending before that Court. *State v. Smith*, 146 N.M. 604, 213 P.3d 213 (2009).

**Discussion: Why the Court of Appeals’ Interpretation of the Statute is Wrong.**

The Court of Appeals’ decision had the following components:

A. The Court began by “reading” MCL 750.145c(1)(m) and MCL 750.145c(2) together. The former statute defines various terms, including “child sexually abusive material”. That statute states that copies that depict child sexually abusive material are themselves child sexually abusive material;

B. The Court opined that its blending of the two statutes reflected legislative intent. The Court cited no authority for this opinion;

C. Based on this interpretation, the Court concluded that the Appellant was within the scope of section c(2) when he burned the images onto the CD-Rs;

D. The Court stated that there was no question that copies were made;

E. The Court noted that the storing of the images was accomplished by copying existing images which continued to exist after the data was transferred from the Internet to the CD-Rs;

F. The Court also relied on the fact that the phrase “child sexually abusive material” is part of section c(2), concluding that the use of the phrase bolstered the Court’s analysis;

G. The Court opined that any other interpretation would ignore the statutory definition and render language nugatory;

H. The Court then referred to evidence from the Preliminary Examination that supported its conclusion that the Appellant’s conduct fell within section c(2);

I. The Court opined that the act of burning the images onto the CD-R was the Appellant’s own creation, i.e. he made the child pornography on the CD-R;

J. The Court further stated that the Appellant shaped and formed the content of the CD-R;

K. The Court noted that the Appellant had brought something into existence that had not previously existed, i.e. copies;

L. The Court noted that the section c(1)(m) included “computer storage device” within the definition of “child sexually abusive material”. A CD-R is a “computer storage device”;

M. The Court then gave an example of what it believed to be simple possession: an individual buys a magazine and possesses that magazine. The Court opined that the linchpin of the example was that the magazine purchase did not increase the amount of child pornography in society;

N. By contrast, if a person makes copies of child pornography, the amount of child

pornography has increased, leading to a proliferation of child pornography in society. The Court opined that an act that increases the absolute amount of child pornography should be punished using the 20 year statute;

O. The Court then used the example of a person who receives child pornography through the mail and then collected that child pornography into a bound book. The Court opined that the act of producing a book that did not previously exist went beyond simple possession and should be punished by the 20 year statute;

P. The Court opined that it would be rational to conclude that the Legislature intended to punish individuals that create things that did not previously exist as harshly as people who actually hurt real children;

Q. The Court stated that there was no support in the statutory language for the proposition that the Legislature never intended the 20 year statute to include individuals who “utilize child sexually abusive material for personal use”;

R. The Court suggested that a person could be directly and personally involved in the original creation of child pornography that was thereafter kept for personal use only. The Court opined that such a person would be properly punished under the 20 year statute;

S. In addition, criminal responsibility under section c(2) does not turn on the number of images that were produced. A person who produces one copy or a person who produces 50 copies are both within the scope of the statute. That statute also doesn't turn on what the individual intends to do with the images personally possessed;

T. Finally, the Court addressed this Court's decision in *Tombs*. The Court noted that the issue in *Tombs* was whether the defendant had criminal intent when he delivered the computer to

his employer. The Court read *Tombs* as holding that while the defendant had the criminal intent to distribute the laptop, he never intended to distribute the images.

The Court then distinguished *Tombs* by noting that there was no dispute about whether the Appellant intended to burn images onto the CD-Rs. The Court stated that even if the Appellant didn't know that burning the CD-Rs was a 20 year felony, ignorance of the law is no excuse.

The Appellant disagrees with the Court of Appeals' analysis for at least the following reasons:

A. At the threshold, the definition section, MCL 750.145c(1)(m) applies to all three penalty sections. There is absolutely nothing in either sections c(1) or c(2)-c(4) that suggests otherwise. Thus, if a particular image is a copy for purposes of section c(2), it is also a copy for purposes of sections c(3) or c(4).

The Court of Appeals decision completely ignores that fact. Rather, the Court of Appeals considered the definitional section only with respect to section c(2). The Appellant submits that this is clear error.

Specifically, if an image is child sexually abusive material, that is an absolute fact regardless of whether the defendant is a maker, a financier, a distributor or the possessor.

Thus, it is the Appellant's position that the correct analysis is to apply the definition section to the image at hand. If the image is child sexually abusive material, the Appellant submits that the question then becomes a determination of the criminal defendant's role in the child pornography industry. That role, in turn, should determine which of the three penalty sections should be charged.

B. The Court of Appeals analysis also completely ignored the history of the child pornography statutes in general and their development in Michigan. By doing so, the Court of Appeals erred when it interpreted sections c(2) to c(4).

Specifically, as recognized in *Tombs*, the Legislature has provided for a graduated series of punishments. This is consistent with what has happened in other states as set forth in some detail in the exhibit attached to the Application.

In addition, as the literature and the experience of other states make clear, the most serious penalties are reserved for those individuals who are involved in the initial creation of the child pornography. These harsh penalties are imposed because such individuals had actual contact with the child and because such individuals directly caused the trauma experienced by children portrayed in the most heinous images, e.g. child rape or sadistic and/or masochistic treatment of a child . An individual who finances the actual creation of the images also stands on this same plane because that individual made the creation of the images and the associated infliction of trauma possible.

Intermediate penalties are provided for those who disseminate the child pornography. The least serious penalties are provided for the end user who simply possesses the child pornography. These graduated penalties represent a Legislative determination of the relative culpability of the various roles played by individuals participating in the child pornography industry and a related determination about the severity of the punishment that should be imposed.

In the instant case, there is no evidence that the Appellant did anything with the CD-Rs other than to possess them. There is nothing in the statute or the cases that distinguishes between the manner and means by which possession is accomplished. Thus, it is the Appellant's position

whether the images are downloaded onto a computer and then downloaded onto a CD-R or downloaded directly onto a CD-R, his status is that of a mere possessor. It is the Appellant's further position that there must be evidence showing that the Appellant had criminal intent to do something other than possess the CD-Rs for his own personal use before he would be chargeable or subject to bind-over on the more serious offenses.

In this regard, there is no claim that the Appellant had any connection to the initial creation of the material or that the Appellant had disseminated the CD-Rs to any other person.

C. The Appellant submits the Court of Appeals erred when it concluded that the Appellant's proposed interpretation would violate the principles of statutory construction by rendering the language in the definitional section nugatory.

The Appellant submits that the underlying premise of this conclusion is that the definitional section is only blended into section c(2). It is the Appellant's position that the definitional section applies to all three penalty sections, and that the Court of Appeals' interpretation itself renders that interpretation nugatory as to sections c(3) and c(4).

It is the Appellant's further position that if the definitional section applies to all three penalty sections, the Court of Appeals' emphasis on copying is completely misplaced. Said differently, a copy is sexually abusive material regardless of which of the three penalty sections is charged. It is thus the Appellant's position that the fact that he is accused of copying material from the Internet onto a CD-R has absolutely no impact on which of the three penalty sections should be charged.

D. The Appellant submits that the fact that the Appellant is accused of copying data and of bringing something into existence that did not exist before is not determinative of the proper

charging statute. Specifically, “copying” applies to all three statutes. Thus, each of the three statutes contemplates that the “child sexually abusive material” could include material that didn’t exist before. Since a common definition applies to all three tiers, it is the Appellant’s position that the Legislature did not intend copying data onto a CD-R to have any special significance or to have any significance when selecting the appropriate penalty statute to be charged.

The Appellant also submits that the Court of Appeals’ analysis does not consider whether the Appellant’s alleged act of copying had anything to do with the social harms the Legislature was trying to regulate when it adopted the three-tiered approach to penalties.

Specifically, it is the Appellant’s position that there is no incremental harm to society caused by a criminal defendant’s decision to make copies from the Internet as opposed to buying a magazine. As long as the criminal defendant does no more than possess the image, that defendant has not caused any harm beyond simple possession. If the criminal defendant disseminates the images, then that defendant is subject to greater penalties. If the criminal defendant creates the original image, that defendant is subject to even greater penalties.

The Appellant thus submits that there is no basis for concluding that the Legislature intended a greater penalty for a simple possessor based upon the means by which the possessor attained possession.

E. The Appellant agrees with the Court of Appeals’ conclusion that someone who buys a magazine is a simple possessor. However, the Appellant disagrees with the Court of Appeals’ rationale—that person is a possessor only because the absolute quantity of child pornography in society is not increased.

The Court of Appeals opined that making copies proliferated child pornography in

society. The Appellant disagrees. There is no proliferation in society if the criminal defendant does no more than possess the images for his or her own personal use. Society is no worse off if a possessor has a magazine or a CD-R containing child sexually abusive material as long as no one other than the possessor sees the images. If the possessor does something other than possess the images, e.g. distributes the images to others, then there are other statutes in the child sexually abusive material section of the criminal code which consequence that additional band of conduct.

F. The Appellant also disagrees with the Court of Appeals assertion that someone who collected child pornography into a bound book has violated the 20 year statute because the bound book did not previously exist.

At the threshold, this analysis is the equivalent of judicial legislation. There is nothing in the statute or the legislative history that indicated that the Legislature intended to distinguish between possessors based upon what the possessors did in the privacy of their own homes.

Moreover, as argued *supra*, there is no additional societal harm as long as the possessor does nothing further with the pornography possessed. No new child is harmed. No additional person is exposed to the pornography. No child whose image has been captured will suffer additional trauma because of the act of obtaining an image from the Internet. Also, as argued *supra*, if the possessor does something other than simple possession, that additional conduct is adequately addressed by other statutes such as the distribution statute.

G. The Appellant also strongly disagrees with the Court of Appeals' assertion that the Legislature intended to punish defendants who make copies as harshly as someone who had contact with the actual children.

The literature, legislative history around the country, and the cases cited make it clear that

a person who actually traumatizes a child by either forcing that child to participate in a sexual act or by publishing the image of a child involved in a sexual act is regarded as the most serious offender.

By contrast, a possessor of child pornography obtained from the Internet has no direct contact with the child and does not directly cause physical or emotional injury to that child.

Finally, the Court of Appeals has absolutely no authority for its assertion. There is nothing in the Legislative history of the child sexually abusive statutes which in any way supports the claim that the Legislature viewed someone who downloaded an image from the Internet and burned that image onto a CD-R as culpable as someone who forced a child to perform a sexual act.

H. The Appellant also disagrees with the Court of Appeals' conclusion that the statutory language did not support the proposition that the Legislature did not intend to have the 20 year statute consequence individuals "who utilize child sexually abusive materials for personal use".

At the threshold, the Appellant submits that this characterization misstates his position. The Court of Appeals' example illustrates that misstatement. That example was of an individual who was personally involved in the creation of child pornography but who intended that the child pornography created would be for personal use alone.

The Appellant agrees that such a person should be charged under the 20 year statute because that person went beyond simple possession when that person created the original image. The Appellant would also agree that a person who distributes the child pornography possessed should be charged under section c(3), the distribution statute.

However, the allegations against the Appellant fall into neither category. The Appellant's

position is that someone who simply possesses images—without regard to how possession was attained—and does nothing further should be charged under the possession statute. The Court of Appeals’ example does not require a different conclusion because that example is distinguishable from the Appellant’s facts.

I. The Appellant agrees that criminal responsibility under any of the three statutes does not turn on the number of images produced, financed, distributed or possessed. However, the Appellant disagrees with the Court of Appeals’ assertion that the charging decision is not affected by what an individual intends to do with the images personally possessed.

This assertion is directly contrary to this Court’s decision in *Tombs* where this Court held that the ultimate question is what the defendant intended to do with the image that ended up in Comcast’s possession. In *Tombs*, the defendant was not chargeable as a distributor because he did not intend to distribute. Similarly, in the instant case, the evidence adduced at the Preliminary Examination at most established that the Appellant’s sole intent was to possess the images. There is no evidence that the Appellant intended to distribute the images, to originally create images, or to finance the original creation of images.

J. Finally, the Appellant disagrees with the Court of Appeals’ specific analysis of *Tombs* and how it applied to his case. The Court of Appeals distinguished *Tombs* by holding that the evidence at the Preliminary Examination showed that the Appellant intended to burn the images onto the CD-Rs.

The Appellant submits that even if this is true, that type of intent is irrelevant to the charging decision. Specifically, in *Tombs*, there was no question that the defendant was responsible for the images found on his business lap top computer. There was equally no

question that the defendant had downloaded those images from the Internet. Yet, this Court held that “the mere obtaining and possessing of child sexually abusive material using the Internet does not constitute a violation of MCL 750.145c(3)”. 472 Mich at 465.

This Court also rejected an attempt by the prosecutor to treat promotion the same as possession. This Court stated that “[t]o accept that argument, this Court would have to ignore the express language of the Legislature that created a graduated scheme of offenses and punishments regarding child sexually abusive material. The Legislature expressly separated the crimes of production of child sexually abusive material, distribution or promotion of the material, and simple possession. It would not have made the distinction had it intended to equate mere possession with promotion”. 472 Mich at 464. This Court went on to opine that if the Legislature had “wanted the end users of the material to be guilty of promoting such material merely because they possess it, MCL 750.145c(4) would have included promotion. Alternatively, the Legislature would have equated possession with both distribution and promotion in MCL 750.145c(3) instead of creating a separate provision for possession in section 145c(4)”. 472 Mich at 464-465.

The Appellant agrees with this analysis. It is the Appellant’s position that if that analysis is applied to his own case, the analysis would be:

1. The evidence at the Preliminary Examination showed no more than an intent to possess the images;

2. If the Legislature had intended to equate copying images from the Internet onto a CD-R equivalent to the more serious crime of “making” child sexually abusive material, it would have said so, e.g. by distinguishing between the various methods by which a person can obtain

child pornography for purposes of possessing it and expressly stating different penalties based on the method of acquisition; and

3. The graduated system makes it clear that the Legislature intended to punish someone who intends to merely possess child sexually abusive material less severely than others involved in the child pornography industry.

In sum, the Court of Appeals decision ignores these passages from *Tombs* and does not focus on what the evidence at the Preliminary Examination at most showed. The Appellant submits that if all the evidence showed was an intent to possess, he cannot be charged under c(2) or c(3) because there is absolutely no evidence that he intended to commit the greater crimes.

For all of the reasons stated, it is the Appellant's position that the Court of Appeals' decision constituted judicial legislation and the creation of offenses never intended by the Legislature. This Court asked for input as to what circumstances would cause someone who downloaded images from the Internet and who burned them onto a CD-R to be within the scope of section c(2). The Appellant's position is that the answer is found in the graduated or tiered punishments enacted by the Michigan Legislature and by the legislatures of Michigan's sister states. The circumstances that would elevate the offense from a simple possession offense to either a distribution or a manufacturing offense would depend on what the person did after the images were downloaded and burned onto CD-Rs. Specifically: 1) If the person, as did the Appellant, does nothing more, he would not fall within the scope of section c(2). Rather, he could be charged under section c(4); 2) If the person distributed the images on the CD-Rs to others or traded those CD-Rs for other CD-Rs, he would not fall within the scope of section c(2). Rather, he could be charged under section c(3); and 3) If the person took the CD-Rs and used

them to manufacture hundreds of other identical CD-Rs for re-sale, that person would fall within the scope of c(2) because he had manufactured or produced child sexually abusive material.

Another example can be derived from an actual federal case recently prosecuted in the Western District of Michigan. The defendant created images of his minor daughter and posted them onto the Internet. If the defendant had thereafter downloaded the images and burned them onto CD-Rs, he could be prosecuted under section c(2) because he had been the original creator of the images.

In sum, decisions to prosecute under section c(2) should be based on the reasons for the graduated or tiered punishments developed by the Michigan Legislature and the legislatures of other states. Such prosecutions would focus on individuals who originally created the original images or financed the original creation of those images. The prosecution could also focus on individuals who take child pornography created by others and manufacture or produce large quantities of those images for personal profit. That prosecution should never focus on the end user who simply possesses the images for personal reasons. That person deserves punishment but the Legislatures of this nation have traditionally concluded that the severity of that punishment should be less than the punishment imposed on more culpable persons.

The Michigan Court of Appeals turned that equation upside down by imposing the severest punishment on simple possessors and by basing that punishment on the methods used by those simple possessors to acquire the images. By doing so, the Court of Appeals effectively ignored the history of child pornography legislation and the legislative history of the Michigan statutes.

The Appellant is respectfully asking this Court to correct the egregious error made by the

Michigan Court of Appeals. This Court has already laid the foundation for such a correction in *Tombs*. *Tombs* focused on what the defendant intended to do, i.e. return a computer with the expectation that the hidden images would never be found. In the instant case, the Appellant did not intend to manufacture or produce child pornography. Rather, he burned the CD-Rs so that he would have a more convenient method of viewing the images. He never intended to be more than a simple possessor.

## II. HOW THE COURT OF APPEALS INTERPRETATION OF MCL 750.145c(2) INTERACTS WITH THE PROHIBITION IN MCL 750.145c(4) ON THE POSSESSION OF CHILD SEXUALLY ABUSIVE MATERIALS

As argued *supra*, the traditional method of punishing individuals involved in child pornography has used a graduated scale.

The underlying theory of the traditional method is that the harshness of the penalties should be related to the societal harm caused by each group of offenders. A person who actually harms or tortures a child and/or who creates the original child pornography causes the greatest societal harm. Without that individual, there would be no child pornography in the first place. Without that individual, children would not be harmed or subjected to trauma. An individual who finances the original creation of child pornography is also at the pinnacle of societal harm because the financial support makes the creation of commercial child pornography possible.

The second tier of offenders traditionally involved individuals who distributed the child pornography to others. The societal harm caused by this group was not as great as the top tier because this group caused no harm to an actual child. However, this group was essential to the functioning of the child pornography industry because this group facilitated a market place for the child pornography. Without their involvement, the child pornography industry could not

function because the creators would not have a vehicle to get the child pornography to the end user.

The bottom tier of offenders creates the least societal harm as long as the offense only involves simple possession. This tier does not harm the actual child. This tier does not distribute the child pornography possessed to others. This tier deserves punishment because its members possess illegal images, but in terms of the actual societal harm, this group is the least culpable.

The Court of Appeals reasoned that greater punishment was warranted if the method by which the child pornography was stored increased the absolute amount of child pornography in society. The Court of Appeals concluded that this increase in the absolute amount resulted in a per-se increase in the societal harm caused by the simple possessor.

It is the Appellant's contrary position that there is no increase in the societal harm as long as the simple possessor does nothing with the pornography other than to retain it in his or her possession for his or her own personal use. Said differently, the societal harm is increased only if the possessor takes the images that have been downloaded and does something with them beyond personal use.

If the possessor does increase that societal harm, e.g. by distributing the images to others, it is the Appellant's position that the possessor's status would change and that he or she would be subject to greater penalties because the possessor went beyond simple possession and committed a more serious criminal offense.

The Court of Appeals decision is contrary to this traditional method because it creates different classes of simple possessors which are distinguished by the method used to store the images. In the instant case, the Appellant's punishment was increased because he stored the

images on CD-Rs.

As to the specific question asked by this Court, it is the Appellant's position that the Court of Appeals decision interacts with section c(4) by creating a new and distinct type of possessor, i.e. possession by Internet. This characterization is supported by the Court of Appeals statement that a person who purchases a magazine would not fall into section c(2) because no additional child pornography was created by the purchase of the magazine.

Specifically, any person who downloads images from the Internet creates a greater amount of child pornography than existed before the download. The original image remains on the Internet and its status is unaffected by the download. However, now that the image has been transferred to the computer of the person who performed the download, there is a greater amount of child pornography in existence.

Since most child pornography is now found on the Internet and since most child pornography prosecutions involve images downloaded from the Internet, the Court of Appeals decision has essentially redefined section c(4) by transferring most of the potential defendants from section c(4) to section c(2).

Another result of the Court of Appeals' decision is confusion. Technology continues to advance very rapidly. That new technology could result in unforeseen methods by which child pornography can be acquired and/or stored by the end user. The Court of Appeals acknowledged that the examples given in its opinion were not exclusive. Thus, new technology may again raise the question of how sections c(2) and c(4) interact because it will be unclear as to which section should control. By contrast, before that decision, the interaction was relatively straight-forward because the graduated format of the statute made it clear whether a person's criminal conduct fell

into c(2) or c(4).

### III. THE COURT OF APPEALS INTERPRETATION OF “MAKES” HAS LEGAL CONSEQUENCES FOR OTHER CRIMINAL OFFENSES THAT INVOLVE DOWNLOADING MATERIAL FROM THE INTERNET,

As argued *supra*, it is the Appellant’s position that the Court of Appeals’ decision is essentially a decision to impose greater penalties for the crime of possession of child pornography by using the Internet to acquire the images possessed..

As this Court knows, there is a seemingly unlimited amount of information on the Internet. People are able to express their opinions virtually without limitation. Those opinions are readily available, whether from Internet news sites, social networking sites, or search engines such as Google.

All of this available information can be easily downloaded onto a person’s computer.

At the threshold, Michigan’s computer-crime statutes are very broad. For example, MCL 752.796 speaks in terms of using a computer to commit a crime. Graduated penalties for the computer crime are based on the severity of the penalty for the underlying crime. MCL 752.797.

Thus, violating the computer statute is quite easy as long as two things are true: 1) A computer is used; and 2) There is an underlying criminal offense.

The next step in the analysis is that a person who posts material that is illegal to possess or publish on the Internet commits a criminal offense. For example, the person who posts child pornography on the Internet has committed a crime. A person who posts defamatory materials on the Internet has committed a crime. A person who pirates movies or music and posts those stolen movies or music on the Internet has committed a crime.

The materials that have been illegally posted are readily available to anyone who chooses

to look at the materials. The first question would be whether merely viewing the illegally posted materials imposes criminal liability on the viewer. Computers automatically record sites visited and viewed, and the illegal material could be captured by the computer even without any conscious act on the part of the viewer. Such images could be retrieved by sophisticated computer investigators even though they have been deleted.

However, the specific question asked by this Court focused on a different problem: downloading and/or burning onto CD-Rs. This Court asked whether the Court of Appeals' definition of "making" would create criminal liability for someone who downloaded the illegal materials (defamatory, music, movie, or otherwise) onto the person's computer and/or who burned the materials downloaded onto CD-Rs. The Court of Appeals defined "making" in the following terms:

The CD-Rs, as compiled by the defendant, were defendant's own creations; he made child-pornography CD-Rs. The term "make" is defined as follows: "to bring into existence by shaping, changing, or combining material[.]" *Random House Webster's College Dictionary* (2001). Defendant acquired the child sexually abusive material through the Internet, and he shaped formed, and combined the material through placement of various selected pictures, videos, and images onto specific CD-Rs bringing into existence something that had not previously existed, i.e. Distinctly created and compiled child-pornography CD-Rs.

269 Mich App at 518.

The downloading of defamatory materials, pirated movies or music, or anything else that is illegal to possess would fit within this definition. The original information would remain on the Internet, and the person who performed the download would have "shaped, formed, or combined" the illegal materials by burning them onto CD-Rs. Thus, it is arguable that the Court of Appeals decision would have potential criminal implications for anyone who downloads from

the Internet.

An example that focuses on the word “make” is MCL 750.543m which makes it a 20 year felony to knowingly make a false report of an act of terrorism. The ability or intent to carry out the threat is not a defense. MCL 750.543m(2). Assume that Individual A posts such a false report on the Internet, knowing that it is false and intending that it would influence the conduct of anyone who might read the false threat. Individual B knows that the threat is false, but he downloads it and burns it onto a CD-R. The CD-R contains downloads of materials from the Internet that Individual B considers bizarre or interesting. Individual B does nothing further with the threat after it is downloaded onto his The Appellant submits that the Court of Appeals’ definition of “making” exposes Individual B to criminal liability for the 20 year felony.

Another example of the word “make” is MCL 750.255 dealing with tools and implements for counterfeit bills or notes. Making false or counterfeit certificates or notes is one way to violate this statute, which is a 10 year felony. Assume that Individual C makes counterfeit documents in violation of the statute. Individual C posts the counterfeit documents on the Internet. Individual D downloads the counterfeit documents and burns them on to a CD-R. Individual D downloaded the documents because they looked “pretty” to him. The CD-R contains many images of things on the Internet that had caught Individual D’s eye. Individual D does nothing further. The Appellant submits that the Court of Appeals’ definition of “making” exposes Individual D to criminal liability for a 10 year felony.

Another example of a statute which could be implicated by the Court of Appeals decision is MCL 752.1052, dealing with the transfer of a live performance onto a recording without consent for commercial advantage or private gain. It is the Appellant’s position that the

Court of Appeals basically defined “making” as being the equivalent of “downloading and burning” onto a CD-R. Thus, the Appellant submits that even if a criminal statute does not use the word “make” as the operative criminal act, downloading and burning a CD-R could potentially be considered a violation of such a statute.

As to MCL 752.1052, assume that Individual E violates the statute by transferring sounds onto a recording. The sounds are then posted onto the Internet. Individual F downloads from the Internet site and burns the sounds onto a CD-R. Individual F downloads more than 180 such sounds which is potentially a 5 year felony. Individual F’s motive in doing the download is to obtain the sounds for free. The Appellant submits that the Court of Appeals’ reasoning potentially exposes Individual F to prosecution.

Based on this reasoning and these examples, the Appellant respectfully submits that the answer to the question posed by the Court is “yes.”

As to the Appellant’s own case, it has been the Appellant’s consistent position that his acts of downloading and burning for the purpose of possession illegal pornography was not “making” or “producing” for purposes of determining the proper statute to charge: c(2) or c(4). The applicability of the Court of Appeals’ reasoning to these other situations bolsters the argument that the Court of Appeals was wrong when it defined “making” in terms of “downloading.”

Said differently, the arguments made in this section are another reason to vacate the Appellant’s conviction and sentence and to remand with instructions that, as a matter of law, the Appellant could only be prosecuted for possessing child sexually abusive materials.

IV. THE TRIAL COURT'S AND THE COURT OF APPEALS' INTERPRETATIONS OF MCL 750.145c(2) AND c(4), VIOLATES THE MICHIGAN AND FEDERAL CONSTITUTIONS AND, AS APPLIED TO THE APPELLANT'S FACTS, MAKES MCL 750.145c(2) VOID FOR VAGUENESS.

**Preservation:** The issue is fully preserved because it was presented to the trial court and to the Court of Appeals.

**Standard of Review:** Constitutional issues are reviewed *de novo*. *E.g., People v. Beam*, 244 Mich App 103, 624 N.W.2d 764 (2000). A trial court's determination concerning the constitutionality of a statute are also reviewed *de novo*. *E.g., People v. Rogers*, 249 Mich App 77, 641 N.W.2d 595 (2001).

**Legal Principles:** A statute may be challenged as being constitutionally vague on three grounds, one of which is that it does not provide fair notice of the conduct proscribed. *People v. Howell*, 396 Mich 16, 238 N.W.2d 148 (1976); *Grayned v. Rockford*, 408 U.S. 104 (1972). "Vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand". 396 Mich at 21; *People v. Vronko*, 228 Mich App 649, 579 N.W.2d 138 (1998). To give fair notice, a statute must inform a person of reasonable intelligence about what conduct is prohibited. *E.g., People v. Noble*, 238 Mich App 647, 608 N.W.2d 123 (1999).

**Discussion: Why the Court of Appeals was Wrong When it Concluded that there was no Void for Vagueness Issues Created by its Interpretation of MCL 750.145c(2).** The Court of Appeals reasoned that the definition contained at MCL 750.145c(1)(m) could be blended into the penalty section MCL 750.145c(2). Since the definition of child sexually abusive material includes copies, the Court reasoned that the Appellant's act of copying images from the

Internet onto a CD-R was within the scope of MCL 750.145c(2). The Court further opined that any reasonably intelligent person would reach the same conclusion as the Court of Appeals.

The Appellant strongly disagrees with this analysis. At the threshold, the issue in MCL 750.145c(1)(m) is whether any particular image constitutes child sexually abusive material. Companion definitional sections define other concepts such as “erotic nudity”. MCL 750.145c(1)(e). *Riggs*, discussed *supra*, illustrates the threshold purpose of the definitional section of the statute. The Court of Appeals in *Riggs* referred to the definitional section and concluded that images of simple child nudity were not “erotic nudity”. By contrast, images of simple child nudity that had been manipulated to focus on the child’s genitals were within the definition of “erotic nudity”. The former images could not be prosecuted whereas the latter images could be the basis for criminal charges. Because the defendant in *Riggs* was the creator of the erotic nudity, he was properly prosecuted pursuant to section c(2).

Similarly, in the instant case, the definitional section would be consulted to determine whether the images found on the CD-Rs qualified as child sexually abusive material.

If the answer is “yes”, it is the Appellant’s position that the utility of the definitional section has been exhausted.

It is the Appellant’s further position that the next step is to go to MCL 750.145c(2) through (4) and to select that statute that best defines the Appellant’s relationship to the child sexually abusive material (original creator, financier, distributor, possessor). The Appellant submits that this analysis could cause any reasonable person to conclude that someone in the Appellant’s position would at most be a possessor of child sexually abusive material, pursuant to MCL 750.145c(4). Specifically, that subsection criminalizes possession. The Appellant is

charged with possessing images he allegedly obtained from the Internet. The evidence adduced at the Preliminary Examination was only that the Appellant possessed the images at his home. It is the Appellant's position that any reasonable person would conclude that section c(4) applied to those facts. In this regard, it is important to note that the definitional section applies to all three penalty sections. Thus, a reasonably intelligent person would conclude that the definitional section does not determine the penalty. Rather, that reasonably intelligent person would conclude that his or her relationship to the child sexually abusive material determined the severity of the potential penalty.

The Court of Appeals then opined that the plain language of section 145(1)(m) makes it clear that the act of copying is within the scope of section 145c(2). The Appellant again disagrees for the same reasons set forth *supra*. Specifically, the plain language of section 145(1)(m) only goes to the question of whether any particular image is child sexually abusive material. It is the Appellant's position that it is not at all plain that the act of copying onto a CD-R makes what would otherwise be possession into a 20 year felony, particularly when one considers that the definitional section applies to all three penalty statutes.

The Court of Appeals then asserted that "the act of making child sexually abusive material clearly encompasses the creation of CD-Rs containing various photographs and videos of children engaged in sexual acts as selectively compiled by a person, where such CD-Rs did not previously exist".

The Appellant disagrees with this reasoning. At the threshold, the historical meaning of "making" has always been the original creation of the child pornography. Makers have traditionally been punished more harshly because makers have direct contact with the children

and/or are the reason why child pornography exists in the first instance.

By contrast, someone who copies child pornography by burning it onto the CD-R is not creating new pornography in the sense that no new child was sexually abused to create the image and/or because the simple possessor does not disseminate the copies to others.

The Court of Appeals comment about “such CD-Rs did not previously exist” is technically true in that the CD-R at issue is no longer blank. However, the Appellant disagrees with the conclusion that the Court of Appeals reached. Specifically, once any criminal defendant burns a CD-R, that individual has several choices. One choice is to do nothing except possess the CD-R for one’s personal use<sup>9</sup>. The testimony at the Preliminary Examination would put the Appellant’s alleged conduct within the scope of this choice. It is the Appellant’s position that anyone who makes this choice is a simple possessor. The Appellant submits that the fact that copies exist in addition to the originals does not change a criminal defendant’s status as long as the Appellant or anyone similarly situated does nothing further except possess the images.

It is the Appellant’s further position that the Court of Appeals erred by not considering whether the burning of the CD-R created any social harm beyond the harm caused by simple possession. The Appellant submits that no additional social harm is created as long as the criminal defendant does nothing more than possess the CD-R. Said differently, the social harm is the same whether the criminal defendant buys a magazine containing child pornography and possesses it for his or her personal purposes or whether that same defendant burns a CD-R. No

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<sup>9</sup> A second choice would be to disseminate the contents of the CD-R to others. However, a defendant who made that choice would properly have his or her conduct charged as distribution using the intermediate tier, MCL 750.145c(3). There is thus an additional consequence for an act that goes beyond simple possession.

additional child was abused based upon the method by which possession was acquired. No additional child pornography is disseminated beyond the pornography disseminated to the possessor. The Appellant thus submits that the issue is not whether there is now an original and a copy, but whether the harms which the Legislature is regulating are implicated. It is the Appellant's position that because there is no additional social harm, burning a CD-R should not take a defendant's conduct from a 4 year felony to a 20 year felony.

In sum, the Appellant submits that a reasonable person would not conclude that changing a blank CD-R into a CD-R containing images constituted a greater crime than simply buying a magazine which contains the same images.

The Court of Appeals then opined that "the statute gives a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited as ascertainable by reference to judicial interpretations, the common law, dictionaries, treatises, and the commonly accepted meanings of words", citing *People v. Sands*, 261 Mich App 158, 161, 680 N.W.2d 500 (2004). The Appellant strongly disagrees.

As to judicial interpretations, the issue before the Court of Appeals was a decision of first impression. Every previous published case that had upheld prosecutions under the 20 year statute involved individuals who had themselves created the original images. The Appellant submits that if a reasonably intelligent person had consulted the cases, that person would not have known that burning a CD-R was equivalent—for punishment purposes-- to the creation of the original image.

As to the common law, it is the Appellant's position that the common law provides no guidance about whether the use of CD-Rs elevates the seriousness of a criminal defendant's

conduct.

Dictionaries and the common meanings of words don't help a reasonably intelligent person either. It is the Appellant's position that a reasonably intelligent person would not know that the definitional section would be blended into the punishment section in order to expand the scope of that statute. Rather, if the reasonably intelligent person consulted sections c(2), (3), and (4), that person would have no reason to conclude that the simple act of burning an image from the Internet onto a CD-R for strictly personal use was the equivalent of the original creation of the CD-R. Moreover, the reasonably intelligent person would note that the definitions apply to all three penalty statutes. Therefore, the Appellant submits that there would be no reason to think that copying controlled which penalty section applied.

Finally, if a reasonably intelligent person consulted treatises, that person would come to the exact opposite conclusion, i.e. historically, the original creator is included in the first tier whereas the simple possessor, regardless of the means by which the images were possessed, was included in the lowest tier.

For all of these reasons, the Appellant submits that a reasonably intelligent person would not know that burning a CD-R would elevate the alleged crime from a 4 year to a 20 year felony. The Appellant further submits that the Court of Appeals erred and that that Court's interpretation of the statute makes MCL 750.145c(2) void for vagueness as applied to the Appellant's facts.

### Relief Sought

The Appellant is respectfully asking this Court to reverse the lower courts and to vacate the Appellant's conviction and sentence. The Appellant is also respectfully asking this Court to instruct the trial court and the prosecutor that the Appellant can at most be prosecuted for simple possession pursuant to MCL 750.145c(4).

Respectfully submitted,

Grand Rapids, MI  
December 3, 2009



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People v. Hill  
Case No. 138668

## EXHIBIT

# STATE BY STATE ANALYSIS OF CHILD PORNOGRAPHY LAWS

A. **Alabama** Ala.Code Sect. 13A-12-192 is entitled “Possession and possession with intent to disseminate obscene matter containing a visual reproduction of a person under the age of 17 years of age involved in obscene acts; prima facie evidence of possession with intent to disseminate”. The body of the statute speaks in terms of “knowingly” possessing.

B. **Alaska**. AS 11.61.127 criminalizes the possession of child pornography: “if a person knowingly possesses any material that visually or orally depicts conduct, described in AS 41.455(a), knowing that the production of the material involved the use of a child under 18 years of age who engaged in the conduct.

C. **Arkansas**. ACA, Sect. 5-27-304(a)(2) defines the child pornography crime in terms of “[k]nowingly solicit, receive, purchase, exchange, possess, view, distribute, or control any visual or print medium depicting a child participating or engaging in sexually explicit conduct”.

Arkansas is one of the few states located by the defendant which uses the word “financing” in connection with a child pornography crime. ACA 5-27-305 criminalizes the financing of the transport of a minor for the purpose of exploiting prohibited sexual conduct. As in Michigan, the focus of the word “financing” is the component of the industry or of individual conduct which involves actual contact with the child.

D. **Arizona**. A.R.S. 13-3553(A)(2) defines the offense in terms of “[d]istributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, transmitting, possessing or exchanging any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct”.

E. **California** Cal. Penal Code, sect. 311.1 is entitled “Sent or brought into state for sale or distribution; possessing, preparing, publishing, producing, duplicating, or printing within state; matter depicting sexual conduct by minor...”. Subsection (a) speaks of persons who do a number

crime, in part, in terms of a “person, by means of a computer, [who] intentionally compiles, enters, accesses, transmits, exchanges, disseminates, stores, makes, prints, reproduces, or otherwise possesses any photograph, image, file, data or other visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act.

I. **Florida.** FSA 827.071(4) states that it is “unlawful for any person to possess with the intent to promote any photograph...which...includes any sexual conduct of a child”. Subsection (5) makes it “unlawful for any person to knowingly possess a photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, he or she knows to include any sexual conduct by a child”.

J. **Georgia.** Ga Code section 16-12-100 separately criminalizes a number of different acts which include the creation, promotion, and distribution of child pornography. Section (b)(8), the last of the specific sections, states that it is “unlawful for any person to knowingly possess or control any material which depicts a minor or a portion of a minor’s body engaged in any sexually explicit conduct”.

K. **Hawaii.** HRS 707.752 is entitled “Promoting Child Abuse”. It criminalizes knowing possession of child pornography. The statute also prohibits the promotion of child abuse.

L. **Idaho.** IC 18-1507A explicitly prohibits knowing and wilful possession of sexually exploitive material (child pornography). A separate section of the Idaho statutes explicitly prohibits the possession of sexually exploitive material for commercial purposes. IC 18-1507.

M. **Illinois.** 720 ILCS 5/11-20.1 criminalizes production and dissemination of child pornography. As to possession, it also specifically criminalizes knowing possession of child pornography.

N. **Indiana.** IC. 18-1507 focuses on commercial sexual exploitation. A separate statute

IC 35-42-4-4 specifically criminalizes knowing and intentional possession of child pornography if the child is less than 16 years of age.

O. **Iowa.** I.C. 728.12 prohibits various forms of sexual abuse of a minor. One form is the actual use of a minor to produce the child pornography. A second form is promoting the distribution of the child pornography. A third form is to knowingly purchase or possess the child pornography.

The first two forms are felonies. The actual use of a minor is a more serious felony than the distribution. Simple possession is a misdemeanor in Iowa as it is in a number of states.

P. **Kansas.** KS 21-3516 deals with the sexual exploitation of a child. Sexual exploitation is defined in terms of the actual use of a child to produce child pornography, possessing child pornography, or distributing child pornography.

Q. **Kentucky.** KRS 531.335 specifically criminalizes "possession of matter portraying a sexual performance by a minor when, having knowledge of its content, character, and that the sexual performance is by a minor, he knowingly has in his possession or control any matter which visually depicts an actual sexual performance by a minor". A first offense is a misdemeanor.

R. **Louisiana.** LSA 14.81.1 is entitled "Pornography involving juveniles". The statute criminalizes the creation of child pornography, the promotion of child pornography, and the intentional possession, sales distribution, or possession with intent to sell or distribute child pornography.

S. **Maine.** Maine statutes focus on various components of child pornography. MRSA 282 prohibits the sexual exploitation of a minor, i.e. actual contact with minor. MRSA 283 prohibits dissemination of sexually explicit material re: minors. MRSA 284 prohibits intentional

and knowing possession of sexually explicit materials re: minors.

T. **Maryland.** MD Code, Criminal Law, Section 11-207 criminalizes a number of components of child pornography, including the direct use of a minor to produce the child pornography, the distribution of child pornography, including possession with the intent to distribute, and the use of a computer to knowingly disseminate “for the purpose of engaging in, facilitating, encouraging, offering, or soliciting unlawful sadomasochistic abuse or sexual conduct of or with a minor”.

U. **Massachusetts.** Massachusetts, as do other states, has enacted separate statutes for the various components of the child pornography problem. For example MGLA 272 sect. 29B prohibits the dissemination of visual material of a child in a state of nudity or sexual conduct. MGLA 272 sect. 29C explicitly prohibits the knowing purchase or possession of visual material of a child depicted in sexual conduct.

V. **Michigan.** MCL 750.145c(2) focuses on the actual abuse of the child, and the original creation of the child pornography. MCL 750.145c(3) focuses on the distribution and promotion of child sexually abusive material. MCL 750.145c(4) focuses on simple possession. A separate statute, MCL 722.677, criminalizes the dissemination, exhibition, or display of sexually explicit material to minors. Michigan does not explicitly criminalize the simple possession of child pornography.

W. **Minnesota.** MSA 617.247 is entitled “Possession of Pornographic Work involving Minors”. As to simple possession the statute states that “a person who possesses a pornographic work or a computer disk or computer or other electronic, magnetic, or optical storage system of any type, containing a pornographic work, knowing or with reason to know its content and character is guilty of a felony...”.

X. **Mississippi.** MCA 97-5-33 is entitled “depicting child engaging in sexual conduct”. The statute focuses on various aspects of the child pornography problem including the original creation of the material, transporting the material, or distributing the material. The statute also explicitly prohibits the possession of any visual depiction of “an actual child engaging in sexually explicit conduct”. The statute expressly includes the use of a computer to possess a prohibited sexual depiction.

Y. **Missouri.** VAMS 573.037 explicitly criminalizes the knowing possession of child pornography.

Z. **Montana.** MCA 45-5-625 is entitled “Sexual Abuse of Children”. It focuses on the use of children, the creation of the pornography, the enticement of a child to participate, distribution, or financing. Financing is specifically not applicable to simple possession. It is applicable to possession with intent to distribute. Both simple knowing possession and possession with intent to distribute are also criminalized.

AA. **Nebraska.** Nebraska statutes separately criminalize possession of a visual depiction of a child engaged in sexually explicit conduct with the “intent to rent, sell, deliver, distribute, trade, or provide to any person” and simple knowing possession of material which visually depicts a child engaged or observing sexually explicit conduct. NRS 28-1463.05 and 28-813.01.

BB **Nevada.** NRS 200.730 is entitled “Possession of visual presentation depicting sexual conduct of person under 16 years of age”. The body of the statute criminalizes knowing and wilful possession of any “film photograph or other visual presentation depicting a person under the age of 16 years as the subject of a sexual portrayal or engaging in or simulating or assisting others to engage in or simulate sexual conduct”.

CC. **New Hampshire.** New Hampshire separately criminalizes knowing possession of a

child engaging in sexual activity for purposes of commercial dissemination, and knowing possession of any visual representation of a child engaging in sexual activity. NHRS 649A:3I(d) and (e).

DD. **New Jersey.** NJS 2C:24-4 is entitled “Endangering welfare of children”. The statute covers a variety of situations including actual abuse of the child and selling and distributing child pornography. As to possession, the statute states that “any person who knowingly possesses or knowingly views any photograph, film, videotape, computer program or file, video game or any other production which depicts a child engaging in a prohibited sexual act or in the simulation of such an act, including on the Internet, is guilty of a crime...”.

EE. **New Mexico.** NMS 30-6A-3 is entitled “Sexual exploitation of children”. The statute covers manufacture of child pornography, causing a child to actually engage in a prohibited, act and distribution. As to possession, the statute states that “it is unlawful for a person to intentionally possess any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts any prohibited sexual act or simulation of such act, and if that person knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age”.

FF. **New York.** New York criminalizes both the knowing possession of a sexual performance by a child and knowing possession of an obscene sexual performance by a child. MPL 263.11 and 263.16.

GG. **North Carolina.** North Carolina has separate statutes which criminalize various components of child pornography. NCGSA 14-190.16 defines first degree sexual exploitation of a minor to include the creation of child pornography. Also include is financing the transportation

of a minor for purposes of creating child pornography. NGS 14-190.16 defines second degree sexual exploitation of a minor to include the distribution of child pornography. NGS 14-190.17A defines third degree sexual exploitation of a minor as knowing possession of material that contains a "visual representation of a minor engaging in sexual activity".

HH. **North Dakota.** NDCC 12.1-27.2-04.1 makes it a misdemeanor to knowingly possess any "visual representation that includes sexual conduct by a minor".

II. **Ohio.** RC 2907.322 is entitled "Pandering sexually oriented matter involving a minor". The statute criminalizes a number aspects of the child pornography industry. Knowing possession of "any material that shows a minor participating or engaging in sexual activity, masturbation or bestiality" is specifically and separately criminalized. "Financing" is criminalized with respect to the transportation of a minor for the creation of visual images of sexual activity.

JJ **Oklahoma.** OS 1021.2 is entitled "Minors-Procuring for participation in pornography". The statute penalizes procuring children and causing their participation in child pornography, knowing possession, procurement or manufacture of child pornography.

KK. **Oregon.** ORS 163.688 is entitled "Possession of Materials depicting sexually explicit conduct of a child". The statute criminalizes knowing possession if that possession is used to induce the child to participate or engage in sexually explicit conduct.

LL **Pennsylvania.** 18 Pa.C.S.A. 6312 is entitled "Sexual abuse of children". One of the prohibited acts is the knowing possession or control of any "book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense".

MM. **Rhode Island.** RI ST 11-9-1.3 is entitled “Child pornography prohibited”. The statute criminalizes production, mail, transport, or reproduction of child pornography, including by computer. Knowing possession is also specifically prohibited, including possession of “any book, magazine, periodical, film, videotape, computer disk, computer file, or any other material that contains an image of child pornography”.

NN. **South Carolina.** South Carolina focuses on engaging a child for sexual performance or producing, directing, or promoting sexual performance by a child under 18. SCC sects. 16-3-800, 16-3-810, and 16-3-820.

OO. **South Dakota.** SDCL 22-22-23.1 is entitled “Possession of child pornography as a felony”. Knowing possession of any medium is a crime, as is knowing possession “encourages aids, or abets, or entices any person to commit a prohibited sexual act”.

PP. **Tennessee.** Tennessee’s statutes concentrate on the production and distribution of child pornography. TCA 39-17-902. A second statute, entitled “Aggravated sexual exploitation” criminalizes possession with the intent to distribute. TCA 39-17-1004.

QQ. **Texas.** VTCA 43.26 criminalizes the knowing possession of “visual material that visually depicts a child younger than 18 years of age at the time the image of the child was made who is engaging in sexual conduct”.

RR. **Utah.** Utah’s statutes set forth legislative determinations about the harm caused by the sexual exploitation of minors. This legislative determination included a statement that the purpose of the statute was “to prohibit the production, possession, possession with the intent to distribute, and distribution of materials which sexually exploit minors, regardless of whether the materials are classified as legally obscene”. UCA 76-5a-1. UCA 76-5a-3 specifically criminalizes each of these activities deemed harmful by the legislative finding.