

CHAPTER NO. 496

SENATE BILL NO. 2102

**By Burchett, Miller, Beavers, Black, Bowers, Bryson, Burks, Cohen, Cooper, Crowe, Crutchfield, Finney, Ford, Fowler, Hagood, Harper, Haynes, Henry, Herron, Jackson, Ketron, Kilby, Kurita, Kyle, McLeary, McNally, Norris, Curtis S. Person, Jr., Ramsey, Southerland, Tracy, Williams, Mr. Speaker Wilder**

**Substituted for: House Bill No. 2082**

**By John DeBerry, McMillan, Rinks, Maddox, Kelsey, Watson, Dunn, Marrero, Hargett, Campfield, Fitzhugh, Briley, Shaw, Tidwell, McDonald, Cooper, Phillip Johnson, Gresham, Swafford, Hill, Fraley, Pruitt, Litz, Coleman, Sontany, Odom, Hood, Curtiss, Davidson, Moore, Cobb, Mike Turner, Winningham, Rowland, Armstrong, Tindell, Maggart, Lynn, Pleasant, McCormick, Bone, Matheny, Baird, Montgomery, Shepard, Pinion, Overbey, Sargent, Eldridge, Miller, Clem, Casada, Bunch, Stanley, Russell Johnson, West, Strader, DuBois, Towns, Hackworth, Ferguson, Favors, Niceley, Brown**

AN ACT to amend Tennessee Code Annotated, Title 39, relative to exploitation of minors.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 39-17-1002, is amended by deleting such section in its entirety and by substituting instead the following:

Section 39-17-1002. The following definitions apply in §§ 39-17-1002--39-17-1007 unless the context requires otherwise:

(1) "Community" means the judicial district, as defined by § 16-2-506, in which a violation is alleged to have occurred;

(2) "Material" means:

(A) Any picture, drawing, photograph, undeveloped film or film negative, motion picture film, videocassette tape or other pictorial representation;

(B) Any statue, figure, theatrical production or electrical reproduction;

(C) Any image stored on a computer hard drive, a computer disk of any type, or any other medium designed to store information for later retrieval; or

(D) Any image transmitted to a computer or other electronic media or video screen by telephone line, cable, satellite transmission, or other method which is capable of further transmission, manipulation, storage or accessing even if not stored or saved at the time of transmission;

(3) "Minor" means any person who has not reached eighteen (18) years of age;

(4) "Patently offensive" means that which goes substantially beyond customary limits of candor in describing or representing such matters;

(5) "Performance" means any play, motion picture, photograph, dance, or other visual representation that can be exhibited before an audience of one or more persons;

(6) "Promote" means to finance, produce, direct, manufacture, issue, publish, exhibit or advertise or to offer or agree to do the same;

(7) "Prurient interest" means a shameful or morbid interest in sex;

(8) "Sexual activity" means any of the following acts:

(A) Vaginal, anal or oral intercourse, whether done with another person or an animal;

(B) Masturbation, whether done alone or with another human or an animal;

(C) Patently offensive, as determined by contemporary community standards, physical contact with or touching of a person's clothed or unclothed genitals, pubic area, buttocks or breasts in an act of apparent sexual stimulation or sexual abuse;

(D) Sado-masochistic abuse including flagellation, torture, physical restraint, domination or subordination by or upon a person for the purpose of sexual gratification of any person;

(E) The insertion of any part of a person's body or of any object into another person's anus or vagina, except when done as part of a recognized medical procedure by a licensed professional;

(F) Patently offensive, as determined by contemporary community standards, conduct, representations, depictions or descriptions of excretory functions; or

(G) Lascivious exhibition of the female breast or the genitals, buttocks, anus or pubic or rectal area of any person.

SECTION 2. Tennessee Code Annotated, Section 39-17-1003, is amended by deleting such section in its entirety and by substituting instead the following:

Section 39-17-1003.

(a) It is unlawful for any person to knowingly possess material that includes a minor engaged in:

- (1) Sexual activity; or
- (2) Simulated sexual activity that is patently offensive.

(b) A person possessing material that violates subsection (a) may be charged in a separate count for each individual image, picture, drawing, photograph, motion picture film, videocassette tape, or other pictorial representation; or where the number of materials possessed is greater than fifty (50) then the person may be charged in a single count to enhance the class of offense under subsection (d).

(c) In a prosecution under this section, the trier of fact may consider the title, text, visual representation, Internet history, physical development of the person depicted, expert medical testimony, expert computer forensic testimony, and any other relevant evidence in determining whether a person knowingly possessed the material or in determining whether the material or image otherwise represents or depicts that a participant is a minor.

(d) A violation of this section is a Class D felony; however, if the number of individual images, materials or combination thereof which are possessed is more than fifty (50) then the offense shall be a Class C felony and if the number of individual images, materials or combination thereof exceeds one hundred (100) the offense shall be a Class B felony.

(e) In a prosecution under this statute the state is not required to prove the actual identity or age of the minor.

SECTION 3. Tennessee Code Annotated, Section 39-17-1004, is amended by deleting such section in its entirety and by substituting instead the following:

Section 39-17-1004.

(a)(1) It is unlawful for a person to knowingly promote, sell, distribute, transport, purchase or exchange material, or possess with the intent to promote, sell, distribute, transport, purchase or exchange material, which includes a minor engaged in:

- (A) Sexual activity; or
- (B) Simulated sexual activity that is patently offensive.

(2) A person who violates subsection (a)(1) may be charged in a separate count for each individual image, picture, drawing, photograph, motion picture film, videocassette tape, or other pictorial representation; or where the number of materials involved in a violation under subsection (a)(1) is greater than twenty-five (25) then the person may be charged in a single count to enhance the class of offense under subsection (4).

(3) In a prosecution under this section, the trier of fact may consider the title, text, visual representation, Internet history, physical development of the person depicted, expert medical testimony, expert computer forensic testimony, and any other relevant evidence in determining whether a person knowingly

promoted, sold, distributed, transported, purchased, exchanged or possessed the material for these purposes or in determining whether the material or image otherwise represents or depicts that a participant is a minor.

(4) A violation of this section is a Class C felony; however, if the number of individual images, materials or combination thereof which are promoted, sold, distributed, transported, purchased, exchanged or possessed with intent to promote, sell, distribute, transport, purchase or exchange is more than twenty-five (25) then the offense shall be a Class B felony.

(b)(1) It is unlawful for a person to knowingly promote, sell, distribute, transport, purchase or exchange material which is obscene, as defined in § 39-17-901(10), or possess with the intent to promote, sell, distribute, transport, purchase or exchange such material, which includes a minor engaged in:

(A) Sexual activity; or

(B) Simulated sexual activity that is patently offensive.

(2) A person who violates subsection (b)(1) may be charged in a separate count for each individual image, picture, drawing, photograph, motion picture film, videocassette tape, or other pictorial representation; or where the number of materials involved in a violation under subsection (b)(1) is greater than twenty-five (25) then the person may be charged in a single count to enhance the class of offense under subdivision (4).

(3) In a prosecution under this section, the trier of fact may consider the title, text, visual representation, Internet history, physical development of the person depicted, expert medical testimony, expert computer forensic testimony, and any other relevant evidence in determining whether a person knowingly promoted, sold, distributed, transported, purchased, exchanged or possessed the material for these purposes or in determining whether the material or image otherwise represents or depicts that a participant is a minor.

(4) A violation of this section is a Class C felony; however, if the number of individual images, materials or combination thereof which are promoted, sold, distributed, transported, purchased, exchanged or possessed with intent to promote, sell, distribute, transport, purchase or exchange is more than twenty-five (25) then the offense shall be a Class B felony.

(c) In a prosecution under this statute the state is not required to prove the actual identity or age of the minor.

(d) A person is subject to prosecution in this state under this statute for any conduct which originates in this state, or for any conduct which originates by a person located outside this state where such person promoted, sold, distributed, transported, purchased, exchanged or possessed with intent to promote, sell, distribute, transport, purchase or exchange material within this state.

SECTION 4. Tennessee Code Annotated, Section 39-17-1005, is amended by deleting such section in its entirety and by substituting instead the following:

## Section 39-17-1005.

(a) It is unlawful for a person to knowingly promote, employ, use, assist, transport or permit a minor to participate in the performance of, or in the production of, acts or material which includes the minor engaging in:

- (1) Sexual activity; or
- (2) Simulated sexual activity that is patently offensive.

(b) A person violating subsection (a) may be charged in a separate count for each individual performance, image, picture, drawing, photograph, motion picture film, videocassette tape, or other pictorial representation.

(c) In a prosecution under this section, the trier of fact may consider the title, text, visual representation, internet history, physical development of the person depicted, expert medical testimony, expert computer forensic testimony, and any other relevant evidence in determining whether a person knowingly promoted, employed, used, assisted, transported or permitted a minor to participate in the performance of or in the production of acts or material for these purposes or in determining whether the material or image otherwise represents or depicts that a participant is a minor.

(d) A violation of this section is a Class B felony. Nothing in this section shall be construed as limiting prosecution for any other sexual offense under this chapter, nor shall a joint conviction under this section and any other related sexual offense even if arising out of the same conduct be construed as limiting any applicable punishment including consecutive sentencing under § 40-35-115 or the enhancement of sentence under § 40-35-114.

(e) In a prosecution under this statute the state is not required to prove the actual identity or age of the minor.

(f) A person is subject to prosecution in this state under this statute for any conduct which originates in this state, or for any conduct which originates by a person located outside this state where such person promoted, employed, assisted, transported or permitted a minor to engage in the performance of, or production of, acts or material within this state.

SECTION 5. Tennessee Code Annotated, Section 39-13-528, is amended by deleting such section in its entirety and by substituting instead the following:

## Section 39-13-528.

(a) It is an offense for a person eighteen (18) years of age or older, by means of oral, written or electronic communication, electronic mail or Internet services, directly or through another, to intentionally command, request, hire, persuade, invite or attempt to induce a person who the person making the solicitation knows or should know is less than eighteen (18) years of age, or solicits a law enforcement officer posing as a minor and who the person making the solicitation reasonably believes to be less than eighteen

(18) years of age, to engage in conduct that if completed would constitute a violation by the soliciting adult of one (1) or more of the following offenses:

- (1) Rape of a child pursuant to § 39-13-522;
- (2) Aggravated rape pursuant to § 39-13-502;
- (3) Rape pursuant to § 39-13-503;
- (4) Aggravated sexual battery pursuant to § 39-13-504;
- (5) Sexual battery by an authority figure pursuant to § 39-13-527;
- (6) Sexual battery pursuant to § 39-13-505;
- (7) Statutory rape pursuant to § 39-13-506;
- (8) Especially aggravated sexual exploitation of a minor pursuant to § 39-17-1005; or
- (9) Sexual activity involving a minor pursuant to § 39-13-529.

(b) It is no defense that the solicitation was unsuccessful, or the conduct solicited was not engaged in, or that the law enforcement officer could not engage in the solicited offense. It is no defense that the minor solicited was unaware of the criminal nature of the conduct solicited.

(c) A violation of this section shall constitute an offense one (1) classification lower than the most serious crime solicited unless the offense solicited was a Class E felony in which case the offense shall be a Class A misdemeanor.

(d) A person is subject to prosecution in this state under this statute for any conduct which originates in this state, or for any conduct which originates by a person located outside this state where such person solicited the conduct of a minor located in this state, or solicited a law enforcement officer posing as a minor located within this state.

SECTION 6. Tennessee Code Annotated, Title 39, Chapter 13, Part 5, is amended by adding a new section thereto, as follows:

Section 39-13-529.

(a) It is an offense for a person eighteen (18) years of age or older, by means of oral, written or electronic communication, electronic mail or Internet service including webcam communications, directly or through another, to intentionally command, hire, persuade, induce or cause a minor to engage in sexual activity or simulated sexual activity that is patently offensive as defined in § 39-17-1002, where such sexual activity or simulated sexual activity is observed by that person or by another.

(b) A violation of this section is a Class B felony.

(c) It is unlawful for any person eighteen (18) years of age or older, directly or by means of electronic communication, electronic mail or Internet service including webcam communications, to intentionally:

(1) Engage in sexual activity, or simulated sexual activity that is patently offensive, as defined in § 39-17-1002, for the purpose of having the minor view such sexual activity or simulated sexual activity, including circumstances where the minor is in the presence of such person or where the minor views such activity via electronic communication including electronic mail, Internet service and webcam communications.

(2) Display to a minor or expose a minor to any material containing sexual activity or simulated sexual activity that is patently offensive, as defined in § 39-17-1002, where the purpose of such display can reasonably be construed as being for the sexual arousal or gratification of the minor or the person displaying the material.

(3) Display to a law enforcement officer posing as a minor and who the person making the display reasonably believes to be less than eighteen (18) years of age, any material containing sexual activity or simulated sexual activity that is patently offensive, as defined in § 39-17-1002, where the purpose of such display can reasonably be construed as being for the sexual arousal or gratification of the intended minor or the person displaying the material.

(d) A violation of this section is a Class E felony provided that if the minor is less than thirteen (13) years of age the violation is a Class C felony.

(e) The statute of limitations for these offenses shall be the applicable statute for the class of the offense or until the child reaches the age of eighteen (18), whichever is greater.

(f) A person is subject to prosecution in this state under this statute for any conduct which originates in this state, or for any conduct which originates by a person located outside this state where such conduct involved a minor located in this state.

SECTION 7. This act shall take effect July 1, 2005, the public welfare requiring it.

PASSED: May 28, 2005

  
JOHN S. WILDER  
SPEAKER OF THE SENATE

  
JIMMY NAIFEH, SPEAKER  
HOUSE OF REPRESENTATIVES

APPROVED this 22<sup>nd</sup> day of June 2005

  
PHIL BREDESEN, GOVERNOR