

**SUBSTITUTE FOR
SENATE BILL NO. 1313**

A bill to amend 1931 PA 328, entitled
"The Michigan penal code,"
by amending section 145c (MCL 750.145c), as amended by 2004 PA 478.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

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

2 (a) "Appears to include a child" means that the depiction
3 appears to include, or conveys the impression that it includes, a
4 person who is less than 18 years of age, and the depiction meets
5 either of the following conditions:

6 (i) It was created using a depiction of any part of an actual
7 person under the age of 18.

8 (ii) It was not created using a depiction of any part of an
9 actual person under the age of 18, but all of the following apply
10 to that depiction:

1 (A) The average individual, applying contemporary community
2 standards, would find the depiction, taken as a whole, appeals to
3 the prurient interest.

4 (B) The reasonable person would find the depiction, taken as a
5 whole, lacks serious literary, artistic, political, or scientific
6 value.

7 (C) The depiction depicts or describes a listed sexual act in
8 a patently offensive way.

9 (b) "Child" means a person who is less than 18 years of age,
10 subject to the affirmative defense created in subsection (6)
11 regarding persons emancipated by operation of law.

12 (c) "Commercial film or photographic print processor" means a
13 person or his or her employee who, for compensation, develops
14 exposed photographic film into movie films, negatives, slides, or
15 prints; makes prints from negatives or slides; or duplicates movie
16 films or videotapes.

17 (d) "Computer technician" means a person who installs,
18 maintains, troubleshoots, upgrades, or repairs computer hardware,
19 software, personal computer networks, or peripheral equipment.

20 (e) "Contemporary community standards" means the customary
21 limits of candor and decency in this state at or near the time of
22 the alleged violation of this section.

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

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

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

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

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

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

27 (k) "Prurient interest" means a shameful or morbid interest in

1 nudity, sex, or excretion.

2 (l) "Child sexually abusive activity" means a child engaging in
3 a listed sexual act.

4 (m) "Child sexually abusive material" means any depiction,
5 whether made or produced by electronic, mechanical, or other means,
6 including a developed or undeveloped photograph, picture, film,
7 slide, video, electronic visual image, computer diskette, computer
8 or computer-generated image, or picture, or sound recording which
9 is of a child or appears to include a child engaging in a listed
10 sexual act; a book, magazine, computer, computer storage device, or
11 other visual or print or printable medium containing such a
12 photograph, picture, film, slide, video, electronic visual image,
13 computer, or computer-generated image, or picture, or sound
14 recording; or any reproduction, copy, or print of such a
15 photograph, picture, film, slide, video, electronic visual image,
16 book, magazine, computer, or computer-generated image, or picture,
17 other visual or print or printable medium, or sound recording.

18 (n) "Sadomasochistic abuse" means either of the following:

19 (i) Flagellation or torture, real or simulated, for the purpose
20 of real or simulated sexual stimulation or gratification, by or
21 upon a person.

22 (ii) The condition, real or simulated, of being fettered,
23 bound, or otherwise physically restrained for sexual stimulation or
24 gratification of a person.

25 (o) "Sexual excitement" means the condition, real or
26 simulated, of human male or female genitals in a state of real or
27 simulated overt sexual stimulation or arousal.

1 (p) "Sexual intercourse" means intercourse, real or simulated,
2 whether genital-genital, oral-genital, anal-genital, or oral-anal,
3 whether between persons of the same or opposite sex or between a
4 human and an animal, or with an artificial genital.

5 (2) A person who persuades, induces, entices, coerces, causes,
6 or knowingly allows a child to engage in a child sexually abusive
7 activity for the purpose of producing any child sexually abusive
8 material, or a person who arranges for, produces, makes, or
9 finances, or a person who attempts or prepares or conspires to
10 arrange for, produce, make, or finance any child sexually abusive
11 activity or child sexually abusive material is guilty of a felony,
12 punishable by imprisonment for not more than 20 years, or a fine of
13 not more than \$100,000.00, or both, if that person knows, has
14 reason to know, or should reasonably be expected to know that the
15 child is a child or that the child sexually abusive material
16 includes a child or that the depiction constituting the child
17 sexually abusive material appears to include a child, or that
18 person has not taken reasonable precautions to determine the age of
19 the child.

20 (3) A person who distributes or promotes, or finances the
21 distribution or promotion of, or receives for the purpose of
22 distributing or promoting, or conspires, attempts, or prepares to
23 distribute, receive, finance, or promote any child sexually abusive
24 material or child sexually abusive activity is guilty of a felony,
25 punishable by imprisonment for not more than 7 years, or a fine of
26 not more than \$50,000.00, or both, if that person knows, has reason
27 to know, or should reasonably be expected to know that the child is

1 a child or that the child sexually abusive material includes a
2 child or that the depiction constituting the child sexually abusive
3 material appears to include a child, or that person has not taken
4 reasonable precautions to determine the age of the child. This
5 subsection does not apply to the persons described in section 7 of
6 1984 PA 343, MCL 752.367.

7 (4) A person who knowingly possesses any child sexually
8 abusive material is guilty of a felony punishable by imprisonment
9 for not more than 4 years or a fine of not more than \$10,000.00, or
10 both, if that person knows, has reason to know, or should
11 reasonably be expected to know the child is a child or that the
12 child sexually abusive material includes a child or that the
13 depiction constituting the child sexually abusive material appears
14 to include a child, or that person has not taken reasonable
15 precautions to determine the age of the child. This subsection does
16 not apply to any of the following:

17 (a) A person described in section 7 of 1984 PA 343, MCL
18 752.367, a commercial film or photographic print processor acting
19 ~~pursuant to~~ **UNDER** subsection (8), or a computer technician acting
20 ~~pursuant to~~ **UNDER** subsection (9).

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

23 (c) An employee or contract agent of the department of social
24 services acting within the scope of his or her duties as an
25 employee or contract agent.

26 (d) A judicial officer or judicial employee acting within the
27 scope of his or her duties as a judicial officer or judicial

1 employee.

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

4 (f) A physician, psychologist, limited license psychologist,
5 professional counselor, or registered nurse licensed under the
6 public health code, 1978 PA 368, MCL 333.1101 to 333.25211, acting
7 within the scope of practice for which he or she is licensed.

8 (g) A social worker registered in this state under article 15
9 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838,
10 acting within the scope of practice for which he or she is
11 registered.

12 (5) Expert testimony as to the age of the child used in a
13 child sexually abusive material or a child sexually abusive
14 activity is admissible as evidence in court and may be a legitimate
15 basis for determining age, if age is not otherwise proven.

16 (6) It is an affirmative defense to a prosecution under this
17 section that the alleged child is a person who is emancipated by
18 operation of law under section 4(2) of 1968 PA 293, MCL 722.4, as
19 proven by a preponderance of the evidence.

20 (7) If a defendant in a prosecution under this section
21 proposes to offer in his or her defense evidence to establish that
22 a depiction that appears to include a child was not, in fact,
23 created using a depiction of any part of an actual person under the
24 age of 18, the defendant shall at the time of the arraignment on
25 the information or within 15 days after arraignment but not less
26 than 10 days before the trial of the case, or at such other time as
27 the court directs, file and serve upon the prosecuting attorney of

1 record a notice in writing of his or her intention to offer that
2 defense. The notice shall contain, as particularly as is known to
3 the defendant or the defendant's attorney, the names of witnesses
4 to be called in behalf of the defendant to establish that defense.
5 The defendant's notice shall include specific information as to the
6 facts that establish that the depiction was not, in fact, created
7 using a depiction of any part of an actual person under the age of
8 18. Failure to file a timely notice in conformance with this
9 subsection precludes a defendant from offering this defense.

10 (8) If a commercial film or photographic print processor
11 reports to a law enforcement agency having jurisdiction his or her
12 knowledge or observation, within the scope of his or her
13 professional capacity or employment, of a film, photograph, movie
14 film, videotape, negative, or slide depicting a person that the
15 processor has reason to know or reason to believe is a child
16 engaged in a listed sexual act; furnishes a copy of the film,
17 photograph, movie film, videotape, negative, or slide to a law
18 enforcement agency having jurisdiction; or keeps the film,
19 photograph, movie film, videotape, negative, or slide according to
20 the law enforcement agency's instructions, both of the following
21 shall apply:

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

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

1 this subsection.

2 (9) If a computer technician reports to a law enforcement
3 agency having jurisdiction his or her knowledge or observation,
4 within the scope of his or her professional capacity or employment,
5 of an electronic visual image, computer-generated image or picture
6 or sound recording depicting a person that the computer technician
7 has reason to know or reason to believe is a child engaged in a
8 listed sexual act; furnishes a copy of that image, picture, or
9 sound recording to the law enforcement agency; or keeps the image,
10 picture, or sound recording according to the law enforcement
11 agency's instructions, both of the following shall apply:

12 (a) The identity of the computer technician shall be
13 confidential, subject to disclosure only with his or her consent or
14 by judicial process.

15 (b) If the computer technician acted in good faith, he or she
16 shall be immune from civil liability that might otherwise be
17 incurred by his or her actions. This immunity extends only to acts
18 described in this subsection.

19 (10) IN ANY CRIMINAL PROCEEDING REGARDING AN ALLEGED VIOLATION
20 OR ATTEMPTED VIOLATION OF THIS SECTION, THE COURT SHALL DENY ANY
21 REQUEST BY THE DEFENDANT TO COPY, PHOTOGRAPH, DUPLICATE, OR
22 OTHERWISE REPRODUCE ANY PHOTOGRAPHIC OR OTHER PICTORIAL EVIDENCE OF
23 A CHILD ENGAGING IN A LISTED SEXUAL ACT IF THE PROSECUTING ATTORNEY
24 MAKES THAT EVIDENCE REASONABLY AVAILABLE TO THE DEFENDANT. EVIDENCE
25 IS CONSIDERED TO BE REASONABLY AVAILABLE TO THE DEFENDANT UNDER
26 THIS SUBSECTION IF THE PROSECUTING ATTORNEY PROVIDES AN OPPORTUNITY
27 TO THE DEFENDANT AND HIS OR HER ATTORNEY, AND ANY PERSON THE

Senate Bill No. 1313 as amended October 17, 2012

1 DEFENDANT MAY SEEK TO QUALIFY AS AN EXPERT WITNESS AT TRIAL, TO
2 INSPECT, VIEW, AND EXAMINE THAT EVIDENCE AT A FACILITY APPROVED BY
3 THE PROSECUTING ATTORNEY.

4 (11) ~~(10)~~—This section applies uniformly throughout the state
5 and all political subdivisions and municipalities in the state.

6 (12) ~~(11)~~—A local municipality or political subdivision shall
7 not enact ~~ordinances,~~ ~~nor~~ **ANY ORDINANCE OR** enforce **ANY** existing
8 ~~ordinances, rules,~~ **ORDINANCE, RULE,** or ~~regulations~~ **REGULATION**
9 governing child sexually abusive activity or child sexually abusive
10 material as defined by this section.

<<Enacting section 1. This amendatory act takes effect March 1,
2013.>>