

SENATE BILL No. 1313

September 25, 2012, Introduced by Senator HANSEN and referred to the Committee on Judiciary.

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:

11 (A) The average individual, applying contemporary community

1 standards, would find the depiction, taken as a whole, appeals to
2 the prurient interest.

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

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

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

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

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

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

22 (f) "Erotic fondling" means touching a person's clothed or
23 unclothed genitals, pubic area, buttocks, or, if the person is
24 female, breasts, or if the person is a child, the developing or
25 undeveloped breast area, for the purpose of real or simulated overt
26 sexual gratification or stimulation of 1 or more of the persons
27 involved. Erotic fondling does not include physical contact, even

1 if affectionate, that is not for the purpose of real or simulated
2 overt sexual gratification or stimulation of 1 or more of the
3 persons involved.

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

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

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

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

26 (k) "Prurient interest" means a shameful or morbid interest in
27 nudity, sex, or excretion.

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

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

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

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

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

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

27 (p) "Sexual intercourse" means intercourse, real or simulated,

1 whether genital-genital, oral-genital, anal-genital, or oral-anal,
2 whether between persons of the same or opposite sex or between a
3 human and an animal, or with an artificial genital.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 **(10) PURSUANT TO SECTION 24 OF ARTICLE I OF THE STATE**
19 **CONSTITUTION OF 1963, GUARANTEEING CRIME VICTIMS THE RIGHT TO BE**
20 **TREATED WITH RESPECT FOR THEIR DIGNITY AND PRIVACY, THE COURT**
21 **SHALL, IN ANY CRIMINAL PROCEEDING REGARDING AN ALLEGED VIOLATION OR**
22 **ATTEMPTED VIOLATION OF THIS SECTION, DENY ANY REQUEST BY THE**
23 **DEFENDANT TO COPY, PHOTOGRAPH, DUPLICATE, OR OTHERWISE REPRODUCE**
24 **ANY PHOTOGRAPHIC OR OTHER PICTORIAL EVIDENCE OF A CHILD ENGAGING IN**
25 **A LISTED SEXUAL ACT IF THE PROSECUTING ATTORNEY MAKES THAT EVIDENCE**
26 **REASONABLY AVAILABLE TO THE DEFENDANT. EVIDENCE IS CONSIDERED TO BE**
27 **REASONABLY AVAILABLE TO THE DEFENDANT UNDER THIS SUBSECTION IF THE**

1 PROSECUTING ATTORNEY PROVIDES AMPLE OPPORTUNITY TO THE DEFENDANT
2 AND HIS OR HER ATTORNEY, AND ANY PERSON THE DEFENDANT MAY SEEK TO
3 QUALIFY AS AN EXPERT WITNESS AT TRIAL, TO INSPECT, VIEW, AND
4 EXAMINE THAT EVIDENCE AT A FACILITY APPROVED BY THE PROSECUTING
5 ATTORNEY.

6 (11) ~~(10)~~ This section applies uniformly throughout the state
7 and all political subdivisions and municipalities in the state.

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