

SENATE BILL No. 878

February 27, 2018, Introduced by Senators HERTEL, O'BRIEN, JONES, HORN, KNOLLENBERG, KNEZEK, BIEDA, ROCCA, EMMONS, CONYERS, ANANICH, HOPGOOD, COLBECK, BRANDENBURG, STAMAS, MARLEAU, ZORN, KOWALL, MACGREGOR, SHIRKEY and SCHUITMAKER 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 2012 PA 583.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

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

2 (a) "Access" means to intentionally cause to be viewed by or
3 transmitted to a person.

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

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

10 (ii) It was not created using a depiction of any part of an

1 actual person under the age of 18, but all of the following apply
2 to that depiction:

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

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

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

11 (c) "Child" means a person who is less than 18 years of age,
12 subject to the affirmative defense created in subsection ~~(6)~~—(7)
13 regarding persons emancipated by operation of law.

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

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

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

25 (g) "Erotic fondling" means touching a person's clothed or
26 unclothed genitals, pubic area, buttocks, or, if the person is
27 female, breasts, or if the person is a child, the developing or

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

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

11 (i) "Listed sexual act" means sexual intercourse, erotic
12 fondling, sadomasochistic abuse, masturbation, passive sexual
13 involvement, sexual excitement, or erotic nudity.

14 (j) "Make" means to bring into existence by copying, shaping,
15 changing, or combining material, and specifically includes, but is
16 not limited to, intentionally creating a reproduction, copy, or
17 print of child sexually abusive material, in whole or part. Make
18 does not include the creation of an identical reproduction or copy
19 of child sexually abusive material within the same digital storage
20 device or the same piece of digital storage media.

21 (k) "Masturbation" means the real or simulated touching,
22 rubbing, or otherwise stimulating of a person's own 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, either by manual manipulation or self-
26 induced or with an artificial instrument, for the purpose of real
27 or simulated overt sexual gratification or arousal of the person.

1 (l) "Passive sexual involvement" means an act, real or
2 simulated, that exposes another person to or draws another person's
3 attention to an act of sexual intercourse, erotic fondling,
4 sadomasochistic abuse, masturbation, sexual excitement, or erotic
5 nudity because of viewing any of these acts or because of the
6 proximity of the act to that person, for the purpose of real or
7 simulated overt sexual gratification or stimulation of 1 or more of
8 the persons involved.

9 (m) "Prurient interest" means a shameful or morbid interest in
10 nudity, sex, or excretion.

11 (n) "Child sexually abusive activity" means a child engaging
12 in a listed sexual act.

13 (o) "Child sexually abusive material" means any depiction,
14 whether made or produced by electronic, mechanical, or other means,
15 including a developed or undeveloped photograph, picture, film,
16 slide, video, electronic visual image, computer diskette, computer
17 or computer-generated image, or picture, or sound recording which
18 is of a child or appears to include a child engaging in a listed
19 sexual act; a book, magazine, computer, computer storage device, or
20 other visual or print or printable medium containing such a
21 photograph, picture, film, slide, video, electronic visual image,
22 computer, or computer-generated image, or picture, or sound
23 recording; or any reproduction, copy, or print of such a
24 photograph, picture, film, slide, video, electronic visual image,
25 book, magazine, computer, or computer-generated image, or picture,
26 other visual or print or printable medium, or sound recording.

27 (p) "Sadomasochistic abuse" means either of the following:

1 (i) Flagellation or torture, real or simulated, for the
2 purpose of real or simulated sexual stimulation or gratification,
3 by or upon a person.

4 (ii) The condition, real or simulated, of being fettered,
5 bound, or otherwise physically restrained for sexual stimulation or
6 gratification of a person.

7 (q) "Sexual excitement" means the condition, real or
8 simulated, of human male or female genitals in a state of real or
9 simulated overt sexual stimulation or arousal.

10 (r) "Sexual intercourse" means intercourse, real or simulated,
11 whether genital-genital, oral-genital, anal-genital, or oral-anal,
12 whether between persons of the same or opposite sex or between a
13 human and an animal, or with an artificial genital.

14 (2) A person who persuades, induces, entices, coerces, causes,
15 or knowingly allows a child to engage in a child sexually abusive
16 activity for the purpose of producing any child sexually abusive
17 material, or a person who arranges for, produces, makes, copies,
18 reproduces, or finances, or a person who attempts or prepares or
19 conspires to arrange for, produce, make, copy, reproduce, or
20 finance any child sexually abusive activity or child sexually
21 abusive material for personal, distributional, or other purposes is
22 guilty of a felony, punishable by imprisonment for not more than 20
23 years, or a fine of not more than \$100,000.00, or both, if that
24 person knows, has reason to know, or should reasonably be expected
25 to know that the child is a child or that the child sexually
26 abusive material includes a child or that the depiction
27 constituting the child sexually abusive material appears to include

1 a child, or that person has not taken reasonable precautions to
2 determine the age of the child.

3 (3) A person who distributes or promotes, or finances the
4 distribution or promotion of, or receives for the purpose of
5 distributing or promoting, or conspires, attempts, or prepares to
6 distribute, receive, finance, or promote any child sexually abusive
7 material or child sexually abusive activity is guilty of a felony,
8 punishable by imprisonment for not more than 7 years, or a fine of
9 not more than \$50,000.00, or both, if that person knows, has reason
10 to know, or should reasonably be expected to know that the child is
11 a child or that the child sexually abusive material includes a
12 child or that the depiction constituting the child sexually abusive
13 material appears to include a child, or that person has not taken
14 reasonable precautions to determine the age of the child. This
15 subsection does not apply to the persons described in section 7 of
16 1984 PA 343, MCL 752.367.

17 (4) ~~A~~ **EXCEPT AS PROVIDED IN SUBSECTION (5),** A person who
18 knowingly possesses or knowingly seeks and accesses any child
19 sexually abusive material is guilty of a felony punishable **AS**
20 **FOLLOWS:**

21 **(A) EXCEPT AS PROVIDED IN SUBDIVISION (B),** by imprisonment for
22 not more than 4 years or a fine of not more than \$10,000.00, or
23 both, if that person knows, has reason to know, or should
24 reasonably be expected to know the child is a child or that the
25 child sexually abusive material includes a child or that the
26 depiction constituting the child sexually abusive material appears
27 to include a child, or that person has not taken reasonable

1 precautions to determine the age of the child. ~~This subsection~~

2 (B) IF BOTH OF THE FOLLOWING APPLY, BY IMPRISONMENT FOR NOT
3 MORE THAN 10 YEARS OR A FINE OF NOT MORE THAN \$50,000.00, OR BOTH:

4 (i) THE CHILD SEXUALLY ABUSIVE MATERIAL DEPICTS A PREPUBESCENT
5 CHILD OR A CHILD LESS THAN 12 YEARS OF AGE, DEPICTS SADOMASOCHISTIC
6 ABUSE OR BESTIALITY, OR INCLUDES MORE THAN 100 IMAGES OF CHILD
7 SEXUALLY ABUSIVE MATERIAL.

8 (ii) THE PERSON KNOWS, HAS REASON TO KNOW, OR SHOULD
9 REASONABLY BE EXPECTED TO KNOW THAT THE DEPICTED CHILD IS A CHILD
10 OR THAT THE SEXUALLY ABUSIVE MATERIAL INCLUDES A CHILD OR THAT THE
11 DEPICTION CONSTITUTING THE CHILD SEXUALLY ABUSIVE MATERIAL APPEARS
12 TO INCLUDE A CHILD, OR THE PERSON HAS NOT TAKEN REASONABLE
13 PRECAUTIONS TO DETERMINE THE AGE OF THE DEPICTED CHILD.

14 (5) SUBSECTION (4) does not apply to any of the following:

15 (a) A person described in section 7 of 1984 PA 343, MCL
16 752.367, a commercial film or photographic print processor acting
17 under subsection ~~(8)~~, ~~(9)~~, or a computer technician acting under
18 subsection ~~(9)~~. ~~(10)~~.

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

21 (c) An employee or contract agent of the department of ~~social~~
22 **HEALTH AND HUMAN** services acting within the scope of his or her
23 duties as an employee or contract agent.

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

27 (e) A party or witness in a criminal or civil proceeding

1 acting within the scope of that criminal or civil proceeding.

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

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

10 (6) ~~(5)~~—Expert testimony as to the age of the child used in a
11 child sexually abusive material or a child sexually abusive
12 activity is admissible as evidence in court and may be a legitimate
13 basis for determining age, if age is not otherwise proven.

14 (7) ~~(6)~~—It is an affirmative defense to a prosecution under
15 this section that the alleged child is a person who is emancipated
16 by operation of law under section 4(2) of 1968 PA 293, MCL 722.4,
17 as proven by a preponderance of the evidence.

18 (8) ~~(7)~~—If a defendant in a prosecution under this section
19 proposes to offer in his or her defense evidence to establish that
20 a depiction that appears to include a child was not, in fact,
21 created using a depiction of any part of an actual person under the
22 age of 18, the defendant shall at the time of the arraignment on
23 the information or within 15 days after arraignment but not less
24 than 10 days before the trial of the case, or at such other time as
25 the court directs, file and serve upon the prosecuting attorney of
26 record a notice in writing of his or her intention to offer that
27 defense. The notice ~~shall~~**MUST** contain, as particularly as is known

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

9 (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~~**MUST** 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 **IS** immune from civil liability that might otherwise be incurred by
26 his or her actions. This immunity extends only to acts described in
27 this subsection.

1 (10) ~~(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 apply:

11 (a) The identity of the computer technician ~~shall~~ **MUST** 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 is immune from civil liability that might otherwise be incurred by
16 his or her actions. This immunity extends only to acts described in
17 this subsection.

18 (11) ~~(10)~~—In any criminal proceeding regarding an alleged
19 violation or attempted violation of this section, the court shall
20 deny any request by the defendant to copy, photograph, duplicate,
21 or otherwise reproduce any photographic or other pictorial evidence
22 of a child engaging in a listed sexual act if the prosecuting
23 attorney makes that evidence reasonably available to the defendant.
24 Evidence is considered to be reasonably available to the defendant
25 under this subsection if the prosecuting attorney provides an
26 opportunity to the defendant and his or her attorney, and any
27 person the defendant may seek to qualify as an expert witness at

1 trial, to inspect, view, and examine that evidence at a facility
2 approved by the prosecuting attorney.

3 (12) ~~(11)~~—This section applies uniformly throughout the state
4 and all political subdivisions and municipalities in the state.

5 (13) ~~(12)~~—A local municipality or political subdivision shall
6 not enact any ordinance or enforce any existing ordinance, rule, or
7 regulation governing child sexually abusive activity or child
8 sexually abusive material. ~~as defined by this section.~~

9 (14) IF A PERSON IS CONVICTED OF A SECOND OR SUBSEQUENT
10 OFFENSE UNDER THIS SECTION, THE SENTENCE IMPOSED FOR A SECOND OR
11 SUBSEQUENT OFFENSE IS A MANDATORY MINIMUM SENTENCE OF NOT LESS THAN
12 5 YEARS. FOR THE PURPOSES OF THIS SECTION, AN OFFENSE IS CONSIDERED
13 A SECOND OR SUBSEQUENT OFFENSE IF, PRIOR TO CONVICTION OF THE
14 SECOND OR SUBSEQUENT OFFENSE, THE PERSON HAS BEEN CONVICTED UNDER
15 THIS SECTION OR OF ANOTHER CRIME INVOLVING A SEXUAL OFFENSE AGAINST
16 A MINOR, OR UNDER A SUBSTANTIALLY SIMILAR STATUTE OF ANOTHER STATE
17 OR OF THE UNITED STATES.

18 Enacting section 1. This amendatory act takes effect 90 days
19 after the date it is enacted into law.