

## **CRIMINAL DISCOVERY: RESTRICT ACCESS TO CHILD SEXUALLY ABUSIVE MATERIAL**

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**Senate Bill 1313 (Substitute H-2)**

**Sponsor: Sen. Goeff Hansen**

**House Committee: Judiciary**

**Senate Committee: Judiciary**

**Complete to 12-10-12**

### **A SUMMARY OF SENATE BILL 1313 AS REPORTED BY HOUSE COMMITTEE**

Senate Bill 1313 would amend the Michigan Penal Code to do the following:

- Require a court in a criminal proceeding regarding an alleged violation or attempted violation of the statute on child sexually abusive activity or material to deny any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any photographic or other pictorial evidence of a child engaging in a listed sexual act if the prosecuting attorney makes that evidence reasonably available to the defendant.
- Specify that evidence would be considered "reasonably available" if the prosecuting attorney provides an opportunity to the defendant and his or her attorney, and an expert witness, to inspect, view, and examine that evidence at a facility approved by the prosecuting attorney.
- Make it a crime to knowingly seek and access child sexually abusive material. The penalty would be the same for possessing such materials: up to four years' imprisonment and/or a fine of not more than \$10,000.
- Make it a crime to copy or reproduce child sexually abusive activity or material, in addition to current prohibitions on causing or knowingly allowing a child to engage in such activity for the purpose of producing child sexually abusive material, and apply the penalty to conduct done for personal, distributional, or other purposes. (The penalty is imprisonment for a maximum of 20 years and/or a fine of not more than \$100,000.)
- Define "make" (as in making child sexually abusive material) as bringing into existence by copying, shaping, changing, or combining material, and specifically include intentionally creating a reproduction, copy, or print of child sexually abusive material, in whole or part. "Make" would not include the creation of an identical reproduction or copy of child sexually abusive material within the same digital storage device or the same piece of digital storage media.

- Define "access" as intentionally causing to be viewed by or transmitted to a person.

The bill would take effect March 1, 2013.

MCL 750.145c

## **BACKGROUND INFORMATION:**

The bill would do several things. First, it would codify into Michigan law a federal statute that requires child pornography that is evidence in a criminal case to remain in the custody of the United States or the court, and prohibits a defendant from obtaining copies of the material as long as the US provides the defendant "ample opportunity for inspection, viewing, and examination." Several states have likewise adopted the provision into their state statutes. By enacting Senate Bill 1313, a court must deny access by a defendant to evidence that is depicting children engaging in sexual acts as long as the prosecutor makes such evidence reasonably available to the defendant, his or her attorney, and any person that the defendant may use as an expert witness in his or her defense. The federal law is contained within the Adam Walsh Child Protection and Safety Act and codified at 18 USC 3509(m). Though some feel denying a defendant or his or her legal counsel copies of the evidence for use to determine a defense violates constitutionally protected due process rights, so far such provisions have been upheld in court challenges as long as the defendants have been given ample opportunity, such as during regular business hours, to examine the materials.

Secondly, the bill clarifies, or specifically states, that "making copies" of child sexually abusive materials is sufficient to violate the prohibition on producing child pornography.

Lastly, the bill criminalizes the act of seeking out and opening websites that depict child pornography, even if no images were actively downloaded or saved. In a recent Michigan Supreme Court case, defendants were convicted of knowingly possessing child sexually abusive materials even though the only such material found on their computers had been automatically stored in temporary Internet files (TIFs). The court held that the term "possess" included both actual and constructive possession. People v Flick, 487 MICH 1; 790 NW2d 295 (2010). Thus, the bill codifies the Flick decision.

## **FISCAL IMPACT:**

The bill would revise current law to provide that a person who copies or reproduces any child sexually abusive material is guilty of felony punishable by up to 20 years in prison and/or a fine of up to \$100,000. Under current law, a person committing this offense would more likely be guilty of possession of child sexually abusive material, which carries a penalty of up to 4 years in prison and/or a fine up to \$10,000. The bill also adds a new felony for knowingly seeking and accessing child sexually abusive material and imposes penalties of up to 4 years in prison and/or a fine up to \$10,000 for this new offense.

To the extent that the bill results in more felony convictions or that convicted offenders are sentenced to longer prison sentences under the bill's provisions, it would increase state correctional costs. The average cost of prison incarceration in a state facility is roughly \$34,000 per prisoner per year, although the marginal cost of adding new prisoners to the system is typically lower. State costs related to parole and felony probation supervision average about \$2,400 per supervised offender per year. The local costs of incarceration in a county jail vary by jurisdiction. Any increase in penal fine revenues would increase funding for local libraries, which are the constitutionally-designated recipients of those revenues.

## **POSITIONS:**

The Office of Attorney General indicated support for the bill. (12-6-12)

The Prosecuting Attorneys Association of Michigan indicated support for the bill. (12-6-12)

The Michigan Coalition to End Domestic and Sexual Violence indicated support for the bill. (12-6-12)

The Michigan Domestic and Sexual Violence Prevention and Treatment Board indicated support for the bill. (12-6-12)

The Wayne County Prosecutor's Office indicated support for the bill. (12-6-12)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.