



97TH GENERAL ASSEMBLY

State of Illinois

2011 and 2012

HB5235

Introduced 2/8/2012, by Rep. Emily McAsey

SYNOPSIS AS INTRODUCED:

720 ILCS 5/11-20.1
720 ILCS 5/11-20.1B rep.

from Ch. 38, par. 11-20.1

Amends the Criminal Code of 1961. Repeals provision creating the offense of aggravated child pornography. In the statute creating child pornography, provides for enhanced penalties if the child depicted is under the age of 13. Provides that the issue of whether the child depicted is under the age of 13 is an element of the offense to be resolved by the trier of fact.

LRB097 16476 RLC 61644 b

CORRECTIONAL
BUDGET AND
IMPACT NOTE ACT
MAY APPLY

A BILL FOR

1 AN ACT concerning criminal law.

2 **Be it enacted by the People of the State of Illinois,**
3 **represented in the General Assembly:**

4 Section 5. The Criminal Code of 1961 is amended by changing
5 Section 11-20.1 as follows:

6 (720 ILCS 5/11-20.1) (from Ch. 38, par. 11-20.1)

7 Sec. 11-20.1. Child pornography.

8 (a) A person commits child pornography who:

9 (1) films, videotapes, photographs, or otherwise
10 depicts or portrays by means of any similar visual medium
11 or reproduction or depicts by computer any child whom he or
12 she knows or reasonably should know to be under the age of
13 18 ~~and at least 13 years of age~~ or any severely or
14 profoundly intellectually disabled person where such child
15 or severely or profoundly intellectually disabled person
16 is:

17 (i) actually or by simulation engaged in any act of
18 sexual penetration or sexual conduct with any person or
19 animal; or

20 (ii) actually or by simulation engaged in any act
21 of sexual penetration or sexual conduct involving the
22 sex organs of the child or severely or profoundly
23 intellectually disabled person and the mouth, anus, or

1 sex organs of another person or animal; or which
2 involves the mouth, anus or sex organs of the child or
3 severely or profoundly intellectually disabled person
4 and the sex organs of another person or animal; or

5 (iii) actually or by simulation engaged in any act
6 of masturbation; or

7 (iv) actually or by simulation portrayed as being
8 the object of, or otherwise engaged in, any act of lewd
9 fondling, touching, or caressing involving another
10 person or animal; or

11 (v) actually or by simulation engaged in any act of
12 excretion or urination within a sexual context; or

13 (vi) actually or by simulation portrayed or
14 depicted as bound, fettered, or subject to sadistic,
15 masochistic, or sadomasochistic abuse in any sexual
16 context; or

17 (vii) depicted or portrayed in any pose, posture or
18 setting involving a lewd exhibition of the unclothed or
19 transparently clothed genitals, pubic area, buttocks,
20 or, if such person is female, a fully or partially
21 developed breast of the child or other person; or

22 (2) with the knowledge of the nature or content
23 thereof, reproduces, disseminates, offers to disseminate,
24 exhibits or possesses with intent to disseminate any film,
25 videotape, photograph or other similar visual reproduction
26 or depiction by computer of any child or severely or

1 profoundly intellectually disabled person whom the person
2 knows or reasonably should know to be under the age of 18
3 ~~and at least 13 years of age~~ or to be a severely or
4 profoundly intellectually disabled person, engaged in any
5 activity described in subparagraphs (i) through (vii) of
6 paragraph (1) of this subsection; or

7 (3) with knowledge of the subject matter or theme
8 thereof, produces any stage play, live performance, film,
9 videotape or other similar visual portrayal or depiction by
10 computer which includes a child whom the person knows or
11 reasonably should know to be under the age of 18 ~~and at~~
12 ~~least 13 years of age~~ or a severely or profoundly
13 intellectually disabled person engaged in any activity
14 described in subparagraphs (i) through (vii) of paragraph
15 (1) of this subsection; or

16 (4) solicits, uses, persuades, induces, entices, or
17 coerces any child whom he or she knows or reasonably should
18 know to be under the age of 18 ~~and at least 13 years of age~~
19 or a severely or profoundly intellectually disabled person
20 to appear in any stage play, live presentation, film,
21 videotape, photograph or other similar visual reproduction
22 or depiction by computer in which the child or severely or
23 profoundly intellectually disabled person is or will be
24 depicted, actually or by simulation, in any act, pose or
25 setting described in subparagraphs (i) through (vii) of
26 paragraph (1) of this subsection; or

1 (5) is a parent, step-parent, legal guardian or other
2 person having care or custody of a child whom the person
3 knows or reasonably should know to be under the age of 18
4 ~~and at least 13 years of age~~ or a severely or profoundly
5 intellectually disabled person and who knowingly permits,
6 induces, promotes, or arranges for such child or severely
7 or profoundly intellectually disabled person to appear in
8 any stage play, live performance, film, videotape,
9 photograph or other similar visual presentation, portrayal
10 or simulation or depiction by computer of any act or
11 activity described in subparagraphs (i) through (vii) of
12 paragraph (1) of this subsection; or

13 (6) with knowledge of the nature or content thereof,
14 possesses any film, videotape, photograph or other similar
15 visual reproduction or depiction by computer of any child
16 or severely or profoundly intellectually disabled person
17 whom the person knows or reasonably should know to be under
18 the age of 18 ~~and at least 13 years of age~~ or to be a
19 severely or profoundly intellectually disabled person,
20 engaged in any activity described in subparagraphs (i)
21 through (vii) of paragraph (1) of this subsection; or

22 (7) solicits, or knowingly uses, persuades, induces,
23 entices, or coerces, a person to provide a child under the
24 age of 18 ~~and at least 13 years of age~~ or a severely or
25 profoundly intellectually disabled person to appear in any
26 videotape, photograph, film, stage play, live

1 presentation, or other similar visual reproduction or
2 depiction by computer in which the child or severely or
3 profoundly intellectually disabled person will be
4 depicted, actually or by simulation, in any act, pose, or
5 setting described in subparagraphs (i) through (vii) of
6 paragraph (1) of this subsection.

7 (b) (1) It shall be an affirmative defense to a charge of
8 child pornography that the defendant reasonably believed,
9 under all of the circumstances, that the child was 18 years
10 of age or older or that the person was not a severely or
11 profoundly intellectually disabled person but only where,
12 prior to the act or acts giving rise to a prosecution under
13 this Section, he or she took some affirmative action or
14 made a bonafide inquiry designed to ascertain whether the
15 child was 18 years of age or older or that the person was
16 not a severely or profoundly intellectually disabled
17 person and his or her reliance upon the information so
18 obtained was clearly reasonable.

19 (1.5) Telecommunications carriers, commercial mobile
20 service providers, and providers of information services,
21 including, but not limited to, Internet service providers
22 and hosting service providers, are not liable under this
23 Section by virtue of the transmission, storage, or caching
24 of electronic communications or messages of others or by
25 virtue of the provision of other related
26 telecommunications, commercial mobile services, or

1 information services used by others in violation of this
2 Section.

3 (2) (Blank).

4 (3) The charge of child pornography shall not apply to
5 the performance of official duties by law enforcement or
6 prosecuting officers or persons employed by law
7 enforcement or prosecuting agencies, court personnel or
8 attorneys, nor to bonafide treatment or professional
9 education programs conducted by licensed physicians,
10 psychologists or social workers.

11 (4) If the defendant possessed more than one of the
12 same film, videotape or visual reproduction or depiction by
13 computer in which child pornography is depicted, then the
14 trier of fact may infer that the defendant possessed such
15 materials with the intent to disseminate them.

16 (5) The charge of child pornography does not apply to a
17 person who does not voluntarily possess a film, videotape,
18 or visual reproduction or depiction by computer in which
19 child pornography is depicted. Possession is voluntary if
20 the defendant knowingly procures or receives a film,
21 videotape, or visual reproduction or depiction for a
22 sufficient time to be able to terminate his or her
23 possession.

24 (6) Any violation of paragraph (1), (2), (3), (4), (5),
25 or (7) of subsection (a) that includes a child engaged in,
26 solicited for, depicted in, or posed in any act of sexual

1 penetration or bound, fettered, or subject to sadistic,
2 masochistic, or sadomasochistic abuse in a sexual context
3 shall be deemed a crime of violence.

4 (c) If the violation does not involve a film, videotape, or
5 other moving depiction, a violation of paragraph (1), (4), (5),
6 or (7) of subsection (a) is a Class 1 felony with a mandatory
7 minimum fine of \$2,000 and a maximum fine of \$100,000. If the
8 violation involves a film, videotape, or other moving
9 depiction, a violation of paragraph (1), (4), (5), or (7) of
10 subsection (a) is a Class X felony with a mandatory minimum
11 fine of \$2,000 and a maximum fine of \$100,000. If the violation
12 does not involve a film, videotape, or other moving depiction,
13 a violation of paragraph (3) of subsection (a) is a Class 1
14 felony with a mandatory minimum fine of \$1500 and a maximum
15 fine of \$100,000. If the violation involves a film, videotape,
16 or other moving depiction, a violation of paragraph (3) of
17 subsection (a) is a Class X felony with a mandatory minimum
18 fine of \$1500 and a maximum fine of \$100,000. If the violation
19 does not involve a film, videotape, or other moving depiction,
20 a violation of paragraph (2) of subsection (a) is a Class 1
21 felony with a mandatory minimum fine of \$1000 and a maximum
22 fine of \$100,000. If the violation involves a film, videotape,
23 or other moving depiction, a violation of paragraph (2) of
24 subsection (a) is a Class X felony with a mandatory minimum
25 fine of \$1000 and a maximum fine of \$100,000. If the violation
26 does not involve a film, videotape, or other moving depiction,

1 a violation of paragraph (6) of subsection (a) is a Class 3
2 felony with a mandatory minimum fine of \$1000 and a maximum
3 fine of \$100,000. If the violation involves a film, videotape,
4 or other moving depiction, a violation of paragraph (6) of
5 subsection (a) is a Class 2 felony with a mandatory minimum
6 fine of \$1000 and a maximum fine of \$100,000.

7 (c-5) Where the child depicted is under the age of 13, a
8 violation of paragraph (1), (4), (5), or (7) of subsection (a)
9 is a Class X felony with a mandatory minimum fine of \$2,000 and
10 a maximum fine of \$100,000. Where the child depicted is under
11 the age of 13, a violation of paragraph (3) of subsection (a)
12 is a Class X felony with a mandatory minimum fine of \$1,500 and
13 a maximum fine of \$100,000. Where the child depicted is under
14 the age of 13, a violation of paragraph (2) of subsection (a)
15 is a Class X felony with a mandatory minimum fine of \$1,000 and
16 a maximum fine of \$100,000. Where the child depicted is under
17 the age of 13, a violation of paragraph (6) of subsection (a)
18 is a Class 2 felony with a mandatory minimum fine of \$1,000 and
19 a maximum fine of \$100,000. The issue of whether the child
20 depicted is under the age of 13 is an element of the offense to
21 be resolved by the trier of fact.

22 (d) If a person is convicted of a second or subsequent
23 violation of this Section within 10 years of a prior
24 conviction, the court shall order a presentence psychiatric
25 examination of the person. The examiner shall report to the
26 court whether treatment of the person is necessary.

1 (e) Any film, videotape, photograph or other similar visual
2 reproduction or depiction by computer which includes a child
3 under the age of 18 ~~and at least 13 years of age~~ or a severely
4 or profoundly intellectually disabled person engaged in any
5 activity described in subparagraphs (i) through (vii) or
6 paragraph 1 of subsection (a), and any material or equipment
7 used or intended for use in photographing, filming, printing,
8 producing, reproducing, manufacturing, projecting, exhibiting,
9 depiction by computer, or disseminating such material shall be
10 seized and forfeited in the manner, method and procedure
11 provided by Section 36-1 of this Code for the seizure and
12 forfeiture of vessels, vehicles and aircraft.

13 In addition, any person convicted under this Section is
14 subject to the property forfeiture provisions set forth in
15 Article 124B of the Code of Criminal Procedure of 1963.

16 (e-5) Upon the conclusion of a case brought under this
17 Section, the court shall seal all evidence depicting a victim
18 or witness that is sexually explicit. The evidence may be
19 unsealed and viewed, on a motion of the party seeking to unseal
20 and view the evidence, only for good cause shown and in the
21 discretion of the court. The motion must expressly set forth
22 the purpose for viewing the material. The State's attorney and
23 the victim, if possible, shall be provided reasonable notice of
24 the hearing on the motion to unseal the evidence. Any person
25 entitled to notice of a hearing under this subsection (e-5) may
26 object to the motion.

1 (f) Definitions. For the purposes of this Section:

2 (1) "Disseminate" means (i) to sell, distribute,
3 exchange or transfer possession, whether with or without
4 consideration or (ii) to make a depiction by computer
5 available for distribution or downloading through the
6 facilities of any telecommunications network or through
7 any other means of transferring computer programs or data
8 to a computer.

9 (2) "Produce" means to direct, promote, advertise,
10 publish, manufacture, issue, present or show.

11 (3) "Reproduce" means to make a duplication or copy.

12 (4) "Depict by computer" means to generate or create,
13 or cause to be created or generated, a computer program or
14 data that, after being processed by a computer either alone
15 or in conjunction with one or more computer programs,
16 results in a visual depiction on a computer monitor,
17 screen, or display.

18 (5) "Depiction by computer" means a computer program or
19 data that, after being processed by a computer either alone
20 or in conjunction with one or more computer programs,
21 results in a visual depiction on a computer monitor,
22 screen, or display.

23 (6) "Computer", "computer program", and "data" have
24 the meanings ascribed to them in Section 16D-2 of this
25 Code.

26 (7) For the purposes of this Section, "child

1 pornography" includes a film, videotape, photograph, or
2 other similar visual medium or reproduction or depiction by
3 computer that is, or appears to be, that of a person,
4 either in part, or in total, under the age of 18 ~~and at~~
5 ~~least 13 years of age~~ or a severely or profoundly
6 intellectually disabled ~~mentally retarded~~ person,
7 regardless of the method by which the film, videotape,
8 photograph, or other similar visual medium or reproduction
9 or depiction by computer is created, adopted, or modified
10 to appear as such. "Child pornography" also includes a
11 film, videotape, photograph, or other similar visual
12 medium or reproduction or depiction by computer that is
13 advertised, promoted, presented, described, or distributed
14 in such a manner that conveys the impression that the film,
15 videotape, photograph, or other similar visual medium or
16 reproduction or depiction by computer is of a person under
17 the age of 18 ~~and at least 13 years of age~~ or a severely or
18 profoundly intellectually disabled ~~mentally retarded~~
19 person.

20 (g) Re-enactment; findings; purposes.

21 (1) The General Assembly finds and declares that:

22 (i) Section 50-5 of Public Act 88-680, effective
23 January 1, 1995, contained provisions amending the
24 child pornography statute, Section 11-20.1 of the
25 Criminal Code of 1961. Section 50-5 also contained
26 other provisions.

1 (ii) In addition, Public Act 88-680 was entitled
2 "AN ACT to create a Safe Neighborhoods Law". (A)
3 Article 5 was entitled JUVENILE JUSTICE and amended the
4 Juvenile Court Act of 1987. (B) Article 15 was entitled
5 GANGS and amended various provisions of the Criminal
6 Code of 1961 and the Unified Code of Corrections. (C)
7 Article 20 was entitled ALCOHOL ABUSE and amended
8 various provisions of the Illinois Vehicle Code. (D)
9 Article 25 was entitled DRUG ABUSE and amended the
10 Cannabis Control Act and the Illinois Controlled
11 Substances Act. (E) Article 30 was entitled FIREARMS
12 and amended the Criminal Code of 1961 and the Code of
13 Criminal Procedure of 1963. (F) Article 35 amended the
14 Criminal Code of 1961, the Rights of Crime Victims and
15 Witnesses Act, and the Unified Code of Corrections. (G)
16 Article 40 amended the Criminal Code of 1961 to
17 increase the penalty for compelling organization
18 membership of persons. (H) Article 45 created the
19 Secure Residential Youth Care Facility Licensing Act
20 and amended the State Finance Act, the Juvenile Court
21 Act of 1987, the Unified Code of Corrections, and the
22 Private Correctional Facility Moratorium Act. (I)
23 Article 50 amended the WIC Vendor Management Act, the
24 Firearm Owners Identification Card Act, the Juvenile
25 Court Act of 1987, the Criminal Code of 1961, the
26 Wrongs to Children Act, and the Unified Code of

1 Corrections.

2 (iii) On September 22, 1998, the Third District
3 Appellate Court in *People v. Dainty*, 701 N.E. 2d 118,
4 ruled that Public Act 88-680 violates the single
5 subject clause of the Illinois Constitution (Article
6 IV, Section 8 (d)) and was unconstitutional in its
7 entirety. As of the time this amendatory Act of 1999
8 was prepared, *People v. Dainty* was still subject to
9 appeal.

10 (iv) Child pornography is a vital concern to the
11 people of this State and the validity of future
12 prosecutions under the child pornography statute of
13 the Criminal Code of 1961 is in grave doubt.

14 (2) It is the purpose of this amendatory Act of 1999 to
15 prevent or minimize any problems relating to prosecutions
16 for child pornography that may result from challenges to
17 the constitutional validity of Public Act 88-680 by
18 re-enacting the Section relating to child pornography that
19 was included in Public Act 88-680.

20 (3) This amendatory Act of 1999 re-enacts Section
21 11-20.1 of the Criminal Code of 1961, as it has been
22 amended. This re-enactment is intended to remove any
23 question as to the validity or content of that Section; it
24 is not intended to supersede any other Public Act that
25 amends the text of the Section as set forth in this
26 amendatory Act of 1999. The material is shown as existing

1 text (i.e., without underscoring) because, as of the time
2 this amendatory Act of 1999 was prepared, People v. Dainty
3 was subject to appeal to the Illinois Supreme Court.

4 (4) The re-enactment by this amendatory Act of 1999 of
5 Section 11-20.1 of the Criminal Code of 1961 relating to
6 child pornography that was amended by Public Act 88-680 is
7 not intended, and shall not be construed, to imply that
8 Public Act 88-680 is invalid or to limit or impair any
9 legal argument concerning whether those provisions were
10 substantially re-enacted by other Public Acts.

11 (Source: P.A. 96-292, eff. 1-1-10; 96-712, eff. 1-1-10;
12 96-1000, eff. 7-2-10; 96-1551, eff. 7-1-11; 97-157, eff.
13 1-1-12; 97-227, eff. 1-1-12; revised 9-12-11.)

14 (720 ILCS 5/11-20.1B rep.)

15 Section 10. The Criminal Code of 1961 is amended by
16 repealing Section 11-20.1B.