

SENATE BILL No. 133

DIGEST OF INTRODUCED BILL

Citations Affected: IC 35-42-4-4; IC 35-50-2-2.2.

Synopsis: Sentencing. Enhances the penalty for child exploitation and child pornography if the person has a previous conviction. Provides that a court may suspend only that part of a sentence that is in excess of the minimum sentence for a person convicted of a Level 2 or Level 3 felony who has a prior unrelated felony conviction, other than a conviction for a felony involving marijuana, hashish, hash oil, or salvia divinorum. (Current law provides that a court may suspend any part of a sentence for certain Level 2 and Level 3 felony convictions, including drug related convictions.) Provides that a court may suspend only that part of a sentence that is in excess of the minimum sentence for a person convicted of a felony for child exploitation or child pornography who has a prior conviction for child exploitation or child pornography.

Effective: July 1, 2021.

Freeman, Sandlin

January 5, 2021, read first time and referred to Committee on Corrections and Criminal Law.



First Regular Session of the 122nd General Assembly (2021)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2020 Regular Session of the General Assembly.

SENATE BILL No. 133

A BILL FOR AN ACT to amend the Indiana Code concerning criminal law and procedure.

Be it enacted by the General Assembly of the State of Indiana:

- 1 SECTION 1. IC 35-42-4-4, AS AMENDED BY P.L.266-2019,
2 SECTION 13, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
3 JULY 1, 2021]: Sec. 4. (a) The following definitions apply throughout
4 this section:
5 (1) "Disseminate" means to transfer possession for free or for a
6 consideration.
7 (2) "Matter" has the same meaning as in IC 35-49-1-3.
8 (3) "Performance" has the same meaning as in IC 35-49-1-7.
9 (4) "Sexual conduct" means:
10 (A) sexual intercourse;
11 (B) other sexual conduct (as defined in IC 35-31.5-2-221.5);
12 (C) exhibition of the:
13 (i) uncovered genitals; or
14 (ii) female breast with less than a fully opaque covering of
15 any part of the nipple;
16 intended to satisfy or arouse the sexual desires of any person;
17 (D) sadomasochistic abuse;



- 1 (E) sexual intercourse or other sexual conduct (as defined in
 2 IC 35-31.5-2-221.5) with an animal; or
 3 (F) any fondling or touching of a child by another person or of
 4 another person by a child intended to arouse or satisfy the
 5 sexual desires of either the child or the other person.
 6 (b) A person who:
 7 (1) knowingly or intentionally manages, produces, sponsors,
 8 presents, exhibits, photographs, films, videotapes, or creates a
 9 digitized image of any performance or incident that includes
 10 sexual conduct by a child under eighteen (18) years of age;
 11 (2) knowingly or intentionally disseminates, exhibits to another
 12 person, offers to disseminate or exhibit to another person, or
 13 sends or brings into Indiana for dissemination or exhibition matter
 14 that depicts or describes sexual conduct by a child under eighteen
 15 (18) years of age;
 16 (3) knowingly or intentionally makes available to another person
 17 a computer, knowing that the computer's fixed drive or peripheral
 18 device contains matter that depicts or describes sexual conduct by
 19 a child less than eighteen (18) years of age; or
 20 (4) with the intent to satisfy or arouse the sexual desires of any
 21 person:
 22 (A) knowingly or intentionally:
 23 (i) manages;
 24 (ii) produces;
 25 (iii) sponsors;
 26 (iv) presents;
 27 (v) exhibits;
 28 (vi) photographs;
 29 (vii) films;
 30 (viii) videotapes; or
 31 (ix) creates a digitized image of;
 32 any performance or incident that includes the uncovered
 33 genitals of a child less than eighteen (18) years of age or the
 34 exhibition of the female breast with less than a fully opaque
 35 covering of any part of the nipple by a child less than eighteen
 36 (18) years of age;
 37 (B) knowingly or intentionally:
 38 (i) disseminates to another person;
 39 (ii) exhibits to another person;
 40 (iii) offers to disseminate or exhibit to another person; or
 41 (iv) sends or brings into Indiana for dissemination or
 42 exhibition;



1 matter that depicts the uncovered genitals of a child less than
 2 eighteen (18) years of age or the exhibition of the female
 3 breast with less than a fully opaque covering of any part of the
 4 nipple by a child less than eighteen (18) years of age; or
 5 (C) makes available to another person a computer, knowing
 6 that the computer's fixed drive or peripheral device contains
 7 matter that depicts the uncovered genitals of a child less than
 8 eighteen (18) years of age or the exhibition of the female
 9 breast with less than a fully opaque covering of any part of the
 10 nipple by a child less than eighteen (18) years of age;

11 commits child exploitation, a Level 5 felony.

12 (c) However, the offense of child exploitation described in
 13 subsection (b) is a Level 4 felony if:

14 (1) the sexual conduct, matter, performance, or incident depicts
 15 or describes a child less than eighteen (18) years of age who:

16 (A) engages in bestiality (as described in IC 35-46-3-14);

17 (B) is mentally disabled or deficient;

18 (C) participates in the sexual conduct, matter, performance, or
 19 incident by use of force or the threat of force;

20 (D) physically or verbally resists participating in the sexual
 21 conduct, matter, performance, or incident;

22 (E) receives a bodily injury while participating in the sexual
 23 conduct, matter, performance, or incident; or

24 (F) is less than twelve (12) years of age; ~~or~~

25 (2) the child less than eighteen (18) years of age:

26 (A) engages in bestiality (as described in IC 35-46-3-14);

27 (B) is mentally disabled or deficient;

28 (C) participates in the sexual conduct, matter, performance, or
 29 incident by use of force or the threat of force;

30 (D) physically or verbally resists participating in the sexual
 31 conduct, matter, performance, or incident;

32 (E) receives a bodily injury while participating in the sexual
 33 conduct, matter, performance, or incident; or

34 (F) is less than twelve (12) years of age; ~~or~~

35 **(3) the person has a previous conviction under this section.**

36 (d) A person who knowingly or intentionally possesses or accesses
 37 with intent to view:

38 (1) a picture;

39 (2) a drawing;

40 (3) a photograph;

41 (4) a negative image;

42 (5) undeveloped film;



- 1 (6) a motion picture;
 2 (7) a videotape;
 3 (8) a digitized image; or
 4 (9) any pictorial representation;
 5 that depicts or describes sexual conduct by a child who the person
 6 knows is less than eighteen (18) years of age or who appears to be less
 7 than eighteen (18) years of age, and that lacks serious literary, artistic,
 8 political, or scientific value commits possession of child pornography,
 9 a Level 6 felony.
- 10 (e) However, the offense of possession of child pornography
 11 described in subsection (d) is a Level 5 felony if:
- 12 (1) the item described in subsection (d)(1) through (d)(9) depicts
 13 or describes sexual conduct by a child who the person knows is
 14 less than eighteen (18) years of age, or who appears to be less
 15 than eighteen (18) years of age, who:
- 16 (A) engages in bestiality (as described in IC 35-46-3-14);
 17 (B) is mentally disabled or deficient;
 18 (C) participates in the sexual conduct, matter, performance, or
 19 incident by use of force or the threat of force;
 20 (D) physically or verbally resists participating in the sexual
 21 conduct, matter, performance, or incident;
 22 (E) receives a bodily injury while participating in the sexual
 23 conduct, matter, performance, or incident; or
 24 (F) is less than twelve (12) years of age; ~~or~~
- 25 (2) the child whose sexual conduct is depicted or described in an
 26 item described in subsection (d)(1) through (d)(9):
- 27 (A) engages in bestiality (as described in IC 35-46-3-14);
 28 (B) is mentally disabled or deficient;
 29 (C) participates in the sexual conduct, matter, performance, or
 30 incident by use of force or the threat of force;
 31 (D) physically or verbally resists participating in the sexual
 32 conduct, matter, performance, or incident;
 33 (E) receives a bodily injury while participating in the sexual
 34 conduct, matter, performance, or incident; or
 35 (F) is less than twelve (12) years of age; ~~or~~
- 36 **(3) the person has a previous conviction under this section.**
- 37 (f) Subsections (b), (c), (d), and (e) do not apply to a bona fide
 38 school, museum, or public library that qualifies for certain property tax
 39 exemptions under IC 6-1.1-10, or to an employee of such a school,
 40 museum, or public library acting within the scope of the employee's
 41 employment when the possession of the listed materials is for
 42 legitimate scientific or educational purposes.



- 1 (g) It is a defense to a prosecution under this section that:
 2 (1) the person is a school employee; and
 3 (2) the acts constituting the elements of the offense were
 4 performed solely within the scope of the person's employment as
 5 a school employee.
- 6 (h) Except as provided in subsection (i), it is a defense to a
 7 prosecution under subsection (b), (c), (d), or (e) if all of the following
 8 apply:
 9 (1) A cellular telephone, another wireless or cellular
 10 communications device, or a social networking web site was used
 11 to possess, produce, or disseminate the image.
 12 (2) The defendant is not more than four (4) years older or younger
 13 than the person who is depicted in the image or who received the
 14 image.
 15 (3) The relationship between the defendant and the person who
 16 received the image or who is depicted in the image was a dating
 17 relationship or an ongoing personal relationship. For purposes of
 18 this subdivision, the term "ongoing personal relationship" does
 19 not include a family relationship.
 20 (4) The crime was committed by a person less than twenty-two
 21 (22) years of age.
 22 (5) The person receiving the image or who is depicted in the
 23 image acquiesced in the defendant's conduct.
- 24 (i) The defense to a prosecution described in subsection (h) does not
 25 apply if:
 26 (1) the person who receives the image disseminates it to a person
 27 other than the person:
 28 (A) who sent the image; or
 29 (B) who is depicted in the image;
 30 (2) the image is of a person other than the person who sent the
 31 image or received the image; or
 32 (3) the dissemination of the image violates:
 33 (A) a protective order to prevent domestic or family violence
 34 or harassment issued under IC 34-26-5 (or, if the order
 35 involved a family or household member, under IC 34-26-2 or
 36 IC 34-4-5.1-5 before their repeal);
 37 (B) an ex parte protective order issued under IC 34-26-5 (or,
 38 if the order involved a family or household member, an
 39 emergency order issued under IC 34-26-2 or IC 34-4-5.1
 40 before their repeal);
 41 (C) a workplace violence restraining order issued under
 42 IC 34-26-6;



- 1 (D) a no contact order in a dispositional decree issued under
 2 IC 31-34-20-1, IC 31-37-19-1, or IC 31-37-5-6 (or
 3 IC 31-6-4-15.4 or IC 31-6-4-15.9 before their repeal) or an
 4 order issued under IC 31-32-13 (or IC 31-6-7-14 before its
 5 repeal) that orders the person to refrain from direct or indirect
 6 contact with a child in need of services or a delinquent child;
 7 (E) a no contact order issued as a condition of pretrial release,
 8 including release on bail or personal recognizance, or pretrial
 9 diversion, and including a no contact order issued under
 10 IC 35-33-8-3.6;
 11 (F) a no contact order issued as a condition of probation;
 12 (G) a protective order to prevent domestic or family violence
 13 issued under IC 31-15-5 (or IC 31-16-5 or IC 31-1-11.5-8.2
 14 before their repeal);
 15 (H) a protective order to prevent domestic or family violence
 16 issued under IC 31-14-16-1 in a paternity action;
 17 (I) a no contact order issued under IC 31-34-25 in a child in
 18 need of services proceeding or under IC 31-37-25 in a juvenile
 19 delinquency proceeding;
 20 (J) an order issued in another state that is substantially similar
 21 to an order described in clauses (A) through (I);
 22 (K) an order that is substantially similar to an order described
 23 in clauses (A) through (I) and is issued by an Indian:
 24 (i) tribe;
 25 (ii) band;
 26 (iii) pueblo;
 27 (iv) nation; or
 28 (v) organized group or community, including an Alaska
 29 Native village or regional or village corporation as defined
 30 in or established under the Alaska Native Claims Settlement
 31 Act (43 U.S.C. 1601 et seq.);
 32 that is recognized as eligible for the special programs and
 33 services provided by the United States to Indians because of
 34 their special status as Indians;
 35 (L) an order issued under IC 35-33-8-3.2; or
 36 (M) an order issued under IC 35-38-1-30.
 37 (j) It is a defense to a prosecution under this section that:
 38 (1) the person was less than eighteen (18) years of age at the time
 39 the alleged offense was committed; and
 40 (2) the circumstances described in IC 35-45-4-6(a)(2) through
 41 IC 35-45-4-6(a)(4) apply.
 42 (k) A person is entitled to present the defense described in



1 subsection (j) in a pretrial hearing. If a person proves by a
 2 preponderance of the evidence in a pretrial hearing that the defense
 3 described in subsection (j) applies, the court shall dismiss the charges
 4 under this section with prejudice.

5 SECTION 2. IC 35-50-2-2.2, AS AMENDED BY P.L.142-2020,
 6 SECTION 85, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
 7 JULY 1, 2021]: Sec. 2.2. (a) Except as provided in subsection (b), (c),
 8 **or (d), or (e)**; the court may suspend any part of a sentence for a felony.

9 (b) ~~Except as provided in subsection (d)~~; If a person is convicted of
 10 a Level 2 felony or a Level 3 felony ~~except a Level 2 felony or a Level~~
 11 ~~3 felony concerning a controlled substance under IC 35-48-4~~, and has
 12 any prior unrelated felony conviction, **other than a conviction for a**
 13 **felony involving marijuana, hashish, hash oil, or salvia divinorum**,
 14 the court may suspend only that part of a sentence that is in excess of
 15 the minimum sentence for the:

16 (1) Level 2 felony; or

17 (2) Level 3 felony.

18 ~~(c) If:~~

19 ~~(1) a person has a prior unrelated felony conviction for dealing in~~
 20 ~~a controlled substance that is not marijuana, hashish, hash oil, or~~
 21 ~~salvia divinorum; and~~

22 ~~(2) the person is convicted of a Level 2 felony under~~
 23 ~~IC 35-48-4-1.1 or IC 35-48-4-1.2;~~

24 the court may suspend only that part of a sentence that is in excess of
 25 the minimum sentence for the Level 2 felony:

26 ~~(d) If a person:~~

27 ~~(1) is convicted of dealing in heroin as a Level 2 or Level 3 felony~~
 28 ~~under IC 35-48-4-1 or IC 35-48-4-2; and~~

29 ~~(2) has a prior unrelated felony conviction;~~

30 the court may suspend only that part of a sentence that is in excess of
 31 the minimum sentence for the Level 2 or Level 3 felony:

32 ~~(e) (c) The court may suspend only that part of a sentence for~~
 33 ~~murder or a Level 1 felony conviction that is in excess of the minimum~~
 34 ~~sentence for murder or the Level 1 felony conviction.~~

35 **(d) If a person is convicted of a felony under IC 35-42-4-4, and**
 36 **has a prior conviction for a felony under IC 35-42-4-4, then the**
 37 **court may suspend only the minimum sentence that is in excess of**
 38 **the minimum sentence for a felony under IC 35-42-4-4.**

