

ENGROSSED HOUSE
BILL NO. 1420

By: Graves, Vaughn and Mitchell
of the House

and

Long of the Senate

An Act relating to crimes and punishments; amending 21 O.S. 1991, Sections 1021.1, 1021.2, as last amended by Section 277, Chapter 133, O.S.L. 1997, 1021.3, as last amended by Section 278, Chapter 133, O.S.L. 1997, 1022, as amended by Section 4, Chapter 37, O.S.L. 1996, 1023, as amended by Section 5, Chapter 37, O.S.L. 1996, 1024, as amended by Section 6, Chapter 37, O.S.L. 1996, 1024.1, as amended by Section 7, Chapter 37, O.S.L. 1996, 1024.2, as amended by Section 279, Chapter 133 O.S.L. 1997, 1040.13 and 1040.54 (21 O.S. Supp. 1998, Sections 1021.2, 1021.3, 1022, 1023, 1024, 1024.1 and 1024.2), which relate to child pornography; eliminating exceptions to certain unlawful acts; authorizing certain civil and injunctive relief for certain purposes; modifying language to include child pornography; modifying penalty to include child pornography; modifying seizures to include child pornography; modifying certain criminal procedures to include child pornography; requiring the magistrate to perform certain acts upon determination of child pornography; requiring the destruction of certain child pornography; modifying and adding certain definitions; modifying penalties; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 21 O.S. 1991, Section 1021.1, is amended to read as follows:

Section 1021.1 ~~This act~~ Sections 1021 through 1024.4 of this title shall not apply to persons who may possess or distribute obscene matter or child pornography or participate in conduct otherwise prescribed by this act, when such possession, distribution, or conduct occurs in the course of law enforcement activities, ~~or in the course of bona fide scientific education or comprehensive research or study, or bona fide objects of art or~~

~~artistic pursuits, or like circumstances or justification, where the possession, distribution or conduct is not related to the subject matter's appeal to prurient interest. The criminal provisions of this title shall not prohibit the district attorney from seeking civil or injunctive relief to enjoin the production, publication, dissemination, distribution, sale, possession or participation in any child pornography, obscene or indecent material or material harmful to minors.~~

SECTION 2. AMENDATORY 21 O.S. 1991, Section 1021.2, as last amended by Section 277, Chapter 133, O.S.L. 1997 (21 O.S. Supp. 1998, Section 1021.2), is amended to read as follows:

Section 1021.2 Any person who shall procure or cause the participation of any minor under the age of eighteen (18) years in ~~any film, motion picture, videotape, photograph, negative, slide, drawing, painting, play, performance or any type of obscene material wherein the minor is engaged in or portrayed, depicted, or represented as engaging in any act of sexual intercourse, in any act of fellatio or cunnilingus, in any act of excretion in the context of sexual activity, in any lewd exhibition of the uncovered genitals or pubic area or areola of the breasts in the context of masturbation or other sexual activity, or in any other exhibition of the uncovered genitals or pubic area or areola of the breasts having the purpose of sexual stimulation of the viewer,~~ child pornography or who knowingly possesses, procures, or manufactures, or causes to be sold or distributed any ~~obscene material involving the participation of any minor under the age of eighteen (18)~~ child pornography shall be guilty, upon conviction, of a felony. The fine for a violation of this section shall not be more than Twenty-five Thousand Dollars (\$25,000.00). Persons convicted under this section shall not be eligible for a deferred sentence. The consent of the minor, or of the mother, father, legal guardian, or custodian of the

minor to the activity prohibited by this section shall not constitute a defense.

SECTION 3. AMENDATORY 21 O.S. 1991, Section 1021.3, as last amended by Section 278, Chapter 133, O.S.L. 1997 (21 O.S. Supp. 1998, Section 1021.3), is amended to read as follows:

Section 1021.3 Any parent, guardian or individual having custody of a minor under the age of eighteen (18) years who knowingly permits or consents to the participation of a minor in any ~~film, motion picture, videotape, photograph, negative, slide, drawing, painting, play, performance or any other obscene material wherein the minor is engaged in or portrayed, depicted or represented as engaging in any act of sexual intercourse, in any act of fellatio or cunnilingus, in any act of excretion in the context of sexual activity, or in any lewd exhibition of the uncovered genitals or pubic area or areola of the breasts in the context of masturbation or other sexual activity~~ child pornography, shall be guilty of a felony, upon conviction. The fine for a violation of this section shall not be more than Twenty-five Thousand Dollars (\$25,000.00). Persons convicted under this section shall not be eligible for a deferred sentence. The consent of the minor to the activity prohibited by this section shall not constitute a defense.

SECTION 4. AMENDATORY 21 O.S. 1991, Section 1022, as amended by Section 4, Chapter 37, O.S.L. 1996 (21 O.S. Supp. 1998, Section 1022), is amended to read as follows:

Section 1022. Every person who is authorized or enjoined to arrest any person for a violation of paragraph 3 of subsection A of Section 1021 of this title is equally authorized and enjoined to seize any obscene or indecent writing, paper, book, picture, print, figure or ~~other~~ obscene material, or child pornography, found in possession of or under the control of the person so arrested, and to deliver the same to the magistrate before whom the person so arrested is required to be taken.

SECTION 5. AMENDATORY 21 O.S. 1991, Section 1023, as amended by Section 5, Chapter 37, O.S.L. 1996 (21 O.S. Supp. 1998, Section 1023), is amended to read as follows:

Section 1023. The magistrate to whom any child pornography, or any obscene or indecent writing, paper, book, picture, print, figure or other obscene material, is delivered pursuant to Section 1022 of this title, shall, upon the examination of the accused, or if the examination is delayed or prevented, without awaiting such examination, determine the character of such child pornography, writing, paper, book, picture, print, figure or other obscene material, and if the magistrate finds it to be child pornography, obscene or indecent, the magistrate shall cause the same to be destroyed, or to be delivered to the district attorney of the county in which the accused is liable to indictment or trial as the interests of justice in his judgment require, but no more than two copies of any child pornography, or any one writing, paper, book, picture, print, figure or other obscene material shall be delivered to the district attorney. The magistrate shall issue in writing the factual and legal basis for the magistrate's determination of the character of the child pornography, writing, paper, book, picture, print, figure or obscene material.

SECTION 6. AMENDATORY 21 O.S. 1991, Section 1024, as amended by Section 6, Chapter 37, O.S.L. 1996 (21 O.S. Supp. 1998, Section 1024), is amended to read as follows:

Section 1024. Upon the conviction of the accused, such district attorney shall cause any child pornography, material harmful to minors, indecent material, or any writing, paper, book, picture, print, figure or other obscene material, in respect whereof the accused stands convicted and which remains in the possession or under the control of such district attorney to be destroyed.

SECTION 7. AMENDATORY 21 O.S. 1991, Section 1024.1, as amended by Section 7, Chapter 37, O.S.L. 1996 (21 O.S. Supp. 1998, Section 1024.1), is amended to read as follows:

Section 1024.1 A. As used in Sections 1021.1 through 1021.3 and 1022 through 1024 of this title, "child pornography" means and includes any film, motion picture, videotape, photograph, negative, undeveloped film, slide, photographic product, reproduction of a photographic product, drawing, painting, CD-ROM, magnetic disk memory, magnetic tape memory, play or performance wherein a minor under the age of eighteen (18) years, or a person who appears prepubescent, is engaged in or portrayed, depicted, or represented as engaging in any act of sexual intercourse which is normal or perverted, in any act of anal sodomy, in any act of sadomasochistic abuse including but not limited to flagellation or torture by or upon any person who is nude or clad in any undergarments or in a costume which is of a revealing nature, or the condition of being fettered, bound or otherwise physically restrained on the part of one who is nude or so clothed, in any act of fellatio or cunnilingus, in any act of excretion in the context of sexual activity, in any lewd exhibition of the uncovered genitals or pubic area or areola of the breasts in the context of masturbation or other sexual activity, or in any other exhibition of the uncovered genitals or pubic area or areola of the breasts having the purpose of sexual stimulation of the viewer, or wherein a portrayed person under the age of eighteen (18) years observes such acts or exhibitions.

B. As used in Sections 1021 through 1024.4 of this title:

1. "Obscene material" means and includes any performance, representation, depiction or description of sexual conduct, whether in any form or medium including still photographs, undeveloped photographs, motion pictures, undeveloped film, videotape, CD-ROM, magnetic disk memory, magnetic tape memory or a purely photographic

product or a reproduction of such product in any book, pamphlet, magazine, or other publication, if said items contain the following elements of paragraph 2 of this section:

- a. depictions or descriptions of sexual conduct which are patently offensive as found by the average person applying contemporary community standards,
- b. taken as a whole have as the dominant theme an appeal to prurient interest as found by the average person applying contemporary community standards; and
- c. a reasonable person would find the material or performance taken as a whole lacks serious literary, artistic, educational, political, or scientific purposes or value;

2. "Indecent" means generally offensive, depraving and obscene;

~~2.~~ 3. "Performance" means and includes any live or cinematic show of whatever nature over any broadcast media, if the performance contains the following:

- a. ~~the obscene material or performance has as one of its participants or portrayed observers a child under the age of eighteen (18) or who appears as prepubescent, or~~
- b. ~~the obscene material or performance contains depictions or descriptions of sexual conduct which are patently offensive as found by the average person applying contemporary community standards,~~
- c. ~~the obscene material or performance taken as a whole has as the dominant theme an appeal to prurient interest as found by the average person applying contemporary community standards, and~~
- d. ~~a reasonable person would find the obscene material or performance taken as a whole lacks serious literary, artistic, educational, political, or scientific~~

~~purposes or value~~ display, live or recorded in any form or medium; and

~~3.~~ 4. "Sexual conduct" means and includes any of the following:

- a. acts of sexual intercourse including any intercourse which is normal or perverted, actual or simulated,
- b. acts of deviate sexual conduct, including oral and anal sodomy,
- c. acts of masturbation,
- d. acts of sadomasochistic abuse including but not limited to:
 - (1) flagellation or torture by or upon any person who is nude or clad in undergarments or in a costume which is of a revealing nature, or
 - (2) the condition of being fettered, bound, or otherwise physically restrained on the part of one who is nude or so clothed,
- e. acts of excretion in a sexual context, or
- f. acts of exhibiting human genitals or pubic areas.

The types of sexual conduct described in paragraph 3 of this ~~section~~ subsection are intended to include situations when, if appropriate to the type of conduct, the conduct is performed alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

SECTION 8. AMENDATORY 21 O.S. 1991, Section 1024.2, as amended by Section 279, Chapter 133, O.S.L. 1997 (21 O.S. Supp. 1998, Section 1024.2), is amended to read as follows:

Section 1024.2 It shall be unlawful for any person to buy, procure or possess obscene material in violation of Section 1024.1 through 1024.4 of this title. Such person shall, upon conviction, be guilty of a felony; and shall be punished by fine or be imprisoned for a period of not more than ten (10) years or by both such fine and imprisonment. The fine for a violation of any

provision of Sections 1024.1 through 1024.4 of this title shall be up to, but not exceeding ~~Five Thousand Dollars (\$5,000.00)~~ Ten Thousand Dollars (\$10,000.00).

SECTION 9. AMENDATORY 21 O.S. 1991, Section 1040.13, is amended to read as follows:

Section 1040.13 Every person who, with knowledge of its contents, sends, brings, or causes to be sent or brought into this state for sale or commercial distribution, or in this state prepares, sells, exhibits, commercially distributes, gives away, offers to give away, or has in his possession with intent to sell, to commercially distribute, to exhibit, to give away, or to offer to give away any child pornography or any obscene, lewd, lascivious, filthy, or indecent electronic video game, printed or written matter or material or other article, or any article of obscene, lewd, lascivious, filthy, or indecent character or for indecent or immoral use, or any mailable matter made subject to this section by virtue of the provisions of Section 1040.21 of this title or gives information stating when, where, how, or from whom, or by what means any of these things can be purchased or obtained, upon conviction, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail for not more than one (1) year or by a fine of not more than One Thousand Dollars (\$1,000.00), or by both such imprisonment and fine felony and shall be punished by fine or by imprisonment for not more than twenty (20) years if the material or matter is child pornography, not more than ten (10) years if the game, matter, material or article is obscene, or not more than one (1) year in the county jail if the game, matter, material or article is lewd, lascivious, filthy or indecent or for indecent or immoral use, or by both such fine and imprisonment. The fine for a violation of this section shall not be more than One Thousand Dollars (\$1,000.00).

SECTION 10. AMENDATORY 21 O.S. 1991, Section 1040.54, is amended to read as follows:

Section 1040.54 A. Any peace officer of this state is authorized to seize any equipment which is used, or intended for use in the preparing, photographing, printing, selling, exhibiting, publishing, distributing, displaying, advertising, filming, copying, recording, or mailing of obscene material as defined in paragraph 1 ~~and subparagraph a of paragraph 2~~ subsection B of Section 1024.1 of ~~Title 21 of the Oklahoma Statutes~~ this title. Said equipment may be held as evidence until a forfeiture has been declared or a release ordered.

B. Notice of seizure and intended forfeiture proceeding shall be given all owners and parties in interest as follows:

1. Upon each owner or party in interest whose name and address is known, by mailing a copy of the notice by registered mail to the last-known address; and

2. Upon all other owners or parties in interest, whose addresses are unknown, by one publication in a newspaper of general circulation in the county where the seizure was made.

C. Within sixty (60) days after the mailing or publication of the notice, the owner of the equipment and any other party in interest may file a verified answer and claim to the equipment described in the notice of seizure and of the intended forfeiture proceeding.

D. If at the end of sixty (60) days after the notice has been mailed or published there is no verified answer on file, the court shall hear evidence upon the fact of the unlawful use and may order the equipment forfeited to the state, if such fact is proven.

E. If a verified answer is filed, the forfeiture proceeding shall be set for hearing.

F. At the hearing the state shall prove by clear and convincing evidence that the equipment was used in the preparing,

photographing, printing, selling, exhibiting, publishing, distributing, displaying, advertising, filming, copying, recording, or mailing of obscene material as defined in paragraph 1 ~~and subparagraph a of paragraph 2~~ subsection B of Section 1024.1 of ~~Title 21 of the Oklahoma Statutes~~ this title with knowledge by the owner of the equipment.

G. The owner or party in interest may prove that his right or interest in the equipment was created without any knowledge or reason to believe that the equipment was being, or was to be, used for the purpose charged.

H. In the event of such proof, the court may order the equipment released to the bona fide or innocent owner or party in interest if the amount due him is equal to, or in excess of, the value of the equipment as of the date of the seizure.

I. If the amount due to such person is less than the value of the equipment, or if no bona fide claim is established, the equipment shall be forfeited to the state and shall be sold pursuant to the judgment of the court.

J. Equipment taken or detained pursuant to this section shall not be repleviable, but shall be deemed to be in the custody of the office of the district attorney of the county where the equipment was seized. The district attorney may release said equipment to the owner of the equipment if it is determined that the owner had no knowledge of the illegal use of the equipment or if there is insufficient evidence to sustain the burden of showing illegal use of such equipment. Equipment which has not been released by the district attorney shall be subject to the orders and decrees of the court or the official having jurisdiction thereof.

K. The district attorney shall not be held civilly liable for having custody of the seized equipment or proceeding with a forfeiture action as provided for in this section.

L. The proceeds of the sale of any equipment shall be distributed as follows, in the order indicated:

1. To the bona fide or innocent purchaser or conditional sales vendor of the equipment, if any, up to the amount of his interest in the equipment, when the court declaring the forfeiture orders a distribution to such person;

2. To the payment of the actual expenses of preserving the equipment;

3. The balance to a revolving fund in the office of the county treasurer of the county where the equipment was seized, said fund to be used and maintained as a revolving fund for any purpose by the department that made the seizure with a yearly accounting to the board of county commissioners in whose county the fund is established. Monies from said fund may be used to pay costs for the storage of such equipment if such equipment is ordered released to a bona fide or innocent owner, purchaser, or conditional sales vendor and if such monies are available in said fund.

M. When any equipment is forfeited pursuant to this section, the district court of jurisdiction may order that the equipment seized may be retained by the state, county, or municipal law enforcement agency which seized the equipment for its official use.

N. If the court finds that the equipment was not used in the preparing, photographing, printing, selling, exhibiting, publishing, distributing, displaying, advertising, filming, copying, recording, or mailing of obscene material as defined in paragraph 1 ~~and subparagraph a of paragraph 2~~ subsection B of Section 1024.1 of Title 21 of the Oklahoma Statutes this title, the court shall order the equipment released to the owner.

O. No equipment shall be forfeited pursuant to the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted without the knowledge or consent of such owner, or by any person other than such

owner while such equipment was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States or of any state.

SECTION 11. This act shall become effective November 1, 1999.

Passed the House of Representatives the 22nd day of February, 1999.

Speaker of the House of
Representatives

Passed the Senate the ____ day of _____, 1999.

President of the Senate