

Department of Legislative Services
Maryland General Assembly
2003 Session

FISCAL AND POLICY NOTE

House Bill 540 (Delegates Zirkin and O'Donnell)
Judiciary

Crimes - Child Pornography - Electronic Communication with Minor

This bill prohibits communication with a minor (or someone believed to be a minor) by computer, the Internet, or other electronic communication to engage in sexually explicit conversation to (or to attempt to) seduce, solicit, or entice the minor to engage in unlawful sexual conduct that would constitute second degree rape or second or third degree sexual offense. Violators are guilty of a felony and, for a first offense, subject to maximum penalties of a fine of \$25,000 and/or imprisonment for ten years. Subsequent violations subject the offender to maximum penalties of a fine of \$50,000 and/or imprisonment for 20 years.

The bill also specifies that the jurisdictions in which a person may be prosecuted, indicted, tried, and convicted include either: (1) any county in or through which the communication originated or terminated; or (2) the county where an individual traveled as a result of the communication to further the crime.

Fiscal Summary

State Effect: Potential minimal increase in general fund expenditures due to the bill's incarceration penalty provision. Revenues would not be affected.

Local Effect: Potential minimal increase in revenues due to the bill's monetary penalty provision. Expenditures are not expected to be affected.

Small Business Effect: None.

Analysis

Current Law: By common law, Maryland prohibits the solicitation of sex with a minor. Depending on the age of the victim and the circumstances of the event, a person engaging in sexual acts with a minor could be subject to a charge of second degree rape; second, third, or fourth degree sexual offense; or child sexual abuse.

A minor generally means a person under the age of 18 years. A conviction for first degree rape or first degree sexual offense generally carries a maximum penalty of life imprisonment. A conviction for child kidnapping along with first degree rape or first degree sexual offense, where the victim is a child under the age of 16 years, carries a maximum penalty of life imprisonment without the possibility of parole. A conviction for second degree rape or second degree sexual offense carries a maximum penalty of 20 years imprisonment. A conviction for third degree sexual offense carries a maximum penalty of ten years imprisonment. A conviction for sexual abuse of a minor by a parent, custodian, or other household or family member carries a maximum penalty of 15 years imprisonment.

If a person who has a prior conviction from another incident of first or second degree rape or sexual offense is convicted of a subsequent offense of second degree rape or sexual offense, third degree sexual offense, or attempted second degree rape or sexual offense, the person is subject to imprisonment not exceeding life. A person is subject to incarceration for life without the possibility of parole if the person is found guilty of rape or sexual offense in the first degree after having been previously convicted of one of the same offenses.

Under case law, a solicitation consists of the accused person's oral or written efforts to activate another to commit a criminal offense. Because the minor is not guilty of a criminal offense under the sexual offenses law, but is rather the victim, it does not appear that the common law crime of solicitation would apply to a person who requests a minor to engage in sexual relations.

The existing prohibition against using a computer for illegally "engaging, facilitating, encouraging, offering, or soliciting" a minor refers only to unlawful sexual conduct or sadomasochistic abuse, and does not include circumstances involving "someone believed to be a minor."

Specifically, Maryland law currently prohibits the depiction or description of a minor engaging in an obscene act or engaging in sexual conduct or sadomasochistic abuse, as defined, and provides that a person who uses "a computer to knowingly compile, enter, transmit, make, print, publish, reproduce, cause, allow, buy, sell, receive, exchange, or disseminate any notice, statement, advertisement, or minor's name, telephone number,

place of residence, physical characteristics, or other descriptive or identifying information for the purpose of engaging in, facilitating, encouraging, offering, or soliciting unlawful sadomasochistic abuse or sexual conduct of or with a minor” is guilty of a felony.

Violators of these provisions are guilty of a felony and subject to maximum penalties of a fine of \$25,000 and/or imprisonment for ten years. Second and subsequent violators are subject to maximum penalties of a fine of \$50,000 and/or imprisonment for 20 years.

“Sadomasochistic abuse” is defined as flagellation or torture by or on a human who is nude, or clad in undergarments, or in a revealing or bizarre costume, or the condition of one who is nude or so clothed and is being fettered, bound, or otherwise physically restrained.

“Sexual conduct” is defined as human masturbation, sexual intercourse, or any touching of or contact with genitals, pubic areas, or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex, or between humans and animals.

“Sexual excitement” is defined as the condition of human male or female genitals, or the breasts of the female, when in a state of sexual stimulation, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity.

Second degree rape is a felony prohibiting a person from engaging in vaginal intercourse with another: (1) by force, or the threat of force, without the consent of the other; (2) if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know that the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual; or (3) if the victim is under the age of 14 years, and the person performing the act is at least 4 years older than the victim. A violator is subject to maximum imprisonment for 20 years.

Second degree sexual offense is a felony prohibiting a person from engaging in a sexual act with another: (1) by force, or the threat of force, without the consent of the other; (2) if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know that the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual; or (3) if the victim is under the age of 14 years, and the person performing the act is at least 4 years older than the victim. A violator is subject to maximum imprisonment for 20 years.

Third degree sexual offense is a felony and the prohibitions provide that a person may not:

- (1) engage in sexual contact with another without the consent of the other;
- (2) employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon; suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime; threaten, or place the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or commit the crime while aided and abetted by another;
- (3) engage in sexual contact with another if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual;
- (4) engage in sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim;
- (5) engage in a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 21 years old; or
- (6) engage in vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 21 years old.

A violator is subject to maximum imprisonment for ten years.

In addition, sexual offenders are required to register with the Crimes Against Children and Sexual Offender Registry for a term of either ten years or life, depending on the offense. Lifetime registration is required for: (1) persons determined to be sexually violent predators; (2) persons convicted of first or second degree rape or first, second, or third degree sexual offense; and (3) all persons who have been convicted of a prior crime as a “child sexual offender,” an “offender,” or a “sexually violent offender.” A person is exempt from registration requirements if the underlying conviction requiring registration is reversed, vacated, or set aside, or if the registrant is pardoned for the underlying conviction.

Background: This legislation was originally offered in the 2000 session (HB 584) as a recommendation on Internet-based crime by the Maryland Information Technology Board. It is also a departmental response to a case currently before the Maryland Court of Appeals wherein the Attorney General is appealing the dismissal of charges in the Frederick County Circuit Court against Donald Taylor, Jr., 44, of Camden, New Jersey, for three counts of solicitation of a minor on the computer. Taylor was also charged with an attempted third degree sex offense, which involves intercourse with a person 14 or 15

years of age, where the perpetrator is at least 21 years of age, and with attempting to assault a minor in the second degree.

In October 1999, the police received a complaint about Taylor. A State police officer, posing as “Stephanie,” a 15-year-old girl living in Frederick, began having Internet chat conversations with Taylor. The judge in the case granted Taylor’s motion to dismiss all of the charges. The judge dismissed the charges of solicitation of a minor over the Internet because there was no minor involved, and dismissed the attempted third degree sex offense on two grounds: that Taylor had not taken a substantial step toward commission of the crime, and that it was impossible for Taylor to have committed the crime because there was no minor involved.

Arguments on this appeal were heard by the Court of Appeals in May 2001 (*State of Maryland v. Donald Taylor, Jr.*, case number 124 of the September term 2000) and the dismissal of charges by the circuit court was upheld.

State Expenditures: General fund expenditures could increase minimally as a result of the bill’s incarceration penalty due to more people being committed to Division of Correction (DOC) facilities. The number of people convicted of this proposed crime is expected to be minimal.

Persons serving a sentence longer than 18 months are incarcerated in DOC facilities. Currently, the average total cost per inmate, including overhead, is estimated at \$1,850 per month. This bill alone, however, should not create the need for additional beds, personnel, or facilities. Excluding overhead, the average cost of housing a new DOC inmate (including medical care and variable costs) is \$350 per month. Excluding medical care, the average variable costs total \$120 per month.

Local Revenues: Revenues could increase minimally as a result of the bill’s monetary penalty provision since these cases would most likely be heard in the circuit courts.

Additional Information

Prior Introductions: Similar bills were introduced during the 2002, 2001, and 2000 sessions. In 2002, HB 99 was withdrawn. HB 202 in 2001 and HB 584 in 2000 each received an unfavorable report from the Judiciary Committee

Cross File: SB 409 (Senators Jimeno and Forehand) – Judicial Proceedings.

Information Source(s): Department of State Police, Department of Public Safety and Correctional Services, Department of Legislative Services

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