

Department of Legislative Services
Maryland General Assembly
2004 Session

FISCAL AND POLICY NOTE
Revised

House Bill 929

(Delegate Zirkin, *et al.*)

Judiciary

Judicial Proceedings

Criminal Law - Sexual Solicitation of a Minor

This bill prohibits a person from knowingly “soliciting” a minor to engage in activities that would be unlawful for the person to engage in under provisions relating to second degree rape or second or third degree sexual offense. For purposes of jurisdiction, a violation is considered to be committed in Maryland if the solicitation originated in Maryland or is received in the State. A violator is guilty of a felony and subject to maximum penalties of imprisonment for 10 years and/or a fine of \$25,000.

The bill also authorizes prosecuting authorities to apply to a judge for wiretap authority to investigate sexual solicitation of a minor.

Fiscal Summary

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

Local Effect: Minimal increase in revenues due to the bill’s incarceration penalty provision. Expenditures would not 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 10 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. It 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 10 years. Second and subsequent violators are subject to maximum penalties of a fine of \$50,000 and/or imprisonment for 20 years.

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 four 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 four 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:

- engage in sexual contact with another without the consent of the other;
- 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;
- 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;
- 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 four years older than the victim;

- 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
- 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 10 years.

In addition, sexual offenders are required to register with the Crimes Against Children and Sexual Offender Registry for a term of either 10 years or life, depending on the offense.

It is generally unlawful to intercept an oral, wire, or electronic communication without the consent of all parties to the communication. However, it is lawful for an investigative or law enforcement officer acting in a criminal investigation to intercept a covered communication in order to provide evidence of the commission of:

- murder;
- kidnapping;
- rape;
- a sexual offense in the first or second degree;
- child abuse;
- child pornography;
- gambling;
- robbery;
- arson or other malicious burning (felonies only);
- bribery;
- extortion;
- dealing in a controlled dangerous substance;
- insurance fraud;
- manufacture or possession of a device containing explosive, incendiary, or toxic material; or
- a conspiracy or solicitation to commit one of the above offenses.

This authority applies when the investigative or law enforcement officer or other person is a party to the communication, or one of the parties to the communication has given prior consent to the communication. The Attorney General, State Prosecutor, or any State's Attorney may apply to a judge of competent jurisdiction for an order authorizing interception in connection with any of the above-listed crimes except rape, sexual offense, child abuse, or insurance fraud.

Interception is also authorized if a person has created a barricade situation, and there is probable cause to believe a hostage or hostages may be involved.

Background: In 2003, SB 409 and HB 540 would have prohibited 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. SB 409 passed the Senate, was referred to the House Rules and Executive Nominations Committee, and had no further action taken on it. HB 540 had a hearing before the House Judiciary Committee and had no further action taken on it. Similar bills, all failed, were introduced in 2000, 2001, and 2002.

Also in 2002, HB 1105 would have prohibited a person from soliciting a minor, or an individual believed to be a minor, with intent to commit rape or a sexual offense with the minor. HB 1105 had a hearing before the House Judiciary Committee and was withdrawn.

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 felony charges are generally heard in the circuit courts.

Additional Information

Prior Introductions: See Background section above.

Cross File: SB 512 (Senator Jimeno, *et al.*) – Judicial Proceedings.

Information Source(s): Commission on Criminal Sentencing Policy, Department of Public Safety and Correctional Services (Division of Correction, Division of Parole and Probation), Department of Legislative Services

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