

Department of Legislative Services
Maryland General Assembly
2008 Session

FISCAL AND POLICY NOTE

House Bill 574

(Delegate McComas, *et al.*)

Judiciary

Criminal Law - Possession of Child Pornography - Enhanced Penalties

This bill enhances penalty provisions applicable to the crime of possession of child pornography, applies the prohibition when the depiction possessed involves a minor (rather than an individual under age 16), and changes the offense from a misdemeanor to a felony.

Fiscal Summary

State Effect: Potential increase in general fund revenues and expenditures due to the bill's increased penalty provisions.

Local Effect: Potential increase in local revenues due to the bill's increased penalty provisions.

Small Business Effect: None.

Analysis

Bill Summary: The bill specifies that the term "sexual conduct," as applied throughout the Criminal Law subtitle governing prohibitions involving obscene matters, includes the display of the genitals of an individual for purposes of sexual arousal or gratification.

The bill mandates a minimum sentence of two years for a first offense and five years for each subsequent offense. The bill increases the maximum penalties for this offense from imprisonment for 2 years and/or a fine of \$2,500 to 5 years and/or \$10,000; for each

subsequent offense, the maximum penalties are increased from 5 years and/or \$10,000 to 10 years and/or \$20,000.

Notwithstanding current provisions of the Criminal Law Article relating to sentencing for crimes with minimum and maximum penalties, the bill prohibits a court from imposing less than these mandatory minimum sentences for violations of this offense. The court may not suspend any part of the mandatory minimum sentence for a first offense unless the defendant is under age 21, the visual representation possessed depicts only one individual who is a minor, and the age difference between the defendant and the minor is not more than four years. The bill also prohibits a court from suspending any part of the mandatory minimum sentence for a subsequent violation. Except for parole provisions applicable to the Patuxent Institution, the bill prohibits parole for a person convicted of this offense prior to expiration of the mandatory minimum sentence.

The bill provides that a person possessing material in violation of these provisions may be charged in a separate count for each visual representation. It is an affirmative defense that the defendant possessed less than three matters containing any prohibited visual representation and took specified actions promptly and in good faith.

The bill conditions the use of the existing affirmative defense against a charge under these provisions by requiring that the defendant not retain or allow a person other than a law enforcement agency to access the visual representation or a copy. Such a defense is also conditioned on the defendant allowing a law enforcement agency access to the visual representation after reporting the matter to the agency.

The bill also requires that a person convicted of this prohibition is an “offender” under provisions requiring registration in the State sexual offender registry.

Current Law: Under provisions of the Criminal Law Article, a minor is a person under age 18.

A person may not knowingly possess a film, videotape, photograph, or other visual representation depicting an actual child under age 16 • engaged in sadomasochistic abuse; • engaged in sexual conduct; or • in a state of sexual excitement. Violators are guilty of a misdemeanor and subject to maximum penalties of a fine of \$2,500 and/or imprisonment for two years for a first violation. Second and subsequent violators are subject to maximum penalties of a fine of \$10,000 and/or imprisonment for five years.

An affirmative defense to a charge under of this offense may be made if the person charged received a visual representation without soliciting it and acted promptly and in

good faith to destroy each visual representation or reported the matter to a law enforcement agency.

Generally, a person convicted of a sex crime or other specified crime in Maryland, including kidnapping and false imprisonment, is required to register with the State sex offender registry upon release from prison or release from court if the person did not receive a prison sentence. Offenders who are required to register in other states and who come to Maryland are required to register upon entering Maryland. Offenders from other states who may not be required to register in the home state are required to register in Maryland if the crime would have required registration in Maryland if committed in Maryland. Juveniles who are adjudicated as adults and convicted for crimes that require registration are included in the registry. Juveniles who are adjudicated delinquent for these crimes through the juvenile court system are not included in the registry.

Maryland has four categories of persons convicted of sexual offenses: (1) a child sexual offender; (2) an offender; (3) a sexually violent offender; and (4) a sexually violent predator.

“Offender” means a person who is ordered by a court to register and who • has been convicted of child kidnapping; • kidnapping; • fourth degree sexual offense, if the victim is under age 18; • false imprisonment, if the victim is under age 18 and the person is not the victim’s parent; • a crime that involves soliciting a person under age 18 to engage in sexual conduct; • production or distribution of child pornography; • prostitution or related criminal prohibitions if the intended prostitute or victim is under age 18; • any crime that involves conduct that by its nature is a sexual offense against a person under age 18; • an attempt to commit any of these offenses; or • has been convicted in another state or in a federal, military, or Native American tribal court of a crime that, if committed in Maryland, would constitute one of these crimes.

“Child sexual offender” means a person who • has been convicted of sexual abuse of a minor; • has been convicted of first or second degree rape or first, second, or third degree sexual offense involving a child under age 15; • has been convicted of fourth degree sexual offense involving such a child and has been ordered by the court to register under these provisions; or • has been convicted in another state or in a federal, military, or Native American tribal court of a crime that, if committed in this State, would constitute one of these crimes.

“Sexually violent predator” means a person who • is convicted of a sexually violent offense; and • has been determined to be at risk of committing another sexually violent offense. Also included under this definition are persons who are or were required to

register every 90 days for life under the laws of another state or a federal, military, or Native American tribal jurisdiction.

“Sexually violent offender” means a person who • has been convicted of a sexually violent offense; or • has been convicted of an attempt to commit a sexually violent offense.

Sexual offenders are required to register, every 3 months or every 6 months, with the Crimes Against Children and Sexual Offender Registry for a term of either 10 years or life depending on the offense. Registration must include a photograph, which must be updated at least annually. The registry is operated by the Sexual Offender Registry unit of the Department of Public Safety and Correctional Services. Under the State’s sexual offender registration laws, a State’s Attorney may request that a sexual offender be designated a sexually violent predator. Lifetime registration is required for • sexually violent predators; • persons convicted of a sexually violent offense; • persons convicted of child abuse for commission of a sexual act involving penetration of a child under age 12; and • recidivist sexual offenders.

Background: Changing crimes from misdemeanors to felonies means (1) that such cases will likely be filed in the circuit courts rather than the District Court; and (2) some persons could eventually serve longer incarcerations due to enhanced penalty provisions, applicable to some offenses, for prior felony convictions. It is not known whether, under this bill’s provisions, the prospect of a jury trial might spur more plea bargains and affect actual sentencing practices for this offense.

In any case, this bill would shift some unknown number of cases from the District Court to the circuit courts.

The sex offender registry has had a total growth rate of 400-600 new registrants per year.

A review of the Maryland Sentencing Guidelines database indicates there were a total of 23 individuals convicted in Maryland’s circuit courts for possession of child pornography, as first offense, in fiscal 2006 and 2007 combined. Many of these individuals were convicted of multiple counts of possession of child pornography. In 12 of the 23 cases in fiscal 2007, possession of child pornography was the controlling (or most serious offense). Among these 12 offenders, 3 (25%) received a sentence including a period of incarceration. Accordingly, on average, six individuals are convicted for possession of child pornography in Maryland’s circuit courts annually, with approximately 25% receiving some period of incarceration. It should be noted that since possession of child pornography is a misdemeanor offense, it is likely additional individuals have been convicted for this offense in Maryland’s District Courts.

State Revenues: General fund revenues could increase minimally as a result of the bill's increased monetary penalty provision from cases heard in the District Court.

State Expenditures: General fund expenditures could increase minimally as a result of the bill's increased incarceration penalty due to people being committed to Division of Correction (DOC) facilities for longer periods of time and increased payments to counties for reimbursement of inmate costs. The number of people convicted of this proposed crime is expected to continue 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 \$2,600 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 \$526 per month. Excluding medical care, the average variable costs total \$148 per month.

Persons serving a sentence of one year or less in a jurisdiction other than Baltimore City are sentenced to local detention facilities. For persons sentenced to a term of between 12 and 18 months, the sentencing judge has the discretion to order that the sentence be served at a local facility or DOC. The State reimburses counties for part of their incarceration costs, on a per diem basis, after a person has served 90 days. State per diem reimbursements for fiscal 2009 are estimated to range from \$19 to \$71 per inmate depending upon the jurisdiction. Persons sentenced to such a term in Baltimore City are generally incarcerated in DOC facilities. The Baltimore City Detention Center, a State-operated facility, is used primarily for pretrial detentions.

Local Revenues: Revenues could increase minimally as a result of the bill's increased monetary penalty provision from cases heard in the circuit courts.

Additional Information

Prior Introductions: SB 1003 of 2007, a similar bill, received a hearing before the Senate Judicial Proceedings Committee and no further action was taken.

Cross File: SB 75 (Senator Stone, *et al.*) – Judicial Proceedings.

Information Source(s): Judiciary (Administrative Office of the Courts), Commission on Criminal Sentencing Policy, Department of Public Safety and Correctional Services, Department of Legislative Services

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mll/jr

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