

**Department of Legislative Services**  
Maryland General Assembly  
2010 Session

**FISCAL AND POLICY NOTE**

Senate Bill 461 (Senator Stone)

Judicial Proceedings

**Criminal Law - Attempted Sexual Offense in the Third Degree - Penalties**

This bill prohibits a person from attempting to commit a sexual offense in the third degree. Violators are guilty of a felony, punishable by imprisonment for up to 10 years.

**Fiscal Summary**

**State Effect:** General fund expenditures for the Office of the Public Defender (OPD) increase by \$71,100 in FY 2011 for additional personnel to handle the increased caseload generated by the bill. Potential minimal increase in State expenditures due to the bill's incarceration penalty.

(in dollars)	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	71,100	90,500	94,700	99,200	103,900
Net Effect	(\$71,100)	(\$90,500)	(\$94,700)	(\$99,200)	(\$103,900)

*Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect*

**Local Effect:** None.

**Small Business Effect:** None.

**Analysis**

**Current Law:** There is no general prohibition against consensual sex with any person age 16 or older. However, depending on the age of the victim and the circumstances of the event, a person unlawfully engaging in sexual acts with a minor could be subject to a charge of second degree rape or second, third, or fourth degree sexual offense. Penalties range from a fine of up to \$1,000 and/or imprisonment for up to 1 year (for a

misdemeanor fourth degree sexual offense) to a maximum imprisonment of 20 years (for the felony of second degree rape). Under the Criminal Law Article, a “minor” means an individual younger than age 18.

Under the State’s prohibition against third degree sexual offense, a person may not:

- engage in sexual contact with another without the consent of the other; and 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 younger than age 14, and the person performing the sexual contact is at least 4 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 guilty of the felony of third degree sexual offense and subject to imprisonment for a maximum of 10 years.

**Background:** In 1997, the Maryland Court of Appeals noted that under Maryland common law, “the attempt to commit a crime is a separate crime – a misdemeanor.” *Lane v. State* 348 Md. 272 (1997). Common law “attempt” has been held applicable to common law crimes and statutory offenses with some exceptions. In 2005, however, the Maryland Court of Appeals held that because criminal intent regarding a victim’s age is not a required element of third degree sexual offense, a defendant could not be convicted of common law attempted third degree sexual offense involving a victim who the defendant thought was a 14 year old minor, but was in fact an undercover law enforcement officer. The court opined that “...absent a change in statute, there can be no crime of attempt such as charged in the present indictment. The fact that the defendant in the case actually had an intent to engage in sexual activity with a fourteen year old person does not in itself create a crime where there is no such crime of attempted third degree

sexual offense under the present statutory scheme and common law principles.” (*Moore v. State*, 388 Md. 623, 645-46 (2005).)

In a 2006 opinion, the Maryland Court of Special Appeals clarified that the decision in the *Moore* case applied to an extremely specific set of circumstances, and that the Court of Appeals “...did not hold that there could be no conviction for attempted third degree sexual offense under other circumstances involving an actual 14-year-old. But in Moore’s situation, because there was no 14-year-old ever actually involved, Moore could not have committed the crime of third degree sexual offense under CL, §3-307(a)(4) or (5), and consequently, there could be no liability for a lesser included common law attempt.” *Maxwell v. State*, 168 Md. App. 1, 13-14 (2006).

**State Expenditures:** OPD advises that the office handled 412 cases of third degree sexual offense in 2009. If approximately 25% of these cases represent the potential OPD caseload for attempted third degree sexual offense, OPD would be required to handle 102 additional cases as a result of the bill. The average caseload standard for circuit court public defenders is 163. As a result, general fund expenditures increase by \$71,134 in fiscal 2011, which accounts for the bill’s October 1, 2010 effective date. This estimate reflects the cost of hiring one assistant public defender to handle the additional cases. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Positions	1
Salaries and Fringe Benefits	\$64,841
Operating Expenses	<u>6,293</u>
<b>Total Fiscal 2011 State Expenditures</b>	<b>\$71,134</b>

Future year expenditures reflect full salaries with 4.4% annual increases and 3% employee turnover; and 1% annual increases in ongoing operating expenses.

General fund expenditures increase minimally as a result of the bill’s incarceration penalty due to more people being committed to Division of Correction (DOC) facilities and increased payments to counties for reimbursement of inmate costs. 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 \$2,750 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 variable medical care and variable operating costs) is \$409 per month. Excluding all medical care, the average variable costs total \$182 per month.

## **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Charles, Frederick, Montgomery, and Somerset counties; Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Department of Public Safety and Correctional Services; State's Attorneys' Association; Department of Legislative Services

**Fiscal Note History:** First Reader - March 16, 2010  
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