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BILL: SB 709 Criminal Law - Masked Intimidation - Prohibition (Unmask Hate Act)
FROM: Maryland Office of the Public Defender
POSITION: Unfavorable
DATE: February 26, 2025

The Maryland Office of the Public Defender respectfully requests that the Judicial Proceedings Committee issue an unfavorable report on Senate Bill 709.

SB 709 prohibits a person from intentionally harassing, intimidating, or threatening another person while hiding or concealing their face, and imposes a misdemeanor penalty of up to 90 days imprisonment and up to \$500 fine for a first offense and up to 180 days imprisonment and up to \$1000 fine or both for subsequent offenses. This bill also provides the following affirmative defenses:

- wearing a mark or face covering in celebration of a holiday, celebration, or other event where masks or face coverings are traditionally worn;
- wearing a mask, hood, article, or other device as personal protective equipment as part of the person's occupation, trade, or profession;
- wearing a mask, hood, article, or other device for the purpose of protection from weather elements or while participating in a winter sport;
- wearing a mask, hood, article, or device in an artistic or theatrical production or celebration;
- wearing a gas mask or other protective facial covering for the purposes of protection during or relating to an emergency situation or during an emergency management drill;
- wearing a mask to limit the spread of airborne illnesses; or
- wearing any garment for religious purposes.

The stated purpose of the bill is to hold individuals who conceal their faces accountable for engaging in harassment, intimidation, or hate crimes while wearing a mask. However, rather than achieving this end, this bill is highly problematic and concerning for numerous reasons.

Laws Already Exist to Criminalize Conduct for Assault, Harassment and Hate Crimes

Including but not limited to the potentially vague and broad applications that could result in more harm to law-abiding citizens than any real deterrence in crime, this bill seeks to further criminalize conduct that is already met with penalties that hold individuals accountable for assault, harassment and hate crimes. Currently in Maryland, there are several laws that already would apply to the conduct of intentionally harassing, intimidating, or threatening another person. Namely, the following offenses all sufficiently address conduct deemed to be threatening, harassing and in particular hate crimes – of which carry significant penalties ranging from misdemeanors to felony offenses with imprisonment up to 20 years.¹

¹ MD Criminal Law Code § 10-306-Hate Crimes Penalty

(a) *Except as provided in subsection (b) of this section, a person who violates this subtitle is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 3 years or a fine not exceeding \$5,000 or both.*

(b) (1) *A person who violates § 10-304(2)(i) of this subtitle is guilty of a felony and on conviction is subject to imprisonment not exceeding 10 years or a fine not exceeding \$10,000 or both.*

- Second Degree Assault (MD Criminal Law Code § 3-203)²
- Harassment (Md. Code, CR § 3-803)³
- Hate Crimes (MD Criminal Law Code § 10-304)⁴
- Hate Crimes specifically prohibiting conduct items or symbols to threaten or intimidate (MD Criminal Law Code § 10-305.1)⁵

Adding a smaller misdemeanor penalty (of 90-180 days imprisonment and \$500-\$1000 fine) in addition to more punitive crimes currently on the books that carry far more significant penalties cannot be said to serve as a deterrent to crime.

(2) A person who violates § 10-304(2)(ii) of this subtitle is guilty of a felony and on conviction is subject to imprisonment not exceeding 20 years or a fine not exceeding \$20,000 or both.

(c) In addition to any other penalties imposed by this section, the court may require a person who violates this subtitle to complete an antibias education program.

² MD Criminal Law Code § 3-203 - Assault in the Second Degree

(a) A person may not commit an assault.

(b) Except as provided in subsection (c) of this section, a person who violates subsection (a) of this section is guilty of the misdemeanor of assault in the second degree and on conviction is subject to imprisonment not exceeding 10 years or a fine not exceeding \$2,500 or both.

(c) (1) In this subsection, "physical injury" means any impairment of physical condition, excluding minor injuries.

(2) A person may not intentionally cause physical injury to another if the person knows or has reason to know that the other is:

- (i) a law enforcement officer engaged in the performance of the officer's official duties;
- (ii) a parole or probation agent engaged in the performance of the agent's official duties; or
- (iii) a firefighter, an emergency medical technician, a rescue squad member, or any other first responder engaged in providing emergency medical care or rescue services.

(3) A person who violates paragraph (2) of this subsection is guilty of the felony of assault in the second degree and on conviction is subject to imprisonment not exceeding 10 years or a fine not exceeding \$5,000 or both.

³ Md. Code, CR § 3-803 – Harassment

(a) A person may not follow another in or about a public place or maliciously engage in a course of conduct that alarms or seriously annoys the other:

(1) with the intent to harass, alarm, or annoy the other; (2) after receiving a reasonable warning or request to stop by or on behalf of the other; and (3) without a legal purpose.

(b) This section does not apply to a peaceable activity intended to express a political view or provide information to others. (c) A person who violates this section is guilty of a misdemeanor and on conviction is subject to: (1) for a first offense, imprisonment not exceeding 90 days or a fine not exceeding \$500 or both; and (2) for a second or subsequent offense, imprisonment not exceeding 180 days or a fine not exceeding \$1,000 or both.

⁴ MD Criminal Law Code § 10-304 – Hate Crimes, Harassment

Motivated either in whole or in substantial part by another person's or group's race, color, religious beliefs, sexual orientation, gender, gender identity, disability, or national origin, or because another person or group is homeless, a person may not:

- (1) (i) commit a crime or attempt to commit a crime against that person or group;
- (ii) deface, damage, or destroy, or attempt or threaten to deface, damage, or destroy the real or personal property of that person or group;
- (iii) burn or attempt or threaten to burn an object on the real or personal property of that person or group; or (iv) make or cause to be made a false statement, report, or complaint that the person knows to be false as a whole or in material part, to a law enforcement officer of the State, of a county, municipal corporation, or other political subdivision of the State, or of the Maryland–National Capital Park and Planning Police, about that person or group, with the intent to deceive and to cause an investigation or other action to be taken as a result of the statement, report, or complaint, in violation of § 9-501 of this article; or
- (2) commit a violation of item (1) of this section that:
 - (i) except as provided in item (ii) of this item, involves a separate crime that is a felony; or
 - (ii) results in the death of a victim.

⁵ MD Criminal Law Code § 10-305.1 - Hate Crimes-Prohibition on Use of Item or Symbol to Threaten or Intimidate

A person may not place or inscribe an item or a symbol, including an actual or depicted noose or swastika, whether temporary or permanent, on any real or personal property, public or private, without the express permission of the owner, owner's agent, or lawful occupant of the property, with the intent to threaten or intimidate any person or group of persons.

Individuals Who Wear Masks and Commit Crimes are Already Held Accountable

While well-intended, this bill appears to be put forth based upon anecdotal reasons and not hard data to support the need for additional criminal laws that will help achieve the goal of helping to identify and hold individuals who commit harassment, assault and/or hate crimes accountable. A rise in hate crimes across the nation and this state are certainly concerning and need to be addressed. However, the ability to identify bad actors does not appear to be preventing law enforcement or prosecutors from holding individuals accountable. Indeed, through highly televised and nationwide cases of crimes being committed by individuals wearing masks over the past several years, we know that individuals who have committed crimes wearing masks are in fact routinely and often swiftly held accountable through highly sophisticated and coordinated investigative work of law enforcement and prosecutors. And attorneys across this state can certainly tell you they have no shortage of cases with individuals who, despite wearing masks or face coverings, have been and continue to be arrested and prosecuted for crimes.

Affirmative Defenses Put the Burden of Proof on Individuals Who May Be Wrongfully Arrested

In Maryland criminal law, affirmative defenses typically include self-defense, insanity, necessity, duress or alibi. Importantly, in order to use an affirmative defense, the burden of proof shifts to the person accused of committing a crime to prove by a preponderance of evidence that they have a legal defense for committing the offense – whereas the underlying offense itself must be proven by the prosecution beyond a reasonable doubt to have occurred. And it does not mean that the end result will be a finding that the individual did not commit the offense, rather it places the burden on the accused of attempting to explain *why* the alleged offense occurred, not that it did not actually occur. And so, these affirmative defenses do not actually help protect law abiding citizens from being accused and tried before a judge or jury in the event they have a legitimate reason for wearing a mask (as listed in the numerous reasons laid out in the bill that could very well be for noncriminal activity). Rather, these affirmative defenses only serve to hopefully mitigate the harms that will likely result given the multitude of reasons individuals wear masks and could be discriminately accused or targeted as engaging in conduct that can be perceived as intimidating or threatening.

Selective Enforcement Risks Could Result in Discrimination, Bias and Harm to Law-Abiding Citizens

Lastly, this bill presents concerns with the ability to enforce and prosecute such conduct in a way that does not unfairly criminalize and discriminate against law-abiding citizens. Not only would this law be difficult to enforce, calling for officers and the public to make potentially discriminatory and highly subjective calls about the intent of face coverings, this law – like many laws that have targeted clothing or certain populations of people, could be enforced disproportionately, targeting marginalized communities, peaceful protestors or activists in overbroad or overreaching applications. An individual who is wrongfully targeted can only put forth an affirmative defense after potentially harmful accusations have been made. There is a real danger in sweeping law-abiding citizens into being accused of harassing someone simply while wearing a mask – which could very well be for any one of the listed affirmative defenses – and yet, their only recourse is after they have been arrested and are being prosecuted for such a crime.

Despite carving out specific instances or occurrences for those who wear masks or face coverings for weather, sporting events, health and/or religious reasons, etc., these individuals have no ability to demonstrate the validity of these reasons before being accused of such a crime. Determining these highly specific reasons will be left to police officers responding to alleged violations, putting people who may have disabilities or health concerns at real risk of being criminalized and traumatized and likely harmed by such encounters and arrests.

For these reasons, the Maryland Office of the Public Defender urges this Committee to issue an unfavorable report on Senate Bill 874.

Submitted by: Maryland Office of the Public Defender, Government Relations Division.