

Department of Legislative Services
Maryland General Assembly
2008 Session

FISCAL AND POLICY NOTE
Revised

House Bill 436
Judiciary

(Delegates McComas and Waldstreicher)

Judicial Proceedings

Criminal Law - Possession of Child Pornography - Penalties

This bill expands the definition of “sexual conduct” as applicable to child pornography prohibitions to include the display of the genitals of an individual for purposes of sexual arousal or gratification. The bill also increases the maximum misdemeanor imprisonment penalty for a first violation of possession of child pornography from 2 to 5 years and makes a subsequent violation a felony subject to a maximum imprisonment penalty of 10 years. The monetary penalties for a first or subsequent offense are unchanged.

Fiscal Summary

State Effect: Minimal decrease in general fund revenues and potential minimal increase in general fund expenditures stemming from felony rather than misdemeanor convictions for subsequent offenses.

Local Effect: Minimal increase in local revenues due to existing monetary penalty provisions applying to more felony cases being heard in the circuit courts.

Small Business Effect: None.

Analysis

Current Law: 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.

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 subsequent offender cases from the District Court to the circuit courts and would also result in fewer *de novo* appeals being taken from the District Court to the circuit courts.

State Revenues: General fund revenues could decrease minimally as a result of shifting some cases from the District Court to the circuit courts.

State Expenditures: General fund expenditures could increase minimally as a result of the bill's incarceration penalty due to some people being committed to Division of Correction (DOC) facilities for longer periods of time due to increased incarceration penalty provisions. The number of people affected by this change is expected to be minimal. In fiscal 2007, DOC had an intake of five persons convicted of this offense.

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 subsequent offender cases being heard in the circuit courts rather than the District Court.

Additional Information

Prior Introductions: Changing this crime from a misdemeanor to a felony was an included feature of HB 685 and SB 329 of 2007. Each bill had a hearing with no further action taken.

Cross File: SB 414 (Senator Stone, *et al.*) – Judicial Proceedings.

Information Source(s): State's Attorneys' Association, 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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