



Ohio Legislative Service Commission 123rd House Bill Analysis

Sub. H.B. 724

123rd General Assembly
(As Passed by the House)

Reps. Austria, Widener, Winkler, Gardner, Harris, Jordan, Tiberi, Hartnett, Evans, Hoops, Robinson, Myers, Hollister, Carey, Allen, Aslanides, Grendell, Clancy, Corbin, O'Brien, Hood, Pringle, Mottley, Terwilliger, Trakas, Jerse, Goodman, Olman, Distel, Krebs, Netzley, Britton, Jolivette, Roman, A. Core, Hughes, Willamowski, Smith, Amstutz, D. Miller, Young, Gooding, Van Vyven, Salerno, DePiero, Sullivan, Roberts, Perry, Barnes, Metzger, Collier, Verich, Buehrer, Flannery, Jones, Kilbane, Womer Benjamin, Stevens, Ford, Boyd, J. Beatty, Patton, Ogg, Vesper, Coughlin, Mettler, Damschroder, Gerberry, Cates

BILL SUMMARY

- Enacts new prohibitions in the offense of "importuning" that specifically prohibit a person from soliciting another by means of a telecommunications device to engage in sexual activity with the offender when the offender is 18 years of age or older and either of the following applies: (1) the other person is less than 13 years of age or is over 12 but less than 16 years of age, and the offender knows that the other person is less than 13 or over 12 but less than 16 or is reckless in that regard, or (2) the other person is a law enforcement officer posing as a person less than 13 or over 12 but less than 16, and the offender believes that the other person is less than 13 or over 12 but less than 16 or is reckless in that regard.
- Enhances the penalty for importuning when the offense involves soliciting a person less than 13 years of age to engage in sexual activity with the offender.
- Modifies the degree of mental culpability required for the offense of "pandering sexually oriented matter involving a minor" when the violation involves an offender who, with knowledge of the character of the material or performance involved, solicits, receives, purchases, exchanges, possesses, or controls any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality (i.e., so that the offender must *knowingly* solicit, etc., the material) and enhances the penalty for that offense in those circumstances.

CONTENT AND OPERATION

Importuning

Existing law

R.C. 2907.07 sets forth the offense of "importuning" and contains the following three prohibitions:

- (1) The first prohibition prohibits a person from soliciting a person *under* 13 years of age to engage in sexual activity with the offender, whether or not the offender knows the age of such person. A violation of this prohibition is a misdemeanor of the first degree.
- (2) The second prohibition prohibits a person from soliciting another, not the spouse of the offender, to engage in sexual conduct with the offender, when the offender is 18 years of age or older and four or more years older than the other person, and the other person is over 12 *but not over 15 years* of age, whether or not the offender knows the age of the other person. A violation of this prohibition is a misdemeanor of the fourth degree.
- (3) The third prohibition prohibits a person from soliciting a person of the same sex to engage in sexual activity with the

offender, when the offender knows the solicitation is offensive to the other person, or is reckless in that regard. A violation of this prohibition is a misdemeanor of the first degree.

Operation of the bill

The bill revises the age tiers that apply to persons who commit the first two prohibitions described under "**Existing law**." The bill revises the first prohibition to apply to an offender who solicits a person *who is less than 13 years of age* (instead of *under 13 years of age*) and revises the second prohibition to apply to an offender who solicits a person who is over 12 *but is less than 16 years of age* (instead of *over 12 but not over 15 years of age*). (R.C. 2907.07(A) and (C).)

The bill enhances the penalty for importuning when it involves a violation of either of the first two prohibitions discussed above. Under the bill, a violation of the first prohibition is a felony of the fourth degree on a first offense and a felony of the third degree on each subsequent offense, and a violation of the second prohibition is a felony of the fifth degree on a first offense and a felony of the fourth degree on each subsequent offense. (R.C. 2907.07(G).)

The bill also enacts two new prohibitions within the offense of importuning.

The first new prohibition specifically prohibits a person from soliciting another by means of a "telecommunications device" to engage in "sexual activity" (see "**Definitions**," below) with the offender when the offender is 18 years of age or older and either of the following applies (R.C. 2907.07(D)):

- (1) The other person is less than 13 years of age, and the offender knows that the other person is less than 13 years of age or is reckless in that regard (similar, but not identical, to the first prohibition described above in "**Existing law**").
- (2) The other person is a law enforcement officer posing as a person who is less than 13 years of age, and the offender believes that the other person is less than 13 years of age or is reckless in that regard (not covered by existing law).

A person who violates this first new prohibition is guilty of a felony of the fourth degree on a first offense and a felony of the third degree on each subsequent offense. (R.C. 2907.07(G).)

The second new prohibition specifically prohibits a person from soliciting another by means of a telecommunications device to engage in sexual activity with the offender when the offender is 18 years of age or older and either of the following applies (R.C. 2907.07(E)):

- (1) The other person is over 12 but less than 16 years of age, and the offender knows that the other person is over 12 but less than 16 years of age or is reckless in that regard (similar, but not identical, to the second prohibition described above in "**Existing law**").
- (2) The other person is a law enforcement officer posing as a person who is over 12 but less than 16 years of age, and the offender believes that the other person is over 12 but less than 16 years of age or is reckless in that regard (not covered by existing law).

A person who violates this second new prohibition is guilty of a felony of the fifth degree on a first offense and a felony of the fourth degree on each subsequent offense. (R.C. 2907.07(G).)

The bill specifies that the two new prohibitions apply to any solicitation that is contained in a transmission via a telecommunications device that either originates in Ohio or is received in Ohio (R.C. 2907.07(F)).

Pandering sexually oriented matter involving a minor

Existing law

The offense of pandering sexually oriented matter involving a minor prohibits, among other things, a person, with knowledge of the character of the "material" or "performance" involved, from soliciting, receiving, purchasing, exchanging, possessing, or controlling any material that shows a "minor" participating or engaging in "sexual activity" (see "**Definitions**," below), masturbation, or bestiality. A person who violates this prohibition is guilty of "pandering sexually oriented matter involving a minor" and is guilty of a felony of the fifth degree. If the offender previously has been convicted of or pleaded guilty to pandering sexually oriented matter involving a minor, pandering obscenity involving a minor, or illegal use of a minor in nudity oriented material or performance, the violation is a felony of the fourth degree. (R.C. 2907.322(A)(5) and (C).) (See **COMMENT 1** for a description of the other activities prohibited by R.C. 2907.322.) *None of the prohibitions in R.C. 2907.322 apply to any material or performance that is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into Ohio, or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance. In addition, mistake of age is not a defense to*

a charge of pandering sexually oriented matter involving a minor, and, in a prosecution of pandering sexually oriented matter involving a minor, the trier of fact may infer that a person in the material or performance involved is a minor if the material or performance, through its title, text, visual representation, or otherwise, represents or depicts the person as a minor. (R.C. 2907.322(B).)

Operation of the bill

The bill revises this prohibition to prohibit a person, with knowledge of the character of the material or performance involved, from *knowingly* soliciting, receiving, purchasing, exchanging, possessing, or controlling any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality (see **COMMENT 2**). The bill also increases the penalty for violating this prohibition to a felony of the fourth degree on a first offense and, if the offender previously has been convicted of or pleaded guilty to pandering sexually oriented matter involving a minor, pandering obscenity involving a minor, or illegal use of a minor in nudity oriented material or performance, to a felony of the third degree. (R.C. 2907.322(A)(5) and (C).)

Definitions

As used in the bill:

Material

"Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch (R.C. 2907.01(J)--not in the bill).

Minor

"Minor" means a person under 18 years of age (R.C. 2907.01(M)--not in the bill).

Performance

"Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience (R.C. 2907.01(K)--not in the bill).

Sexual activity

"Sexual activity" means any of the following (R.C. 2907.01(A), (B), and (C)--not in the bill): (1) any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person; (2) vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. *Penetration, however slight, is sufficient to complete vaginal or anal intercourse.*

Telecommunications device

"Telecommunications device" means any instrument, equipment, machine, or other device that facilitates telecommunication, including, but not limited to, a *computer, computer network*, computer chip, computer circuit, scanner, telephone, cellular telephone, pager, personal communications device, transponder, receiver, radio, modem, or device that enables the use of a modem. "Telecommunication" means the origination, emission, dissemination, transmission, or reception of data, images, signals, sounds, or other intelligence or equivalence of intelligence of any nature over any communications system by any method, including, but not limited to, a fiber optic, electronic, magnetic, optical, digital, or analog method. (R.C. 2913.01(X) and (Y)--not in the bill.)

COMMENT

1. R.C. 2907.322 also prohibits a person, with knowledge of the character of the material or performance involved, from doing any of the following:

- (a) Creating, recording, photographing, filming, developing, reproducing, or publishing any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;
- (b) Advertising for sale or dissemination, selling, distributing, transporting, disseminating, exhibiting, or displaying any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;
- (c) Creating, directing, or producing a performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(d) Advertising for presentation, presenting, or participating in presenting a performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(e) Bringing or causing to be brought into Ohio any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality, or bringing, causing to be brought, or financing the bringing of any minor into or across Ohio with the intent that the minor engage in sexual activity, masturbation, or bestiality in a performance or for the purpose of producing material containing a visual representation depicting the minor engaged in sexual activity, masturbation, or bestiality.

A person who violates any of these prohibitions is guilty of pandering sexually oriented matter involving a minor and is guilty of a felony of the second degree. (R.C. 2907.07(A)(1), (2), (3), (4), and (6) and (C).)

2. R.C. 2901.22(A) to (D) set forth, and define, the "culpable mental states" that apply in the Criminal Law--the culpable mental states, in descending degree of stringency, are purpose, knowledge, recklessness, and negligence. Relevant to the bill, the section specifies that a person acts *knowingly*, regardless of his or her purpose, when he or she is aware that his or her conduct will probably cause a certain result or will probably be of a certain nature, and that a person has knowledge of circumstances when he or she is aware that such circumstances probably exist.

The significance of these culpable mental states is described in R.C. 2901.21. That section specifies that, except as described in the next sentence, a person is not guilty of a criminal offense in Ohio unless both of the following apply: (a) the person's liability is based on conduct that includes either a voluntary act, or an omission to perform an act or duty which he or she is capable of performing, and (b) the person has *the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense*. However, R.C. 2901.21 also provides that: (a) when the section defining a criminal offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense, and (b) *when the section defining a criminal offense neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense*. As used in R.C. 2901.21, "culpability" means purpose, knowledge, recklessness, or negligence, as defined in R.C. 2901.22.

Finally, R.C. 2901.21(E) specifies that: (a) when the section defining a criminal offense provides that negligence suffices to establish an element of the offense, then recklessness, knowledge, or purpose is also sufficient culpability for that element, (b) when recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for that element, and (c) when knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for that element.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	05-24-00	p. 2114
Reported, H. Criminal Justice	11-14-00	p. 2343
Passed House (92-0)	11-15-00	pp. 2357-2358

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