

An Overview Of Sex Offenses Against Children And The South Carolina Criminal Justice System



CHILDREN'S LAW CENTER

The Children's Law Center serves as a training, project, and resource center in child protection and juvenile justice for attorneys, judges, case workers, law enforcement, child advocates, guardians ad litem, and other child serving professionals.

Manuals, newsletters, and other publications are also available.

For more information, or to schedule a training session, contact the

Children's Law Center at (803) 777-1646 or visit the Children's Law Center web site at <http://childlaw.sc.edu>.

The Children's Law Center is funded in part by the SC Bar Foundation



School of Law
University of South Carolina

September 2010

The Children's Law Center designed this information packet for child protection case workers and children's advocacy center employees as an overview of South Carolina's criminal justice system. This packet is not designed to provide comprehensive information concerning substantive criminal law or criminal procedure in South Carolina.

The criminal justice system has substantive and procedural components. This information packet will first describe substantive crimes. The second part will describe criminal procedures - arrest, bond, indictment, trial, evidentiary rules, and sentencing. For more information, call (803) 777-1646 or go to the Children's Law Center's web site, <http://childlaw.sc.edu>.

Sex Crimes Against Children

Sex crimes against children can be placed into three broad categories: crimes that involve touching or attempted touching; crimes of solicitation; and crimes involving photographs or other media.

Crimes that Involve Touching

Crimes that involve a bodily touch are divided into two types: penetration offenses and non-penetration offenses. The most serious penetration offense in South Carolina is Criminal Sexual Conduct (CSC) with a minor.

A person commits CSC with a minor when the person commits a sexual battery upon a child. Sexual battery is defined as sexual intercourse, anal intercourse, cunnilingus, fellatio, or any intrusion of any part of a person's body or of any object into the genital or anal openings of another person's body (except for medically recognized treatment or diagnosis). The following summary of the CSC statute shows the degrees of CSC with a minor and reflects the Legislature's view that CSC with younger children merits greater punishment.

First degree CSC (Type One): Child under 11. S.C. Code § 16-3-655(A)(1).

First degree CSC (Type Two): Child under 16 and offender previously convicted of specified offense. S.C. Code § 16-3-655(A)(2).

Second degree CSC (Type One): Child between the ages of 11 and 14. S.C. Code § 16-3-655(B)(1).

Second degree CSC (Type Two): Child between the ages of 14 and 15 and actor older than the child. S.C. Code § 16-3-655(B)(2).

Although older than the child, a person does not commit second degree CSC with a minor when the person is eighteen years of age or less and engages in illicit but consensual sexual conduct with another person who is at least fourteen years of age.

Sexual Battery with a Student: Prohibits specified acts between a person affiliated with a public or private secondary school and students enrolled in those schools. S.C. Code § 16-3-755.

TEXT OF CSC WITH MINOR STATUTE

S.C. Code § 16-3-655.

(A) A person is guilty of criminal sexual conduct in the first degree if:

- (1) the actor engages in sexual battery with the victim who is less than eleven years of age; or
- (2) the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D).

A person convicted of a violation of (A)(1) must be imprisoned for a mandatory minimum of twenty-five years, no part of which may be suspended or probation granted, or must be imprisoned for life.

A person convicted of a violation (A)(2) must be imprisoned for not less than ten years nor more than thirty years, no part of which may be suspended nor probation granted.

A person convicted of a subsequent violation of (A)(1) where both the prior offense and subsequent offense involved sexual intercourse, anal intercourse or intrusion by an object, may be punished by death or by imprisonment for life.

(B) A person is guilty of criminal sexual conduct in the second degree if:

- (1) the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age.
- (2) the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim. However, a person may not be convicted of a violation of the provisions of this item if he is eighteen years of age or less when he engages in illicit but consensual sexual conduct with another person who is at least fourteen years of age.

A person convicted of a violation of (B) may be imprisoned for not more than 20 years.

An important feature of the criminal law of South Carolina is that an attempt to commit a crime such as CSC is punished the same as the completed offense. For example, an attempt to commit a sexual penetration offense carries the same penalty as if the offense were fully carried out.

The primary non-penetration offense is lewd acts upon a minor under sixteen. A person commits this offense when the person commits a "lewd or lascivious act" upon a child under 16. This act must be intended to arouse the sexual desires of the actor or of the child.

TEXT OF LEWD ACTS STATUTE

16-15-140. Lewd acts upon a child under 16.

It is unlawful for a person over the age of fourteen years to willfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child. A person violating the provisions of this section is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than fifteen years, or both.

Crimes Not Involving Touching

Crimes that do not involve touching or attempted touching typically prohibit solicitation or child pornography. South Carolina's solicitation statute is relatively broad, making it an offense for a person to communicate or attempt to communicate with a minor under the age of 18 for the purpose of persuading or coercing the minor to engage in sexual activity. For example, asking a minor to engage in sexual activity is a serious felony.

Likewise, photographing or videotaping minors engaged in sexual activity is an offense. The pictures must involve actual or simulated sexual activity; photographs involving nudity alone without sexual acts do not constitute child pornography under state law (though such images do potentially fall within the federal child pornography offense)

COMMON CRIMES AGAINST CHILDREN

CSC with a minor. 16-3-655.

Penetration offenses with children under 16.

Lewd acts. 16-15-140.

Contact offenses with children under 16.

Sexual Battery with a Student. 16-3-755.

Sexual performance. 16-3-810.

Employing or inducing a minor under 18 to engage in a sexual performance.

Criminal solicitation. 16-15-342.

Communicating with a minor under 18 for the purpose of enticing the minor to participate in sexual activity.

Sexual exploitation. 16-15-395.

Producing a visual representation of a minor engaging in sexual activity.

Procedures

Pre-trial

Arrest and bail. A law enforcement officer in South Carolina has the authority to arrest a person without a warrant under limited circumstances. Most often, however, a magistrate issues a warrant commanding a person's arrest, and a law enforcement officer will make the arrest with the authority of the warrant.

Once under arrest, the defendant will be brought before a magistrate for a bond hearing. South Carolina law allows a defendant to be released on his or her own recognizance; defendants accused of committing a felony against a child, however, are likely to be required to post bail before being released. A magistrate may place conditions upon the bond, such as restraining the defendant from being around specified locations or people.

Preliminary hearing indictment.

A defendant has the right to request a preliminary hearing, at which the magistrate must make a determination, based on facts presented by the prosecution, that probable cause exists to maintain the defendant in custody or to limit the defendant's freedom. A defendant may waive the preliminary hearing. Following the preliminary hearing, the solicitor will present the facts to a grand jury and seek an indictment which is the formal charge against a defendant.

Trial Process

The vast majority of cases in South Carolina that are not dismissed result in guilty pleas. That is, a small percentage of all arrests end up with a jury trial. While a defendant might agree to plead "straight up" to the charges, most often the defendant pleads to a lesser offense than the one charged.

Factors influencing the prosecutor's decision to accept a plea include the strength of the evidence, the potential trauma to the victim in testifying, the nature of the charged offense, and prior offenses by the defendant. While prosecutors are often criticized for accepting pleas that are perceived as too lenient, the reality of the current criminal justice system is that most cases are resolved by guilty pleas. Substantially more governmental resources would be required to take a large percentage of cases to trial; in the absence of these resources, the system relies on regular plea negotiations that allow both the defendant and the state to obtain a portion of their desired results.

Evidence

Not all information known to the prosecution is admissible as evidence in a criminal trial. For example, a prosecutor may know that a defendant was accused of other crimes in the past, yet the law might not allow the prosecutor to present this evidence to the jury. Two types of evidentiary issues recur in child sexual abuse prosecutions: hearsay; and prior bad acts.

Hearsay. One common rule that comes into play in these cases is the rule against hearsay. Generally speaking, the law of evidence requires a person who possesses information relevant to a prosecution to personally make any statement about that information in the courtroom. Statements made to others outside of court generally are not admissible.

For example, a child might tell a family member that a defendant touched her in a sexual manner. At trial, the family member may not be permitted to repeat to the jury what the child said to the family member.

As with many areas of the law, there are numerous exceptions to this rule. In some circumstances hearsay may be admissible as an exception to the rule against hearsay.

For example, a person may leave the scene of an assault and make an excited statement while still under the stress of the event. Such a statement might be admissible under the excited utterance exception to the hearsay rule.

Similarly, statements made to a medical professional relevant to the person's medical care and treatment may be admissible under a separate hearsay exception. Witnesses and other participants in the criminal justice system must be aware that the hearsay rules are complex and are constantly modified by new cases.

As a general rule, South Carolina does not have expansive hearsay exceptions. Consequently, many statements made by children out of court have not been admissible at trial. The General Assembly acted to change that situation by enacting S.C. Code § 17-23-175 which was effective on July 1, 2006.

Portion of S.C. Code § 17-23-175

- (C) For the purposes of this section, a child is:
- (1) a person who is under the age of twelve years at the time of the making of the statement or who functions cognitively, adaptively or developmentally under the age of twelve at the time of the making of the statement; and
 - (2) a person who is the alleged victim of, or witness to, a criminal act for which the defendant, upon conviction, would be required to register pursuant to the provisions of Article 7, Chapter 3, Title 23.
- (D) For the purposes of this section an investigative interview is the questioning of a child by a law enforcement officer, a Department of Social Services case worker, or other professional interviewing the child on behalf of on these agencies, or in response to a suspected case of child abuse.

Under Code § 17-23-175, an out of court statement of a child is admissible if: the statement was given in response to questioning conducted during an investigative interview of the child; an audio and visual recording of the statement is preserved; the child testifies in the proceeding and is subject to cross-examination on elements of the offense and the making of the out of court statement; and the court finds in a hearing conducted outside the presence of the jury that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

Prior bad acts. A second important evidentiary issue is a rule that prohibits presenting to the jury prior bad acts of a defendant. The criminal justice process is structured to require the state to prove a person's guilt based on evidence of the crime charged. Thus, evidence of a person's prior bad conduct is deemed irrelevant. A person should be convicted based on evidence about the crime charged, not on the fact that the person is perceived to be a "bad person."

Exceptions to this general rule permit introduction of prior bad acts in some cases. For example, a person may engage in a continuous pattern of acts that is really part of the same criminal offense; in such a case, all of the acts can generally be admitted to prove the offense. However, like the hearsay rules, the law governing prior bad acts is constantly being refined by the courts. Prosecutors and defense attorneys must argue the law as applied to the facts of a particular case; some prior acts will be admitted while others will not.

Sentencing

While several general points can be made about sentencing in South Carolina, South Carolina sentencing statutes are complex and constantly changing. The table below demonstrates the complexity of sentencing in South Carolina.

Sentencing is generally left to the discretion of the judge, within general sentencing limits imposed by statute. The statute defining lewd acts, for example, states that a person convicted of this offense can be imprisoned "not more than fifteen years." Based on evidence presented at a sentencing hearing, a judge can sentence a defendant to any term of years up to fifteen.

A judge may also suspend a sentence and place a defendant on probation. Conditions placed on the defendant's probation may limit the defendant's activities. The defendant will be incarcerated and serve the remaining sentence if he violates the conditions of probation. A prisoner may be released on parole before the completion of his or her sentence.

For certain offenses, the legislature has imposed mandatory minimum sentences and has limited a judge's ability to suspend sentences. For example, CSC with a minor in the first degree (an (A)(1) offense) carries a mandatory 25 year minimum sentence or life imprisonment, and no part of that 25 years may be suspended or probation granted.

The General Assembly has designated certain offenses for which an offender must serve 85 percent of the sentence. Criminal sexual conduct offenses and crimes involving production of child pornography are examples of crimes subject to that requirement.

Offense	Sentence	Register as Sex Offender?	Predicate SVP Offense?	85% of Time Served?
CSC 1 st (A)(1)	Mandatory minimum 25 years or life*	Yes	Yes	Yes
CSC 1 st (A)(2)	Mandatory Minimum 10 years; 30 year maximum *death for subsequent offense as specified	Yes	Yes	Yes
CSC 2d	20 year maximum	Yes	Yes	Yes
lewd acts	15 year maximum	Yes	Yes	No
sexual battery with a student				
(B)	5 year maximum	No	No	No
(C)	30 day maximum	No	No	No
(D)	5 year maximum	No	No	No
sexual performance	20 year maximum	Yes	Yes	Yes
solicitation	10 year maximum	Yes	Yes	No
sexual exploitation, 1 st	20 year maximum	Yes	Yes	Yes

Post-Sentencing

Appeals. After conviction, a defendant may appeal decisions made by the judge during the trial. (Guilty pleas also are occasionally challenged on appeal). The law allows for certain convicted defendants to be released on bail during an appeal. The appellate process can take several years before all appeals are exhausted.

Probation and parole revocation.

A person who has been released on probation or parole and who violates a condition of release is entitled to a hearing on the revocation of probation or parole. The hearing will determine factual issues about whether the probation or parole conditions were in fact violated. If the judge upholds the revocation, the defendant will return to prison to complete the sentence.

Sexually violent predators. South Carolina law provides a mechanism for classifying a person as a sexually violent predator (SVP) and for committing such a person to the Department of Mental Health until such time as the person is no longer an SVP. An SVP is a person who has a “mental illness or personality disorder” that makes the person likely to engage in acts of sexual violence if not detained.

An SVP commitment proceeding is similar in many ways to a criminal trial. Among other rights, the defendant has the right to an attorney, the right to cross-examine witnesses the right to have an expert appointed, and the right to a jury trial. If the fact finder determines that the person meets the statutory definition of an SVP, the person is then committed to the care of the Department of Mental Health. This involuntary commitment lasts until the detainee is determined not to be an SVP.

Sex offender registration. Offenders convicted of sex offenses who live in South Carolina must register as sex offenders. The State Law Enforcement Division (SLED) maintains a searchable website identifying all registered sex offenders in the state. A person who is required to register as a sex offender must remain registered for life. See www.sled.state.sc.us.

Active electronic monitoring.

Offenders convicted of first degree CSC with a minor (an (A)(1) offense) or of committing a lewd act upon a child under sixteen pursuant to Code section 16-15-140 must be ordered to be monitored with an active electronic monitoring device upon the person’s release from confinement. Offenders convicted of other offenses may, upon release from confinement, be ordered to be monitored with an active electronic monitoring device. Those other offenses include: first degree CSC with a minor (an (A)(2) offense), CSC 2d with a minor unless the person was eighteen years of age or less or the conduct between persons under sixteen years of age was consensual; engaging a child for a sexual performance; producing, directing, or promoting sexual performance by a child; assaults with intent to commit sexual conduct involving a minor; and violations of Article 3, Chapter 15 of Title 16 involving a minor (child sexual exploitation and obscenity offenses).