

Offenses Against Children

3.1	CHAPTER OVERVIEW	5
3.2	LURING A CHILD INTO A MOTOR VEHICLE OR STRUCTURE	5
	A. Statutory	5
	B. Elements of Offense	5
	1. Mens Rea	6
	2. Definition of “Child”	6
	3. Conduct Constituting “Lure”	6
	4. Element: “Into” a Motor Vehicle	6
	5. Definition of Structure	7
	C. Penalties	7
	D. Sex Offender Registration	7
	E. 2005 Amendment	7
3.3	ENDANGERING WELFARE OF CHILDREN	7
	A. Statutory	7
	B. Elements of Offense	7
	1. A Parent, Guardian or Other Person	7
	2. Definition of “Knowingly Endangers”	8
	(a) Three Prong Test	8
	(b) Examples of “Knowingly Endanger”	8
	3. Violation of a Duty of Care, Protection or Support	10
	C. Penalties	10
	1. Single Episode	10
	2. Course of Conduct	10
	3. Merger	11
	D. Sex Offender Registration	11
3.4	CORRUPTION OF MINORS	12
	A. Statutory	12
	B. Elements of Offense	12
	1. Corrupting Morals of Minor	12

- C. Adjudication of Delinquency Unnecessary 13
- D. Presumptions Regarding Minor’s Age and Court Orders 13
- E. Mistakes as to Age 13
- F. Penalties 14
- G. Sex Offender Registration 14
- 3.5 SEXUAL ABUSE OF CHILDREN 14**
 - A. Statutory 14
 - B. Purpose of Statute 14
 - 1. Elements in General 15
 - 2. Photograph, Videotape or Depiction 17
 - (a) Specific Elements 17
 - (b) Penalty 17
 - 3. Dissemination 17
 - (a) Specific Elements 17
 - (b) Penalty 17
 - 4. Possession 17
 - (a) Specific Elements 17
 - (b) Penalty 18
 - D. Evidence of Age 18
 - 1. Mistake as to Age 18
 - 2. Exceptions 18
 - E. Sex Offender Registration 18
 - F. Merger 18
- 3.6. UNLAWFUL CONTACT WITH MINOR 19**
 - A. Statutory 19
 - B. Elements of Offense 19
 - C. Penalties 20
 - 1. Grading 20
 - 2. No Merger 20
 - D. Concurrent Jurisdiction to Prosecute 20
 - E. Definitions 20
 - F. Sex Offender Registration 21

3.7 SEXUAL EXPLOITATION OF CHILDREN 21

A. Statutory 21

B. Elements of Offense 21

 1. Offense Defined 21

 2. Definitions 21

C. Penalties 21

D. Sex Offender Registration 21

3.8 INTERNET CHILD PORNOGRAPHY 22

A. Act Declared Unconstitutional 22

3.9 SOLICITATION 22

A. Statutory 22

B. Definition of Solicitation and Renunciation 22

C. Penalties 23

 1. Grading 23

 2. Mitigation 23

D. Sex Offender Registration 23

E. Pertinent Case Law 23

 1. Culpability of the One Solicited 23

 2. Complicity of the One Solicited 23

 3. Culpability for Crimes Intended to be Committed 24

3.1 CHAPTER OVERVIEW

This chapter outlines statutes specifically designed to protect children. Offenses of sexual violence which may involve children as victims, such as Rape, 18 PA.CONS.STAT.ANN. § 3121, Statutory Sexual Assault, 18 PA.CONS.STAT.ANN. § 3122, and Involuntary Deviate Sexual Intercourse, 18 PA.CONS.STAT.ANN. § 3123, are covered in Chapter 2.

Listed below are the statutes discussed in this chapter.

- **Section 3.2:**
Luring a Child into a Motor Vehicle, 18 PA.CONS.STAT.ANN. § 2910;
- **Section 3.3:**
Endangering Welfare of Children, 18 PA.CONS.STAT.ANN. § 4304;
- **Section 3.4:**
Corruption of Minors, 18 PA.CONS.STAT.ANN. § 6301;
- **Section 3.5:**
Sexual Abuse of Children, 18 PA.CONS.STAT.ANN. § 6312;
- **Section 3.6:**
Unlawful Contact with Minor, 18 PA.CONS.STAT.ANN. § 6318;
- **Section 3.7:**
Sexual Exploitation of Children, 18 PA.CONS.STAT.ANN. § 6320; and
- **Section 3.8:**
Internet Child Pornography, 18 PA.CONS.STAT.ANN. §§ 7621-7630.

Lastly, Section 3.9 examines the cases where children are the intended victims of solicitation crimes involving sexual violence.

3.2 LURING A CHILD INTO A MOTOR VEHICLE OR STRUCTURE

A. Statutory

18 Pa.Cons.Stat.Ann. § 2910

B. Elements of Offense

- 1) Lures or attempts to lure a child;
- 2) Into a motor vehicle; or
- 3) Into a structure;

- 4) Unless the circumstances reasonably indicate that the child is in need of assistance;
- 5) Without the consent, express or implied, of the child's parent or guardian.

1. Mens Rea

As to the luring element, culpability required is intentionally, knowingly or recklessly. **Commonwealth v. Figueroa**, 648 A.2d 555 (Pa. Super. 1994), *appeal denied*, 540 Pa. 578, 655 A.2d 510 (1995); **Commonwealth v. Gallagher**, 2005 Pa. Super. 116 (2005).

As to the "child" element, the Commonwealth must prove that the defendant intentionally sought out the victim because the victim was under the age of 18, knew the victim was under the age 18 or was reckless as to the age of the victim. **Commonwealth v. Gallagher**.

There is strict liability in the luring statute only with respect to an intent to harm. Luring does not require a bad purpose intent. **Commonwealth v. Figueroa; Commonwealth v. Gallagher**.

2. Definition of "child"

A person under 18 years of age. 18 PA.CON.S.TAT.ANN. § 2908(b)

3. Conduct Constituting "lure"

Hand motions – waiving or motioning "come here" to the victim. **Commonwealth v. McClintock**, 639 A.2d 1222, 1227 (Pa. Super. 1994).

Inducement - offering the victim money in exchange for work, the nature of which defendant refused to describe unless the victim accompanied him to his car, constitutes a "lure". The definition of "lure" includes tempting by pleasure or gain, and the gain does not have to be a pleasant one; it can be "any kind of inducement." **Commonwealth v. Adamo**, 637 A.2d 302, 307 (Pa. Super. 1994).

Commands and Threats - the term "lure" is not limited to enticement or invitation to pleasure or gain. **Commonwealth v. Nanorta**, 742 A.2d 176 (Pa. Super. 1999). The court held that the command, "get in my car" could be characterized as a lure.

4. Element: "Into" a Motor Vehicle

There is a requirement that the child is lured "into" a vehicle. The plain meaning of Luring a Child into a Motor Vehicle does not include the inchoate offense of attempting to lure a child into a motor vehicle. Where a defendant does not manage to get the child into the vehicle, the appropriate offense is criminal attempt. **Commonwealth v. Tate**, 572 Pa. 411, 816 A.2d 1097 (2003).

"Motor vehicle" defined: Every self-propelled device in, upon or by which any person or property is or may be transported or drawn on a public highway. 18 PA.CON.S.TAT.ANN. § 2910(c).

5. Definition of Structure

“Structure” defined: A house, apartment building, shop, warehouse, barn, building, vessel, railroad car, cargo container, house car, trailer, trailer coach, camper, mine, floating home or other enclosed structure capable of holding a child, which is not open to the general public. 18 PA.CON.S.TAT.ANN. § 2910(c).

Affirmative defense: it’s an affirmative defense that the person lured or attempted to lure the child into the structure for a lawful purpose. 18 PA.CON.S.TAT.ANN. § 2910(b).

C. Penalties

Luring a Child into a Motor Vehicle or Structure is a Misdemeanor of the First Degree. In accordance with 18 PA. CONS. STAT. ANN. § 1104, in the case of a misdemeanor of the first degree, a term of imprisonment shall be fixed by the court at no more than 5 years, and in accordance with 18 PA. CONS. STAT. ANN. § 1101, a fine not to exceed \$ 10,000.00.

D. Sex Offender Registration

The crime of Luring a Child into a Motor Vehicle under 18 PA.CON.S.TAT.ANN. § 2910 was added in 2004 as a “listed offense” under the Pennsylvania Registration of Sexual Offenders Act (Megan’s Law II). See 42 PA.CON.S.TAT.ANN. § 9795.1(a).

E. 2005 Amendment

On November 10, 2005, *Luring a Child into a Motor Vehicle* was amended to *Luring a Child into a Motor Vehicle or Structure*. The new statute makes it a crime to lure a child into a structure, provides an affirmative defense to luring a child to a structure for a lawful purpose, and defines motor vehicle and structure. The act took effect 60 days following November 10, 2005.

3.3 ENDANGERING WELFARE OF CHILDREN

A. Statutory

18 Pa.Cons.Stat.Ann. § 4304.

B. Elements of Offense

- 1) A parent, guardian, or other person supervising the welfare of a child under 18 years of age;
- 2) Knowingly endangers the welfare of the child;
- 3) By violating a duty of care, protection or support.

1. A Parent, Guardian, or Other Person

The duty to care, protect or support a child is not limited to natural and adoptive parents. “Whenever a person is placed in control and supervision

of a child, that person has assumed such a status relationship to the child so as to impose a duty to act.” *Commonwealth v. Kellam*, 719 A.2d 792, 796 (Pa. Super. 1998). (Where the defendant lived with his girlfriend and her infant daughter, controlled many aspects of the mother’s life, including raising her other children and the infant victim, voluntarily assumed parental responsibilities with regard to the child, (e.g. watching her when the mother was away, changing her diaper and feeding her), he was held to have supervised the welfare of the child.)

There must be a case-by-case review in determining whether an adult living with a minor child is criminally liable and there must be evidence that the adult was “involved” with the child. Factors such as playing with the child, eating with the child, babysitting the child or otherwise interacting with the child should be examined. *Commonwealth v. Brown*, 721 A.2d 1105, 1108 (Pa. Super. 1998).

- Defendant had a duty to protect the child when she accepted the role of babysitter. *Commonwealth v. Vining*, 744 A.2d 310 (Pa. Super. 1999), appeal denied, 564 Pa. 709, 764 A.2d 1069 (2000).
- Where there is no evidence of defendant’s role as a supervisor or guardian of the child, (e.g. defendant is just a visitor in the victim’s home) defendant cannot be convicted of Endangering Welfare of Children. *Commonwealth v. Halye*, 719 A.2d. 763 (Pa. Super. 1998), appeal denied, 560 Pa. 699, 743 A.2d 916 (1999), cert. denied, 529 U.S. 1012, 120 S. Ct. 1287, 146 L. Ed. 2d 233 (2000).

2. Definition of “Knowingly Endangers”

(a) Three Prong Test

The accused must act “knowingly” to be convicted of endangering the welfare of a child. The Superior Court of Pennsylvania has employed a three-prong standard to determine whether the Commonwealth’s evidence is sufficient to prove this intent element:

- i) The accused is aware of his duty to protect the child;
- ii) The accused is aware the child is in circumstances that threaten the child’s physical or psychological welfare; and
- iii) The accused failed to act or has taken action so lame or meager that such actions cannot reasonably be expected to protect the child’s welfare.

(b) Examples of “Knowingly Endanger”

In *Commonwealth v. Miller*, 600 A.2d 988 (Pa. Super. 1992), the Court held that defendant was not aware that she had placed her child in circumstances that threatened the child’s physical or psychological welfare where the defendant agreed to go out only after being told by the child’s father that his neighbor had

agreed to baby sit the child. Defendant relied on that representation and child had been beaten and burned. The court held that the nature of her injuries would have been apparent to defendant Jones and thus he knew the victim had been injured and needed medical assistance, but failed to seek immediate medical attention for the child.

In ***Commonwealth v. Retkofsky***, 860 A.2d 1098 (Pa. Super. 2004), the Court held that defendant was aware of the dangers and “knowingly” endangered his son when he drove an ATV at an accelerated speed down a paved residential street, fleeing from police, with his nine year-old son hanging onto defendant’s body without any other restraint.

Commonwealth v. Cardwell, 515 A.2d 311 (Pa. Super. 1986), *appeal denied*, 515 Pa. 573, 527 A.2d 535 (1987): The statute requires affirmative performance which cannot be met simply by showing any step at all toward preventing harm, however incomplete or ineffectual. The person charged with the duty of care must take steps that are reasonably calculated to achieve success. The facts of the ***Cardwell*** case involved a situation where the defendant’s husband had sexually abused her daughter for a period of four years and defendant, upon learning of the abuse, did nothing other than to write two angry letters to her husband and failed to take concrete steps to remove her daughter from the situation, defendant was guilty of Endangering Welfare of Children.

Where a child suffers from a serious and life-threatening medical condition, prayers and anointment of the child are not sufficient steps to protect the child’s welfare. Parents have an affirmative duty to provide medical care to protect the child’s life, regardless or despite their religious beliefs. ***Commonwealth v. Barnhart***, 497 A.2d 616 (Pa. Super. 1985), *appeal denied*, 517 Pa. 620, 538 A.2d 874 (1988), *cert. denied*, 488 U.S. 817, 109 S. Ct. 55, 102 L. Ed. 34 (1988). *See also* ***Commonwealth v. Foster***, 764 A.2d 1076 (Pa. Super. 2000), *appeal denied*, 566 Pa. 658, 782 A.2d 542 (2001).

Where defendant did nothing to better the conditions of his house (dirty house with foul odor, dried food and food stains covering the walls, flies, maggots, hundreds of mice, spoiled food in the refrigerator, a hole in the roof, large holes in the kitchen floor and ceiling which allowed water to flow into an electric box in the basement), the defendant was guilty of Endangering Welfare of Children. ***Commonwealth v. Wallace***, 817 A.2d 485 (Pa. Super. 2002), *appeal denied*, 574 Pa. 774, 833 A.2d 143 (2003), *cert. denied*, 541 U.S. 907, 124 S. Ct. 1610, 158 L. Ed.2d 251 (2004).

The statute does not require actual infliction of physical injury or that child be in imminent threat of physical harm; exposure to danger is sufficient. **Commonwealth v. Wallace**, 817 A.2d 485, 491 (Pa. Super. 2002), *appeal denied*, 574 Pa. 774, 833 A.2d 143 (2003), *cert. denied*, 541 U.S. 907, 124 S. Ct. 1610, 158 L. Ed.2d 251 (2004). Even though his children suffered no physical harm, by allowing the children to live “with such filth and vermin, with no working furnace for heat, and with water running into the electrical box creating a fire hazard”, the risk of physical and/or psychological harm was present. 817 A.2d at 492.

3. Violation of a Duty of Care, Protection or Support.

Parents have an affirmative legal duty to protect their child and seek medical help when the life of their child is threatened despite their religious beliefs. The child’s welfare should override the parents’ religious beliefs and failure to seek medical care for the child under such circumstances constitutes a breach of their duties as parents. Every parent has a duty of care for their child and at the very least “to avert the child’s untimely death.” **Commonwealth v. Barnhart**, 497 A.2d 616, 619 (Pa. Super. 1985), *appeal denied*, 517 Pa. 620, 538 A.2d 874 (1988), *cert. denied*, 488 U.S. 817, 109 S. Ct. 55, 102 L. Ed. 34 (1988).

It is not a violation of the parents’ duty of care when their minor daughter is sexually active, even if they have knowledge of it. Where there is no evidence that the parents “permitted, condoned, fostered or prompted” their thirteen year old daughter’s sexual activity with her boyfriend, which led to her pregnancy, the parents are not guilty of endangering the welfare of their child. **Commonwealth v. Campbell**, 580 A.2d 868, 869 (Pa. Super. 1990).

C. Penalties

1. Single Episode

Endangering the Welfare of Children is a Misdemeanor of the First Degree. In accordance with 18 PA. CONS. STAT. ANN. § 1104, in the case of a misdemeanor of the first degree, a term of imprisonment shall be fixed by the court at nor more than 5 years, and in accordance with 18 PA. CONS. STAT. ANN. § 1101, a fine not to exceed \$ 10,000.00.

2. Course of Conduct

Where there is a course of conduct of endangering the welfare of a child, the offense constitutes a felony of the third degree. In accordance with 18 PA. CONS. STAT. ANN. § 1103, in the case of a felony of the third, a term of imprisonment shall be fixed by the court at nor more than 7 years, and in accordance with 18 PA. CONS. STAT. ANN. § 1101, a fine not to exceed \$ 15,000.00.

Examples of “Course of Conduct”

- Where defendant’s two young children had dirty hands, feet and toes, dirt all over their skin, dirty clothes, numerous bruises on their buttocks groin, thighs and backs, consistent with intentional infliction, and one of the victims had lost twenty percent of her body weight in a two week period, and defendant admits she was the full-time caregiver, jury could reasonably conclude course of conduct existed that endangered the welfare of the children. **Commonwealth v. Mackert**, 781 A.2d 178 (Pa. Super. 2001), *appeal denied*, 568 Pa. 696, 796 A.2d 980 (2002).
- Course of conduct existed where the sexual abuse of his stepdaughter occurred over a period of two years. **Commonwealth v. Ressler**, 798 A.2d 221 (Pa. Super. 2002).
- Where the entire episode for which defendant was charged, was one event, on one night, there was no “course of conduct” justifying a third degree felony charge of Endangering Welfare of Children. The legislative intent of 18 Pa.Cons.Stat.Ann. § 4304(b) is to punish a parent who abused their child over a period of time and for repeated behavior, but not for a single incident that occurred within minutes. **Commonwealth v. Popow**, 844 A.2d 13 (Pa. Super. 2004).
- Where the Commonwealth labels the charge of Endangering Welfare of Children in the information as a felony of the third degree, but the descriptive language in the information indicates only a misdemeanor and no course of conduct is alleged, the trial court was correct in sentencing defendant to a misdemeanor sentence upon a conviction for Endangering Welfare of Children. **Commonwealth v. Passarelli**, 789 A.2d 708 (Pa. Super. 2001), *appeal granted in part*, 571 Pa. 592, 812A.2d 1225 (2002), *affirmed*, 573 Pa. 372, 825 A.2d 628 (2003).

3. Merger

Endangering Welfare of Children is not a lesser included offense of Reckless Endangerment. **Commonwealth v. Martir**, 712 A.2d 327 (Pa. Super. 1998). However, Endangering Welfare of Children is a lesser included offense of Involuntary Manslaughter if the same facts are used as a basis for both convictions. **Commonwealth v. Barnhart**, 497 A.2d 616, 619, 630 (Pa. Super. 1985), *appeal denied*, 517 Pa. 620, 538 A.2d 874 (1988), *cert. denied*, 488 U.S. 817, 109 S. Ct. 55, 102 L. Ed. 34 (1988). In **Commonwealth v. Bird**, 597 A.2d 1169 (Pa. Super. 1991), the court held that the trial court erred in not merging the two offenses since the same facts were relevant to prove both. .

D. Sex Offender Registration

The crime of Endangering Welfare of Children under 18 PA.CON.S.TAT.ANN. § 4304 is not specifically designated as a “listed offense” under the Pennsylvania

Registration of Sex Offenders Act (Megan's Law II). See 42 Pa.Cons.Stat.Ann. § 9795.1.

3.4 CORRUPTION OF MINORS

A. Statutory

18 PA.CON.S.TAT.ANN. § 6301(a)(1)& (2).

B. Elements of Offense

- 1) Any person
 - a) Being of the age of 18 years and upwards,
 - b) By any act corrupts or tends to corrupt the morals of any minor less than 18 years of age, or
 - c) Aids, abets, entices or encourages any such minor in the commission of any crime, or
 - d) Knowingly assists or encourages such minor in violating his or her parole or any order of court; or
- 2) Any person
 - a) Who knowingly aids, abets, entices or encourages
 - b) A minor younger than 18 years of age
 - c) To commit truancy.

1. Corrupting Morals of Minor

Standard in deciding what conduct can be said to corrupt the morals of a minor is “the common sense of the community, as well as the sense of decency, propriety and the morality which most people entertain.”

Commonwealth v. Pankraz, 554 A. 2d 974, 977 (Pa. Super. 1989), *appeal denied*, 522 Pa. 618, 563 A.2d 887 (1989), quoting **Commonwealth v. Randall**, 133 A.2d 276 (Pa. Super. 1957), *cert denied*, 355 U.S. 954 (1958); **Commonwealth v. Decker**, 698 A.2d 99, 101(Pa. Super. 1997), *appeal denied*, 550 Pa. 698, 705 A.2d 1304 (1998). Since the statute is protective in nature and designed to “cover a broad range of conduct in order to safeguard the welfare and security of our children”, the statute must be drawn broadly. **Commonwealth v. Barnette**, 760 A. 2d 1166, 1173(Pa. Super. 2000), *appeal denied*, 566 Pa. 634, 781 A.2d 138 (2001).

There is no need to prove that the minor's morals were actually corrupted. The Commonwealth need only prove that the conduct of the defendant tended to corrupt the minor's morals. **Commonwealth v. Barnette**, 760 A.2d 1166 (Pa. Super. 2000) *appeal denied*, 566 Pa. 634, 781 A.2d 138 (2001)(Defendant was guilty of Corruption of Minors where he requested a 16 year old youth to sign for a package containing marijuana even though

he told the youth it contained “knick knacks”); ***Commonwealth v. Mumma***, 489 Pa. 547, 414 A.2d 1026 (Pa. 1980).

Underlying criminal activity is not required. Statute states that conduct which corrupts or tends to corrupt is by “any act” not by any “criminal act.” ***Commonwealth v. Decker***, 698 A.2d 99 (Pa. Super. 1997) *appeal denied*, 550 Pa. 698, 705 A.2d 1304 (1998). (Defendant, a 37 year old male, guilty of Corruption of Minors where he engaged in consensual sexual intercourse with a 15 year old female.).

Sexual intercourse with a minor is considered corruption of morals. ***Commonwealth v. Berry***, 513 A. 2d 410 (Pa. Super. 1986).

Conviction for corruption of minors charge can still stand where there are acquittals of other offenses which were specified in the information filed against the defendant as the corrupting acts. ***Commonwealth v. Bricker***, 580 A.2d 388 (Pa. Super. 1990), *appeal denied*, 527 Pa. 596, 589 A.2d 687 (1991), ***Commonwealth v. Miller***, 657 A. 2d 946 (Pa. Super. 1995). (Defendants’ convictions for COM in both cases stand even though both were acquitted of Indecent Assault charges. The courts held that the jury had the prerogative to convict defendants on the corruption of minors charge while at the same time acquitting them on the charge of indecent assault and that inconsistent verdicts will stand as long as there is sufficient evidence to sustain the conviction.)

A married minor’s morals can be corrupted by his or her spouse. ***Commonwealth v. Stafford***, 749 A.2d 489, 499-500 (Pa. Super. 2000), *appeal denied*, 568 Pa. 660, 795 A.2d 975 (2000).

Consent is not an element in a corruption of minors charge. ***Commonwealth v. Kitchen***, 814 A.2d 209 (Pa. Super. 2002), *affirmed*, 576 Pa. 229, 839 A.2d 184 (2003).

C. Adjudication of Delinquency Unnecessary

A conviction under the provisions of this section may be had whether or not the jurisdiction of any juvenile court has attached or shall thereafter attach to such minor or whether or not such minor has been adjudicated a delinquent or shall thereafter be adjudicated a delinquent. 18 PA.CON.S.TAT.ANN. § 6301(b).

D. Presumptions Regarding Minor’s Age and Court Orders

In trials and hearings upon charges of violating the provisions of this section, knowledge of the minor’s age and the court’s orders and decrees concerning such minor shall be presumed in the absence of proof to the contrary. 18 PA.CON.S.TAT.ANN. § 6301(c).

E. Mistakes as to Age

Whenever in this section the criminality of conduct depends upon the corruption of a minor whose actual age is under 16 years, it is no defense that the actor did not know the age of the minor or reasonably believed the minor to be older than 18 years. 18 PA.CON.S.TAT.ANN. § 6301(d).

Whenever in this section the criminality of conduct depends upon the corruption of a minor whose actual age is 16 years or more but less than 18 years, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the minor to be 18 years or older. 18 PA.CONS.STAT.ANN. § 6301(d).

F. Penalties

Corruption of Minors, under section (a)(1), is a Misdemeanor of the First Degree. In accordance with 18 PA. CONS. STAT. ANN. § 1104, in the case of a misdemeanor of the first degree, a term of imprisonment shall be fixed by the court at nor more than 5 years, and in accordance with 18 PA. CONS. STAT. ANN. § 1101, a fine not to exceed \$ 10,000.00.

A violation of 18 Pa.Cons.Stat.Ann. § 6301(2), regarding **truancy**, is a summary offense. In accordance with 18 PA. CONS. STAT. ANN. § 1105, in the case of a summary conviction, a term of imprisonment shall be fixed by the court at nor more than 90 days, and in accordance with 18 PA. CONS. STAT. ANN. § 1101, a fine not to exceed \$ 300. A second offense within one year of the date of the first conviction is a misdemeanor of the third degree.

G. Sex Offender Registration

The crime of Corruption of Minors under 18 Pa.Cons.Stat.Ann. § 6301 is not specifically designated as a “listed offense” under the Pennsylvania Registration of Sex Offenders Act (Megan’s Law). See 42 PA.CONS.STAT.ANN. § 9795.1.

3.5 SEXUAL ABUSE OF CHILDREN

A. Statutory

18 PA.CONS.STAT.ANN. § 6312.

B. Purpose of Statute

The purpose of this statute, prohibiting “sexual abuse of children”, is to criminalize the filming, depiction or possession of photographs or computer depictions of children engaging in sexual acts.

On two occasions the Pennsylvania Superior Court has held that the statute is not unconstitutionally overbroad or vague. **Commonwealth v. Pepe**, 897 A.2d 463 (Pa.Super. 2006);¹ **Commonwealth v. Davidson**, 860 A.2d 575 (Pa.Super. 2004), *appeal granted in part*, 582 Pa. 356, 871 A.2d 185 (2005).²

¹ In **Pepe** and **Davidson**, the Superior Court made it clear that the statute proscribes the photographing or videotaping of “real” children, not computer-generated images. **Pepe**, 897 A.2d at 464, **Davidson**, 860 A.2d at 584.

² As indicated, the Pennsylvania Supreme Court accepted review of **Davidson** in 582 Pa. 356, 871 A.2d 185 (2005), and ordered the parties to address the following issues:

1) Whether 18 PA.CONS.STAT.ANN. § 6312(d) is unconstitutionally vague and overbroad?

C. Elements of Offense

1. Elements in General

The statute reads as follows:

18 PA.CON.S.TAT.ANN. § 6312.

Sexual Abuse of Children

(a) Definition. As used in this section, “prohibited sexual act” means sexual intercourse as defined in section 3101 (relating to definitions), masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.

(b) Photographing, videotaping, depicting on computer or filming sexual acts. Any person who causes or knowingly permits a child under the age of 18 years to engage in a prohibited sexual act or in the simulation of such act is guilty of a felony of the second degree if such person knows, has reason to know or intends that such act may be photographed, videotaped, depicted on computer or filmed. Any person who knowingly photographs, videotapes, depicts on computer or films a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such an act is guilty of a felony of the second degree.

(c) Dissemination of photographs, videotapes, computer depictions and films.

(1) Any person who knowingly sells, distributes, delivers, disseminates, transfers, displays or exhibits to others, or who possesses for the purpose of sale, distribution, delivery, dissemination, transfer, display or exhibition to others, any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.

(2) A first offense under this subsection is a felony of the third degree, and a second or subsequent

2) Did the General Assembly intend that a person charged under 18 PA.CON.S.TAT.ANN. § 6312(d) be subjected to individual counts for each piece of child pornography possessed?
3) If the General Assembly so intended, is it constitutional to impose separate punishments for each conviction?

offense under this subsection is a felony of the second degree.

(d) Possession of child pornography.

(1) Any person who knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.

(2) A first offense under this subsection is a felony of the third degree, and a second or subsequent offense under this subsection is a felony of the second degree.

(e) Evidence of age. In the event a person involved in a prohibited sexual act is alleged to be a child under the age of 18 years, competent expert testimony shall be sufficient to establish the age of said person.

(e.1) Mistake as to age. Under subsection (b) only, it is no defense that the defendant did not know the age of the child. Neither a misrepresentation of age by the child nor a bona fide belief that the person is over the specified age shall be a defense.

(f) Exceptions. This section does not apply to any material that is possessed, controlled, brought or caused to be brought into this Commonwealth, or presented for a bona fide educational, scientific, governmental or judicial purpose.

“**Sexual Intercourse**” is defined in 18 PA.CON.S.TAT.ANN. § 3101 to include, in addition to its ordinary meaning, intercourse per os or per anus with some penetration, however slight; emission is not required.

“**Transfer**” as used in § 6312(c) herein means a change of possession from one person to another. *Commonwealth v. McCue*, 487 A.2d 880, 883 (Pa.Super. 1983).

Consent: The consent of a child victimized by having pornographic pictures taken of him or her is not a defense. *Commonwealth v. Kitchen*, 814 A.2d 209, 213 (Pa. Super. 2002), *affirmed*, 576 Pa. 229, 839 A.2d 184 (2003)(Defendant’s conviction for taking and possessing pornographic photographs of his 16 year old paramour, with whom he had a child, stands regardless of the victim’s consent or cohabitation with the defendant.)

2. Photograph, Videotape or Depiction

- (a) **Specific Elements:** Photographing, videotaping, depicting on computer or filming sexual acts - 18 PA.CON.S.TAT.ANN. § 6312(b)
- i) causes or knowingly permits a child under the age of 18 years to engage in a prohibited sexual act or in the simulation of such act, and
 - ii) knows, has reason to know or intends that such act may be photographed, videotaped, depicted on computer or filmed
- (b) **Penalty** – A violation of this subsection is a felony of the second degree.

3. Dissemination

- (a) **Specific Elements:** Dissemination of photographs, videotapes, computer depictions and films - 18 PA.CON.S.TAT.ANN. §6312(c)
- i) knowingly sells, distributes, delivers, disseminates, transfers, displays or exhibits to others, or who possesses for the purpose of sale, distribution, delivery, dissemination, transfer, display or exhibition to others, any book, magazine, pamphlet, slide, photograph, film, videotape, computerdepiction or other material,
 - ii) depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act
- (b) **Penalty** - A first offense under this subsection is a felony of the third degree, and a second or subsequent offense under this subsection is a felony of the second degree.

4. Possession

- (a) **Specific Elements:** Possession of child pornography - 18 PA.CON.S.TAT.ANN. § 6312(d)
- i) knowingly possesses³ or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material
 - ii) depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.

³ In *Commonwealth v. Diodoro*, 2006 WL 3095476 (Pa.Super., Nov. 2, 2006), a panel of the Superior Court held that in relation to crime of Possession of Child Pornography, 18 PA.CON.S.TAT.ANN. § 6312(d), merely viewing child pornography on internet without intentionally (i.e., “knowingly”) saving or downloading any of the images does not constitute “knowing possession” of child pornography, and is not a violation of § 6312(d). However, the panel decision was withdrawn and reconsideration was granted on January 10, 2007. *Commonwealth v. Diodoro*, 2007 Pa. Super. LEXIS 323 (Pa.Super., January 10, 2007).

- (b) **Penalty** - A first offense under this subsection is a felony of the third degree, and a second or subsequent offense under this subsection is a felony of the second degree.

D. Evidence of Age - 18 PA.CONST.STAT.ANN. §6312(e)

In the event a person involved in a prohibited sexual act is alleged to be a child under the age of 18 years, competent expert testimony shall be sufficient to establish the age of said person.

Proof of age, like proof of any other material fact, can be accomplished by the use of either direct or circumstantial evidence, or both. The trier of fact can assess the age of the child depicted based on everyday observations and common experiences with the requisite degree of certainty to satisfy the standard of proof beyond a reasonable doubt. *Commonwealth v. Robertson-Dewar*, 829 A.2d 1207 (Pa. Super 2003), *appeal denied*, 576 Pa. 712, 839 A.2d 352 (2003).

Expert testimony: § 6312(e) does not mandate expert opinion testimony to satisfy the element of age but merely allows that if competent expert testimony is presented, it shall be sufficient to establish the age element. Whether expert testimony is necessary must be determined on a case-by-case basis. *Id.*, at 1212.

1. Mistake as to Age – 18 PA.CONST.STAT.ANN. § 6312 (e.1).

Under subsection (b) only, it is no defense that the defendant did not know the age of the child. Neither a misrepresentation of age by the child nor a bona fide belief that the person is over the specified age shall be a defense.

2. Exceptions - 18 PA.CONST.STAT.ANN. § 6312(f).

This section does not apply to any material that is possessed, controlled, brought or caused to be brought into this Commonwealth, or presented for a bona fide educational, scientific, governmental or judicial purpose.

E. Sex Offender Registration

The crime of Sexual Abuse of Children under 18 PA.CONST.STAT.ANN. § 6312 is designated as a “listed offense” under Pennsylvania Registration of Sexual Offenders Act (Megan’s Law). See 42 PA.CONST.STAT.ANN. § 9795.1.

F. Merger

Taking photographs in violation of § 6312(b) and possessing the same photographs in violation of § 6312(d) do not merge for sentencing purposes. *Commonwealth v. Kitchen*, 814 A.2d 209, 215 (Pa. Super. 2002), *affirmed*, 576 Pa. 229, 839 A.2d 184 (2003).

In *Commonwealth v. Koehler*, 914 A.2d 427 (Pa. Super. 2006), the Superior Court held that the imposition of 14 separate sentences for each conviction for sexual abuse of children/possession of child pornography did not constitute an illegal sentence in violation of the double jeopardy clause. *Id.* at 438-439. The

Court explained that the statute expressly criminalized possession of “any computer depiction,” not the “possession of any computer hard-drive containing depictions”; therefore, because the defendant had obtained each video clip individually, at separate times, he possessed 14 separate computer depictions. Consequently, it was appropriate to charge, convict, and sentence the defendant separately for each act of possessing each video clip of child pornography, and given separate acts of possession, the merger doctrine was inapplicable. *Id.* at 439.⁴

3.6 UNLAWFUL CONTACT WITH MINOR

A. Statutory

18 Pa.Cons.Stat.Ann. § 6318.

B. Elements of Offense

In accordance with 18 PA.CON.S.TAT.ANN. § 6318(a), a person commits an offense if he is intentionally in contact with a minor for the purpose of engaging in a prohibited act, and either the person initiating the contact or the person being contacted is within this Commonwealth. The prohibited acts are as follows:

- i) Any of the offenses enumerated in Chapter 31 (relating to sexual offenses)
- ii) Open lewdness as defined in section 5901 (relating to open lewdness).
- iii) Prostitution as defined in section 5902 (relating to prostitution and related offenses).
- iv) Obscene and other sexual materials and performances as defined in section 5903 (relating to obscene and other sexual materials and performances).
- v) Sexual abuse of children as defined in section 6312 (relating to sexual abuse of children).
- vi) Sexual exploitation of children as defined in section 6320 (relating to sexual exploitation of children).

⁴ In *Commonwealth v. Davidson*, 860 A.2d 575 (Pa.Super. 2004), *appeal granted in part*, 582 Pa. 356, 871 A.2d 185 (2005), the Pennsylvania Supreme Court accepted review in a similar case and ordered the parties to address, i.e., the following issue: “If the General Assembly so intended, is it constitutional to impose separate punishments for each conviction?”

C. Penalties

1. Grading

A violation of subsection (a) is:

- an offense and the same grade and degree as the most serious underlying offense in subsection (a) for which the defendant contacted the minor; or
- a misdemeanor of the first degree; whichever is greater.

2. No Merger

Indecent assault and unlawful contact with a minor did not merge for sentencing purposes as offenses do not share the same elements.

Commonwealth v. Evans, 901 A.2d 528, 536 (Pa.Super. 2006). The elements of unlawful contact with a minor consist of intentionally, either directly or indirectly, contacting or communicating with minor for purpose of engaging in indecent assault, whereas elements of indecent assault, 18 PA.CONS.STAT.ANN. § 3126(a)(7), require the touching of sexual or other intimate parts of person under age of 13 for purpose of arousing or gratifying sexual desire, in either person.

D. Concurrent Jurisdiction to Prosecute

The Attorney General has concurrent prosecutorial jurisdiction with the district attorney for violations under this section and any crime arising out of the activity prohibited by this section when the person charged with a violation of this section contacts a minor through the use of a computer, computer system or computer network. 18 PA.CONS.STAT.ANN. § 6318(b.1)

E. Definitions

As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

“Computer.” An electronic, magnetic, optical, hydraulic, organic or other high-speed data processing device or system which performs logic, arithmetic or memory functions and includes all input, output, processing, storage, software or communication facilities which are connected or related to the device in a computer system or computer network.

“Computer network.” The interconnection of two or more computers through the usage of satellite, microwave, line or other communication medium.

“Computer system.” A set of related, connected or unconnected computer equipment, devices, and software.

“Contacts” Direct or indirect contact or communication by any means, method or device, including contact or communication in person or through an agent or agency, through any print medium, the mails, a common carrier or

communication common carrier, any electronic communication system and any telecommunications, wire, computer or radio communications device or system.

“**Minor**” An individual under 18 years of age.

F. Sex Offender Registration

The crime of Unlawful Contact with Minor under 18 PA.CON.S.TAT.ANN. § 6318 is designated as a “listed offense” under Pennsylvania Registration of Sexual Offenders Act (Megan’s Law). See 42 PA.CON.S.TAT.ANN. § 9795.1.

3.7 SEXUAL EXPLOITATION OF CHILDREN

A. Statutory

18 Pa.Cons.Stat.Ann. § 6320.

B. Elements of Offense

1. Offense Defined

A person commits the offense of sexual exploitation of children if he *procures* for another person a child under 18 years of age for the purpose of *sexual exploitation*.

2. Definitions

As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

“**Procure.**” To obtain or make available for sexual exploitation.

“**Sexual exploitation.**” Actual or simulated sexual activity or nudity arranged for the purpose of sexual stimulation or gratification of any person.

C. Penalties

Sexual Exploitation of Children is a Felony of the Second Degree, pursuant to 18 PA. CONS. STAT. ANN. § 6320(b). In accordance with 18 PA. CONS. STAT. ANN. § 1103, in the case of a felony of the second degree, a term of imprisonment shall be fixed by the court at not more than 10 years, and in accordance with 18 PA. CONS. STAT. ANN. § 1101, a fine not to exceed \$ 25,000.00.

D. Sex Offender Registration

The crime of Sexual Exploitation of Children under 18 PA.CON.S.TAT.ANN. § 6320 is designated as a “listed offense” under Pennsylvania Registration of Sexual Offenders Act (Megan’s Law). See 42 PA.CON.S.TAT.ANN. § 9795.1.

3.8 INTERNET CHILD PORNOGRAPHY

A. Act Declared Unconstitutional

The Internet Child Pornography Act, 18 PA.CON.S.TAT.ANN. §7621 *et seq.*, was enacted to require internet service providers (“ISPs”) to remove or disable access to *child pornography items* “residing on or accessible through its service in a manner accessible to persons located within Pennsylvania after notification by the Pennsylvania Attorney General.”⁵

This Act was declared unconstitutional in *Center for Democracy & Tech. vs. Pappert*, 337 F. Supp. 2d 606 (E.D. Pa. 2004). The Court held that the Act violated the First Amendment in that the Act could not be implemented without “excessive blocking of innocent speech”; that the procedures provided by the Act “are insufficient to justify the prior restraint of materials protected by the First Amendment”; and that it was unconstitutional under the dormant Commerce Clause “because of its affect on interstate commerce.” *Id.*, at 611.

3.9 SOLICITATION

A. Statutory

18 PA.CON.S.TAT.ANN. §902.

B. Definition of Solicitation and Renunciation

18 PA.CON.S.TAT.ANN. § 902.

Criminal Solicitation

(a) Definition of solicitation. A person is guilty of solicitation to commit a crime if with the intent of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

(b) Renunciation. It is a defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal intent.

⁵ Pursuant to 18 PA.CON.S.TAT.ANN. § 7622, the ISP had to remove or disable access to child pornography items residing on or accessible through its service within five business days of notification by the Attorney General.

C. Penalties

1. Grading

18 PA.CON.S.TAT.ANN. § 905(a) provides that solicitation is a crime of the same grade and degree as the most serious offense which is solicited (unless otherwise provided in the Pennsylvania Crimes and Offenses Code).

2. Mitigation

18 PA.CON.S.TAT.ANN. § 905(b) additionally provides that if the particular conduct charged to constitute solicitation “is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this section, the court may dismiss the prosecution.”

D. Sex Offender Registration

The crime of solicitation under 18 PA.CON.S.TAT.ANN. § 902 is not specifically designated as a “listed offense” under the Pennsylvania Registration of Sexual Offenders Act (Megan’s Law). See 42 PA.CON.S.TAT.ANN. § 9795.1.

E. Pertinent Case Law

1. Culpability of the One Solicited

A defendant may be convicted of solicitation where the person approached would be the victim of a crime and not an accomplice. **Commonwealth v. Cauto**, 535 A.2d 602 (Pa. Super. 1987), *appeal denied*, 521 Pa. 601, 555 A.2d 112 (1988) (offering to perform oral sex on one minor and requesting another minor to pose in photographs depicting masturbation and oral sex with another male, constitutes complicity or participation in the commission of a crime, to wit: Involuntary Deviate Sexual Intercourse and Sexual Abuse of Children by Photograph or Film); **Commonwealth v. Morales**, 601 A.2d 1263 (Pa. Super. 1992), *appeal denied*, 531 Pa. 652, 613 A.2d 558 (1992)(offering to perform oral sex on a minor is sufficient for a solicitation conviction since the solicitation was for the victim’s participation in conduct, without which the defendant could not have committed involuntary deviate sexual intercourse.)

2. Complicity of the One Solicited

The crime of solicitation “encompasses more than requesting another to commit the substantive crime underlying the solicitation charge.” **Commonwealth v. Spetzer**, 722 A.2d 702, 716 (Pa. Super. 1998), *vacated on other grounds*, 572 Pa. 17, 813 A.2d 707 (2002)(Since defendant encouraged his wife to engage in conduct which would have made her an accomplice to the sexual offenses had she complied, defendant was guilty of solicitation of those sexual offenses.)

3. Culpability for Crimes Intended to be Committed

Culpability only extends to those offenses “intended or contemplated to be committed.” *Commonwealth v. Spetzer*, 722 A.2d 702, 716-717 (Pa. Super. 1998), *vacated on other grounds*, 572 Pa. 17, 813 A.2d 707 (2002). In the *Spetzer* case, as a part of a sting operation, the defendant’s wife had pretended to go along with defendant, led the defendant to believe that her daughters were willing to engage in sexual relations with him in the motel room, and planned a fictitious meeting with the two girls at a motel; however, the Superior Court found where there was a lack of evidence that the defendant intended to commit forcible sexual assaults, therefore, only the convictions for solicitation relating to non-forcible sexual assault and corruption of minor charges were permitted to stand, and the charges of solicitation to commit forcible or non-consensual sexual assaults were reversed.

18 PA.CONS.STAT.ANN. § 904.

Incapacity, Irresponsibility or Immunity of Party to Solicitation or Conspiracy

(a) General rule.—Except as provided in subsection (b) of this section, it is immaterial to the liability of a person who solicits or conspires with another to commit a crime that:

(1) he or the person whom he solicits or with whom he conspires does not occupy a particular position or have a particular characteristic which is an element of such crime, if he believes that one of them does; or

(2) the person whom he solicits or with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime.

(b) Exception.—It is a defense to a charge of solicitation or conspiracy to commit a crime that if the criminal object were achieved, the actor would not be guilty of a crime under the law defining the offense or as an accomplice under section 306(e) of this title (relating to status of actor) or section 306(f)(1) or (2) of this title (relating to exceptions).

⁶ In *Commonwealth v. Jacob*, 867 A.2d 614, 617 n.6 (Pa. Super. 2005). another panel of the Superior Court found that although *Spetzer* was not binding precedent due to the fact that the Pennsylvania Supreme Court had overruled it on other grounds, its reasoning was “instructive.”