



MEMORANDUM

TO: The Pennsylvania House of Representatives

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: May 21, 2021

RE: OPPOSITION TO HB 231 P.N. 195 (MUSTELLO)

Bill summary: [HB 231](#) PN 195 adds 18 existing offenses to [18 Pa. C.S. § 6318](#), which creates the crime of unlawful contact with a minor. Grading for a violation is: (1) an offense of the same grade and degree as the most serious underlying offense in subsection (a) for which the defendant contacted the minor; or (2) a felony of the third degree, whichever is greater.

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose House Bill 231.

HB 231 creates 18 NEW criminal offenses simply by adding a new element to 18 existing offenses.

The offenses listed under [Section 6318](#) are not unique; every crime listed within § 6318 is already an *existing criminal offense*. Section 6318 simply creates an additional offense if the person commits the underlying offense AND initiates contact with a minor or the minor being contacted. If enacted, [HB 231](#) (PN 195) will add **18 new offenses** to § 6318 (in addition to the 11 offenses already included from [Chapter 30](#)), allowing each act to generate separate offenses. Offenses under § 6318 are graded — at a minimum — as third-degree felonies, which impose a maximum of 7 years of incarceration. So, for example:

- Indecent exposure could be charged under § 3127 as an M1 (5 years max incarceration) AND as an F3 under § 6318 (7 years max incarceration) for a new total of **12 years maximum incarceration**.
- Offenses graded as an F2 (10 years max incarceration) would also be charged as an F2 under § 6318 for a new total of **20 years maximum incarceration**.
- Offenses graded as an F1 (20 years max incarceration) would also be charged as an F1 under § 6318 for a new total of **40 years maximum incarceration**.

In addition, HB 231 would make “**an attempt, solicitation or conspiracy to commit**” any of the existing offenses an additional crime under § 6318, graded as an F3 or higher.

The offenses created by HB 231 do not merge at sentencing, allowing prosecutors to stack charges and threaten excessive punishment in order to secure a plea deal.

Section 6318 creates separate, stand-alone offenses that are not considered “lesser included offenses” for charging and conviction purposes.¹ Lesser or greater included offenses are offenses based on the same facts, where all the elements of the crime are the same and the offenses merge for sentencing purposes. For example, manslaughter is a lesser included offense of murder, simple assault is a lesser included offense of aggravated assault because you cannot commit the greater offense without committing the lesser one. But due to Pennsylvania’s strict doctrine regarding lesser included offenses, very few offenses are merged for sentencing purposes — and especially not offenses under § 6318.

¹ The Pennsylvania Superior Court has held repeatedly that the enumerated crimes in § 6318 do not merge with § 6318 for sentencing purposes and are therefore NOT lesser included offenses. See [Comm. v. Evans](#) 901 A.2d 528 (Pa.Super. 2006) (finding that indecent assault and unlawful contact with a minor, while both “crimes were carried out contemporaneously, such a circumstance does NOT require merger for sentencing purposes.” *Id.* at 538. § 6318 and the crimes contained with it are not lesser included offenses. “Since each offense requires proof of an element that the other does not, the offenses do not merge.” *Id.*

Why does this matter? Creating a separate offense allows prosecutors to charge **two separate offenses** listed under § 6318 **for the exact same conduct**: once under the existing statute and then again, separately, under § 6318. This gives prosecutors even greater plea bargaining leverage by permitting them to charge two separate offenses for the same act. And since the grading scheme ensures that the offenses under § 6318 are graded as third-degree felonies or higher, plea deals are all but guaranteed, further impeding the already vanishing right to trial.

HB 231 would result in an obscene and unjustifiable escalation of penalties.

The new offenses created by HB 231 penalize existing offenses when they are committed against a minor. But 11 of the 18 the new offenses created by HB 231 are based on existing offenses that **already increase the grading** if committed against a minor or are **already offenses against minors** (indicated in red). Again, because each offense would be charged and sentenced separately and because offenses under § 6318 are graded as F3 or higher, here is what will happen if HB 231 is enacted:

Chapter 31 offenses added to § 6318 by HB 231	Current offense grading	Grading for existing & new offense under § 6318	New max incarceration
3121. Rape.	F1 if under 13	F1 + F1	20 + 20 = 40 yrs
3122.1. Statutory sexual assault.	F2 or F1, based on age difference	F2 + F2	10 + 10 = 20 yrs
3123. Involuntary deviate sexual intercourse.	F1 if under 18	F1 + F1	20 + 20 = 40 yrs
3124.1. Sexual assault.	F2	F2 + F2	10 + 10 = 20 yrs
3124.2. Institutional sexual assault.	F3 if under 18	F3 + F3	7 + 7 = 14 yrs
3124.3. Sexual assault by sports official, volunteer or employee of nonprofit association.	F3	F3 + F3	7 + 7 = 14 yrs
3125. Aggravated indecent assault.	F1 if under 13; otherwise F2	F1 + F1	20 + 20 = 40 yrs
3126. Indecent assault.	M2 if under 16; M1, F3 under 13	M2 + F3	2 + 7 = 9 yrs
3127. Indecent exposure.	M1 if under 16; otherwise M2	M1 + F3	5 + 7 = 12 yrs
3129. Sexual intercourse with animal.	M2	M2 + F3	2 + 7 = 9 yrs
3130. Conduct relating to sex offenders.	F3	F3 + F3	7 + 7 = 14 yrs
3131. Unlawful dissemination of intimate image.	M1 if under 18; otherwise M2	M1 + F3	5 + 7 = 12 yrs
3132. Female mutilation.	F1	F1 + F1	20 + 20 = 40 yrs
3133. Sexual extortion.	F3 if under 18; otherwise M1	F3 + F3	7 + 7 = 14 yrs
<u>(1.3) Incest as defined in section 4302(b) (relating to incest).</u>	F2	F2 + F2	10 + 10 = 20 yrs
<u>(1.4) Endangering welfare of children as defined in section 4304(a)(1), if the activity involved sexual contact with the minor.</u>	M1, F3, F2, one grade enhancement if under 6	M1 + F3	5 + 7 = 12 yrs
<u>(4.1) Corruption of minors as defined in section 6301(a)(1)(i), if the activity involved sexual contact with the minor.</u>	M1	M1 + F3	5 + 7 = 12 yrs
<u>(4.2) Corruption of minors as defined in section 6301(a)(1)(ii).</u>	F3	F3 + F3	7 + 7 = 14 yrs

For these reasons, we urge you to oppose House Bill 231.