

State of South Dakota

EIGHTIETH LEGISLATIVE ASSEMBLY, 2005

916L0122

SENATE BILL NO. _____

Introduced by: _____

1 FOR AN ACT ENTITLED, An Act to MOODY–SEX OFFENSES.

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

3 Section 1. That § 22-22-1 be amended to read as follows:

4 22-22-1. Rape is an act of sexual penetration accomplished with any person under any of
5 the following circumstances:

6 (1) If the victim is less than ~~ten~~ thirteen years of age; or

7 (2) Through the use of force, coercion, or threats of immediate and great bodily harm
8 against the victim or other persons within the victim's presence, accompanied by
9 apparent power of execution; or

10 (3) If the victim is incapable, because of physical or mental incapacity, of giving consent
11 to such act; or

12 (4) If the victim is incapable of giving consent because of any intoxicating, narcotic, or
13 anesthetic agent or hypnosis; or

14 (5) If the victim is ~~ten~~ thirteen years of age, but less than sixteen years of age, and the
15 perpetrator is at least three years older than the victim; ~~or~~

16 ~~—(6)— If persons who are not legally married and who are within degrees of consanguinity~~



1 ~~within which marriages are by the laws of this state declared void pursuant to § 25-1-~~
2 ~~6, which is also defined as incest; or~~

3 ~~—(7)— If the victim is ten years of age but less than eighteen years of age and is the child of~~
4 ~~a spouse or former spouse of the perpetrator.~~

5 A violation of subdivision (1) of this section is rape in the first degree, which is a ~~Class 1~~
6 Class C felony. A violation of subdivision (2); ~~of this section is rape in the second degree which~~
7 is a Class 1 felony. A violation of subdivision (3); or (4) of this section is rape in the ~~second~~
8 third degree, which is a Class 2 felony. A violation of subdivision (5), ~~(6), or (7)~~ of this section
9 is rape in the ~~third~~ fourth degree, which is a Class 3 felony. Notwithstanding § 23A-42-2 a
10 charge brought pursuant to this section may be commenced at any time prior to the time the
11 victim becomes age twenty-five or within seven years of the commission of the crime,
12 whichever is longer.

13 Section 2. That § 22-22-30.1 be repealed.

14 ~~—22-22-30.1. Criminal pedophilia is any act of sexual penetration accomplished with a victim~~
15 ~~less than thirteen years of age by any person twenty-six years of age or older. Criminal~~
16 ~~pedophilia is a Class 1 felony. If any person is convicted of criminal pedophilia, the court shall~~
17 ~~impose a minimum sentence of twenty-five years for a first offense. If any person is convicted~~
18 ~~for a second offense, the factual basis for which occurred after the date of the first conviction,~~
19 ~~the court shall impose a sentence of life without parole.~~

20 Section 3. That § 22-22-1.2 be amended to read as follows:

21 22-22-1.2. If any adult is convicted of any of the following violations, the court shall impose
22 the following minimum sentences:

23 (1) For a violation of subdivision 22-22-1(1), ten years for a first offense and twenty
24 years for a subsequent offense; and

1 (2) For a violation of § 22-22-7 if the victim is less than ~~ten~~ thirteen years of age, five
2 years for a first offense and ten years for a subsequent offense.

3 Section 4. That § 22-22-1.3 be amended to read as follows:

4 22-22-1.3. Any person convicted of a violation ~~listed as provided~~ in § 22-22-1.2 shall have
5 included in ~~his~~ the offender's presentence investigation report an assessment ~~which shall include~~
6 including the following information: the offender's sexual history; intellectual, adaptive and
7 academic functioning; social and emotional functioning; previous legal history; previous
8 treatment history; victim selection; risk to the community; and treatment options recommended.

9 Section 5. That § 22-22-1.4 be amended to read as follows:

10 22-22-1.4. The sentencing court may impose a sentence other than that which is required by
11 § 22-22-1.2 if the court finds that mitigating circumstances exist which require a departure from
12 the mandatory sentence imposed by § 22-22-1.2. The court's finding of mitigating circumstances
13 ~~allowed by this section~~ and the factual basis relied upon by the court shall be in writing.

14 Section 6. That § 22-22-2 be amended to read as follows:

15 22-22-2. Sexual penetration means an act, however slight, of sexual intercourse,
16 cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the body
17 or of any object into the genital or anal openings of another person's body. All of the foregoing
18 acts of sexual penetration, except sexual intercourse, are also defined as sodomy. Practitioners
19 of the healing arts lawfully practicing within the scope of their practice, which determination
20 shall be conclusive as against the state and shall be made by the court prior to trial, are not
21 included within the provisions of this section. In any pretrial proceeding under this section, the
22 prosecution has the burden of establishing probable cause.

23 Section 7. That § 22-22-5 be repealed.

24 ~~22-22-5. Any person convicted of rape or of a violation of § 22-22-7 shall be given an initial~~

1 ~~screening evaluation to determine whether psychiatric or psychological counseling would be~~
2 ~~beneficial. Psychiatric or psychological counseling shall be made available if the convicted~~
3 ~~person can reasonably be expected to benefit therefrom. The warden of the state penitentiary~~
4 ~~may utilize the services of the South Dakota Human Services Center for such screening,~~
5 ~~evaluation, and counseling. Counseling may be imposed as a condition of parole.~~

6 Section 8. That § 22-22-7 be amended to read as follows:

7 22-22-7. Any person, sixteen years of age or older, who knowingly engages in sexual contact
8 with another person, other than that person's spouse if the other person is under the age of
9 sixteen years is guilty of a Class 3 felony. If the actor is less than three years older than the other
10 person, the actor is guilty of a Class 1 misdemeanor. Notwithstanding § 23A-42-2, a charge
11 brought pursuant to this section may be commenced at any time before the victim becomes age
12 twenty-five or within seven years of the commission of the crime, whichever is longer.

13 Section 9. That § 22-22-7.1 be amended to read as follows:

14 22-22-7.1. As used in this chapter, the term, sexual contact, means any touching, not
15 amounting to rape, whether or not through clothing or other covering, of the breasts of a female
16 or the genitalia or anus of any person with the intent to arouse or gratify the sexual desire of
17 either party. Practitioners of the healing arts lawfully practicing within the scope of their
18 practice, which determination shall be conclusive as against the state and shall be made by the
19 court prior to trial, are not included within the provisions of this section. In any pretrial
20 proceeding under this section, the prosecution has the burden of establishing probable cause.

21 Section 10. That § 22-22-7.2 be amended to read as follows:

22 22-22-7.2. Any person, fifteen years of age or older, who knowingly engages in sexual
23 contact with another person, other than his or her spouse if the other person is sixteen years of
24 age or older and the other person is incapable, because of physical or mental incapacity, of

1 consenting to sexual contact, is guilty of a Class 4 felony.

2 Section 11. That § 22-22-7.3 be amended to read as follows:

3 22-22-7.3. Any person, younger than sixteen years of age, who knowingly engages in sexual
4 contact with another person, other than his or her spouse, ~~when~~ if such other person is younger
5 than sixteen years of age, is guilty of a Class 1 misdemeanor.

6 Section 12. That § 22-22-7.4 be amended to read as follows:

7 22-22-7.4. No person fifteen years of age or older may knowingly engage in sexual contact
8 with another person other than his or her spouse who, although capable of consenting, has not
9 consented to such contact. A violation of this section is a Class 1 misdemeanor.

10 Section 13. That § 22-22-7.5 be amended to read as follows:

11 22-22-7.5. The court, upon the conviction of any person of a violation of the provisions of
12 chapter 22-22 in which the victim was a child or upon an adjudication of a juvenile as a
13 delinquent child for a violation of the provisions of chapter 22-22 in which the victim was a
14 child, may, as a part of the sentence or adjudication, order that the defendant or delinquent child
15 not:

- 16 (1) Reside within one mile of the victim's residence unless the person is residing in a
17 juvenile detention facility, jail, or state corrections facility;
- 18 (2) Knowingly or willfully come within one thousand feet of the victim;
- 19 (3) Attend the same school as the victim; or
- 20 (4) Have any contact with the victim, whether direct or indirect or through a third party.

21 ~~This section does not apply~~ No condition imposed pursuant to this section applies once the
22 victim attains the age of majority. A violation of any condition imposed pursuant to this section
23 is a Class 6 felony.

24 Section 14. That § 22-22-7.6 be amended to read as follows:

1 22-22-7.6. Any person employed at any jail or juvenile correctional facility, who knowingly
2 engages in an act of sexual contact or sexual penetration with another person who is in detention
3 and under the custodial, supervisory, or disciplinary authority of the person so engaging, and
4 which act of sexual contact or sexual penetration does not otherwise constitute a felony pursuant
5 to the provisions of chapter 22-22, is guilty of a Class 6 felony.

6 A juvenile correctional facility pursuant to this section is a juvenile detention facility as
7 defined in subdivision 26-7A-1(16) or a juvenile facility operated by the Department of
8 Corrections under § 1-15-1.4.

9 Section 15. That § 22-22-11 be repealed.

10 ~~22-22-11. Any person who by force, menace, or duress compels another to marry, is guilty~~
11 ~~of a Class 4 felony.~~

12 Section 16. That § 22-22-24.3 be amended to read as follows:

13 22-22-24.3. A person is guilty of sexual exploitation of a minor if the person causes or
14 knowingly permits a minor to engage in an activity or the simulation of an activity that:

- 15 (1) Is harmful to minors, ~~or in the simulation of such an activity;~~
16 (2) Involves nudity, ~~or in the simulation of such an activity;~~ or
17 (3) Is obscene, ~~or in the simulation of such an activity.~~

18 Consent to performing these proscribed acts by a minor or a minor's parent, guardian, or
19 custodian, or mistake as to the minor's age is not a defense to a charge of violating this section.

20 A violation of this section is a Class 6 felony. If a person is convicted of a second or
21 subsequent violation of this section within fifteen years of the prior conviction, the violation a
22 Class 5 felony.

23 ~~Further, the~~ The court shall order a mental examination of ~~the~~ any person convicted of
24 violating this section. The examiner shall report to the court whether treatment of the person is

1 indicated.

2 Section 17. That § 22-22-26 be amended to read as follows:

3 22-22-26. If a physician, hospital, or clinic examines the victim of an alleged rape or sexual
4 offense to gather information or evidence about the alleged crime, the examination shall be
5 provided without cost to the victim if the alleged offense is reported to the state. The physician,
6 hospital, or clinic shall be paid for the cost of the examination by the county where the alleged
7 rape or sexual offense occurred, which shall be reimbursed by any defendant if he is convicted.

8 Section 18. That § 22-22-27 be amended to read as follows:

9 22-22-27. Terms used in §§ 22-22-28 and 22-22-29 mean:

- 10 (1) ~~"Emotionally dependent,"~~ "Emotional dependency," a condition of the patient
11 brought about by the nature of the patient's own emotional condition or the nature of
12 the treatment provided by the psychotherapist which is characterized by significant
13 impairment of the patient's ability to withhold consent to sexual acts or contact with
14 the psychotherapist and which the psychotherapist knows or has reason to know
15 exists;
- 16 (2) "Patient," a any person who seeks or obtains psychotherapeutic services from a
17 psychotherapist on a regular and ongoing basis;
- 18 (3) "Psychotherapist," a any physician, psychologist, nurse, chemical dependency
19 counselor, social worker, member of the clergy, marriage and family therapist, mental
20 health service provider, or other person, whether or not licensed or certified by the
21 state, who performs or purports to perform psychotherapy; and
- 22 (4) "Psychotherapy," the professional treatment, assessment, or counseling of a mental
23 or emotional illness, symptom, or condition.

24 Section 19. That § 22-22-28 be amended to read as follows:

1 22-22-28. A Any psychotherapist who knowingly engages in sexual contact, as defined in
2 § 22-22-7.1, with a person who is not his or her spouse and who is ~~his~~ a patient who is
3 emotionally dependent ~~patient~~ on the psychotherapist at the time of contact, commits a Class
4 5 felony. Consent by the patient is not a defense.

5 Section 20. That § 22-22-29 be amended to read as follows:

6 22-22-29. A Any psychotherapist who knowingly engages in an act of sexual penetration,
7 as defined in § 22-22-2, with a person who is not his or her spouse and who is ~~his~~ a patient who
8 is emotionally dependent ~~patient~~ on the psychotherapist at the time that the act of sexual
9 penetration is committed, commits a Class 4 felony. Consent by the patient is not a defense.

10 Section 21. That § 22-22-42 be amended to read as follows:

11 22-22-42. No person, for the purpose of that person's sexual gratification, may:

- 12 (1) Engage in a sexual act with an animal; or
- 13 (2) Coerce any other person to engage in a sexual act with an animal; or
- 14 (3) Use any part of the person's body or an object to sexually stimulate an animal; or
- 15 (4) Videotape a person engaging in a sexual act with an animal; or
- 16 (5) Kill or physically abuse an animal.

17 Any person who violates any provision of this section is guilty of the crime of bestiality.
18 Bestiality is a Class 6 felony. However, if ~~any~~ the person has been previously convicted of a sex
19 crime pursuant to § 22-22-30, any subsequent violation of this section is a Class 5 felony.

20 Section 22. That § 22-22-43 be amended to read as follows:

21 22-22-43. For the purposes of § 22-22-42, the term, sexual act with an animal, means any
22 act between a person and an animal involving direct physical contact between the genitals of one
23 and the mouth or anus of the other, or direct physical contact between the genitals of one and
24 the genitals of the other. A sexual act with an animal may be proved without evidence of

1 penetration.

2 Section 23. That § 22-22-44 be amended to read as follows:

3 22-22-44. The provisions of § 22-22-42 do not apply to or prohibit normal, ordinary, or

4 accepted practices involved in animal husbandry, artificial insemination, or veterinary medicine.