UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1325

September Term, 2011

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SCOTT WALLACE

v.

STATE OF MARYLAND, et al.

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Krauser, C.J.,
Woodward,
Graeff,
JJ.

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Opinion by Woodward, J.

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Filed: July 28, 2015

This civil action arises out of a dispute as to whether appellant, Scott Wallace, must register as a sex offender in Maryland under the Maryland sex offender registration act ("MSORA"). Appellant, a Maryland resident, was convicted in Virginia of Internet Solicitation of a Minor and was placed on probation in 2007 under the supervision of Maryland's Division of Parole and Probation in Carroll County, Maryland.

During the week of May 9, 2011, a Maryland probation officer directed appellant to register as a Tier II sex offender, because, according to the officer, appellant was convicted of a crime that, if committed in Maryland, would trigger registration. On May 17, 2011, appellant filed a complaint for declaratory and injunctive relief in the Circuit Court for Carroll County against appellees, the State of Maryland, as well as the Attorney General of Maryland and the Maryland Probation Office (collectively, "the State"). Appellant sought a declaratory judgment stating that he had no obligation to register as a sex offender, as well as an injunction preventing the State from ordering appellant to register or prosecuting him for failing to register. On May 20, 2011, appellant filed an emergency motion requesting a temporary restraining order ("TRO"), a preliminary injunction, and a permanent injunction ("TRO motion").

After holding a hearing on appellant's TRO motion, the circuit court issued a memorandum opinion on June 6, 2011, in which it determined that appellant must register as sex offender under MSORA; in an accompanying order, the court denied appellant's TRO motion. On June 16, 2011, the State moved to dismiss appellant's complaint, or, in the

alternative, for summary judgment. The circuit court granted summary judgment in favor of the State on July 27, 2011.

On appeal, appellant presents two questions for our review, which we have rephrased:[1]

> 1. Did the circuit court err in finding that, as a matter of law, appellant's conviction for Internet Solicitation of a Minor in Virginia requires him to register as a sex offender in Maryland?
>
> 2. Assuming that the circuit court correctly found that appellant must register under MSORA, does the retroactive application of the law to appellant violate the Maryland constitutional prohibition against *ex post facto* laws under the Court of Appeals' decision in *Doe v. Department of Public Safety & Correctional Services*, 430 Md. 535 (2013)?

[1] Appellant's questions, as presented in his brief, are:

> A. Did the lower court err in granting the state's Motion for Summary Judgment and in finding that, as a matter of law, Mr. Wallace's conviction in Virginia requires him to register in Maryland as a Tier II sex offender?
>
> B. Assuming, *arguendo*, that the lower court correctly found that Mr. Wallace must register pursuant to existing laws, given the highly punitive and restrictive nature of the sex offender registration laws, does their retroactive application to Mr. Wallace violate the federal constitutional ban on *ex post facto* laws and ***both*** clauses of Article 17 of the Maryland Declaration of Rights prohibiting *ex post facto* laws and *ex post facto* restrictions?

For the reasons set forth below, we answer the first question in the negative. We do not reach appellant's second question, because appellant failed to preserve it for our review. Accordingly, we affirm the judgment of the circuit court.

## BACKGROUND

### Virginia Facts & Procedural History

During the entire time period relevant to the matter *sub judice*, appellant resided in Carroll County, Maryland. According to the Commonwealth Attorney's Office in Arlington County, Virginia, appellant had conversations with "deb14xoxo" ("Debbie"), an undercover FBI agent posing as a fourteen-year-old girl, in an Internet chat room in June and July of 2006. During these conversations, appellant claimed to be twenty-seven years old, even though he was then at least forty-three years old. Appellant told Debbie that he wanted to "kiss and touch [Debbie's] lips, her breasts, and her pussy." When Debbie asked appellant whether he would "hurt her, make her bleed, or get [her] pregnant," appellant responded that he would use protection to prevent pregnancy, and that Debbie "wanted to lose her virginity" and "was hungry for someone to teach her."

Appellant and Debbie arranged to meet at an Arlington address provided by Debbie. When appellant arrived, the Arlington County police placed him under arrest.

On September 18, 2006, appellant was indicted in the Circuit Court of Arlington County for "us[ing] a communication system or any other electronic means for the purpose of procuring or promoting the use of a minor for any activity proscribed in 18.2-370 or 18.2-

374.1." *See* Va. Code Ann. § 18.2-374.3 (2006).[2] On November 6, 2006, appellant signed a plea memorandum agreeing to plead guilty to Internet Solicitation of a Minor pursuant to Va. Code Ann. § 18.2-374.3. In the plea memorandum, which did not include a statement of facts, appellant admitted that he "committed the crime to which I am pleading."

On February 22, 2007, the Arlington circuit court sentenced appellant to five years' imprisonment, with all but nine months suspended, and three years' probation to commence upon appellant's release from incarceration. The sentencing court also required appellant to "register as a sex-offender if required by law."

On November 21, 2008, and again on October 1, 2010, the Arlington circuit court found appellant guilty of violation of probation. For the first violation, the court sentenced appellant to an additional three months in prison, and extended his probation an additional two years. For the second violation, appellant was sentenced to an additional forty days in prison and was to be restored to probation upon his release.

**Maryland Facts & Procedural History**

The Division of Parole and Probation in Carroll County has supervised appellant's probation since his release from incarceration in 2007. During the week of May 9, 2011, a probation officer told appellant that he was required to register as a sex offender, because his

[2] All future references to the Virginia Code are to the 2006 version, which was in effect at the time appellant signed his plea memorandum on November 6, 2006. *See* Va. Code Ann. § 18.2-374.3 (2014) ("Credits").

Virginia solicitation conviction "is substantially similar" to Maryland's solicitation statute, which triggers registration under MSORA.

On May 17, 2011, appellant filed a complaint against the State in the Circuit Court for Carroll County, Maryland. Appellant sought a declaratory judgment stating that he was not required under MSORA to register as a sex offender. He also requested an order enjoining the State from ordering appellant to register or prosecuting him for failing to register.

On May 20, 2011, appellant filed the TRO motion, in which appellant again asked the circuit court to order the State to refrain from directing appellant to register as a sex offender and from taking any action against appellant for failing to register. In both his complaint and his TRO motion, appellant argued that he was exempt from Maryland's registration requirements under MSORA, because the Virginia solicitation statute under which he was convicted was not "sufficiently equivalent" or "substantially similar" to the analogous Maryland solicitation statute.

On June 2, 2011, the circuit court held a hearing on the TRO motion. On June 6, 2011, the court issued a memorandum opinion in which it concluded that the Virginia and Maryland solicitation statutes "prohibit[] the same or similar conduct." That same day, the court issued an order denying appellant's TRO motion.

On June 16, 2011, the State filed a motion to dismiss appellant's complaint, or in the alternative, for summary judgment. Appellant filed an opposition to the State's motion on

July 6, 2011. By order dated July 27, 2011, and entered on August 1, 2011, the circuit court granted the State's motion for summary judgment.

On August 16, 2011, appellant filed a Motion to Revise and Reverse the Court's Declaration of Rights Dismissing the Complaint ("motion to revise"). The State filed a response to the motion to revise on August 25, 2011. Appellant filed his notice of appeal from the grant of summary judgment on August 26, 2011; he also filed a reply to the State's response on September 9, 2011.

In an order dated September 12, 2011, the circuit court denied appellant's motion to revise. In that order, the court (1) reaffirmed the grant of summary judgment in the July 27, 2011 order, and (2) incorporated "the findings and conclusions" of its June 6, 2011 memorandum opinion, "specifically the finding that, as a matter of law, [appellant] is required to register as a sex offender in Maryland, as the basis for granting [the State's] Motion for Summary Judgment."[3]

[3] On July 6, 2011, appellant filed an Amended Complaint for Declaratory Judgment, and Emergency, Preliminary and Permanent Injunctive Relief. On July 29, 2011, the State filed a motion to dismiss the amended complaint, or, in the alternative, for summary judgment, which appellant opposed on August 16, 2011. The circuit court did not explicitly address the amended complaint in its July 27, 2011 order granting the State's initial motion for summary judgment, presumably because the State had not yet filed its second motion for summary judgment. Notably, however, the amended complaint did not add any new allegations that had not been made in the original complaint, and thus the court had no reason to revise its July 27, 2011 order. When the court reaffirmed its July 27, 2011 order in its September 12, 2011 order, the court had before it both the amended complaint and the second motion for summary judgment. Thus, by reaffirming its grant of summary judgment on September 12, 2011, the court effectively disposed of the amended complaint.

## STANDARD OF REVIEW

The trial court may grant a motion for summary judgment if no dispute as to a material facts exists, and the party seeking summary judgment is entitled to the judgment as a matter of law. *Tyler v. City of College Park*, 415 Md. 475, 498 (2010). We perform an independent review of the record to determine whether there is a dispute of material fact. *Id*. Whether a trial court's grant of summary judgment was proper under Rule 2-501 is a question of law subject to *de novo* review. *Walk v. Hartford Cas. Ins. Co.*, 382 Md. 1, 14 (2004).

## DISCUSSION

### MSORA Registration Requirement

#### Retroactive Registration

When Maryland enacted its first sex offender registration system in 1995, under former Article 27 of the Maryland Code, the resulting law only applied *prospectively* to offenses committed on or after October 1, 1995. *See* Md. Code (1957, 1992 Repl. Vol., 1995 Cum. Supp.), Article 27, § 692B.[4] The General Assembly added a retroactivity provision to MSORA in 2001, which applied the registration requirement retroactively to (1) registrants "convicted of an offense committed before July 1, 1997," who were "under the custody or supervision of a supervising authority on October 1, 2001," and (2) "child sexual offender[s] who committed the sexual offense on or before October 1, 1995," who were "under the

[4] In 1996, Section 692B was transferred to Section 792. *See* Editor's note, Md. Code (1957, 1996 Repl. Vol.), Article 27, § 792.

custody or supervision of a supervising authority on October 1, 2001." Md. Code (2001), § 11-702.1 of the Criminal Procedure Article ("CP 2001").[5]

The General Assembly expanded MSORA's retroactive reach via the 2010 amendment, which created three categories of retroactive application, including the registration of sex offenders who were under the supervision or custody of a supervising authority on October 1, 2010, regardless of when the offense subject to registration occurred. CP 2010 § 11-702.1(a)(1). Appellant was on probation on October 1, 2010, for the Virginia conviction at issue in the instant case, and thus qualified for retroactive registration.[6] *See* CP 2011 § 11-702.1(a)(1).

Persons Subject to Registration

MSORA sets forth the categories of persons subject to registration as follows:

**Sex offenders required to register with supervising authority**

(a) **A person shall register with the person's supervising authority if the person is**:

(1) a tier I sex offender;

(2) **a tier II sex offender**;

(3) a tier III sex offender; or

[5] This opinion makes several references to different versions of MSORA, so the date of the each provision will be included following "CP" for clarification purposes.

[6] MSORA defines "supervising authority" to include "the Director of Parole and Probation, if the registrant is under the supervision of the Division of Parole and Probation." CP 2011 § 11-701(n)(9).

> (4) a sex offender who is required to register by another jurisdiction, a federal, military, or tribal court, or a foreign government, and who is not a resident of this State, and who enters this State:
>
> (i) to begin residing or to habitually live;
>
> (ii) to carry on employment;
>
> (iii) to attend a public or private educational institution, including a secondary school, trade or professional institution, or institution of higher education, as a full-time or part-time student; or
>
> (iv) as a transient.

CP 2011 § 11-704(a) (emphasis added).

Under CP 2011 § 11-701(p), a tier II sex offender is defined as a person who has been convicted of:

> (1) conspiring to commit, attempting to commit, or **committing a violation of** § 3-307(a)(4) or (5), **§ 3-324**, § 11-207, or § 11-209 of the Criminal Law Article;[7]
>
> (2) conspiring to commit, attempting to commit, or committing a violation of § 11-303, § 11-305, or § 11-306 of the Criminal Law Article, if the intended prostitute or victim is a minor;

[7] Md. Code (2002, 2006 Cum. Supp.), § 3-324 of the Criminal Law (I) Article ("CL"). The 2006 version of the Criminal Law (I) Article was in effect at the time appellant signed the plea memorandum on November 6, 2006; all future references to this Article will refer to the 2006 version.

> (3) conspiring to commit, attempting to commit, or committing a violation of § 3-314 or § 3-603 of the Criminal Law Article, if the victim is a minor who is at least 14 years old;
>
> (4) conspiring to commit, attempting to commit, or committing an offense that would require the person to register as a tier I sex offender after the person was already registered as a tier I sex offender;
>
> **(5) a crime that was committed in a federal, military, tribal, or other jurisdiction that, if committed in this State, would constitute one of the crimes listed in items (1) through (3) of this subsection; . . .**
>
> ***

CP 2011 § 11-701(p) (emphasis added).

Appellant does not challenge the retroactive application of MSORA on statutory grounds. Instead, appellant challenges the circuit court's determination that his commission of Internet Solicitation of a Minor in Virginia would, if committed in Maryland, constitute a violation of the Maryland solicitation statute, thus requiring his registration as a tier II sex offender. Accordingly, we turn to the two solicitation statutes at issue.

Solicitation Statutes

As stated above, appellant pled guilty to violating Virginia's solicitation statute, which prohibits

> any person to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means for the purposes of procuring or promoting the use of a minor for any activity in violation of § 18.2-370 or § 18.2-374.1.

Va. Code Ann. § 18.2-374.3(A).

Va. Code Ann § 18.2-370, which is incorporated into the Virginia solicitation statute, provides:

> **Taking indecent liberties with children; penalties**
>
> A. **Any person 18 years of age or over, who, with lascivious intent, knowingly and intentionally commits any of the following acts with any child under the age of 15 years is guilty of a Class 5 felony**:
>
> (1) Expose his or her sexual or genital parts to any child to whom such person is not legally married or propose that any such child expose his or her sexual or genital parts to such person; or
>
> (2) Repealed.
>
> (3) Propose that any such child feel or fondle the sexual or genital parts of such person or **propose that such person feel or fondle the sexual or genital parts of any such child; or**
>
> (4) **Propose to such child the performance of an act of sexual intercourse or any act constituting an offense under § 18.2-361;** or
>
> (5) Entice, allure, persuade, or invite any such child to enter any vehicle, room, house, or other place, for any of the purposes set forth in the preceding subdivisions of this section.

Va. Code Ann. § 18.2-370(A) (emphasis added).

The Maryland solicitation statute, CL § 3-324, provides, in relevant part:

> **Definitions**
> (a) In this section, "solicit" means to command, authorize, urge, entice, request, or advise a person by any means, including:

(1) in person;

(2) through an agent or agency;

(3) over the telephone;

(4) through any print medium;

(5) by mail;

(6) by computer or Internet; or

(7) by any other electronic means.

**Prohibited**

(b) **A person may not, with the intent to commit a violation of** § 3-304, § 3-306, or **§ 3-307 of this subtitle, knowingly solicit a minor, or a law enforcement officer posing as a minor, to engage in activities that would be unlawful for the person to engage in under** § 3-304, § 3-306, or **§ 3-307** of this subtitle.

CL § 3-324 (Emphasis added).

CL § 3-307, which is incorporated into the Maryland solicitation statute, is the most relevant offense to the case *sub judice*. CL § 3-307, entitled sexual offense in the third degree, provides, in pertinent part:

(a) *Prohibited.* — A person may not:

***

(5) **engage in vaginal intercourse** with another **if the victim is 14 or 15 years old, and the person** performing the act **is at least 21 years old.**

CL § 3-307 (emphasis added).

According to appellant, this Court should evaluate the elements of both statutes and determine whether they are equivalent, without focusing on appellant's actual underlying conduct. The State responds that this Court should evaluate the conduct that appellant engaged in when he committed the underlying crime and determine whether that conduct, if committed in Maryland, would constitute a violation of Maryland criminal law. For the reasons set forth below, we agree with the State.

As indicated above, CP 2011 § 11-701(p) provides that a tier II sex offender under MSORA includes a person convicted of "a crime that was committed in [another] jurisdiction that, if committed in this State, would constitute one of the crimes listed in items (1) through (3) of this subsection." CP 2011 § 11-701(p)(5). In order to "commit" a crime, a person must perpetrate the act or acts that the law identifies as a criminal offense. *See* Black's Law Dictionary 329 (10th ed. 2014) (defining "commit" as "[t]o perpetrate (a crime)"). Thus, to determine whether a crime has been committed in Maryland, a court must examine the underlying conduct of the person and determine whether such conduct would constitute a crime under Maryland law. Similarly, under CP 2011 § 11-701(p)(5), the conduct of a person that resulted in the commission of the crime in another jurisdiction must be examined to ascertain whether that same conduct "if committed in this State, would constitute one of the crimes listed" in the statute. To ignore the actual conduct of the person and rely solely on a comparison of the elements of the foreign crime at issue with the most comparable Maryland crime would read the words "if committed in this State" out of CP 2011

§ 11-701(p)(5). *See Fisher v. E. Corr. Inst.*, 425 Md. 699, 707 (2012) ("[W]e are guided by the presumption that the Legislature intends its enactments to operate together as a consistent and harmonious body of law, such that no part of the statute is rendered meaningless or nugatory." (citations and internal quotation marks omitted)).

In support of his argument, appellant relies on the cases of *Cain v. State*, 386 Md. 320 (2005), and *State v. Duran*, 407 Md. 532 (2009). Appellant's reliance on these cases is misplaced.

In *Cain*, the appellant pled guilty to the crime of second degree assault based upon his unpermitted touching of the thigh of a girl under the age of eighteen. 386 Md. at 326. The issue before the Court of Appeals was whether the trial court could order the appellant to register under MSORA as an "offender" under CP 2001 § 11-701(d)(7), which defined "offender" as, among other things, a person ordered by the court to register who "[h]as been convicted of a crime that involves conduct that by its nature is a sexual offense against a person under the age of 18 years." *Id.* at 325 n.6, 326-27. The Court summarized the parties' arguments: "[The appellant] argues that the elements of the crime of assault for which he was convicted negate the registration requirement, while the State asserts that the underlying facts to which [the appellant] pled guilty mandate registration." *Id*. at 329.

The Court sided with the appellant for two reasons. First, looking at the language of the statute, the Court observed that the plain meaning of such language "suggests that the elements of the crime for which one stands convicted is that to which we must look to

determine whether registration is appropriate. To determine otherwise, would be to read the word 'crime' out of the definition and rely solely on the offender's conduct." *Id*. at 336.

Second, the statute's legislative history, according to the Court, supported its interpretation of the language at issue. The Court explained:

> Obviously, the definition of "offender" in the Maryland statute is derived from the corresponding definition in the Wetterling Act. As explained *supra*, the U.S. Attorney General's Final Guidelines explained that **the Wetterling Act's provision relating to crimes involving conduct that is inherently a sexual offense** was intended to insure uniform coverage of convictions under statutes defining sex offenses and **was based upon the elements of the offense.**

*Id.* at 338 (citation omitted) (emphasis added). The Court concluded that the appellant was not required to register as an "offender," because the elements of the crime of second degree assault "do not, necessarily and solely, contemplate conduct that by its nature involves a sexual offense." *Id*.

In *Duran*, the Court of Appeals was called upon to interpret the same statutory language, but with a different crime, namely, indecent exposure. 407 Md. at 548-49. Relying on *Cain*, the Court sought to determine whether "indecent exposure[] by its nature contains a sexual component." *Id*. at 549-52. The Court concluded that indecent exposure is not a crime that by its nature is a sexual offense, and thus Duran was not required to register as an offender under CP 2001 § 11-701(d)(7). *Id*. at 554.

*Cain* and *Duran* involved a different statutory provision in a prior version of MSORA, with different language and a different purpose, than the statute in the case *sub judice*. *Cain*

and *Duran* interpreted CP 2001 § 11-701(d)(7). That section, which was deleted in the 2010 amendments to MSORA, focused on a crime, which was not identified in MSORA as one that would subject the perpretrator to registration, and sought to determine whether that crime "by its nature is a sexual offense." *See Duran*, 407 Md. at 549; *Cain*, 386 Md. at 336; *see also* Historical & Statutory Notes, CP 2011§ 11-701. Of necessity, that analysis required an examination of the elements of the subject crime. By contrast, the instant case addresses CP 2011 § 11-701(p)(5). That section focuses on the conduct of the person that resulted in the commission of a crime in another jurisdiction and seeks to determine whether the same conduct, *if committed in Maryland*, would constitute a crime that would subject such person to registration in Maryland as a tier II sex offender. Of necessity, that analysis requires an examination of the conduct of the perpetrator. Therefore, to determine whether an out-of-state conviction, if committed in Maryland, would constitute an enumerated offense triggering registration under MSORA, trial courts need look only to the facts established in the record that underlie the out-of-state conviction. *See* CP 2011 § 11-701(p)(5); *see also Temoney v. State*, 290 Md. 251, 263 (1981) (holding that a defendant's out-of-state conviction for robbery could not be used as a predicate offense for mandatory sentencing because the State had failed to establish below that defendant's underlying conduct involved violence as required under Maryland law).

Appellant's Out-of-State Conduct

We are hampered somewhat in identifying, with particularity, the conduct of appellant that supported his conviction in Virginia for Internet Solicitation of a Minor. In the Plea Memorandum, signed by appellant on November 6, 2006, appellant stated, among other things, that "I am going to plead guilty under Va. Code § 18.2-374.3 to the crime of Internet Solicitation of a Minor as charged in Indictment 06-1198," and that "I understand that by pleading guilty I admit I committed the crime to which I am pleading." No facts, however, were stated in the Plea Memorandum regarding what appellant did that constituted the commission of the crime of Internet Solicitation of a Minor. Nevertheless, our review of the record before the trial court in the instant case reveals the facts supporting the commission of such crime.

In his TRO motion, appellant stated:

> **[Appellant] was convicted on** allegations relating to **his meeting a minor female on an Internet chatroom, arranging a date with her, and discussing [appellant's] desire to engage in foreplay and possibly sexual intercourse with her.** The allegations do not show [appellant's] conditioning the date on such activities. [Appellant] crossed state lines from Maryland into Arlington Virginia to meet the female for the date, where he was apprehended by Virginia police.

(Emphasis added). In an affidavit attached to the TRO motion, appellant swore that he had read the TRO motion and that "[b]ased on my information and belief, the facts and allegations stated therein are accurate."

In its motion to dismiss or for summary judgment, the State asserted that the "records provided by the Commonwealth of Virginia reflect that [appellant] was soliciting a law enforcement official posing as a 14 year old female." The State attached to its motion a document entitled "Current Offense Information" that contained a "statement of facts from the Arlington County Commonwealth Attorney's Office" relating to appellant's arrest in Virginia for Internet Solicitation of a Minor. The statement indicated, among other things, that appellant was in an Internet chat room and sent messages to the screen name "deb14xoxo," asking for her "age, sex and location." Deb14xoxo replied that she was a fourteen-year-old girl in Arlington named Debbie. Debbie was in fact an undercover FBI agent who was working on an Internet task force out of the Arlington County Police Department." In his opposition to the State's motion, appellant conceded the age of the victim to be fourteen years old by stating that "the exhibits attached to [the State's] Motion show[] [appellant] was convicted for communications with what [sic] he thought was a 14 year-old."[8]

In the Plea Memorandum for the Virginia crime, which was also attached to the State's motion to dismiss or for summary judgment, appellant's date of birth was stated as

[8] Appellant went on to dispute that the victim was *under* fourteen years old by stating: "Maryland law focuses many of its violations on those under 14, *which age was not established in [appellant's] conviction*. Va. Code § 18.2-370." (Emphasis added).

"___, 1962."[9] With the offense date of "[o]n or about the 12th day of July 2006," appellant's age at the time of the offense was at least forty-three years old.

Finally, as previously indicated, appellant stated in his Plea Memorandum that he admitted to committing "the crime to which [he is] pleading." Appellant pled guilty to "the crime of Internet Solicitation of a Minor as charged in Indictment 06-1198." Indictment 06-1198, also attached to the State's motion to dismiss or for summary judgment, alleged that appellant "did use a communication system or any other electronic means for the purpose of procuring or promoting the use of a minor for any activity proscribed in 18.2-370." *See* Va. Code Ann. § 18.2-374.3. The activity proscribed by Va. Code Ann. § 18.2-370 relevant to the instant case is "[a]ny person 18 years of age or over, who, with lascivious intent, knowingly and intentionally, commits . . . with any child under the age of 15 years" the act of "propos[ing] that such person feel or fondle the sexual or genital parts of any such child" or "propos[ing] to such child the performance of an act of sexual intercourse." Va. Code Ann. § 18.2-370(A)(3), (4).

Thus, in sum, appellant admitted that he, a person over the age of eighteen years, i.e., forty-three years old, did use a communication system, i.e., an Internet chat room, for the purpose of procuring or promoting the use of a minor for the knowing and intentional commission with a child under the age of fifteen years, i.e. fourteen years old, of the act of

[9] Appellant's month and day of birth were redacted from the record.

proposing that he feel or fondle the sexual or genital parts of such child or that such child perform the act of sexual intercourse.

Appellant's Conduct in Virginia, If Committed in Maryland

Having identified appellant's conduct in Virginia that formed the factual basis for his conviction of Internet Solicitation of a Minor under Va. Code Ann. § 18.2-374.3, we must now determine whether that same conduct, if committed in Maryland, would constitute a crime under CP 2011 § 11-701(p)(1)-(3). *See* CP 2011 § 11-701(p)(5). As stated above, MSORA requires that a person who is a "tier II sex offender" register as a sex offender. CP 2011 § 11-704(a)(2). A tier II sex offender includes a person who has committed a violation of the Maryland solicitation statute, CL § 3-324, or a person who has committed a crime in another jurisdiction "that, if committed in this State, would constitute" a violation of CL § 3-324. *See* CP 2011 § 11-701(p)(1), (5). Under CL § 3-324, a person, among other things, "may not, with the intent to commit a violation of . . . CL § 3-307," "knowingly solicit a minor, or a law enforcement officer posing as a minor," to engage in vaginal intercourse with another if the victim is fourteen or fifteen years old, and the person performing the act is at least twenty-one years old. *See* CL §§ 3-307(a)(5), 3-324(b).

In the instant case, appellant admitted that he met in an Internet chat room a person whom he thought was a fourteen-year-old girl, but was in reality a law enforcement officer posing as a fourteen-year-old girl. Appellant, who was at least forty-three years old at the time, arranged a date with the "fourteen-year-old girl," discussed his desire and proposed to

engage in sexual intercourse with her.[10] Thus appellant "knowingly solicit[ed]" the law enforcement officer posing as a fourteen-year-old girl within the meaning of CL § 3-324(a), because appellant "urge[d], entice[d], request[ed], or advise[d]" such officer "by computer or Internet." *See* CL § 3-324(a)(6). Appellant also knowingly solicited the "fourteen-year-old girl" to engage in vaginal intercourse, which, by virtue of appellant's age of forty-three, is a violation of CL § 3-307(a)(5). Therefore, appellant's criminal conduct in Virginia would, if committed in Maryland, constitute a crime that would classify him as a tier II sex offender and would require him to register as such under MSORA. *See* CP 2011 §§ 11-701(p)(1), (5), -704(a)(2). Accordingly, the trial court did not err in ruling that appellant was required to register as a tier II sex offender under MSORA.

**Appellant's *Ex Post Facto* Claim**

Appellant argues that, if we hold that he must register as a sex offender under Maryland law, then we must consider whether MSORA, as applied to appellant, violates state and federal constitutional bans on *ex post facto* laws. We need not reach the merits of this

[10] Appellant also admitted to discussing with the "fourteen-year-old girl" his desire to engage in "foreplay" with her. Appellant admitted that such discussion constituted a proposal that he "feel or fondle the sexual or genital parts of any such child," in violation of Va. Code Ann. § 18.2-370(A)(3). In Maryland, CL § 3-307(a)(4) prohibits only the commission of a "sexual act" by a person at least twenty-one years old with a victim of fourteen or fifteen years. The definition of "sexual act" does not include the feeling or fondling of the sexual or genital parts of a person. *See* CL § 3-301(e)(1). Therefore, appellant's proposed fondling of the "fourteen-year-old girl" would not constitute a violation of CL § 3-324, the Maryland solicitation statute.

argument, however, because we conclude that appellant failed to preserve his *ex post facto* claim for appellate review.

Generally, this Court will not "decide any [] issue unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). The State correctly asserts, and appellant's attorney conceded at oral argument, that appellant did not raise the *ex post facto* claim in his complaint, his TRO motion, his subsequent pleadings, or at the hearing on the TRO motion. As a result, this issue is not preserved for our review.

Moreover, due process limits our ability to consider appellant's *ex post facto* claim. The circuit court did not have the authority to rule on the constitutionality of MSORA as applied to appellant, because appellant failed to ask the court to consider that issue in his original or amended complaint. This Court held in *Gatuso v. Gatuso* that "the authority of the [trial] court to act in any case is still limited by the issues framed by the pleadings." 16 Md. App. 632, 637 (1973). In other words, a trial court has "no authority, discretionary or otherwise, to rule upon a question not raised as an issue by the pleadings, and of which the parties therefore had neither notice nor an opportunity to be heard." *Id.* at 633; *accord Early v. Early*, 338 Md. 639, 658 (1995); *Ledvinka v. Ledvinka*, 154 Md. App. 420, 429 (2003). By failing to raise the constitutional issue in his pleadings, appellant has denied the State fair notice of the claim, and thus, if we heard the issue on appeal, we would deny the State due process. *See Liberty Mut. Ins. Co. v. Ben Lewis Plumbing, Heating & Air Conditioning, Inc.*, 121 Md. App. 467, 476-77 (1998) ("[B]oth this Court and the Court of Appeals require that

a claim or defense be asserted with sufficient particularity to put the opposing party on fair notice of both the basis of the claim and the relief sought."), *aff'd*, 354 Md. 452 (1999). Accordingly, because appellant did not raise in his pleadings below the issue of whether the application of MSORA would violate the constitutional ban on *ex post facto* laws, neither we nor the trial court may address that issue.

Furthermore, appellate courts strictly avoid reaching unraised constitutional issues based on the widely-held principle that courts should refrain, if possible, from deciding constitutional issues, even if raised. *See Balt. Teachers Union v. Md. State Bd. of Educ.*, 379 Md. 192, 205-06 (2004) ("It is particularly important not to address a constitutional issue not raised in the trial court in light of the principle that a court will not unnecessarily decide a constitutional question."); *see also Burch v. United Cable Television of Balt. Ltd. P'ship*, 391 Md. 687, 695 (2006) ("Even when a constitutional issue is properly raised at trial and on appeal, or presented in a certiorari petition and the grant of the petition does not limit the issues, this Court will not reach the constitutional issue unless it is necessary to do so."). As a result, we do not to reach the issue of whether the requirement of registration in MSORA is constitutional as applied to appellant.

**JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY AFFIRMED; APPELLANT TO PAY COSTS.**