

Department of Legislative Services
Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

Senate Bill 736

(Senator Lee, *et al.*)

Judicial Proceedings

Judiciary

Criminal Law - Child Pornography

This bill (1) expands the definition of “sexual conduct” under § 11-101 of the Criminal Law Article to include lascivious exhibition of the genitals or pubic area of any person and (2) expands the prohibition against possession of child pornography under § 11-208 of the Criminal Law Article by prohibiting the knowing possession and intentional retention of a computer-generated image that is indistinguishable from an actual and identifiable child younger than age 16.

Fiscal Summary

State Effect: Minimal increase in revenues and expenditures due to the bill’s expanded application of existing penalty provisions.

Local Effect: Minimal increase in revenues and expenditures due to the bill’s expanded application of existing penalty provisions.

Small Business Effect: None.

Analysis

Bill Summary: “Indistinguishable from an actual child” means an ordinary person would conclude that the image is of an actual minor engaged in sexual conduct. While “indistinguishable from an actual child” includes an actual minor or a computer-generated image that has been created, adapted, or modified to appear as an identifiable child, it does not include images or items depicting minors that are drawings, cartoons, sculptures, or paintings.

The bill retains the application of the existing definition of “sexual conduct” under § 11-105 of the Criminal Law Article (Adult sexual displays – Displaying or allowing display for advertising purposes).

Current Law: Section 11-101 of the Criminal Law Article defines “sexual conduct” as (1) human masturbation; (2) sexual intercourse; or (3) whether alone or with another individual or animal, any touching of or contact with the breasts of a female individual or the genitals, buttocks, or pubic areas of an individual. This definition applies to several criminal prohibitions in Title 11, Subtitles 1 and 2 of the Criminal Law Article, as indicated in **Appendix 1**.

Section 11-208 of the Criminal Law Article prohibits a person from knowingly possessing and intentionally retaining a film, videotape, photograph, or other visual representation showing an actual child younger than age 16 (1) engaged as a subject of sadomasochistic abuse; (2) engaged in sexual conduct; or (3) in a state of sexual excitement. A first offense is a misdemeanor, punishable by imprisonment for up to 5 years and/or a \$2,500 maximum fine. A subsequent offense is a felony, punishable by imprisonment for up to 10 years and/or a \$10,000 maximum fine.

The prohibition does not apply to a parent who possesses a visual representation of the parent’s own child in the nude unless the visual representations show the child engaged as a subject of sadomasochistic abuse or in sexual conduct and in a state of sexual excitement.

It is an affirmative defense that the person did the following promptly and in good faith: (1) took reasonable steps to destroy each visual representation; or (2) reported the matter to a law enforcement agency.

Background: **Exhibit 1** contains information from the Maryland Judiciary on the number of violations filed in the District Court and the circuit courts under §§ 11-207 and 11-208 of the Criminal Law Article and information from the Maryland State Commission on Criminal Sentencing Policy on the number of individuals sentenced in the State’s circuit courts under § 11-208 during fiscal 2018. A violation is a charge filed with the court. It is not a conviction, and one person may be associated with multiple violations.

Exhibit 1
Violations Filed (§§ 11-207 and 11-208 of the Criminal Law Article) and
Individuals Sentenced in the Circuit Courts (§ 11-208 of the Criminal Law Article)
Fiscal 2018

	<u>District Court</u> <u>Violations</u>	<u>Circuit Court</u> <u>Violations</u>	<u>Individuals</u> <u>Sentenced in</u> <u>Circuit Courts</u>
Criminal Law Article § 11-207(a)(1)	51	29	Not Provided
Criminal Law Article § 11-207(a)(2)(3)	33	213	
Criminal Law Article § 11-207(a)(4)	250	230	
Criminal Law Article § 11-207(a)(5)	4	1	
Criminal Law Article § 11-208	645	504	60 (119 counts)

Source: Maryland Judiciary and Maryland State Commission on Criminal Sentencing Policy

State Revenues: General fund revenues increase minimally as a result of the bill’s expanded application of existing monetary penalty provisions from cases heard in the District Court.

State Expenditures: General fund expenditures increase minimally as a result of the bill’s expanded application of existing incarceration penalties due to more people being committed to State correctional facilities. The number of people convicted as a result of the bill is expected to be minimal.

Persons serving a sentence longer than 18 months are incarcerated in State correctional facilities. Currently, the average total cost per inmate, including overhead, is estimated at \$3,800 per month. Persons serving a sentence of one year or less in a jurisdiction other than Baltimore City are sentenced to local detention facilities. For persons sentenced to a term of between 12 and 18 months, the sentencing judge has the discretion to order that the sentence be served at a local facility or a State correctional facility. The State provides assistance to the counties for locally sentenced inmates and for (1) inmates who are sentenced to and awaiting transfer to the State correctional system; (2) sentenced inmates confined in a local detention center between 12 and 18 months; and (3) inmates who have been sentenced to the custody of the State but are confined in or who receive reentry or other prerelease programming and services from a local facility.

The State does not pay for pretrial detention time in a local correctional facility. Persons sentenced in Baltimore City are generally incarcerated in State correctional facilities. The

Baltimore Pretrial Complex, a State-operated facility, is used primarily for pretrial detentions.

The Judiciary advises that it does not anticipate a significant fiscal or operational impact from additional cases filed as a result of the bill.

Local Revenues: Revenues increase minimally as a result of the bill's expanded application of existing monetary penalty provisions from cases heard in the circuit courts.

Local Expenditures: Expenditures increase minimally as a result of the bill's expanded application of existing incarceration penalties. Counties pay the full cost of incarceration for people in their facilities for the first 12 months of the sentence. Per diem operating costs of local detention facilities have ranged from approximately \$40 to \$170 per inmate in recent years.

Prince George's County advises that while the bill may result in additional case filings, the bill's impact on circuit court operations and expenditures is minimal.

Additional Information

Prior Introductions: None.

Cross File: HB 1027 (Delegate Lopez, *et al.*) - Judiciary., HB 691 (Delegates Wilson and Pippy) - Judiciary.

Information Source(s): Montgomery and Prince George's counties; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland State's Attorneys' Association; Department of Public Safety and Correctional Services; Department of Legislative Services

Fiscal Note History: First Reader - February 21, 2019
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Appendix 1
Statutory Offenses Referring to or Incorporating the Definition of “Sexual Conduct”
Title 11, Subtitles 1 and 2 of the Criminal Law Article

Section	Offense	Penalty (Maximum Imprisonment/Maximum Fine)
§ 11-102	Adult sexual displays – Selling or offering to sell to minor	Misdemeanor, 6 months and/or \$1,000
§ 11-103	Adult sexual displays – Exhibition to minors	Misdemeanor, 6 months and/or \$1,000
§ 11-104	Adult sexual displays – Allowing minors to enter or remain on premises	Misdemeanor, 6 months and/or \$1,000
§ 11-104.1	Adult sexual displays – Allowing minors to enter or remain on premises – Bookstores and entertainment venues	Misdemeanor, 6 months and/or \$1,000
§ 11-105	Adult sexual displays – Displaying or allowing display for advertising purposes	Misdemeanor, 6 months and/or \$1,000
§ 11-203	Sale or display of obscene item to minor	Misdemeanor, 1 year and/or \$1,000 (1 st offense) and 3 years and/or \$5,000 (subsequent offenses)
§ 11-207	Distribution or manufacture of child pornography	Felony, 10 years and/ or \$25,000 (1 st offense) and 20 years and/or \$50,000 (subsequent offenses)
§ 11-208	Possession of child pornography	First Offense: Misdemeanor, 5 years and/or \$2,500 Subsequent Offenses: Felony, 10 years and/or \$10,000
§ 11-208.1	Removal of child pornography from Internet/Report of child pornography by service provider	Misdemeanor, \$5,000 (1 st offense), \$20,000 (2 nd offense), and \$30,000 (subsequent offenses)
§ 11-209	Hiring minor for prohibited purpose	Misdemeanor, 1 year and/or \$1,000 (1 st offense) and 3 years and/or \$5,000 (subsequent offenses)