

Department of Legislative Services
Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 97
Judiciary

(Delegate Dumais)

Judicial Proceedings

Criminal Law - Sale or Display of Obscene Item to Minor - Video Image

This bill adds the following items to the definition of “item” under § 11-203 of the Criminal Law Article, which prohibits the sale or display of an obscene item to a minor: a motion picture, an image, a visual representation, a video file, a video image, and a video recording. “Image” includes a two-dimensional image, a three-dimensional image, and a holographic image.

Fiscal Summary

State Effect: Potential minimal increase in general fund revenues from fines imposed in District Court cases. Potential minimal increase in general fund expenditures if the bill results in additional incarcerations.

Local Effect: Potential minimal increase in local revenues from fines imposed in the circuit courts. Potential minimal increase in local expenditures if the bill results in additional incarcerations.

Small Business Effect: None.

Analysis

Current Law: The First Amendment to the U.S. Constitution protects freedom of speech. However, courts have determined that not all types of speech are protected. Obscenity is one example of speech that is not protected under the First Amendment. *Miller v. California*, 413 U.S. 15 (1973), involved a bookseller who appealed his conviction under California obscenity laws for distributing illustrated books of a sexual nature. In *Miller*, the U.S. Supreme Court established the following three-pronged test for obscenity:

- whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;
- whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Under § 11-203 of the Criminal Law Article, a person may not willfully or knowingly display or exhibit to a minor an item (1) the cover or content of which is principally made up of an obscene description or depiction of illicit sex or (2) that consists of an obscene picture of a nude or partially nude figure. A person is also prohibited from willfully or knowingly engaging in the business of displaying, exhibiting, selling, showing, advertising for sale, or distributing such an item to a minor. If a newsstand or other place of business is frequented by minors, the owner, operator, franchisee, manager, or an employee with managerial responsibility may not openly and knowingly display such an item at the place of business.

The term “item” is defined as a (1) still picture or photograph; (2) book, pocket book, pamphlet, or magazine; (3) videodisc, videotape, video game, film, or computer disc; or (4) recorded telephone message. The term “obscene” has a statutory definition that resembles the *Miller* test. “Partially nude” is also specifically defined under the statute.

Violators are guilty of a misdemeanor, punishable by imprisonment for up to one year and/or a \$1,000 maximum fine for a first violation and imprisonment for up to three years and/or a \$5,000 maximum fine for each subsequent violation.

Background: The Maryland Court of Special Appeals recently addressed the application of the definition of “item” under § 11-203 of the Criminal Law Article to current technology in *In Re. S.K.*, 237 Md. App. 458 (2018). The case involved a juvenile who sent a text message to two of her friends, both juveniles, containing a digital video file of herself engaged in sexual conduct. The juvenile court found S.K. involved in the offenses of distribution of child pornography and displaying an obscene item to a minor. The Court of Special Appeals vacated the juvenile court’s finding that S.K. was involved in displaying an obscene item to a minor because the list of materials in the definition of “item” under § 11-203 “does not cover an electronically-transmitted digital video file.”

Additional Information

Prior Introductions: None.

Cross File: SB 1003 (Senator Lee) - Rules.

Information Source(s): Judiciary (Administrative Office of the Courts); Office of the Public Defender; U.S. Supreme Court; Department of Legislative Services

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