

Department of Legislative Services
Maryland General Assembly
2020 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 272
Judiciary

(Delegate Clippinger)

Judicial Proceedings

Juveniles – Sexting

This bill establishes special procedures for juveniles who commit certain offenses involving or arising out of “sexting.” Specifically, the bill (1) establishes that, in juvenile court proceedings for violations of specified obscenity and child pornography laws, it is a mitigating factor that the violation involved or arose out of sexting; (2) prohibits the juvenile court from making certain dispositions for these violations, except under certain circumstances; (3) authorizes the juvenile court to order a child to participate in an educational program on the risks and consequences of sexting; (4) establishes an affirmative defense for these violations; and (5) establishes that a child who violates a provision of Title 11, Subtitle 2 of the Criminal Law Article (Obscene Matter) is not subject to sex offender registration. “Sexting” means the sending of a sexually explicit photograph, image, or video of *oneself* to another by mobile telephone, computer, or other electronic or digital device.

Fiscal Summary

State Effect: The bill is not anticipated to materially affect State finances or operations.

Local Effect: The bill is not anticipated to materially affect local government finances or operations.

Small Business Effect: None.

Analysis

Bill Summary: It is a mitigating factor in a juvenile court proceeding for a violation of § 11-203 (sale or display of obscene item to minor), § 11-207 (production or distribution

of child pornography), or § 11-208 (possession of child pornography) of the Criminal Law Article that the violation involved or arose out of sexting.

When determining a disposition on a finding that a child committed a violation of §§ 11-203, 11-207, or 11-208, the juvenile court:

- must take into consideration whether the mitigating factor described above applies to the case;
- may not make a disposition of community detention or commit the child to the custody or under the guardianship of the Department of Juvenile Services, the Maryland Department of Health, or a public or licensed private agency if the violation involved or arose out of sexting, unless the court finds and explains on the record, verbally and in writing, that extraordinary circumstances exist to warrant committed custody; and
- may order a child whose violation involved or arose out of sexting to participate in an age-appropriate educational program on the risks and consequences of possessing, sending, displaying, and publishing sexually explicit photographs, images, and videos.

It is an affirmative defense in a proceeding that the child was coerced, threatened, or intimidated into committing the conduct constituting the violation.

Current Law:

Juvenile Court Jurisdiction

In general, the juvenile court has jurisdiction over a child alleged to be delinquent, in need of supervision, or who has received a citation for specified violations.

The juvenile court does not have jurisdiction over children at least age 16 who are alleged to have committed specified violent crimes, children age 14 and older charged with a crime punishable by life imprisonment, and children who have previously been convicted as an adult of a felony and are subsequently alleged to have committed an act that would be a felony if committed by an adult. However, with specified exceptions, a circuit court may transfer a case involving such a child to the juvenile court if such a transfer is believed to be in the interests of the child or society (“reverse waiver”).

Sale or Display of Obscene Item to Minor – § 11-203 of the Criminal Law Article

Section 11-203 of the Criminal Law Article prohibits a person from willfully or knowingly displaying or exhibiting to a minor an item the cover or content of which is principally

made up of an obscene description or depiction of illicit sex or that consists of an obscene picture of a nude or partially nude figure.

A person also may not willfully or knowingly engage in the business of displaying, exhibiting, selling, showing, advertising for sale, or distributing to a minor an item the cover or content of which is principally made up of an obscene description or depiction of illicit sex or that consists of an obscene picture of a nude or partially nude figure.

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.

Production or Distribution of Child Pornography – § 11-207 of the Criminal Law Article

Under current law, a person may not:

- cause, induce, solicit, or knowingly allow a minor to engage as a subject in the production of obscene matter or a visual representation or performance that depicts a minor engaged as a subject in sadomasochistic abuse or sexual conduct;
- photograph or film a minor engaging in an obscene act, sadomasochistic abuse, or sexual conduct;
- use a computer to depict or describe a minor engaging in an obscene act, sadomasochistic abuse, or sexual conduct;
- knowingly promote, advertise, solicit, distribute, or possess with the intent to distribute any matter, visual representation, or performance that depicts a minor engaged as a subject in sadomasochistic abuse or sexual conduct or in a manner that reflects the belief, or that is intended to cause another to believe, that the matter, visual representation or performance depicts a minor engaged as a subject of sadomasochistic abuse or sexual conduct; or
- use a computer to knowingly compile, enter, transmit, make, print, publish, reproduce, cause, allow, buy, sell, receive, exchange, or disseminate any notice, statement, advertisement, or minor's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information for the purpose of engaging in, facilitating, encouraging, offering, or soliciting unlawful sadomasochistic abuse or sexual conduct of or with a minor.

Violators are guilty of a felony, punishable by imprisonment for up to 10 years and/or a \$25,000 maximum fine for a first violation and imprisonment for up to 20 years and/or a \$50,000 maximum fine for each subsequent violation.

Possession of Child Pornography – § 11-208 of the Criminal Law Article

Under current law, a person may not knowingly possess and intentionally retain a film, videotape, photograph, or other visual representation showing an actual child or a computer-generated image that is indistinguishable from an actual and identifiable child younger than age 16:

- engaged as a subject of sadomasochistic abuse;
- engaged in sexual conduct; or
- in a state of sexual excitement.

Violators are guilty of a misdemeanor, punishable by imprisonment for up to 5 years and/or a \$2,500 maximum fine for a first offense. A subsequent violation is a felony, punishable by imprisonment for up to 10 years and/or a \$10,000 maximum fine.

Background:

Sexting

Sexting is the sending of sexually explicit digital images or videos by mobile device. Sexting can be done at any age but is problematic when minors record sexually explicit images or videos of themselves and send those images or videos to other minors. Anyone receiving such images may share them with others without the knowledge of the creator. It is believed that sexting among minors is fairly common. In a meta-analysis published in *JAMA Pediatrics* (2018), the mean prevalence for sending and receiving sexts by youth were 14.8% and 27.4%, respectively, while the mean prevalence for forwarding a sext without consent and having a sext forwarded without consent were 12.0% and 8.4%, respectively.

In re: S.K.

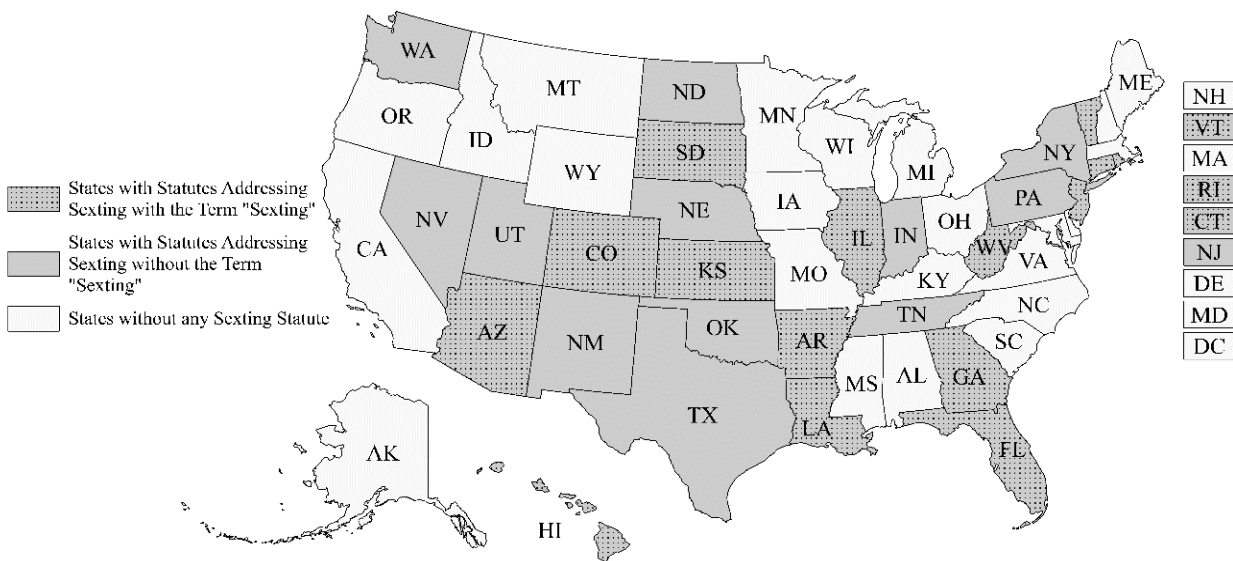
In August 2019, the Maryland Court of Appeals upheld a juvenile court's ruling that a 16-year-old girl who texted a video of herself participating in a consensual sexual act with another person was delinquent under statutory prohibitions against distribution of child pornography and displaying an obscene item to a minor. The girl who was the subject of the case, S.K., had sent to two of her friends a one-minute video of herself performing a sexual act. Later, there was a disagreement among the friends, and the video was distributed to other students at the high school as well as the school resource officer. After notification, the State's Attorney for Charles County filed a juvenile petition alleging criminal charges against S.K. under § 11-207 (a)(2) and (a)(4) and § 11-203(b)(1)(ii) of the Criminal Law Article. The juvenile court ultimately found S.K. involved as to two of the three charges and imposed supervised probation subject to several terms and conditions, including

approximately three weeks of electronic monitoring. S.K. subsequently fulfilled her probation requirements, and the case has been ordered closed and sealed.

In the opinion, the Court of Appeals noted that other states have responded to the issues surrounding teenage sexting with specific legislation. For example, states have included provisions such as separate offenses as applied to minors, affirmative defenses for minors, and lower penalties if the minor is found delinquent. Further, the court noted that Maryland has not passed any such legislation. See **Exhibit 1** for details regarding states with sexting statutes.

The court recognized that there may be compelling reasons for treating teenage sexting differently than child pornography. The court noted that while legislation to specially address sexting by minors has been unsuccessful in the past, "...in light of these policy concerns, such legislation ought to be considered by the General Assembly in the future."

Exhibit 1 States with Sexting Statutes



Source: Cyberbullying Research Center; Department of Legislative Services

Maryland Sentencing Guidelines Database

A review of the Maryland Sentencing Guidelines Database indicates that for fiscal 2019, 0 individuals younger than age 18 were sentenced to the offenses under §§ 11-203, 11-207, or 11-208 of the Criminal Law Article in the State's circuit courts.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Harford, Montgomery, Talbot, and Wicomico 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 Juvenile Services; Department of Public Safety and Correctional Services; Cyberbullying Research Center; Department of Legislative Services

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