

Department of Legislative Services
Maryland General Assembly
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FISCAL AND POLICY NOTE
First Reader

House Bill 737
Judiciary

(Delegate B. Wilson)

Criminal Procedure - Child Pornography - Discovery Exception

This bill prohibits the reproduction of specified material during the discovery process for a prosecution of a violation of the State's prohibition on production or distribution of child pornography under § 11-207 of the Criminal Law Article and establishes alternate procedures for dissemination of this material during the discovery process.

Fiscal Summary

State Effect: The bill is procedural and can be handled with existing budgeted State resources.

Local Effect: The bill is procedural and can be handled with existing local resources.

Small Business Effect: None.

Analysis

Bill Summary: During the discovery process for a prosecution for a violation of the State's prohibition on child pornography under § 11-207 of the Criminal Law Article, the State may not reproduce the obscene material or any visual representation or performance that depicts a minor engaged as a subject in sadomasochistic abuse or sexual conduct.

Instead, the State must (1) make this material available for review by a defendant in the State's Attorney's office; (2) produce redacted copies of the material; and (3) if applicable, produce any metadata of the material. Other than under these circumstances, a defendant is not entitled to the obscene material during the discovery process.

The bill incorporates the definition of “metadata” under § 4-205(a) of the General Provisions Article.

Current Law: Section 4-205 (a) of the General Provisions Article defines “metadata” as information, generally not visible when an electronic document is printed, describing the history, tracking, or management of the electronic document, including information about data in the electronic document that describes how, when, and by whom the data is collected, created, accessed, or modified and how the data is formatted. “Metadata” does not include a spreadsheet formula, a database field, an externally or internally linked file, or a reference to an external file or a hyperlink.

Under the State’s prohibition on production or distribution of child pornography, among other things, 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 (1) that depicts a minor engaged as a subject in sadomasochistic abuse or sexual conduct or (2) 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 engage in specified activities 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 conviction and imprisonment for up to 20 years and/or a \$50,000 maximum fine for each subsequent conviction.

The State is not required to identify or produce testimony from the minor who is depicted in the obscene matter or in any visual representation or performance that depicts the minor engaged as a subject in sadomasochistic abuse or sexual conduct if the minor’s identity is unknown or the minor is outside the jurisdiction of the State.

The trier of fact may determine whether an individual who is depicted in an obscene matter, or any visual representation or performance as the subject in sadomasochistic abuse or sexual conduct, was a minor by (1) observation of the matter depicting the individual; (2) oral testimony by a witness to the production of the matter, representation, or performance; (3) expert medical testimony; or (4) any other method authorized by an applicable provision of law or rule of evidence.

The *possession* of child pornography material offense, referenced as “possession of visual representation of child younger than age 16 engaged in certain sexual acts,” as specified in § 11-208 of the Criminal Law Article, is a misdemeanor offense that has different penalties and is subject to the existing discovery procedures that are specified in the Criminal Procedure Article.

Background: According to the Maryland Sentencing Guidelines Database, the Maryland State Commission on Criminal Sentencing Policy received information for 47 individuals sentenced in the State’s circuit courts during fiscal 2016 under § 11-207 of the Criminal Law Article.

State/Local Expenditures: While the bill is likely to result in additional court proceedings and increased workloads for the Office of the Public Defender, the bill’s requirements can be handled with existing budgeted resources.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; State’s Attorneys’ Association; Department of Legislative Services

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