

**Department of Legislative Services**  
Maryland General Assembly  
2020 Session

**FISCAL AND POLICY NOTE**  
**First Reader**

Senate Bill 45

(Senator Waldstreicher)

Judicial Proceedings

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**Criminal Law - Child Pornography - Distribution, Creation, or Possession by  
Minor Subject**

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This bill alters certain elements of the crimes of production or distribution of child pornography and possession of child pornography to exclude from criminal liability a minor who is the subject of the pornographic matter.

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**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.

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**Analysis**

**Bill Summary/Current Law:**

*§ 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.

The bill specifically excludes from these child pornography crimes the minor who is the subject of the pornography by specifying that prohibitions pertaining to a minor apply to “*another who is a minor.*”

*§ 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.

The bill makes the possession of child pornography offense inapplicable to children who are the subject of the pornography.

## **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.*

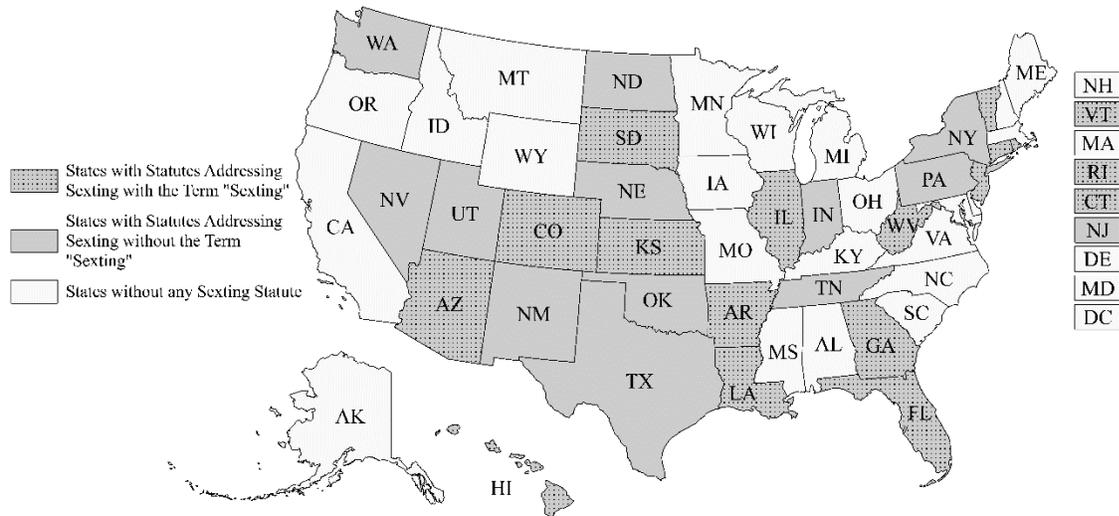
In August 2019, the Maryland Court of Appeals upheld a juvenile court's ruling that a 16-year-old girl who texted a video of herself participating in a consensual sexual act with another person was delinquent under statutory prohibitions against distribution of child pornography and displaying an obscene 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) (sale or display of an obscene item to a minor) 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."

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### Exhibit 1 States with Sexting Statutes



Source: Cyberbullying Research Center; Department of Legislative Services

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#### *Maryland's Juvenile Justice System*

With certain exceptions, persons younger than age 18 who commit illegal acts are handled by the juvenile justice system. Unlike the adult criminal system, the juvenile system is designed to protect public safety while holding young offenders accountable for their actions without a determination of guilt or the imposition of fixed sentences.

#### *Maryland Sentencing Guidelines Database*

A review of the Maryland Sentencing Guidelines Database indicates the following sentencing activity in the State's circuit courts during fiscal 2019:

- 41 individuals were sentenced to 54 counts for production or distribution of child pornography under § 11-207 of the Criminal Law Article; and
- 47 individuals were sentenced to 94 counts of possession of child pornography under § 11-208 of the Criminal Law Article.

## **Additional Information**

**Prior Introductions:** None.

**Designated Cross File:** None.

**Information Source(s):** Office of the Attorney General; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland State's Attorneys' Association; Cyberbullying Research Center; Department of Legislative Services

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