

Chapter 393

(House Bill 180)

AN ACT concerning

Juveniles – Sexting

FOR the purpose of establishing a certain mitigating factor in a certain juvenile court proceeding against a child for a certain violation; requiring and authorizing the juvenile court to take certain actions in making a certain disposition on a certain finding; prohibiting the juvenile court from taking certain actions in making a certain disposition on a certain finding; ~~establishing a certain affirmative defense in a certain juvenile court proceeding for a certain violation;~~ establishing that a child who is found by the juvenile court to have violated a certain provision of law is not subject to certain sex offender registration; defining a certain term; and generally relating to juveniles, obscene matter, and sexting.

BY repealing and reenacting, without amendments,
Article – Courts and Judicial Proceedings
Section 3–8A–19(d)(1)
Annotated Code of Maryland
(2020 Replacement Volume)

BY adding to
Article – Courts and Judicial Proceedings
Section 3–8A–35
Annotated Code of Maryland
(2020 Replacement Volume)

BY repealing and reenacting, without amendments,
Article – Criminal Law
Section 11–203, 11–207, and 11–208
Annotated Code of Maryland
(2012 Replacement Volume and 2020 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,
That the Laws of Maryland read as follows:

Article – Courts and Judicial Proceedings

3–8A–19.

(d) (1) In making a disposition on a petition under this subtitle, the court may:

(i) Place the child on probation or under supervision in his own home or in the custody or under the guardianship of a relative or other fit person, upon terms the court deems appropriate, including community detention;

(ii) Subject to the provisions of paragraphs (2) and (3) of this subsection, 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 on terms that the court considers appropriate to meet the priorities set forth in § 3-8A-02 of this subtitle, including designation of the type of facility where the child is to be accommodated, until custody or guardianship is terminated with approval of the court or as required under § 3-8A-24 of this subtitle; or

(iii) Order the child, parents, guardian, or custodian of the child to participate in rehabilitative services that are in the best interest of the child and the family.

3-8A-35.

(A) (1) IN THIS SECTION, “SEXTING” MEANS:

(I) THE SENDING OF A ~~SEXUALLY EXPLICIT~~ PHOTOGRAPH, IMAGE, OR VIDEO THAT DEPICTS SEXUAL CONDUCT, AS DEFINED IN § 11-101 OF THE CRIMINAL LAW ARTICLE, OR SEXUAL EXCITEMENT, AS DEFINED IN § 11-101 OF THE CRIMINAL LAW ARTICLE, OF ONESELF TO ANOTHER OR OF ONESELF AND THE RECIPIENT BY MOBILE TELEPHONE, COMPUTER, OR OTHER ELECTRONIC OR DIGITAL DEVICE; OR

(II) THE RECEIPT AND RETENTION OF A PHOTOGRAPH, IMAGE, OR VIDEO DESCRIBED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH.

(2) “SEXTING” DOES NOT INCLUDE CONDUCT DESCRIBED IN PARAGRAPH (1) OF THIS SUBSECTION IF:

(I) THE SENDER IS MORE THAN 4 YEARS OLDER THAN THE RECIPIENT;

(II) THE RECIPIENT IS MORE THAN 4 YEARS OLDER THAN THE SENDER;

(III) THE CHILD DID NOT CONSENT TO COMMITTING THE CONDUCT CONSTITUTING THE VIOLATION; OR

(IV) THE CHILD WAS COERCED, THREATENED, OR INTIMIDATED INTO COMMITTING THE CONDUCT CONSTITUTING THE VIOLATION.

(B) IT IS A MITIGATING FACTOR IN A PROCEEDING AGAINST A CHILD UNDER THIS SUBTITLE FOR A VIOLATION OF § 11-203, § 11-207, OR § 11-208 OF THE CRIMINAL LAW ARTICLE THAT THE VIOLATION INVOLVED OR AROSE OUT OF SEXTING.

(C) IN MAKING A DISPOSITION UNDER § 3-8A-19 OF THIS SUBTITLE ON A FINDING THAT THE CHILD COMMITTED A VIOLATION OF § 11-203, § 11-207, OR § 11-208 OF THE CRIMINAL LAW ARTICLE, THE COURT:

(1) SHALL TAKE INTO CONSIDERATION WHETHER THE MITIGATING FACTOR DESCRIBED IN SUBSECTION (B) OF THIS SECTION APPLIES TO THE CASE;

(2) MAY NOT MAKE A DISPOSITION OF COMMUNITY DETENTION UNDER § 3-8A-19(D)(1)(I) OF THIS SUBTITLE OR A DISPOSITION UNDER § 3-8A-19(D)(1)(II) OF THIS SUBTITLE 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 THE DISPOSITION; AND

(3) 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 DESCRIBED IN SUBSECTION (A) OF THIS SECTION.

~~(D) IT IS AN AFFIRMATIVE DEFENSE IN A PROCEEDING UNDER THIS SUBTITLE FOR A VIOLATION OF § 11-203, § 11-207, OR § 11-208 OF THE CRIMINAL LAW ARTICLE THAT THE CHILD WAS COERCED, THREATENED, OR INTIMIDATED INTO COMMITTING THE CONDUCT CONSTITUTING THE VIOLATION.~~

~~(E)~~ A CHILD WHO IS FOUND BY THE COURT TO HAVE VIOLATED A PROVISION OF TITLE 11, SUBTITLE 2 OF THE CRIMINAL LAW ARTICLE IS NOT SUBJECT TO SEX OFFENDER REGISTRATION UNDER TITLE 11, SUBTITLE 7 OF THE CRIMINAL PROCEDURE ARTICLE.

Article – Criminal Law

11-203.

- (a) (1) In this section the following words have the meanings indicated.
- (2) “Distribute” includes to rent.
- (3) “Illicit sex” means:

- (i) human genitals in a state of sexual stimulation or arousal;
- (ii) acts of human masturbation, sexual intercourse, or sodomy; or
- (iii) fondling or other erotic touching of human genitals.

(4) “Item” means a:

- (i) still picture or photograph;
- (ii) book, pocket book, pamphlet, or magazine;
- (iii) videodisc, videotape, video game, film, or computer disc; or
- (iv) recorded telephone message.

(5) “Obscene” means:

- (i) that the average adult applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
- (ii) that the work depicts sexual conduct specified in subsection (b) of this section in a way that is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material; and
- (iii) that the work, taken as a whole, lacks serious artistic, educational, literary, political, or scientific value.

(6) “Partially nude figure” means a figure with:

- (i) less than completely and opaquely covered human genitals, pubic region, buttocks, or female breast below a point immediately above the top of the areola; or
- (ii) human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(b) (1) A person may not willfully or knowingly display or exhibit to a minor an item:

- (i) the cover or content of which is principally made up of an obscene description or depiction of illicit sex; or
- (ii) that consists of an obscene picture of a nude or partially nude figure.

(2) A person may not willfully or knowingly engage in the business of displaying, exhibiting, selling, showing, advertising for sale, or distributing to a minor an item:

(i) the cover or content of which is principally made up of an obscene description or depiction of illicit sex; or

(ii) that consists of an obscene picture of a nude or partially nude figure.

(3) 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 at the place of business an item whose sale, display, exhibition, showing, or advertising is prohibited by paragraph (2) of this subsection.

(c) The provision of services or facilities by a telephone company under a tariff approved by the Public Service Commission is not a violation of subsection (b) of this section relating to recorded telephone messages.

(d) A person who violates this section is guilty of a misdemeanor and on conviction is subject to:

(1) for a first violation, imprisonment not exceeding 1 year or a fine not exceeding \$1,000 or both; and

(2) for each subsequent violation, imprisonment not exceeding 3 years or a fine not exceeding \$5,000 or both.

11-207.

(a) A person may not:

(1) 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;

(2) photograph or film a minor engaging in an obscene act, sadomasochistic abuse, or sexual conduct;

(3) use a computer to depict or describe a minor engaging in an obscene act, sadomasochistic abuse, or sexual conduct;

(4) knowingly promote, advertise, solicit, distribute, or possess with the intent to distribute any matter, visual representation, or performance:

(i) that depicts a minor engaged as a subject in sadomasochistic abuse or sexual conduct; or

(ii) 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

(5) 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.

(b) A person who violates this section is guilty of a felony and on conviction is subject to:

(1) for a first violation, imprisonment not exceeding 10 years or a fine not exceeding \$25,000 or both; and

(2) for each subsequent violation, imprisonment not exceeding 20 years or a fine not exceeding \$50,000 or both.

(c) (1) (i) This paragraph applies only if the minor's identity is unknown or the minor is outside the jurisdiction of the State.

(ii) In an action brought under this section, 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.

(2) 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:

(i) observation of the matter depicting the individual;

(ii) oral testimony by a witness to the production of the matter, representation, or performance;

(iii) expert medical testimony; or

(iv) any other method authorized by an applicable provision of law or rule of evidence.

(a) (1) In this section, “indistinguishable from an actual and identifiable child” means an ordinary person would conclude that the image is of an actual and identifiable minor.

(2) “Indistinguishable from an actual and identifiable child” includes a computer-generated image that has been created, adapted, or modified to appear as an actual and identifiable child.

(3) “Indistinguishable from an actual and identifiable child” does not include images or items depicting minors that are:

- (i) drawings;
- (ii) cartoons;
- (iii) sculptures; or
- (iv) paintings.

(b) 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 under the age of 16 years:

- (1) engaged as a subject of sadomasochistic abuse;
- (2) engaged in sexual conduct; or
- (3) in a state of sexual excitement.

(c) (1) Except as provided in paragraph (2) of this subsection, a person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 5 years or a fine not exceeding \$2,500 or both.

(2) A person who violates this section, having previously been convicted under this section, is guilty of a felony and on conviction is subject to imprisonment not exceeding 10 years or a fine not exceeding \$10,000 or both.

(d) Nothing in this section may be construed to prohibit a parent from possessing visual representations of the parent’s own child in the nude unless the visual representations show the child engaged:

- (1) as a subject of sadomasochistic abuse; or
- (2) in sexual conduct and in a state of sexual excitement.

(e) It is an affirmative defense to a charge of violating this section that the person promptly and in good faith:

- (1) took reasonable steps to destroy each visual representation; or
- (2) reported the matter to a law enforcement agency.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2021.

Enacted under Article II, § 17(c) of the Maryland Constitution, May 30, 2021.