

# HOUSE BILL 272

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By: **Delegate Clippinger**

Introduced and read first time: January 20, 2020

Assigned to: Judiciary

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## A BILL ENTITLED

1 AN ACT concerning

2 **Criminal Law – Obscene Matter – Sexting by Minor**

3 FOR the purpose of clarifying that a minor charged with a certain violation is subject to the  
4 jurisdiction of the juvenile court; establishing that it is a mitigating factor in a  
5 juvenile court proceeding for a certain violation that the respondent's violation  
6 involved or arose out of sexting; requiring the juvenile court, at a certain time, to  
7 take into consideration whether a certain mitigating factor applies to the case;  
8 prohibiting the juvenile court from sentencing a certain respondent to committed  
9 custody at a certain time, with a certain exception; authorizing the juvenile court to  
10 order a certain respondent to participate in a certain program at a certain time;  
11 clarifying that a certain respondent is not subject to a certain sex offender  
12 registration; defining a certain term; and generally relating to obscene matter.

13 BY repealing and reenacting, without amendments,  
14 Article – Criminal Law  
15 Section 11–203, 11–207, and 11–208  
16 Annotated Code of Maryland  
17 (2012 Replacement Volume and 2019 Supplement)

18 BY adding to  
19 Article – Criminal Law  
20 Section 11–212  
21 Annotated Code of Maryland  
22 (2012 Replacement Volume and 2019 Supplement)

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

25 **Article – Criminal Law**

26 11–203.

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EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



- 1           (a)   (1)   In this section the following words have the meanings indicated.
- 2                   (2)   “Distribute” includes to rent.
- 3                   (3)   “Illicit sex” means:
- 4                       (i)   human genitals in a state of sexual stimulation or arousal;
- 5                       (ii)   acts of human masturbation, sexual intercourse, or sodomy; or
- 6                       (iii)   fondling or other erotic touching of human genitals.
- 7                   (4)   “Item” means a:
- 8                       (i)   still picture or photograph;
- 9                       (ii)   book, pocket book, pamphlet, or magazine;
- 10                      (iii)   videodisc, videotape, video game, film, or computer disc; or
- 11                      (iv)   recorded telephone message.
- 12                   (5)   “Obscene” means:
- 13                       (i)   that the average adult applying contemporary community
- 14 standards would find that the work, taken as a whole, appeals to the prurient interest;
- 15                       (ii)   that the work depicts sexual conduct specified in subsection (b)
- 16 of this section in a way that is patently offensive to prevailing standards in the adult
- 17 community as a whole with respect to what is suitable material; and
- 18                       (iii)   that the work, taken as a whole, lacks serious artistic,
- 19 educational, literary, political, or scientific value.
- 20                   (6)   “Partially nude figure” means a figure with:
- 21                       (i)   less than completely and opaquely covered human genitals, pubic
- 22 region, buttocks, or female breast below a point immediately above the top of the areola; or
- 23                       (ii)   human male genitals in a discernibly turgid state, even if
- 24 completely and opaquely covered.
- 25           (b)   (1)   A person may not willfully or knowingly display or exhibit to a minor
- 26 an item:
- 27                       (i)   the cover or content of which is principally made up of an obscene

1 description or depiction of illicit sex; or

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

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

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

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

11 (3) If a newsstand or other place of business is frequented by minors, the  
12 owner, operator, franchisee, manager, or an employee with managerial responsibility may  
13 not openly and knowingly display at the place of business an item whose sale, display,  
14 exhibition, showing, or advertising is prohibited by paragraph (2) of this subsection.

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

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

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

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

24 11-207.

25 (a) A person may not:

26 (1) cause, induce, solicit, or knowingly allow a minor to engage as a subject  
27 in the production of obscene matter or a visual representation or performance that depicts  
28 a minor engaged as a subject in sadomasochistic abuse or sexual conduct;

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

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

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

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

5 (ii) in a manner that reflects the belief, or that is intended to cause  
6 another to believe, that the matter, visual representation, or performance depicts a minor  
7 engaged as a subject of sadomasochistic abuse or sexual conduct; or

8 (5) use a computer to knowingly compile, enter, transmit, make, print,  
9 publish, reproduce, cause, allow, buy, sell, receive, exchange, or disseminate any notice,  
10 statement, advertisement, or minor's name, telephone number, place of residence, physical  
11 characteristics, or other descriptive or identifying information for the purpose of engaging  
12 in, facilitating, encouraging, offering, or soliciting unlawful sadomasochistic abuse or  
13 sexual conduct of or with a minor.

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

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

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

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

22 (ii) In an action brought under this section, the State is not required  
23 to identify or produce testimony from the minor who is depicted in the obscene matter or in  
24 any visual representation or performance that depicts the minor engaged as a subject in  
25 sadomasochistic abuse or sexual conduct.

26 (2) The trier of fact may determine whether an individual who is depicted  
27 in an obscene matter, or any visual representation or performance as the subject in  
28 sadomasochistic abuse or sexual conduct, was a minor by:

29 (i) observation of the matter depicting the individual;

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

32 (iii) expert medical testimony; or

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

1 11-208.

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

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

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

10 (i) drawings;

11 (ii) cartoons;

12 (iii) sculptures; or

13 (iv) paintings.

14 (b) A person may not knowingly possess and intentionally retain a film,  
15 videotape, photograph, or other visual representation showing an actual child or a  
16 computer-generated image that is indistinguishable from an actual and identifiable child  
17 under the age of 16 years:

18 (1) engaged as a subject of sadomasochistic abuse;

19 (2) engaged in sexual conduct; or

20 (3) in a state of sexual excitement.

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

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

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

30 (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.

**11-212.**

**(A) IN THIS SECTION, "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.**

**(B) A MINOR CHARGED WITH A VIOLATION OF THIS SUBTITLE IS SUBJECT TO THE JURISDICTION OF THE JUVENILE COURT.**

**(C) IT IS A MITIGATING FACTOR IN A JUVENILE COURT PROCEEDING FOR A VIOLATION OF § 11-203, § 11-207, OR § 11-208 OF THIS SUBTITLE THAT THE RESPONDENT'S VIOLATION INVOLVED OR AROSE OUT OF SEXTING.**

**(D) WHEN DETERMINING A DISPOSITION OF A CHARGE AGAINST A RESPONDENT UNDER § 11-203, § 11-207, OR § 11-208 OF THIS SUBTITLE, THE JUVENILE COURT:**

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

**(2) MAY NOT SENTENCE A RESPONDENT WHOSE VIOLATION INVOLVED OR AROSE OUT OF SEXTING TO COMMITTED CUSTODY UNLESS THE COURT FINDS AND EXPLAINS ON THE RECORD, VERBALLY AND IN WRITING, THAT EXTRAORDINARY CIRCUMSTANCES EXIST TO WARRANT COMMITTED CUSTODY; AND**

**(3) MAY ORDER A RESPONDENT WHOSE VIOLATION INVOLVED OR AROSE OUT OF SEXTING TO PARTICIPATE IN A DIVERSIONARY OR EDUCATIONAL PROGRAM DEVELOPED OR APPROVED BY THE DEPARTMENT OF JUVENILE SERVICES THAT ADDRESSES THE RISKS AND CONSEQUENCES OF SEXTING.**

**(E) A RESPONDENT WHO IS FOUND BY THE JUVENILE COURT TO HAVE VIOLATED THIS SUBTITLE IS NOT SUBJECT TO SEX OFFENDER REGISTRATION UNDER TITLE 11, SUBTITLE 7 OF THE CRIMINAL PROCEDURE ARTICLE.**

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

1 October 1, 2020.