

Bill Number: HB 180
Scott D. Shellenberger, State's Attorney for Baltimore County
Opposed

WRITTEN TESTIMONY OF SCOTT D. SHELLENBERGER,
STATE'S ATTORNEY FOR BALTIMORE COUNTY,
IN OPPOSITION OF HOUSE BILL 180
SEXTING BY MINOR

I write in opposition to the current House Bill 180 as amended. It is confusing and impossible to understand. The original House Bill, which I have attached, approached this difficult issue with a reasoned approach. I ask that you amend back to the original. This House Bill on sexting is in response to the Court of Appeals decision, In RE: S.K. 466 Md 31 (2019).

In RE: S.K. involved a 16 year old high school student who sent a one-minute video of herself performing fellatio on a male to two other high school students. The sending student was charged in Juvenile Court with child pornography and obscenity. The issue before Maryland's highest was can a minor legally engaged in consensual sexual activity be her own pornographer through the act of sexting?

The court's simple answer was yes. What made this case alarming is that after a fall-out with two friends, the video she had sent to those friends who then sent it to many more students in the school. This practically assured that it could be viewed, sent and posted forever. The appellate case cannot and does not address the 16 year old's need for services through the juvenile justice system.

House Bill 180 is meant to address concerns raised by this case. It is properly placed in the juvenile section of the code.

House Bill 180 keeps juvenile conduct such as that displayed by S.K. a delinquent act, but makes sure of these things:

1. It is handled in the Juvenile Court.
2. The Court consider "sexting" as a mitigating factor.
3. The juvenile cannot be committed to custody unless there is an articulated extraordinary circumstance.
4. Importantly makes sure there is an educational component built into the sentence.
5. Does not require the juvenile to register as a sex offender.

This is a practical approach. We must take action in these cases because we must recognize that juveniles like S.K. need to be educated on how their actions of distributing this kind of material can adversely affect them for the rest of their lives. While I acknowledge that behavior like S.K.'s is happening frequently among those of a similar age, it does not mean it does not need to be addressed. Each individual

offender can and should be evaluated to determine what, if any, services are needed for the juvenile.

I urge that HB180 as it currently appears be amended back to its original form so that we have a workable statute.

HOUSE BILL 180

E3

11r0913

HB 272/20 – JUD

(PRE-FILED)

By: **Delegate Clippinger**

Requested: October 12, 2020

Introduced and read first time: January 13, 2021

Assigned to: Judiciary

A BILL ENTITLED

1 AN ACT concerning

2 **Juveniles – Sexting**

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

12 BY repealing and reenacting, without amendments,
13 Article – Courts and Judicial Proceedings
14 Section 3–8A–19(d)(1)
15 Annotated Code of Maryland
16 (2020 Replacement Volume)

17 BY adding to
18 Article – Courts and Judicial Proceedings
19 Section 3–8A–35
20 Annotated Code of Maryland
21 (2020 Replacement Volume)

22 BY repealing and reenacting, without amendments,
23 Article – Criminal Law
24 Section 11–203, 11–207, and 11–208
25 Annotated Code of Maryland
26 (2012 Replacement Volume and 2020 Supplement)

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



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

3 **Article – Courts and Judicial Proceedings**

4 3–8A–19.

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

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

9 (ii) Subject to the provisions of paragraphs (2) and (3) of this
10 subsection, commit the child to the custody or under the guardianship of the Department
11 of Juvenile Services, the Maryland Department of Health, or a public or licensed private
12 agency on terms that the court considers appropriate to meet the priorities set forth in §
13 3–8A–02 of this subtitle, including designation of the type of facility where the child is to
14 be accommodated, until custody or guardianship is terminated with approval of the court
15 or as required under § 3–8A–24 of this subtitle; or

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

18 3–8A–35.

19 (A) IN THIS SECTION, “SEXTING” MEANS THE SENDING OF A SEXUALLY
20 EXPLICIT PHOTOGRAPH, IMAGE, OR VIDEO OF ONESELF TO ANOTHER BY MOBILE
21 TELEPHONE, COMPUTER, OR OTHER ELECTRONIC OR DIGITAL DEVICE.

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

26 (C) IN MAKING A DISPOSITION UNDER § 3–8A–19 OF THIS SUBTITLE ON A
27 FINDING THAT THE CHILD COMMITTED A VIOLATION OF § 11–203, § 11–207, OR §
28 11–208 OF THE CRIMINAL LAW ARTICLE, THE COURT:

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

31 (2) MAY NOT MAKE A DISPOSITION OF COMMUNITY DETENTION
32 UNDER § 3–8A–19(D)(1)(I) OF THIS SUBTITLE OR A DISPOSITION UNDER §
33 3–8A–19(D)(1)(II) OF THIS SUBTITLE IF THE VIOLATION INVOLVED OR AROSE OUT
34 OF SEXTING, UNLESS THE COURT FINDS AND EXPLAINS ON THE RECORD, VERBALLY

1 AND IN WRITING, THAT EXTRAORDINARY CIRCUMSTANCES EXIST TO WARRANT THE
2 DISPOSITION; AND

3 (3) MAY ORDER A CHILD WHOSE VIOLATION INVOLVED OR AROSE OUT
4 OF SEXTING TO PARTICIPATE IN AN AGE-APPROPRIATE EDUCATIONAL PROGRAM ON
5 THE RISKS AND CONSEQUENCES OF POSSESSING, SENDING, DISPLAYING, AND
6 PUBLISHING SEXUALLY EXPLICIT PHOTOGRAPHS, IMAGES, AND VIDEOS.

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

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

15 Article - Criminal Law

16 11-203.

17 (a) (1) In this section the following words have the meanings indicated.

18 (2) "Distribute" includes to rent.

19 (3) "Illicit sex" means:

20 (i) human genitals in a state of sexual stimulation or arousal;

21 (ii) acts of human masturbation, sexual intercourse, or sodomy; or

22 (iii) fondling or other erotic touching of human genitals.

23 (4) "Item" means a:

24 (i) still picture or photograph;

25 (ii) book, pocket book, pamphlet, or magazine;

26 (iii) videodisc, videotape, video game, film, or computer disc; or

27 (iv) recorded telephone message.

28 (5) "Obscene" means:

1 (i) that the average adult applying contemporary community
2 standards would find that the work, taken as a whole, appeals to the prurient interest;

3 (ii) that the work depicts sexual conduct specified in subsection (b)
4 of this section in a way that is patently offensive to prevailing standards in the adult
5 community as a whole with respect to what is suitable material; and

6 (iii) that the work, taken as a whole, lacks serious artistic,
7 educational, literary, political, or scientific value.

8 (6) "Partially nude figure" means a figure with:

9 (i) less than completely and opaquely covered human genitals, pubic
10 region, buttocks, or female breast below a point immediately above the top of the areola; or

11 (ii) human male genitals in a discernibly turgid state, even if
12 completely and opaquely covered.

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

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

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

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

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

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

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

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

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

1 is subject to:

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

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

6 11-207.

7 (a) A person may not:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 (iii) expert medical testimony; or

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

16 11-208.

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

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

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

25 (i) drawings;

26 (ii) cartoons;

27 (iii) sculptures; or

28 (iv) paintings.

29 (b) A person may not knowingly possess and intentionally retain a film,
30 videotape, photograph, or other visual representation showing an actual child or a
31 computer-generated image that is indistinguishable from an actual and identifiable child

1 under the age of 16 years:

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

3 (2) engaged in sexual conduct; or

4 (3) in a state of sexual excitement.

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

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

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

14 (1) as a subject of sadomasochistic abuse; or

15 (2) in sexual conduct and in a state of sexual excitement.

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

18 (1) took reasonable steps to destroy each visual representation; or

19 (2) reported the matter to a law enforcement agency.

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