



POSITION ON PROPOSED LEGISLATION

BILL: HB 180- Juveniles - Sexting

POSITION: Unfavorable

DATE: March 23, 2021

The Maryland Office of the Public Defender respectfully requests that the Committee issue an unfavorable report on House Bill 180.

Teenaged sexting is not child pornography. Laws prohibiting the production, distribution, and possession of child pornography were enacted to prevent the exploitation of children by adults. The prototypical child pornography case, and the behavior those laws intend to prevent, involves adults and their intentional sexual abuse or exploitation of a child, against the child's will, and often for monetary or other gain. In contrast, the act of young people sexting one another, which typically involves a completely voluntary and consensual exchange of self-produced images of nudity or consensual sex, is not and should not be considered criminal.

Nonetheless, unfortunately, in a decision that strains common sense, our state's highest court ruled that children can be charged for producing, distributing and/or possessing child pornography for self-produced images as if they were their own exploiters and abusers. See *In Re: S.K.*, 466 Md. 31 (2019). S.K. had sent a video of herself engaged in consensual sexual behavior to two friends. When one of those former friends posted the video on social media, S.K. hoped the school police officer would offer assistance in removing the video; instead, she was interrogated, charged, prosecuted, and eventually convicted of distribution of child pornography. Despite its ultimate ruling that Maryland's laws allowed sexting to be charged as child pornography, the court correctly noted that "there may be compelling reasons for treating teenage sexting different from child pornography." *Id.* at 57. To do so, the court called on a legislative fix to outdated laws, noting that "legislation ought to be considered by the General Assembly." *Id.*

Although HB 180 aims to fix the issues that were highlighted by the Court of Appeals, the legislation as proposed would lead to the same disastrous results of teenagers charged with distribution, possession, and production of child pornography for sending images of themselves. In a legislative session focused on reducing the number of youth in the juvenile justice system, this bill would increase the criminalization of common adolescent behavior. The bill, while well-intentioned, leaves too much to the discretion of police, prosecutors, and judges; that same discretion allowed 16 year old S.K. to be charged, prosecuted, and adjudicated in juvenile court. Instead of excluding sexting from prosecution as child pornography, it only makes it a mitigating factor for the court to

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consider at disposition, thus allowing harmful arrest, detention, and prosecution before the fact that this was consensual sexting can even be raised as a mitigating factor.

The bill also does not fix the harms that occur when sexting is treated as child pornography; instead, HB 180 codifies that very harm by endorsing prosecution for sexting within the criminal laws related to child pornography. Continuing to allow this behavior to be prosecuted as a criminal act is likely to prevent youth in S.K.'s position, where a photo or video has been distributed publicly, from approaching trusted adults for help because of the fear of prosecution. The bill does not prohibit detention or out of home placement for youth charged based on sexting, and a judge can still order Community Detention if they make a finding of extraordinary circumstances, a standard which isn't clearly defined in the bill. This furthers the potential that the images might be used nefariously because youth are reluctant to report threats of blackmail or exploitation for fear they may be prosecuted for initially taking or sending the images. Additionally, this bill does not provide any educational component to prevent situations like S.K.'s from occurring and instead provides education only as punishment for those who are prosecuted.

Although attempts were made to fix some of these issues, youth advocates were left out of those conversations. As a result, the bill as written by well-meaning adults offers no actual assistance to youth. For example, by removing the affirmative defense, forced or coerced sending of sexual images is now no longer considered sexting but still isn't excluded from child pornography prosecution. In addition, in defining sexting, too many instances of consensual sexting are still excluded from the definition for the mitigation consideration.

While the loopholes in Maryland's child pornography laws highlighted by In re: S.K. clearly need to be fixed, this legislation would do more harm than good by endorsing selective prosecution of adolescents for ordinary behavior.

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For these reasons, the Maryland Office of the Public Defender urges an unfavorable report on House Bill 180.