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POSITION ON PROPOSED LEGISLATION

BILL: HB 233 - Criminal Law - Child Pornography - Accessing With Intent to View

FROM: Maryland Office of the Public Defender

POSITION: Unfavorable

DATE: 2/3/2023

The Maryland Office of the Public Defender respectfully requests that the Committee issue an unfavorable report on House Bill 233.

House Bill 233 would expand the crime of Possession of Child Pornography to include instances where individuals knowingly or intentionally access the visual representations prohibited by Criminal Law Section 11–208. Criminal Law Section 11–208 already prohibits the knowing possession and intentional retention of child pornography. In seeking to expand the definition of possession to include those who merely access the content, House Bill 233 would expand the universe of youth who could be selectively charged for common behavior, and could result in the criminalization of mere adolescent curiosity.

Although adolescent sexting is not child pornography, in 2019 Maryland’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. In Re: S.K., 466 Md. 31 (2019). S.K. had sent two friends a video of herself engaged in consensual sexual behavior. When one of her now former friends posted the video on social media, S.K. had hoped the police officer at her school 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, the court noted, however, 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 To do so, the court called on a legislative fix to the outdated laws, noting that “legislation ought to be considered by the General Assembly.” Id.

While this committee aimed in previous legislative sessions to fix the issues that were highlighted in In Re: S.K., the legislation passed by the General Assembly in 2021 can and does lead to the same disastrous results: teenagers charged with distribution, possession, and production of child pornography for sending or receiving images of themselves engaged in consensual sexual behavior. The well-intentioned legislation that was enacted, 2021 House Bill 180, left too much to the discretion of police, prosecutors, and judges – the same discretion that

led to charging, prosecuting, and convicting 16 year old S.K. The legislature, in passing a bill that continued to define adolescent sexting as child pornography, codified the very harm highlighted by In Re: S.K., endorsing prosecution for sexting within the criminal laws related to child pornography.

As a result, any expansion of Criminal Law Section 11–208 runs the risk of selective and disparate prosecution of adolescents for sending or receiving images or videos that were created by the subject of that “child pornography.” Take, for example, a common situation in a high school building full of teenagers with phones: 17 year old Adam, intentionally or mistakenly, airdrops a nude image of himself. That image is received by everyone within a certain proximity – hundreds of people in an ordinary high school building. Curious about the contents of a file sent without an explanation, Bailey opens the image. Bailey has now knowingly or intentionally possessed child pornography if the definition is expanded as proposed by HB 233. Similarly, youth often share content with the intention that the images or videos will not be saved. Snapchat, a social media application where temporary sharing is the very purpose of the app, is used for exactly that scenario. HB 233 would criminalize the sending or receiving of a temporary image over snapchat – even when the recipient did not know the content of the image before viewing it – as long as they knowingly or intentionally accessed the content.

While prosecution based on the circumstances described above may seem absurd, it is important to remember that in Charles County, 16 year old S.K. was charged, prosecuted, and convicted for sending a video of herself to two friends. That situation – an abuse of discretion at every level – occurred in this state less than 10 years ago. Teenaged sexting is not child pornography, but until the legislature changes the definition of child pornography to treat teenagers who sext as entirely different from adults who possess, produce, or distribute sexually explicit images of children, any expansion of Criminal Law Section 11–208 runs the risk of the selective criminalization of more youth like S.K. for behavior that many, if not most, adolescents surveyed have admitted to.

For these reasons, the Maryland Office of the Public Defender urges this Committee to issue an unfavorable report on HB 233.

Submitted by: Maryland Office of the Public Defender, Government Relations Division.

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