



## POSITION ON PROPOSED LEGISLATION

BILL: HB 180 Juveniles - Sexting  
POSITION: Unfavorable  
DATE: January 19, 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. It is, in the words of the Supreme Court, "a most serious crime and an act repugnant to the moral instincts of a decent people" Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). 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 in 2019 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). The young child in this case, S.K., had sent a video of herself engaged in consensual sexual behavior to two of her friends. When one of her now former friends posted the video on social, 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 correctly 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 To do so, the court called on a legislative fix to the outdated laws, noting that "legislation ought to be considered by the General Assembly."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.

Although HB 180 aims to fix the issues that were highlighted by the Court of Appeals opinion in In Re: S.K., the legislation as proposed could unfortunately lead to the same disastrous results of teenagers charged with distribution, possession, and production child pornography for sending images of themselves. The bill, while well-intentioned, leaves too much to the discretion of police, prosecutors, and judges. That same discretion led to charging, prosecuting, and convicting 16 year old S.K.

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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 individuals such as S.K. from approaching trusted adults for help because of the fear of prosecution. By specifically allowing for punitive measures such as detention and out of home placements, the bill also furthers the potential that the images might be used as blackmail or for exploitation. 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 caught.

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