



## **Update on Sexting**

October 21, 2014

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# Overview



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# Background



- Sexting, derived from the word texting, is the act of taking a sexually suggestive photo, usually of oneself, and sending it via a picture message from one cell phone to another.
- Over the past 5 to 10 years, sexting has attracted increased attention nationwide, as many of the participants taking and receiving such photos are minors.

# Background



- Sexting has raised debates across the country, both amongst policy makers and members of the general public:
  - Are child pornography laws, which were meant to criminalize the predatory behavior of older men, appropriate for the prosecution of teenagers who have engaged in sexting voluntarily?
  - What happens when sexting has a “malicious” motive; e.g., spurned boyfriend forwards the pictures to dozens of people?
  - What happens if pictures are not forwarded maliciously, but recklessly or thoughtlessly; e.g., “look what someone just sent me?”
  - How should recipients of pictures be treated?
  - What are the best ways to curtail this activity amongst teenagers?

# Background



- Sexting that involves minors may violate Virginia's child pornography statutes, depending upon the nature of the pictures.
- Va. Code § 18.2-374.1 criminalizes the production and distribution of child pornography.
- If a minor takes a picture of himself, it is a violation of subsection (B)(2).
- If the minor is under the age of 15, it is an unclassified felony carrying from 5 to 30 years.
- If the minor is 15 years of age or older, it is an unclassified felony carrying from 1 to 20 years.
- It should be noted that unless the juvenile was tried as an adult, he almost certainly would not receive such a lengthy sentence.

# Background



- Va. Code § 18.2-374.1:1 criminalizes the possession of any such photos that are sent, making it a Class 6 felony for a first violation, and a Class 5 felony for a second violation.
- If the recipient of the photos then digitally passes them on to a friend, or even just displays them on his phone to another, his act of distribution or display is an unclassified felony carrying from 5 to 20 years.
- A second act of distribution or display also carries from 5 to 20 years, with a mandatory minimum punishment of 5 years.
- Unless the minor was tried as an adult, he also would probably not receive such a lengthy sentence.

# Background



- Under Virginia law, actual nudity is not required for the images to be child pornography.
- Under the relevant definitions provided by Va. Code § 18.2-390, “nudity” includes “a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple....”
- The nudity must involve a lewd exhibition; not all naked pictures of children qualify as child pornography. Asa v. Commonwealth, 17 Va. App. 714 (1994).

# Background



- A minor can also break the law if he solicits his girlfriend to give him a nude photo of herself.
- Soliciting a minor to be the subject of child pornography is a violation of Va. Code § 18.2-374.1(B), and carries the same penalties as the actual production of child pornography.
- Additionally, if the minor communicates his solicitation by e-mail, phone, cell phone, or other communications system, it is a violation of Va. Code § 18.2-374.3(B), which is a Class 6 felony.



# Previous Crime Commission Study



- In 2009, the Crime Commission examined the topic of sexting.
- At that time, only a few studies and surveys had been carried out on what was a relatively new social phenomenon.
- An online survey conducted in 2008 found that 22% of teenage girls, and 18% of teenage boys, had sent or posted images or video showing themselves nude or semi-nude.
  - 11% of young teenage girls, between the ages of 13 and 16, had done so.

Source: National Campaign to Prevent Teen and Unplanned Pregnancy (2008). *Sex and Tech: Results from a Survey of Teens and Young Adults*.

# Previous Crime Commission Study



- The Crime Commission deliberated upon various statutory options that could be enacted to treat sexting differently from child pornography.
  - Possible lower penalties for certain, limited types of acts.
  - Statutory language that would either mandate, or strongly suggest, that the charge should be dismissed after a period of probation.
- Ultimately, the Crime Commission decided not to endorse any changes to statutory language.
- A letter was sent to the Va. Department of Education, requesting that they work to educate students on the dangers and illegality of sexting.
  - Independently of this request, the Department had begun work on an information brief on sexting, which included a reminder that “schools should have a policy in place to address sexting.”

# Recent Studies and News Articles



- Since 2009, published studies and reoccurring news articles indicate that sexting continues to be a problem, both nationally and in Virginia.
- A probability sample of 1,839 students in Los Angeles high schools found that 15% of adolescents reported having engaged in sexting; 54% reported knowing someone who had sexted.

Source: Rice, E. (2012). *Sexually Explicit Cell Phone Messaging Associated with Sexual Risk Among Adolescents*, p. 667.

- Another study examined “at risk” seventh graders; 5% of the sample reported having sexted images in the past 6 months.

Source: Houck, C. (2014). *Sexting and Sexual Behavior in At-Risk Adolescents*, p. e276.

# Recent Studies and News Articles



- Other recent studies of high school adolescents have found that 18% to 28% have reported sending nude or seminude photos. Around 50% of boys have reported receiving such a photo.
  - Strassberg, D. (2013). *Sexting by high school students: An exploratory and descriptive study*, p. 15.
  - Temple, J. (2012). *Teenager sexting and its association with sexual behaviors*, p. 828.
- The study by Strassberg found that students who reported being aware of the possible legal repercussions for sexting were actually more likely to have engaged in sexting.

# Recent Studies and News Articles



- A number of incidents involving sexting have been reported by the press just this year.
- In February, in James City County, a 16 year old teenager was reported as having taken nude self-photos of herself and then posted them on Twitter.  
“Va. Teen Faces Child Porn Charges for Tweeting Nude ‘Selfie’,”  
Washington.CBSlocal.com, Feb. 7, 2014.

# Recent Studies and News Articles



- In April, the national press reported on a large sexting “ring” that was discovered in Louisa County; over 1,000 images of underage teenagers had been posted on Instagram accounts, and over 100 teenagers were involved in some manner.

“Deputies Bust Massive Teen Sexting Ring in Louisa County,”  
WRIC.com, Apr. 3, 2014, updated May 2, 2014.

- This story is the subject of a lengthy feature article in the upcoming November issue of The Atlantic, “Why Kids Sext: An Inquiry into One Recent Scandal Reveals How Kids Think about Sexting—And What Parents and Police Should Do about It.”

# Recent Studies and News Articles



- In July, it was reported that a Manassas City teenager, suspected of sexting, was the subject of a search warrant to undergo a medical procedure so that his genitals could be photographed.

“In ‘sexting’ case Manassas City police want to photograph teen in sexually explicit manner, lawyers say,” WashingtonPost.com, July 9, 2014.

- This story created national discussion on the appropriateness of such a warrant being issued.
- Ultimately, the photographs were not taken.

# VCJC Recommendations



- The Virginia Criminal Justice Conference (VCJC) was created in 2006 to be the criminal justice system equivalent of the Boyd-Graves Conference.
- It is made up of a roughly equal balance of prosecutors and defense attorneys, and also includes jurists from each level of Virginia's courts, legal scholars, and representatives from the General Assembly.
- Its goal is to improve criminal justice in Virginia, and make proposals for improvement, but only if substantial consensus is reached amongst the members.



# VCJC Recommendations



- For three years, the VCJC has had a subcommittee examine the subject of sexting.
- In 2012 and 2013, the subcommittee reported to the full Conference that because recent attempts to pass sexting legislation had not been well-received by the General Assembly, no potential sexting legislation should be drafted.
- In 2013, the entire Conference unanimously voted for the subcommittee to attempt to draft a sexting bill that could be brought to the General Assembly.

# VCJC Recommendations



- In September, the VCJC sexting subcommittee decided that sexting legislation:
  - Should not completely decriminalize any sexting behavior, as even taking a lewd photo of oneself, as a minor, creates an unquestionable risk of harm;
  - Should recognize that qualitatively, some sexting behaviors are less culpable than the conduct that is the primary focus of the child pornography statutes, and are therefore deserving of a lessened penalty;
  - Should fit within the existing child pornography statutes;
  - Should be very limited in scope; and,
  - Should contain a “first offender” provision that would apply only to those limited sexting behaviors.

# VCJC Recommendations



- The VCJC decided that taking a lewd photo of oneself, without anyone else in the picture, is the least culpable form of juvenile sexting, and is more appropriately punished by a Class 1 misdemeanor than the existing unclassified felonies of 1 to 20 years (if 15 or older), or 5 to 30 years (if younger than 15).
  - This would not apply to images that depict excretory functions, sadomasochistic abuse, or crimes against nature as defined in Va. Code § 18.2-361.
  - The language for this subsection should mirror the accommodation subsection of Virginia’s drug distribution statute—it is the burden of the defendant to show he meets the requirements.

# VCJC Recommendations



- The VCJC decided that in instances of consensual sexting, the simple possession of an image should only be a Class 1 misdemeanor, if:
  - Any child depicted is at least 13 years old;
  - The possessor is no more than 4 years older than every child depicted in the image;
  - The possession is with the knowing consent of every depicted child; and,
  - The image does not depict excretory functions, sadomasochistic abuse, or crimes against nature as defined in Va. Code § 18.2-361.
- The language for this subsection should also mirror the accommodation subsection of Virginia’s drug distribution statute.

# VCJC Recommendations



- The VCJC also recommended that it should be a Class 1 misdemeanor if a child sends a sexting image of himself, provided that he is the only person depicted in the image, and all of the requirements for the Class 1 misdemeanor offense of producing a sexting image are met:
  - The image cannot depict excretory functions, sadomasochistic abuse, or crimes against nature as defined in Va. Code § 18.2-361.
  - The language for this subsection should mirror the accommodation subsection of Virginia’s drug distribution statute—it is the burden of the defendant to show he meets the requirements.

# VCJC Recommendations



- The VCJC recommended that a first offender provision be created for sexting, mirroring the language used for Virginia's first offender statute for drug possession.
- It would only apply to the three new Class 1 misdemeanor offenses, and would require:
  - Successful completion of a treatment or education program;
  - 10 to 100 hours of community service; and,
  - Any other conditions the court deems appropriate.
- Upon completion of all terms and conditions, the charge would be dismissed; first offender status would not be available if future offenses were committed.

# VCJC Recommendations



- All other sexting behaviors would not be covered by the proposed statutory changes, including:
  - Possession of a sexting image if the subject of the photo did not know the defendant had possession of the image, or did not give consent;
  - Production of a sexting image, if anyone else appears in the photo, even if the other person is clothed and not engaged in sexual behavior;
  - Transmission of a sexting image, if anyone else appears in the photo, even if the other person is clothed and not engaged in sexual behavior; and,
  - Requesting someone take or send a sexting image.
- These cases could still be handled by prosecutorial discretion, when appropriate.

# Summary



- Sexting behavior by juveniles frequently meets the statutory definitions of child pornography.
  - The possible penalties are very severe, for behavior that many teenagers view as “flirting” or “not a big deal.”
- Sexting continues to be a problem in terms of its frequency amongst teenagers, both nationally and in Virginia.
- The VCJC has officially recommended that Virginia give prosecutors and defense attorneys a tool to handle certain sexting cases in a manner that delineates them from predatory child pornography cases.
- The new Class 1 misdemeanors proposed would be very limited in scope.



# Policy Options



- Should the VCJC Recommendations be adopted?
- Should the VCJC Recommendations be further limited?
  - The Class 1 misdemeanor for possession of child pornography could be limited to cases where only a certain number of images were possessed; e.g., the defendant did not possess more than 10 images.
  - The Class 1 misdemeanor for transmission of child pornography could be limited to cases where the images were sent to a particular individual; e.g., sending images to a public website, to more than a certain number of recipients, or to Twitter or Instagram accounts would not qualify for the reduced penalty.



## **Discussion**

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