

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1618

SPONSOR: Criminal Justice Committee and Senator Saunders

SUBJECT: Offenses Against Children and Minors

DATE: April 4, 2000 **REVISED:** _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-----------------|----------------|-----------|---------------------|
| 1. | <u>Erickson</u> | <u>Cannon</u> | <u>CJ</u> | <u>Favorable/CS</u> |
| 2. | _____ | _____ | <u>FP</u> | _____ |
| 3. | _____ | _____ | _____ | _____ |
| 4. | _____ | _____ | _____ | _____ |
| 5. | _____ | _____ | _____ | _____ |

I. Summary:

The Committee Substitute for SB 1618 amends the section prohibiting the luring or enticing of a child under the age of 12 into a building, structure, or conveyance for other than a lawful purpose. The amendment makes the offense applicable to minors, rather than simply children under 12 years of age.

The CS also prohibits a person from transmitting live over a computer on-line service, Internet service, or local bulletin board service certain sexual acts when the person knows or should know or has reason to believe the transmission is being viewed by a person less than 16 years of age.

The CS also corrects an omission in the section relating to computer pornography which does not expressly state the conduct described in that section is prohibited.

This CS substantially amends the following sections of the Florida Statutes: 787.025; 800.04; 847.0135; and 921.0022. The CS reenacts the following sections of the Florida Statutes: 394.912(9); 775.082(9)(a); 775.084(1)(d); 775.15(7); 775.21 (4)(c) and (10)(b); 787.01(3); 787.02(3); 914.16; 943.0435(1)(a); 943.0585; 943.059; 944.606(1)(b); 944.607(1)(a); 947.1405(7); 948.01(15); 948.03(4), (5), and (6); and 948.06(2)(a).

II. Present Situation:

A. Luring or Enticing a Child Under 12 Years of Age

Section 787.025, F.S., currently provides that it is a third degree felony for a person over the age of 18 who, having been previously convicted of a violation of Chapter 794, F.S., (sexual battery), or s. 800.04, F.S., (lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age), or a violation of a similar law of another jurisdiction, to intentionally lure or entice a child under 12 years of age into a structure, dwelling, or conveyance for other than a lawful purpose.

On March 21, 2000, in an article by the Associated Press from Clearwater, it was reported that the previous month a 12 year old girl was walking home from school when a man approached her in a car and asked her to get in the car with him. The girl kept on walking. A short time later, the girl's mother pulled up and the girl told her the man was following her and propositioning her. The mother chased the man as he was trying to speed away. Police later caught the man and found that he was convicted in 1989 of attempted sexual battery on an 8-year old child and handling and fondling. The girl identified the man as her pursuer. However, when the police learned that the girl was 12 years of age, they let the man go as the luring or enticing offense covered in s. 787.025, F.S., didn't apply to a 12-year old victim.

B. Lewd or Lascivious Exhibition

Section 800.04, F.S., prohibits, in part, lewd or lascivious exhibition. A person 18 years of age or older commits a second degree felony if he or she, in the presence of a victim less than 16 years of age, does any of the following:

- Intentionally masturbates;
- Intentionally exposes the genitals in a lewd or lascivious manner;
- Intentionally commits any other sexual act that does not involve actual physical or sexual contact with the victim, including, but not limited to, sadomasochistic abuse, sexual bestiality, or the simulation of any act involving sexual activity.

An offender less than 18 years of age who commits lewd or lascivious exhibition commits a third degree felony.

C. Computer Pornography

Section 847.0135(2), F.S., relates to computer pornography and addresses offenders who use a computer to facilitate, encourage, offer, or solicit sexual conduct with a minor. Subsection (2) of the section provides that any person who violates the provisions of this subsection commits a felony of the third degree. However, there is no language in the subsection that specifically prohibits any of the conduct which is specified in s. 847.0135(2), F.S. Arguably, the section does not create a crime. In a 1997 case, *State v. Cohen*, 696 So.2d 435 (Fla. 4th DCA 1997), the Fourth District Court of Appeal discussed s. 847.135, F.S. The discussion indicates that the court interpreted the conduct prohibited in s. 847.0135, F.S., to constitute a criminal offense, but the issue on appeal was not the interpretation of this section. The discussion of s. 847.0135, F.S., arose in the context of a comparison between this section and another section that was being challenged on appeal. The court's discussion of s. 847.0135, F.S., is only dicta.

III. Effect of Proposed Changes:

Committee Substitute for Senate Bill 1618 makes the following changes to Florida law:

- Amends s. 787.025, F.S., the section prohibiting the luring or enticing of a child under the age of 12 into a building, structure, or conveyance for other than a lawful purpose. The amendment makes the offense applicable to *minors*, rather than applicable to children under 12 years of age.

- Amends s. 800.04, F.S., (lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age), to create a new lewd or lascivious exhibition offense. A person commits this offense if the person:
 - Intentionally masturbates;
 - Intentionally exposes the genitals in a lewd or lascivious manner; or
 - Intentionally commits any other sexual act that does not involve actual physical or sexual contact with the victim, including, but not limited to, sadomasochistic abuse, sexual bestiality, or the simulation of any act involving sexual activity; and
 - Transmits any of these sexual acts live over a computer on-line service, Internet service, or local bulletin board service certain sexual acts when the person knows or should know or has reason to believe the transmission is being viewed by a person less than 16 years of age.

The CS further provides that the fact that an undercover operative or law enforcement officer was involved in the detection and investigation of this offense is not a defense to prosecution for this offense.

The penalties provided for this new lewd or lascivious offense are the penalties provided for the current lewd or lascivious exhibition offense: if the person committing the offense is 18 years of age or older, the offense is a second degree felony; if the person committing the offense is less than 18 years of age, the offense is a third degree felony.

- Amends s. 847.0135(2), F.S., (computer pornography), to expressly state that the conduct described in that section is prohibited.
- Amends s. 921.022, F.S., the Criminal Punishment Code offense ranking chart to reflect changes in subsection referencing of s. 800.04, F.S., by the amendment of this section by this CS.
- Reenacts the following sections of the Florida Statutes: 394.912(9); 775.082(9)(a); 775.084(1)(d); 775.15(7); 775.21 (4)(c) and (10)(b); 787.01(3); 787.02(3); 914.16; 943.0435(1)(a); 943.0585; 943.059; 944.606(1)(b); 944.607(1)(a); 947.1405(7); 948.01(15); 948.03(4), (5), and (6); and 948.06(2)(a).
- Provides that the effective date of the CS is October 1, 2000.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The Second District Court of Appeal recently declared s. 787.025, F.S., to be unconstitutionally vague, finding that the term “other than a lawful purpose” fails to give persons of common intelligence adequate notice of the proscribed conduct. *See Brake v. State*, Case No. 98-02773 (December 10, 1999) (slip. op.). Absent interdistrict conflict, district court decisions bind all Florida trial courts. *Pardo v. State*, 596 So.2d 665 (Fla.1992). A decision of a district court of appeal must be followed by the judges of other districts unless a contrary ruling has been issued from their district or there is a ruling from the Florida Supreme Court superseding that district court. *State v. Sanchez*, 642 So.2d 122 (Fla. 5th DCA 1994).

The Second District Court indicated that the vague language could be cured by simply deleting the term noted as vague. Presently, the changes made to s. 775.025, F.S., by the CS do not incorporate this suggestion or other language to attempt to cure the constitutional defect.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

An analysis of the fiscal impact of the CS was not available at the time this analysis was completed. However, regarding the new lewd or lascivious exhibition offense, the fiscal impact is anticipated by staff to be indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Committee Substitute for Senate Bills 1284, 1476, 1528 and 1616 creates a new offense relating to certain Internet transmissions of pornography. There may be some cross-over between this

offense and the lewd or lascivious exhibition offense created by this CS. However, CS/SB's 1284, 1476, 1528 and 1616 provides that the new section it creates shall not prohibit prosecution of the conduct under a section providing for a greater penalty. The offense created by this CS is a second degree felony; the offense created by CS/SB's 1284, 1476, 1528 and 1616 is a third degree felony. Therefore, there is no conflict.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
