

STORAGE NAME: h0895a.jud

DATE: March 8, 2000

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
JUDICIARY
ANALYSIS**

BILL #: HB 895

RELATING TO: Child pornography and exploitation

SPONSOR(S): Committee on Juvenile Justice, Representative Merchant and Others

TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUVENILE JUSTICE YEAS 12 NAYS 0
 - (2) JUDICIARY YEAS 9 NAYS 0
 - (3) CRIMINAL JUSTICE APPROPRIATIONS
 - (4)
 - (5)
-

I. SUMMARY:

The bill amends chapter 847, F.S., which relates to obscene literature and profanity. The bill adds the definition of "child pornography" to s. 847.001, F.S. Under the bill, any person who knows, or has reasonable cause to believe, that a computer contains images of child pornography, evidence of computer pornography, or evidence that a computer service has been used to solicit sexual activity with a child or induce a child to perform sexual acts, and fails to report that knowledge or belief to the Florida Department of Law Enforcement commits a misdemeanor of the second degree. However, no person shall be held civilly liable for making a report in good faith to the Florida Department of Law Enforcement pursuant to the requirements of the bill. Any person who knowingly and willfully makes a false report pursuant to the requirements of the bill commits a felony of the third degree.

The Florida Department of Law Enforcement is specified as the repository for all reports made pursuant to the requirements of the bill. The Florida Department of Law Enforcement is authorized to promulgate rules for the purpose of carrying out its obligations under the bill.

By giving effect to s. 847.0135(2), F.S., and by mandating reporting of certain offenses, the bill may result in more cases being reported and prosecuted. There will be a fiscal impact associated with the cost of receiving and investigating reports of child pornography, computer pornography, and certain uses of computer services. There will also be a cost associated with the enforcement of specified sanctions. However, increased revenues may be generated through civil forfeiture proceedings and by the imposition of fines against those sentenced for violating the provisions of s. 847.0135, F.S.

The bill takes effect on October 1, 2000.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1. Less Government Yes No N/A

The bill requires any person who knows, or has reasonable cause to believe, that a computer contains certain information to immediately make a report to the Florida Department of Law Enforcement or face criminal penalties. The bill also provides new rulemaking authority.

2. Lower Taxes Yes No N/A

3. Individual Freedom Yes No N/A

4. Personal Responsibility Yes No N/A

5. Family Empowerment Yes No N/A

B. PRESENT SITUATION:

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 Act provides that any person who violates the provisions of the 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. As written, it could be argued that s. 847.0135(2), F.S., does not create a crime. But see State v. Cohen, 696 So. 2d 435 (Fla. 4th DCA 1997)(explaining the differences between pornography prosecutions under s. 827.071 and s. 847.0135, F.S.).

Section 847.0135(3), F.S., prohibits the use of computer services for the purpose of seducing, soliciting, luring, or enticing, or attempting to seduce, solicit, lure, or entice, a child, or a person who is or is believed to be a child, to commit any illegal act described in chapter 794, F.S., (sexual battery), chapter 800, F.S., (lewdness; indecent exposure), or chapter 827, F.S., (child abuse). Any person who violates the provisions of s. 847.0135(3), F.S., commits a felony of the third degree.

Section 847.0135(4), F.S., provides any owners or operators of computer on-line services who knowingly permit subscribers to use their computer services to commit violations of the Act are subject to first degree misdemeanor penalties.

C. EFFECT OF PROPOSED CHANGES:

Section 1 of the bill amends s. 847.001, F.S., which provides definitions for the chapter. The bill adds "child pornography," to the section, providing a new subsection (1). The bill defines "child pornography" to mean any image depicting, or intended to depict, a minor engaged in 'sexual conduct' as defined in subsection (12)." The bill moves the definition of sexual conduct to subsection (12). The bill specifically excludes from the definition of "child pornography" any image of a mother breast-feeding her baby.

Section 1 of the bill renumbers the remaining subsections and amends a cross-reference for conformity.

Section 2 of the bill amends s. 847.0135, F.S., giving effect to subsection (2) and providing a new subsection (5).

In amending s. 847.0135(2), F.S., the bill provides language which actually prohibits the conduct specified in the subsection. The new language makes it clear that it is a crime to engage in activities described in s. 847.0135(2), F.S. The bill provides a third degree felony penalty for any person who:

- (a) knowingly compiles, enters into, or transmits by means of a computer;
- (b) makes, prints, publishes, or reproduces by other computerized means;
- (c) knowingly causes or allows to be entered into or transmitted by means of a computer;
or
- (d) buys, sells, receives, exchanges, or disseminates,

any notice, statement, or advertisement of any minor's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information, for purposes of facilitating, encouraging, offering, or soliciting sexual conduct of or with any minor, or the visual depiction of such conduct. This section of the bill also replaces the word "or" before the phrase "any minor's name . . ." with the word "of."

The bill creates mandatory reporting requirements, adding a new subsection (5) to s. 847.0135, F.S. The bill requires that any person who knows, or has reasonable cause to believe, that a computer contains images of child pornography as specified in the new definition provided in s. 847.001(1), F.S., or evidence of a violation of s. 847.0135(2), F.S., relating to computer pornography, or evidence of a violation of s. 847.0135(3), F.S., relating to prohibited uses of computer services, to immediately report such to the Florida Department of Law Enforcement. Examples of persons who must report include computer repair technicians, computer system administrators, or Internet service providers. The bill provides second degree misdemeanor sanctions for any person who has such knowledge or belief and fails to make a report. A third degree felony penalty is provided for any person who knowingly and willfully makes a false report under the requirements of the subsection.

Florida law already requires persons who know or have reasonable cause to believe that a child is being abused to report that knowledge to the Department of Children and Families. s. 39.201, F.S. Failure to report child abuse is a first degree misdemeanor. s. 39.205, F.S. In Barber v. State, 592 So. 2d 330, 335 (Fla. 2d DCA 1992), the court rejected constitutional challenges against the child abuse reporting law and held that the statute was not overbroad. The language in the bill mirrors the language approved in Barber.

Similarly, the language in the bill related to false reporting penalties and to good faith immunity is identical to the language found in s. 39.203(1)(a), F.S., and s. 39.205, F.S.

The bill gives authority to the Florida Department of Law Enforcement to promulgate necessary rules for processing reports made in accordance with these requirements. Any person who makes a report in good faith pursuant to the requirements of the bill is afforded immunity from any civil liability that may arise in connection with the disclosures.

Section 3 of the bill provides an effective date of October 1, 2000.

D. SECTION-BY-SECTION ANALYSIS:

Please refer to Paragraph II-C (Effect of Proposed Changes) above.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

By giving effect to s. 847.0135(2), F.S., and by providing a mandatory reporting requirement, the bill may result in more cases being reported and prosecuted. As a result of an increase in the number of prosecutions, revenues may be generated pursuant to the provisions of s. 775.083, F.S., which allows for the imposition of fines at sentencing. Additionally, any personal property used as an instrumentality in the commission of a felony is subject to forfeiture under the Florida Contraband Forfeiture Act, ss. 932.701 - 932.707, F.S. Such proceedings may be an additional source of revenues. Increased revenues may also be generated through fines imposed against those sentenced for failing to make a report or for intentionally making a false report pursuant to the bill.

2. Expenditures:

The bill gives effect to s. 847.0135(2), F.S., and provides mandatory reporting requirements. FDLE says it cannot provide an estimate of the costs since it has no experience receiving reports required by the bill and cannot estimate how many it might receive.

Reports of a person's knowledge or reasonable belief that a computer contains images of child pornography are to be received, documented and catalogued by FDLE. Presently, there is no agency designated as the central repository for receiving such reports. Expenditures associated with establishing and staffing a repository for receiving, documenting, and cataloging this information pursuant to the provisions of the bill will be required.

There may also be additional expenditures associated with investigation and prosecution because the mandatory reporting requirement may bring more of these offenses to the attention of law enforcement.

FDLE has requested funding for a "Computer Crime Center" in its budget request. This request is for \$2.3 million in F.Y. 2000-01, and \$1.8 million for the second year. According to FDLE, child pornography cases would "constitute a major portion of the Center's efforts if this bill is enacted."

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Please refer to Paragraph III-A(1) (FISCAL IMPACT ON STATE GOVERNMENT: Revenues) above.

2. Expenditures:

Please refer to Paragraph III-B(2) (FISCAL IMPACT ON STATE GOVERNMENT: Expenditures) above.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The Criminal Justice Economic Conference has not yet evaluated the fiscal impact of the bill.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds. Additionally, the bill is a criminal law and exempt from the mandates provision.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority of counties or municipalities to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill would not reduce the percentage of a state tax shared with counties or municipalities. Therefore, it would not contravene the requirements of Article VII, Section 18 of the Florida Constitution.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Any bill that criminalizes communications can be subject to First Amendment challenge. This bill requires person to report instances of child pornography and criminalizes the transmission via computer of the visual depiction of sexual conduct of or with a minor. The definition of child pornography incorporates the definition of sexual conduct. The definition of sexual conduct in the statute is:

actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; **actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast;** or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. (emphasis added).

Section 847.001(11), Fla. Stat. (emphasis added).

The emphasized portion of the definition of "sexual conduct" was struck down in another statute (s. 827.071(1)(g), F.S., which criminalized the possession of child pornography) as overbroad by the Florida Supreme Court in Schmitt v. State, 590 So. 2d 404, 411-413 (Fla. 1991), because the emphasized portion criminalized innocent conduct.¹ However, the Schmitt court severed the objectionable portion of the statute and held that the judicially modified statute was constitutional. Schmitt, 590 So. 2d at 415.

If this bill were challenged, the court could follow Schmitt and judicially "read" the same language out of the statute.

The definition of "sexual conduct" in s. 827.071(1)(g), F.S., has been amended:

"Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, **with the intent to arouse or gratify the sexual desire of either party**; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

Section 827.071(1)(g), F.S. (emphasis added).

This definition has not been challenged.

In Reno v. ACLU, 521 U.S. 844 (1997), the court struck down a statute designed to protect children from harmful materials on the Internet. However, this bill deals with child pornography. Child pornography is not protected by the First Amendment. See Osborne v. Ohio, 495 U.S. 103 (1990). The Schmitt court held that materials criminalized under the judicially modified 827.071 would be obscene and not entitled to First Amendment protection. Schmitt, 590 So. 2d at 416-417. Obscenity is not entitled to First Amendment protection. Miller v. California, 413 U.S. 15 (1973).

B. RULE-MAKING AUTHORITY:

The bill directs the Florida Department of Law Enforcement to promulgate rules pursuant to the ss. 120.54 and 120.536(1), F.S., that will be necessary for cataloguing and documenting reports of information received pursuant to the requirements of s. 847.0135(5), F.S.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The House Committee on Judiciary considered the bill on March 8, 2000. Representative Merchant offered an amendment to the definition of "sexual conduct" to match the definition in section 827.071(1)(g), Florida Statutes. The amended definition reads:

¹ The court gave as an example that under the statute as written, possession of a photograph of a parent changing a child's diaper would be criminal since it showed actual physical contact with a person's unclothed buttocks. Schmitt, 590 So. 2d at 413.

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“Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

The amendment passed without objection and the Committee reported the bill and amendment favorably.

VII. SIGNATURES:

COMMITTEE ON JUVENILE JUSTICE:

Prepared by:

Staff Director:

Lori Ager

Lori Ager

AS REVISED BY THE COMMITTEE ON JUDICIARY:

Prepared by:

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