

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1107 Prohibited Acts in Connection with Obscene or Lewd Materials
SPONSOR(S): Criminal Justice Subcommittee, Gottlieb
TIED BILLS: IDEN./SIM. **BILLS:** CS/SB 160

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	15 Y, 0 N, As CS	Bruno	Hall
2) Justice Appropriations Subcommittee	12 Y, 0 N	Jones	Gusky
3) Judiciary Committee			

SUMMARY ANALYSIS

In recent years, the sex industry has developed increasingly realistic and advanced sex dolls. Robotic sex dolls have interactive capabilities and even programmable personalities. The industry largely markets dolls resembling adults; however, niche manufacturers create and sell child-like sex dolls (CLSDs).

Experts emphasize that using CLSDs would likely positively reinforce pedophilic ideation, at least for some people. Additionally, research suggests that people who have actually molested children have a 10 to 50 percent recidivism rate. Already at a risk of reoffending, child molesters gaining access to CLSDs that positively reinforce their behavior poses a significant threat to children. Other commentators have expressed concerns, about child- and adult-dolls alike, that the dolls' passive nature normalizes unequal sexual power dynamics, which are particularly pronounced when an adult molests a child.

CS/HB 1107 prohibits a person from knowingly possessing, selling, lending, giving away, distributing, transmitting, showing, or transmuting an obscene CLSD. Simple possession of an obscene CLSD is a second degree misdemeanor, punishable by up to 60 days in county jail and a \$500 fine.

Selling, lending, giving away, distributing, transmitting, showing, transmuting, or possessing with intent to do any of these is a first degree misdemeanor, punishable by up to one year in county jail and a \$1,000 fine, for a first offense, and a third degree felony, punishable by up to five years in prison and a \$5,000 fine, for a second or subsequent offense. The unranked third degree felony offense is ranked, by default, in Level 1 of the Criminal Punishment Code Offense Severity Ranking Chart.

To the extent that persons are arrested for, charged with, and convicted of the criminal offenses created in the bill, the bill will have an indeterminate fiscal impact to state and local governments as these cases are processed through the criminal justice system. See Fiscal Impact.

The bill provides an effective date of October 1, 2019.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

In recent years, the sex industry has developed increasingly realistic and advanced sex dolls,¹ Robotic sex dolls have interactive capabilities and even programmable personalities.² The industry largely markets dolls resembling adults; however, niche manufacturers create and sell child-like sex dolls (CLSDs).

The owner of a leading Japanese company making CLSDs is an admitted pedophile who has never acted on his urges.³ Though his company markets the dolls as an alternative to acting on pedophilic impulses, experts emphasize that using CLSDs would likely positively reinforce pedophilic ideation, at least for some people.⁴ Additionally, research suggests that people who have actually molested children have a 10 to 50 percent recidivism rate.⁵ Already at a risk of reoffending, child molesters gaining access to CLSDs that positively reinforce their behavior poses a significant threat to children. Other commentators have expressed concerns, about child- and adult-dolls alike, that the dolls' passive nature normalizes unequal sexual power dynamics, which are particularly pronounced when an adult molests a child.⁶

Great Britain and Australia have explicitly outlawed importing and distributing CLSDs, but the United States federal government and states, including Florida, have not. This year, the Kentucky Legislature introduced legislation criminalizing possession of a CLSD⁷ after a judge dismissed child pornography charges against a man for possessing two CLSDs – one resembling a 6- to 8-year-old girl and the other an infant.⁸ The court reasoned that no actual child was involved, and therefore the CLSD was not child pornography.⁹ In Massachusetts, police tracked an online CLSD order to a registered sex offender, prompting them to discover and charge him with possession of other child pornography; he was not charged for possessing the doll.¹⁰ Many online sellers and search engines, including eBay and Google, proactively block sales of and searches for CLSDs.¹¹

Regulation of Obscenity and Child Pornography

The First Amendment to the United States Constitution guarantees the right to free speech.¹² The government may restrict obscenity and child pornography, however, because neither qualifies as protected speech.

¹ Julie Beck, *A (Straight, Male) History of Sex Dolls*, The Atlantic (Aug. 6, 2014), <https://www.theatlantic.com/health/archive/2014/08/a-straight-male-history-of-dolls/375623/> (last visited Mar. 28, 2019).

² Marie-Helen Maras and Lauren R. Shapiro, *Child Sex Dolls and Robots: More Than Just an Uncanny Valley*, Journal of Internet Law (Dec. 2017), at 4, https://www.researchgate.net/publication/321137227_Child_Sex_Dolls_and_Robots_More_Than_Just_an_Uncanny_Valley (last visited Mar. 28, 2019).

³ Jason Lee, *Can Child Dolls Keep Pedophiles from Offending*, The Atlantic (Jan. 11, 2016), <https://www.theatlantic.com/health/archive/2016/01/can-child-dolls-keep-pedophiles-from-offending/423324/> (last visited Mar. 28, 2019).

⁴ *Id.*

⁵ *Id.*

⁶ Beck, *supra* note 1.

⁷ Kentucky S.B. 102 (2019), <https://legiscan.com/KY/bill/SB102/2019> (last visited Mar. 28, 2019).

⁸ Associated Press, *No porn charge for Kentucky man who ordered sex dolls resembling children*, WDRB (Oct. 4, 2018), https://www.wdrb.com/news/crime-reports/no-porn-charge-for-kentucky-man-who-ordered-sex-dolls/article_b8ecdeb6-55bb-52d0-8daf-c01776797112.html (last visited Mar. 28, 2019).

⁹ *Id.*

¹⁰ Ally Donnelly, *Child Sex Dolls: Why Aren't They Illegal?*, NECN (Jul. 23, 2018), <https://www.necn.com/news/new-england/Child-Sex-Dolls-Why-Arent-They-Illegal-488937711.html> (last visited Mar. 28, 2019).

¹¹ *Id.*

¹² U.S. Const. Amend. I.

Obscenity

The United States Supreme Court (Supreme Court) developed the test for determining whether material is obscene in *United States v. Miller*.¹³ Florida uses the *Miller* test to define obscenity, which refers to the status of material that:

- The average person, applying contemporary community standards, would find appeals to the prurient interest;
- Depicts or describes, in a patently offensive way, sexual conduct; and
- Taken as a whole lacks serious literary, artistic, political, or scientific value.¹⁴

Florida law criminalizes a variety of acts related to obscenity in ch. 847, F.S. Section 847.011, F.S., prohibits a person from the following acts, knowingly committed, relating to specified obscene materials:¹⁵

- Sells;
- Lends;
- Gives away;
- Distributes;
- Transmits;
- Shows;
- Transmutes;
- Possesses with the intent to sell, lend, give away, distribute, transmit, show, or transmute;
- Designs;
- Copies;
- Draws;
- Photographs;
- Poses for;
- Writes;
- Prints;
- Publishes;
- Manufactures;
- Prepares;
- Advertises; or
- Hires, employs, uses, or permits another person to do any of these acts.

Relevant to CLSDs, s. 847.011(1)(a), F.S., prohibits any of these acts with an article or instrument intended for obscene use. A CLSD may fall under this definition, if a prosecutor could prove obscenity. A first violation of s. 847.011(1)(a), F.S., is a first degree misdemeanor, punishable by up to one year in county jail and a \$1,000 fine; a second or subsequent offense is a third degree felony, punishable by up to five years in prison and a \$5,000 fine.¹⁶

Obscenity, however, is notoriously difficult to define, as a Supreme Court Justice famously noted when saying, "I know it when I see it."¹⁷ The *Miller* test relies on applicable community standards, which some have noted are significantly more accepting of sexualized content today due to the easy accessibility of pornography on the internet and the inability of prosecutors to respond to its pervasiveness before it

¹³ 413 U.S. 15 (1973).

¹⁴ S. 847.001, F.S.

¹⁵ Enumerated materials are a book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing photograph, motion picture film, figure, image, phonograph, record, wire or tape or other recording, any written, printed, or recorded matter, or sensory representations, or any article or instrument for obscene use. S. 847.011, F.S.

¹⁶ Ss. 775.082 and 775.083, F.S.

¹⁷ *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

was normalized in society.¹⁸ Most appellate cases in Florida addressing the obscenity statute are over 50 years old, indicating, particularly when coupled with real-world observations, that the crime is rarely charged for standard pornography.

Importantly, the Supreme Court has held that the First Amendment protects private possession of obscenity in one's home:

But we think that mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.¹⁹

Child Pornography

Although child pornography is generally also obscene, the Supreme Court has articulated a different basis for exempting it from First Amendment protections. In *New York v. Ferber*, the Supreme Court held that the government may ban child pornography distribution, regardless of whether the material meets the *Miller* test for obscenity, because:

- The government has a very compelling interest in preventing sexual exploitation of children.
- Distributing visual depictions of children engaged in sexual activity is intrinsically related to the sexual abuse of children, as:
 - These images serve as a permanent reminder of the abuse; and
 - The government must regulate distribution to eliminate production.
- Advertising and selling child pornography provides an economic motive for producing child pornography.
- Visual depictions of children engaged in sexual activity have negligible artistic value.
- Exempting child pornography from free speech protections is consistent with other First Amendment jurisprudence.²⁰

Unlike obscenity, which is protected for private possession purposes, the Supreme Court subsequently held that the government can also ban mere possession of child pornography in *Osborne v. Ohio*.²¹ The Supreme Court, however, limited the definition of child pornography to material featuring actual children in *Ashcroft v. Free Speech Coalition*.²² In *Ashcroft*, the Supreme Court considered provisions of the federal Child Pornography Prevention Act of 1996 (CPPA) prohibiting:

- Virtual child pornography, such as computer-generated images that do not feature an actual child; and
- A sexually explicit image conveying the impression that it depicts a minor engaging in sexually explicit conduct.²³

The Supreme Court held that these restrictions violated the First Amendment by extending to material that did not qualify as obscenity and not implicating actual children. Regarding obscenity, the Supreme Court noted that the CPPA prohibited materials without regard to its potential serious literary, artistic, political, or scientific value; whether the material appeals to the prurient interest; and whether the

¹⁸ Geoffrey Stone, *Sexual Expression and Free Speech: How Our Values Have (D)evolved*, American Bar Association Human Rights Magazine, https://www.americanbar.org/groups/crsi/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/sexual-expression-and-free-speech/ (last visited Mar. 28, 2019).

¹⁹ *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

²⁰ 458 U.S. 747 (1982).

²¹ 495 U.S. 103 (1990).

²² 535 U.S. 234 (2002).

²³ *Id.*

material is patently offensive, considering that some imagery of teenagers engaged in sexually explicit activity may not contravene community standards.²⁴

Regarding child pornography, the *Ashcroft* Court relied on the government's interest in protecting the victims of child pornography; if no actual child was used in the virtual or simulated pornography, there is no victim.²⁵ The Supreme Court specifically rejected an argument that restricting virtual child pornography was justified by the potential that it would encourage actual abuse, reasoning that such an indirect harm "does not necessarily follow from the speech but depends upon some unquantified potential for subsequent criminal acts."²⁶

Florida law prohibits child pornography. A person may not possess any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, includes any sexual conduct by a child;²⁷ simple possession is a third degree felony,²⁸ and possession with intent to promote is a second degree felony.²⁹ A person commits a third degree felony by transmitting child pornography to another.³⁰

Due Process

The Fourteenth Amendment to the United States Constitution conveys substantive due process, protecting certain rights from governmental interference.³¹ In *Lawrence v. Texas*, the Supreme Court held that substantive due process under the Fourteenth Amendment protects intimate consensual sexual conduct such as sodomy, striking down Texas's criminal sodomy law.³² Shortly after *Lawrence*, in 2004, the federal Court of Appeals for the Eleventh Circuit (Eleventh Circuit) considered an Alabama law prohibiting the sale of sex toys and held the constitutional right to privacy did not encompass a right to use sex toys, as such a right was not objectively, deeply rooted in history and tradition.³³ The Eleventh Circuit also declined to recognize the right to engage in private intimate sexual conduct as a fundamental right, triggering strict scrutiny review.³⁴ The Eleventh Circuit again held that consenting adults have no fundamental right to engage in private sexual intimacy, including the use of sex toys, in a 2016 challenge to a Georgia city ordinance;³⁵ the Supreme Court denied certiorari of the Georgia case.³⁶

The federal Court of Appeals for the Fifth Circuit (Fifth Circuit), however, held in 2008 that a Texas statute prohibiting the sale of sex toys violated due process under the Fourteenth Amendment.³⁷ The Fifth Circuit recognized *Lawrence* as standing for a right to be free from governmental intrusion regarding the most private human contact – sexual behavior – and reasoned that "an individual who wants to legally use a safe sexual device during private intimate moments alone or with another is unable to legally purchase a device in Texas, which heavily burdens a constitutional right."³⁸

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 250.

²⁷ S. 827.071, F.S.

²⁸ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Ss. 775.082 and 775.083, F.S.

²⁹ A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

³⁰ S. 847.0137, F.S.

³¹ U.S. Const. Amend. XIV.

³² 539 U.S. 558 (2003).

³³ *Williams v. Alabama*, 378 F.3d 1232 (11th Cir. 2004).

³⁴ *Id.*

³⁵ *Flanigan's Enterprises v. City of Sandy Springs*, 831 F.3d 1342 (11th Cir. 2016).

³⁶ *Flanigan's Enterprises v. City of Sandy Springs*, 138 S.Ct. 1326 (2018).

³⁷ *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008).

³⁸ *Id.*

Criminal Punishment Code

Felony offenses subject to the Criminal Punishment Code³⁹ are listed in a single offense severity ranking chart, which uses 10 offense levels to rank felonies from least severe (1) to most severe (10). Each felony offense is assigned to a level according to the severity of the offense, commensurate with the harm or potential for harm to the community that is caused by the offense, as determined by statute.⁴⁰ If an offense is unlisted on the offense severity ranking chart, the Criminal Punishment Code provides a ranking based on felony level.⁴¹ For example, an unranked third degree felony is a level one offense.⁴²

A person's primary offense, any other current offenses, and prior offenses are scored using the points designated for the offense severity level of each offense.⁴³ A person may also accumulate points for factors such as victim injury points, community sanction violation points, and certain sentencing multipliers.⁴⁴ The final calculation, following the scoresheet formula, determines the lowest permissible sentence that the trial court may impose, absent a valid reason for departure.⁴⁵

If a person scores more than 44 points, the lowest permissible sentence is a specified term of months in state prison, determined by a formula.⁴⁶ If a person scores 44 points or fewer, the court may impose a nonprison sanction, such as a county jail sentence, probation, or community control.⁴⁷

Effect of Proposed Changes

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Selling, lending, giving away, distributing, transmitting, showing, transmuting, or possessing with intent to do any of these is a first degree misdemeanor, punishable by up to one year imprisonment and a \$1,000 fine, for a first offense, and a third degree felony, punishable by up to five years in prison and a \$5,000 fine, for a second or subsequent offense. The unranked third degree felony offense is ranked, by default, in Level 1 of the Criminal Punishment Code Offense Severity Ranking Chart.

The bill provides an effective date of October 1, 2019.

B. SECTION DIRECTORY:

- Section 1:** Amends s. 847.011, F.S., relating to prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty.
- Section 2:** Reenacts s. 772.102, F.S., relating to definitions.
- Section 3:** Reenacts s. 847.02, F.S., relating to confiscation of obscene material.
- Section 4:** Reenacts s. 847.03, F.S., relating to officer to seize obscene material.
- Section 5:** Reenacts s. 847.09, F.S., relating to legislative intent.
- Section 6:** Reenacts s. 895.02, F.S., relating to definitions.
- Section 7:** Reenacts s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity ranking chart.

³⁹ All felony offenses, other than capital felonies, committed on or after October 1, 1998, are subject to the Criminal Punishment Code. S. 921.002, F.S.

⁴⁰ S. 921.0022, F.S.

⁴¹ S. 921.0023, F.S.

⁴² *Id.*

⁴³ Ss. 921.0022 and 921.0024, F.S.

⁴⁴ S. 921.0024(2), F.S.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Ss. 775.082 and 775.083, F.S.

- Section 8:** Reenacts s. 933.02, F.S., relating to grounds for issuance of search warrant.
Section 9: Reenacts s. 933.03, F.S., relating to destruction of obscene prints and literature.
Section 10: Reenacts s. 943.325, F.S., relating to DNA database.
Section 11: Provides an effective date of October 1, 2019.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill has an indeterminate, but likely insignificant, fiscal impact on state government by creating a new felony offense. The Criminal Justice Impact Conference has not yet reviewed the bill.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill has an indeterminate fiscal impact on local governments by creating new misdemeanor offenses.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill appears to be exempt from the requirements of Article VII, Section 18, of the Florida Constitution because it is a criminal law.

2. Other:

A baseline question to the constitutionality of banning CLSDs under the First Amendment is whether CLSDs or certain uses of CLSDs qualify as speech. The requirement that the CLSD must be "obscene" implies the prohibition may be based in part on expression, but the case for a CLSD qualifying as speech is less clear than with pornography.

Based on *Ashcroft*, it appears unlikely that CLSDs qualify as child pornography and cannot be regulated on that ground. If CLSDs are speech, the government may be able to regulate sale and distribution as obscenity; however, the First Amendment still protects private possession of obscenity in one's home, and the provision banning simple possession may not pass muster.

There is a circuit split between the Fifth and Eleventh Circuits on whether *Lawrence* extends to private use of sex toys. However, in Florida, the Eleventh Circuit holding is binding authority, allowing the state to regulate these devices without violating the Fourteenth Amendment.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

To the extent the bill explicitly covers an obscene CLSD, it may encourage prosecution; however, the conduct related to selling or otherwise transmitting an obscene CLSD may be presently prosecutable at the same level as an instrument or article for obscene use.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 26, 2019, the Criminal Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment simplified language relating to simple possession of a CLSD.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.