

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: CS/SB 160

INTRODUCER: Criminal Justice Committee and Senator Book

SUBJECT: Prohibited Acts in Connection with Obscene or Lewd Materials

DATE: March 1, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Storch</u>	<u>Jones</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	<u>Tulloch</u>	<u>Cibula</u>	<u>JU</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 160 prohibits a person from knowingly doing any of the following with an obscene, child-like sex doll:

- Selling, lending, giving away, distributing, transmitting, showing, or transmuted;
- Offering to sell, lend, give away, distribute, transmit, show, or transmute;
- Having in his or her possession, custody, or control with the intent to sell, lend, give away, distribute, transmit, show, or transmute; or
- Advertising in any manner.

The bill provides that a person who violates this provision commits a first degree misdemeanor, while a second or subsequent violation is a third degree felony.

The bill also prohibits a person from knowingly having in his or her possession, custody, or control an obscene, child-like sex doll without intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise. A violation of this provision is punishable as a second degree misdemeanor and a subsequent violation is punishable as a first degree misdemeanor.

Additionally, multiple sections of law are reenacted by the bill to incorporate changes made by the bill.

The Criminal Justice Impact Conference has not yet determined the fiscal impact for this bill. To the extent that the felony and misdemeanor created in the bill results in persons being convicted,

the bill may result in a positive indeterminate fiscal impact on prisons and/or jails (i.e. an increase in prison and/or jail beds).

The bill is effective October 1, 2019.

II. Present Situation:

Obscenity and the Law

The First Amendment of the U.S. Constitution states that, “Congress shall make no law . . . abridging the freedom of speech”¹ This language prohibits the government from having the ability to constrain the speech of citizens.²

However, there are some exceptions to this outright prohibition. The Supreme Court has ruled over time that some forms of speech are not protected by the First Amendment. Among the types of unprotected speech are child pornography,³ “fighting words,” and obscenity.⁴

Case Law Prohibiting the Use of Obscenity

There have been numerous cases that have made it to the United States Supreme Court regarding the issue of obscenity. In 1957, the Court decided *Roth v. U.S.*, a case in which the defendant was challenging the constitutionality of a federal obscenity statute⁵ that prohibited the mailing of “obscene, lewd, lascivious, indecent, filthy, or vile” materials.⁶ The Court was faced with the pointed question of whether obscenity was protected speech.⁷ In its analysis, the Court considered the state laws in effect at the time the U.S. Constitution was ratified in 1792, and noted that most of these states provided criminal punishments for using certain types of speech, such as libel and obscenity. The Court concluded that, “In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance.”⁸

The Court further explained that “[a]ll ideas having even the slightest redeeming social importance” have the full protection of the First Amendment’s guaranties.⁹ Obscenity, however, was not an “essential part of any exposition of ideas” and was of “such slight social value” that

¹ U.S. CONST. amend. I.

² Kathleen Ann Ruane, *Freedom of Speech and Press: Exceptions to the First Amendment*, Congressional Research Service, summary page, (September 8, 2014), available at <https://fas.org/sgp/crs/misc/95-815.pdf> (last visited Feb. 28, 2019).

³ “Child pornography” means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical or other means, of sexually explicit conduct, where (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. See 18 U.S.C.A. s. 2256(8).

⁴ See n. 2, *supra*.

⁵ 18 U.S.C.A s. 1461.

⁶ *Roth v. U.S.*, 354 U.S. 476, 479 (1957).

⁷ *Id.* at 481.

⁸ *Id.* at 482-83.

⁹ *Id.* at 484.

any benefit derived from its use was “clearly outweighed by the social interest in order and morality.”¹⁰ As a result, the Court held that obscenity was not constitutionally protected speech.¹¹

Though the Court had clearly declined to extend protection to obscenity, the more difficult question over time came in defining it. In *Roth*, the Court classified obscene material as that which “deals with sex in a manner appealing to prurient interest,” and defined prurient as “having a tendency to excite lustful thoughts.”¹² Similar difficulties arose a few years later for the Court in *Jacobellis v. Ohio*, where a man’s conviction for possession and exhibition of a film portraying a single explicit sexual scene hinged on whether the French film at issue was in fact obscene.¹³ The Court held that the film was not obscene;¹⁴ and it was in Justice Stewart’s concurrence that he famously demonstrated the difficulty of explaining obscenity, stating it is “indefinable” but “I know it when I see it.”¹⁵

It wasn’t until the Court’s decision in *Miller v. California* that clarity in defining obscenity was established with the creation of what is now commonly referred to as the *Miller Test*.¹⁶ The three-prong *Miller Test* requires the trier of fact to consider the following factors to determine if something is obscene:

- (1) Whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest;
- (2) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (3) Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁷

Obscenity Involving Minors

Federal law prohibits obscenity involving minors, and those who violate the law often face harsher penalties than if the offense involved adults only.¹⁸ The law prohibits any individual from knowingly transferring or attempting to transfer obscene material using any means to a minor under 16 years of age.¹⁹ It is also prohibited for any person to knowingly produce, distribute, receive, or possess with intent to transfer or distribute material that appears to depict minors engaged in sexually explicit conduct and is deemed obscene.²⁰

The threshold for determining whether material involving minors is obscene is slightly lower than the *Miller Test*. Material involving minors can be considered obscene if:

- It depicts a minor engaging in sexually explicit conduct;

¹⁰ *Id.* at 485 (quoting *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-72 (1942)(internal citations omitted).

¹¹ *Id.* at 485.

¹² *Id.* at 487 and n. 20.

¹³ *Jacobellis v. Ohio*, 378 U.S. 184, 185-87, 193 (1964).

¹⁴ *Id.* at 193.

¹⁵ *Id.* at 197.

¹⁶ *Miller v. California*, 413 U.S. 15, 24 (1973).

¹⁷ *Id.* (citations omitted).

¹⁸ The United States Department of Justice, *Citizen’s Guide to U.S. Federal Law on Obscenity*, available at <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-obscenity> (last visited Feb. 28, 2019).

¹⁹ 18 U.S.C.A. s. 1470 (1998).

²⁰ 18 U.S.C.A. s. 1466A. (2003).

- It depicts an image that is, or appears to be a minor engaged in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse; and
- The image lacks serious literary, artistic, political, or scientific value.²¹

The Court tends to grant greater protections to minors, routinely upholding state statutes that penalize those who possess or disseminate obscene material relating to minors. In *New York v. Ferber*, the defendant was convicted for distributing material that depicted a sexual performance by a minor under the age of 16 in violation of a state law that prohibited persons from knowingly promoting material that depicted such a performance.²² In *Ferber*, the Court held that the statute at issue did not violate the First Amendment, explaining that the states have a compelling interest, and thus are granted more leeway, in regulating pornographic depictions of children.²³ The Court reasoned that such material bears so heavily on the welfare of children engaged in its production that a balance of compelling interests is struck and, therefore, these materials are not afforded the protections of the First Amendment.²⁴

Florida Obscenity Laws

In *Miller*, the Court explained that state laws that regulate obscene material must be carefully limited as written or construed in order to adequately protect the values of the First Amendment.²⁵ Current Florida law defines “obscene” to mean the status of material which:

- (1) The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
- (2) Depicts or describes, in a patently offensive way, sexual conduct;²⁶ and
- (3) Taken as a whole, lacks serious literary, artistic, political, or scientific value.²⁷

Under this state’s obscenity statute, the possession, custody, or control of obscene material²⁸ by any person who knowingly sells, lends, gives away, distributes, transmits, shows, transmutes, offers to sell, lend, give away, distribute, transmit, show, or transmute, or has in his or her possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show,

²¹ *Id.* See also *New York v. Ferber*, 458 U.S. 747, 764 (1982).

²² *New York v. Ferber*, 458 U.S. 747, 749 (1982).

²³ *Ferber*, 458 U.S. at 756.

²⁴ *Id.* at 747-48, 756-62.

²⁵ *Miller*, 413 U.S. 15, 24-25.

²⁶ “Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, 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. A mother’s breastfeeding of her baby does not under any circumstance constitute “sexual conduct.” Section 847.001(16), F.S.

²⁷ Section 847.001(10), F.S.

²⁸ The following materials are listed as examples of an obscene material: Any obscene 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, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose. Section 847.011(1)(a), F.S.

transmute, or advertise in any manner commits a first degree misdemeanor.²⁹ A subsequent violation is punishable as a third degree felony.³⁰

Additionally, the possession, custody, or control of obscene material by any person who does not have the intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise commits a second degree misdemeanor.³¹ A subsequent violation is punishable as a first degree misdemeanor.³²

The courts have consistently held that the obscenity statute is not overbroad; and that, in light of the fact that obscenity is not protected by the First and Fourteenth Amendments, obscenity is subject to limited regulation pursuant to the police power left to the states.³³

If a violation of the obscenity statute is based on the distribution or offer to distribute material that depicts a minor engaged in any act or conduct that is harmful to minors, such a violation is a third degree felony.³⁴ The penalty applies regardless of a person's ignorance of a minor's age, a minor's misrepresentation of his or her age, a bona fide belief of a minor's age, or a minor's consent. Additionally, none of these circumstances may be raised as a defense in a prosecution.³⁵

Sex Dolls

The sex toy industry is now a \$15 billion industry, with projections that it will surpass \$50 billion by 2020.³⁶ A main component in today's industry are sex dolls – a type of sex toy that is shaped and sized to resemble a human sexual partner.³⁷ Such dolls are engineered to warm to the human touch,³⁸ customizable to include accessories, and equipped with settings to change facial expressions.³⁹

²⁹ Section 847.011(1)(a), F.S. A first degree misdemeanor is punishable by a state prison term not exceeding 1 year, a fine not exceeding \$1,000, or both. Sections 775.082 and 775.083, F.S.

³⁰ *Id.* A third degree felony is punishable by a state prison term not exceeding 5 years, a fine not exceeding \$5,000, or both. Sections 775.082 and 775.083, F.S.

³¹ Section 847.011(2), F.S. A second degree misdemeanor is punishable by a term of imprisonment not exceeding 60 days, a fine not exceeding \$500, or both. Sections 775.082 and 775.083, F.S.

³² *Id.*

³³ *Johnson v. State*, 351 So. 2d 10, 11 (Fla. 1977).

³⁴ Section 847.011(1)(c), F.S.

³⁵ Section 847.011(1)(d), F.S.

³⁶ Janet Burns, *How the 'Niche' Sex Toy Market Grew Into an Unstoppable \$15B Industry*, Forbes (July 15, 2016), available at <https://www.forbes.com/sites/janetwburns/2016/07/15/adult-expo-founders-talk-15b-sex-toy-industry-after-20-years-in-the-fray/#49bad9be5bb9> (last visited Feb. 28, 2019).

³⁷ Ally Donnelly, *Child Sex Dolls: Why Aren't They Illegal?*, NECN, (July 23, 2018), available at <https://www.necn.com/news/new-england/Child-Sex-Dolls-Why-Arent-They-Illegal-488937711.html> (last visited Feb. 28, 2019).

³⁸ Alice B. Lloyd, *Congressman: Child Sex Dolls Are Coming – And We're Not Ready*, The Weekly Standard (March 15, 2018), available at <https://www.weeklystandard.com/alice-b-lloyd/congressman-child-sex-dolls-are-coming-mdash-and-were-not-ready> (last visited Feb. 28, 2019).

³⁹ Alanna Vagianos, *House Passes Bill Banning Sex Dolls That Look Like Children*, Huffington Post (June 15, 2018), available at https://www.huffingtonpost.com/entry/house-passes-bill-banning-sex-dolls-that-look-like-children_us_5b23c2f7e4b07cb1712dcc7d (last visited Feb. 28, 2019).

Sex dolls that resemble children are made overseas and imported into the U.S., where they are becoming increasingly prevalent.⁴⁰ Child-like sex dolls are robots that are made to look lifelike with prepubescent features and are engineered to warm to the human touch.⁴¹ Such dolls are manufactured in China, Hong Kong, or Japan, and are shipped to the U.S. labeled as clothing mannequins or models in order to avoid detection.⁴² A few U.S.-based internet retailers offer these dolls for sale; however, in April 2018, Amazon announced that it will no longer sell child-like sex dolls.⁴³

Banning Child-like Sex Dolls Outside of the U.S.

There is a growing trend toward banning both the importation and possession of child-like sex dolls. In July 2017, a judge in the United Kingdom ruled that a child-like sex doll that a man was attempting to import was obscene, which led to his conviction for being in violation of a law banning the importation of obscene items. The judge explained that, “any right-thinking person” would consider the doll obscene.⁴⁴

In Canada, there were at least 42 child-like sex dolls seized by Canadian border officials between January 2016 and August 2018. The dolls were seized and labeled as illegal child pornography. Despite there being no tangible scientific evidence to show child-like sex dolls lead to acts against children, a lawyer for the Canadian Centre for Child Protection explained that acting out a sexual fantasy on a realistic doll could lead someone to prey on a real child.⁴⁵

Federal Laws Banning Child-like Sex Dolls

While there is no current ban in the U.S. on importation or private possession of child-like sex dolls, there is a federal law banning the importation of obscene matters. The law makes it a crime to bring into the U.S., or any place subject to the jurisdiction of the U.S., “any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion picture film, paper, letter, writing, print, or other matter of indecent character.”⁴⁶ A first-time offender of this provision shall be fined or imprisoned to a maximum term of 5 years, or both. A subsequent offense shall be subject to a fine or imprisonment of a maximum term of 10 years, or both.⁴⁷

However, in 2018, legislation was passed in the House of Representatives that prohibited the importation of child-like sex dolls, robots, or mannequins.⁴⁸ The Curbing Realistic Exploitative Electronic Pedophilic Robots Act of 2017 (CREEPER Act) would have been the first law preventing the selling and distributing of child-like sex dolls and robots in the U.S.⁴⁹ Regulation of interstate commerce is within congressional power, which is why the CREEPER Act aims to

⁴⁰ See n. 38, *supra*.

⁴¹ *Id.*

⁴² See n. 39, *supra*.

⁴³ *Id.*

⁴⁴ BBC, *Child sex doll an obscene item, judge rules*, (July 31, 2017), available at <https://www.bbc.com/news/uk-40776622> (last visited Feb. 28, 2019).

⁴⁵ Rita Celli and Kathleen Harris, *Dozens of child sex dolls seized by Canadian border agents*, CBC News, (December 12, 2018), available at <https://www.cbc.ca/news/politics/cbsa-border-child-sex-dolls-1.4941213> (last visited Feb. 28, 2019).

⁴⁶ 18 U.S.C.A. s. 1462 (1996).

⁴⁷ *Id.*

⁴⁸ H.R. 4655, 115th Congress 2d Session (2017).

⁴⁹ See n. 39, *supra*.

stop the selling and distributing of these dolls in the U.S., rather than the possession of them. Critics of the legislation claimed that it did not go far enough, in part because the law did not criminalize possession of the dolls.⁵⁰ A similar law in the U.K. prohibits importation of the dolls, but does not prohibit possession.⁵¹

The legislative findings of the CREEPER Act expressed concern that the dolls make rape easier by teaching the rapist how to subdue the victim and overcome resistance.⁵² With this, some have expressed concern that the life-like nature of the dolls can serve as a stepping stone toward committing an actual rape by permitting those unsure about their desires to test them out on the dolls. Others have suggested that these child-like sex dolls can normalize a pedophile's behaviors and potentially shift society's norms to make pedophilia more socially acceptable.⁵³

While possession and distribution of child pornography is criminalized in the U.S., both courts and experts alike have maintained that possession of a child-like sex doll is not considered to be child pornography. In Kentucky, a county judge dropped child pornography charges against a man who was arrested after police tracked a package from China to the man's home that contained two child-like sex dolls. The judge dismissed the case because there was no actual child involved.⁵⁴ In July 2018, police officers went to a man's home in Shirley, Massachusetts, after being notified by eBay that he had purchased a child-like sex doll. This purchase, coupled with a previous eBay purchase of "a doll with the height and weight of an average 8-year-old girl" prompted police to get a search warrant for the man's home. During the search, officers found the doll, which he was not charged for having, and child pornography, which led to his arrest.⁵⁵

III. Effect of Proposed Changes:

The bill prohibits a person from knowingly doing any of the following with an obscene, child-like sex doll:

- Selling, lending, giving away, distributing, transmitting, showing, or transmuting;
- Offering to sell, lend, give away, distribute, transmit, show, or transmute;
- Having in his or her possession, custody, or control with the intent to sell, lend, give away, distribute, transmit, show, or transmute; or
- Advertising in any manner.

The bill provides that a person who violates this provision commits a first degree misdemeanor and a second or subsequent violation is a third degree felony.

⁵⁰ See n. 37, *supra*.

⁵¹ Dr. Marie-Helen Maras and Dr. Lauren R. Shapiro, *Child Sex Dolls and Robots: More Than Just an Uncanny Valley*, Journal of Internet Law, pg. 14 (December 2017), available at https://www.researchgate.net/publication/321137227_Child_Sex_Dolls_and_Robots_More_Than_Just_an_Uncanny_Valley (last visited Feb. 28, 2019).

⁵² H.R. 4655, 115th Congress 2d Session (2017).

⁵³ John F. Banzhaf, *House Bans Child Sex Dolls – As Legal Expert Suggested*, ValueWalk, (June 13, 2018), available at <https://www.valuewalk.com/2018/06/house-bans-child-sex-dolls/> (last visited Feb. 28, 2019).

⁵⁴ WKRC, *Kenton County man who police say bought child sex dolls no longer facing charges*, (October 4, 2018), available at <https://local12.com/news/local/kenton-county-man-who-police-say-bought-child-sex-dolls-no-longer-facing-charges> (last visited Feb. 28, 2019).

⁵⁵ See n. 37, *supra*.

The bill also prohibits a person from knowingly having in his or her possession, custody, or control an obscene, child-like sex doll without intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise. A violation of this provision is punishable as a second degree misdemeanor and a subsequent violation is punishable as a first degree misdemeanor.

The bill reenacts ss. 772.102, 847.02, 847.03, 847.09, 895.02, 921.0022, 933.02, 933.03, and 943.325, F.S., for the purpose of incorporating the amendments made by the bill to s. 847.011, F.S., by reference to that statute.

The bill is effective October 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

The First Amendment of the U.S. Constitution prevents the government from creating laws that restrict the speech of citizens. The bill makes it a crime to knowingly possess or intend to sell or lend, among other things, an obscene child-like sex doll. To the extent that this prohibition restricts a person's right to free speech, the bill may implicate the First Amendment. However, such a provision would likely be upheld as the courts have routinely refused to extend protection to obscene speech involving minors.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. **Government Sector Impact:**

The Criminal Justice Impact Conference has not yet determined the fiscal impact for this bill. To the extent that the felony and misdemeanor created in the bill results in persons being convicted for a felony or misdemeanor, the bill may result in a positive indeterminate fiscal impact on prisons and/or jails (i.e. an increase in prison and/or jail beds).

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

None.

VIII. **Statutes Affected:**

This bill substantially amends section 847.011 of the Florida Statutes.

The bill reenacts the following sections of the Florida Statutes: 772.102, 847.02, 847.03, 847.09, 895.02, 921.0022, 933.02, 933.03, and 943.325.

IX. **Additional Information:**

A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on February 11, 2019:

The Committee Substitute provides that it is a second degree misdemeanor for a person to knowingly have possession, custody, or control of an obscene, child-like sex doll, with a subsequent violation being punishable as a first degree misdemeanor.

B. **Amendments:**

None.