

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB CRJ 18-01 Child Exploitation
SPONSOR(S): Criminal Justice Subcommittee
TIED BILLS: PCB CRJ 18-02 **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Criminal Justice Subcommittee		Bruno	Sumner

SUMMARY ANALYSIS

PCB CRJ 18-01 amends ch. 847, F.S., which currently addresses obscenity, child pornography, and other child exploitation offenses, to address the following issues:

- **Morphed Child Pornography:** The PCB criminally prohibits persons in Florida from possessing, promoting, or transmitting morphed child pornography. "Morphing" refers to a process in which a computer user distorts or transforms one picture into another. Individuals use this technique to create "morphed" child pornography, involving sexually explicit images in which a child's head has been superimposed onto an adult's body. While federal law currently prohibits morphed child pornography, Florida law does not.
- **Computer Pornography and Transmission of Child Pornography:** The PCB allows offenses relating to the possession and transmission of child pornography to be charged as separate offenses based upon each image of child pornography and other proscribed items. Currently, because the statutory language establishing the offenses uses the modifier "any," rather than "a" or "an" before the term "image" and other terms, Florida courts have held that separate offenses may not be charged. The PCB also establishes that sharing child pornography via file servers is criminally prohibited, consistent with a recent Florida Supreme Court decision.
- **Reorganization of Child Exploitation Laws:** Currently, ch. 847, F.S., entitled "Obscenity," contains numerous sections of law which criminalize possession of child pornography, transmission of child pornography through a computer, transmission of depictions to minors that are harmful, luring a child over the Internet for sexual conduct, and other related matters. One section of law, which prohibits the direction or promotion of sexual performances by children and the possession of child pornography, is included in s. 827.071, F.S., in the chapter entitled "Child Abuse." The PCB moves the provisions of s. 827.071, F.S., to ch. 847, F.S. The PCB also renames ch. 847, F.S., as "Obscenity; Child Exploitation" so that the chapter title more accurately reflects its contents.
- **Investigative Subpoenas:** The PCB creates s. 794.10, F.S., to authorize criminal justice agencies to issue subpoenas for investigations involving sexual offenses against children that require the recipient of the subpoena to keep the existence and contents of the subpoena confidential.

The Criminal Justice Impact Conference (CJIC) has not yet considered this PCB; however, after considering a similar version of this PCB filed during the 2017 Regular Session, the CJIC determined that the prior version of the PCB would have a positive significant impact on the need for prison beds.

This PCB provides an effective date of October 1, 2018.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Morphed Child Pornography

“Morphing,” which refers to a process in which a computer user distorts or transforms one picture into another, is a relatively simple technique using inexpensive and readily available software. Individuals use this technique to create “morphed” child pornography, involving images depicting sexually explicit conduct in which a child’s head has been superimposed onto an adult’s body.

Federal Law

Generally, the First Amendment does not protect child pornography. In *New York v. Ferber*,¹ the United States Supreme Court (Supreme Court) recognized that states have a compelling interest in safeguarding the physical and psychological well-being of minors and in preventing their sexual exploitation and abuse. The Supreme Court noted that it was “unlikely that visual depictions of children . . . lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work.”² Under these principles, states have criminalized possessing, distributing, and other acts involving child pornography. However, the constitutionality of criminalizing such acts is less clear when the images at issue are morphed pornography.

Child Pornography Prevention Action of 1996

Prior to 1996, federal law criminalized a variety of acts relating to child pornography.³ At that time, the statutes described images of a minor actually engaging in sexually explicit conduct.⁴ In 1996, Congress passed the Child Pornography Prevention Action of 1996 (CPPA),⁵ creating a definition of “child pornography” that for the first time criminalized acts relating to morphed child pornography. Under the CPPA, “child pornography” was defined as:

- (8) 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,⁶ where:
- (A) The production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
 - (B) Such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct (i.e., virtual child pornography – created without using an actual child);
 - (C) Such visual depiction has been created, adapted, or modified to appear that an identifiable minor⁷ is engaging in sexually explicit conduct (i.e., morphed child pornography); or

¹ 458 U.S. 747 (1982).

² *Id.* at 762-63.

³ See, e.g., 18 USC §2252 (1994 ed.).

⁴ *U.S. v. Hotaling*, 599 F.Supp.2d 306, 309 (N.D.N.Y. 2008); see also 18 USC §§ 2252 and 2256 (1994 ed.).

⁵ Pub. L. No. 104-208.

⁶ 18 USC §2256(2) (1996 ed.) defined the term “sexually explicit conduct” as actual or simulated sexual intercourse (including genital-genital, oral-genital, anal-genital, or oral-anal) whether between persons of the same or opposite sex; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person.

⁷ 18 USC §2556(9) (1996 ed.) defined the term “identifiable minor” as a person who is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature, and:

- Who was a minor at the time the visual depiction was created, adapted, or modified; or
- Whose image as a minor was used in creating, adapting, or modifying the visual depiction.

The term was not be construed to require proof of the actual identity of the identifiable minor.

(D) Such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.⁸

Case Law Following the Passage of the CPPA

In 2002, the Supreme Court decided *Ashcroft v. Free Speech Coalition*,⁹ a case in which a California trade association for the adult entertainment industry challenged section 2256(8)(B) of the CPPA as unconstitutionally overbroad. Section 2256(8)(B) made it a crime to possess or distribute images depicting sexually explicit conduct which could be created by using advanced computer imaging techniques to “create realistic images of children who do not exist” (i.e., virtual child pornography).¹⁰ The Supreme Court held that the speech criminalized in the challenged provision of the CPPA violated the First Amendment since it extended the federal prohibition against child pornography to sexually explicit images that “appeared to” depict minors but were “produced without using any real children.”¹¹ The Supreme Court decided that “by prohibiting child pornography that did not depict an actual child,” section 2256(8)(B) of the CPPA “abridged the freedom to engage in a substantial amount of lawful speech” and was therefore overbroad and unconstitutional.¹²

While the *Ashcroft* decision did not specifically address the constitutionality of 18 U.S.C. 2256(8)(C) (prohibiting *morphed* child pornography), it did note, in dictum, that “[a]lthough morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children...”¹³ This suggests that morphed child pornography is not protected by the First Amendment.¹⁴

Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act

Congress attempted to remedy the constitutional issues raised in *Ashcroft* by passing the “Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act” (Protect Act) in 2003.¹⁵ The Protect Act, in part, narrowed the definition of virtual child pornography in section (8)(B) of the CPPA to include only virtual or computer-generated images that are “indistinguishable from” images of actual minors engaging in sexually explicit conduct.¹⁶

The definition of morphed child pornography contained in section 2256(8)(C) remained unchanged by the Protect Act.

Federal Case Law since the Passage of the Protect Act

To date, the federal statutes relating to morphed child pornography have been upheld.¹⁷ In *United States v. Bach*,¹⁸ the defendant was convicted of possessing morphed child pornography. The image at issue showed a young nude boy sitting in a tree, grinning, with his pelvis tilted upward, his legs opened wide, and a full erection.¹⁹ The photograph of a well-known child entertainer’s head had been “skillfully inserted onto the photograph of the nude boy so that the resulting image appeared to be a nude picture of the child entertainer sitting in the tree.”²⁰ The defendant appealed, arguing that his

⁸ 18 USC §2556(8) (1996 ed.).

⁹ 535 U.S. 234 (2002).

¹⁰ *Supra*, FN 9.

¹¹ *Supra*, FN 8 at 256.

¹² *Id.*

¹³ *Id.* at 242.

¹⁴ *McFadden v. Alabama*, 67 So. 3d 169, 181-82 (Ala. Crim. App. 2010).

¹⁵ Pub. L. No. 108-21.

¹⁶ 18 USC §2256(8)(B).

¹⁷ *United States v. Ramos*, 685 F.3d 120, 134 (2d Cir. 2012), *cert. denied*, 133 S.Ct. 567 (2012); *see also Doe v. Boland*, 630 F.3d 491, 497 (6th Cir. 2011).

¹⁸ 400 F.3d 622 (8th Cir. 2005).

¹⁹ *Id.* at 625.

²⁰ *Id.*

conviction was invalid because the definition of morphed child pornography violated the First Amendment. The United States Court of Appeals for the Eighth Circuit disagreed, holding that morphed child pornography “implicate[s] the interests of real children” and creates a lasting record of an identifiable minor child seemingly engaged in sexually explicit activity.²¹ However, the court noted that:

Although there may well be instances in which the application of §2256(8)(C) violates the First Amendment, this is not such a case. The interests of real children are implicated in the image received by Bach showing a boy with the identifiable face of AC in a lascivious pose. This image involves the type of harm which can constitutionally be prosecuted under *Free Speech Coalition* and *Ferber*.^{22, 23}

More recently, the United States Court of Appeals for the Eighth Circuit decided *United States v. Anderson*.²⁴ In *Anderson*, the defendant was charged with distribution of morphed child pornography relating to an image in which the face of a minor female was superimposed over the face of an adult female engaging in sex with an adult male.²⁵ The defendant moved to dismiss the charge, arguing that the definition of morphed child pornography was unconstitutionally overbroad.²⁶ The court noted that the image at issue was different than the one in *Bach* in that “no minor was sexually abused.”²⁷ However, the court held that because such images falsely portray identifiable children engaging in sexual activity, such images implicate the compelling governmental interest in protecting minors.²⁸ Using this reasoning, the court applied a strict scrutiny balancing test and held that the definition of morphed child pornography was constitutional as applied to the facts of *Anderson*.

Florida Law

Florida law contains a variety of statutes that prohibit acts relating to child pornography. Currently, these statutes are found in ch. 827, entitled “Abuse of Children,” and ch. 847, entitled “Obscenity.” A summary of these laws follows.

Section 827.071, F.S. – Sexual Performance by a Child

Section 827.071(4), F.S., makes it a second degree felony²⁹ for a person to possess with the intent to promote any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, includes any sexual conduct by a child.³⁰

Section 827.071(5), F.S., makes it a third degree felony³¹ for any person to knowingly possess, control, or intentionally view³² a photograph, motion picture, or other presentation listed in subsection (4) that, in whole or in part, he or she knows to include any sexual conduct by a child.³³

²¹ Id. at 632.

²² Id.

²³ *United States v. Hotaling*, 634 F.3d 725 (2d Cir. 2008), cert. denied, 132 S.Ct. 843 (2011) (citing *Bach*, the Court held that “child pornography created by digitally altering sexually explicit photographs of adults to display the face of a child is not protected expressive speech under the First Amendment.)

²⁴ 759 F.3d 891 (8th Cir. 2014).

²⁵ Id.

²⁶ Id.

²⁷ Id. at 895.

²⁸ Id. at 896.

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 Possession of three or more copies of such photographs, etc., is prima facie evidence of intent to promote.

³¹ 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.

³² Section 827.071(1)(b), F.S., defines “intentionally view” as to deliberately, purposefully, and voluntarily view. Proof of intentional viewing requires establishing more than a single image, motion picture, exhibition, show, image, data, computer depiction, representation, or other presentation was viewed over any period of time.

³³ The statute also specifies that the possession, control, or intentional viewing of each such photograph, or presentation listed in subsection (4), is a separate offense. If such photograph or presentation listed in subsection (4) includes sexual conduct by more than one child, then each child in each photograph or presentation that is knowingly possessed, controlled, or intentionally was viewed is a separate offense.

The following definitions apply to the above-described offenses:

- “Child” means any person under the age of 18 years.
- “Promote” means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer or agree to do the same.
- “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.
- “Simulated” means the explicit depiction of sexual conduct which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.³⁴

Section 847.0137, F.S. – Transmitting Child Pornography

Section 847.0137, F.S., specifies that any person who knew or reasonably should have known that he or she was transmitting child pornography to another person commits a third degree felony.

The following definitions apply to the above-described offense:

- “Child pornography” means any image depicting a minor engaged in sexual conduct.
- “Minor” means any person under the age of 18 years.
- “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.
- “Simulated” means the explicit depiction of sexual conduct which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.³⁵

The terms used in the above-described statutes do not specifically include morphed pornography.

Florida Case Law

In 2010, Florida’s Second District Court of Appeal (DCA) decided *Stelmack v. State*,³⁶ a case in which the defendant was charged with possession of child pornography.³⁷ The images at issue showed the faces and heads of two girls, ages 11 and 12, cut and pasted onto images of a 19-year old woman lewdly exhibiting her genitals.³⁸ After closely examining the definition of sexual conduct, the court determined that it requires images to include actual lewd exhibition of the genitals *by a child*.³⁹ Because the only sexual conduct in the images at issue was performed by an adult, the court held that the images were not prohibited by s. 827.071(5), F.S.⁴⁰

The court also noted that the images depicted *simulated* lewd exhibition of the genitals by a child. The state, citing the *Bach* decision, argued that s. 827.071(5), F.S., proscribed such images because they were photographs or representations “which ... *in part* ... include ... sexual conduct by a child.”⁴¹ The

³⁴ SS. 827.01(2) and 827.071(1), F.S.

³⁵ S. 847.001, F.S.

³⁶ 58 So. 3d 874 (Fla. 2d DCA 2010).

³⁷ S. 827.071(5), F.S.

³⁸ Id. at 875.

³⁹ Id. at 877

⁴⁰ Id.

⁴¹ Id.

court disagreed and noted that the legislature specifically excluded *simulated* lewd exhibition from the definition of sexual conduct. In discussing this point, the court stated:

We do not mean to suggest that the possession of composite images of real children that simulate lewd and lascivious exhibition of the children's genitals should not be criminalized. However, there is no indication in either the plain language of section 827.071(5) or its legislative history that the legislature intended to do so. If the legislature had intended to proscribe the possession of composite images that simulate lewd and lascivious exhibition of the genitals, it could have included a provision doing so.⁴² In fact, child pornography has been defined in the federal statutes to specifically include composite images...⁴³

Shortly after the *Stelmack* decision, the Second DCA reviewed another case in which the defendant was convicted of possessing child pornography.⁴⁴ In this case, the images at issue were morphed images in which photographs of children's heads were pasted onto photographs of nude women engaged in sexual intercourse, deviate sexual intercourse, or masturbation. After extensively reviewing the definition of sexual conduct and the elements of the offense, the court reversed the lower court's decision holding that "no child engaged in the sexual conduct" and that "no matter how one parses the words, section 827.071 requires that the depicted sexual conduct be that of a child."⁴⁵

In reversing the trial court's decision, the Second DCA also reviewed the legislative history of the relevant federal statutes. The court noted that Congress had enacted child pornography legislation three times (in 1994, 1996, and 2003), each time broadening the definition of child pornography.⁴⁶ The latest iteration, the Protect Act, defines child pornography to include not only images of actual children engaged in sexually explicit conduct, but also images created by computer that are indistinguishable from images of actual minors engaging in such conduct and images that are created or modified to appear as though an identifiable minor was involved in the production of the depiction.⁴⁷ After noting that Congress specifically removed the defense that no actual minor was involved in the production of the depiction, the court stated that "if our legislature wants to follow Congress's example and prohibit the possession of the types of photographs involved here, we are confident that it can, and perhaps should, craft an appropriate statute."⁴⁸

Effect of Proposed Changes

Section 827.071, F.S., contains provisions relating to sexual performance by a child and child pornography. The PCB repeals this section of statute and moves its criminal provisions to statutes in ch. 847, F.S., which the PCB renames "Obscenity; Child Exploitation."

The PCB moves the provisions of s. 827.071(2) and (3), F.S., relating to sexual performance by a child, to s. 847.003, F.S. The PCB does not change the elements of these offenses.

The PCB moves the provisions of s. 827.071(4) and (5), F.S., which criminalize the possession and promotion of child pornography, to s. 847.0137, F.S., and defines several terms in accordance with federal law to include morphed images. For example:

- "Child pornography" is defined as a visual depiction of sexual conduct, where:
 - The production of such visual depiction involves the use of a minor engaging in sexual conduct; or

⁴² In a footnote, the court noted that they would "leave for another day a discussion of the constitutionality of such a provision." *Id.* at 876.

⁴³ *Id.*

⁴⁴ *Parker v. State*, 81 So. 3d 451 (Fla. 2d DCA 2011).

⁴⁵ *Id.* at 453.

⁴⁶ *Id.* at 455-57.

⁴⁷ *Id.*

⁴⁸ *Id.* at 457.

- Such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct.
- "Identifiable minor" is defined as a person who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark, or other recognizable feature and:
 - Who was a minor at the time the visual depiction was created, adapted, or modified; or
 - Whose image as a minor was used in creating, adapting, or modifying the visual depiction.
 - The PCB further notes that proof of the actual identity of the identifiable minor is not required.
- "Visual depiction" is defined to include any photograph, picture, image, motion picture, film, video, representation, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means. The term also includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

The PCB expands the definition of "sexual conduct" applicable to all of ch. 847, F.S., to include "simulated" lewd exhibition of the genitals.

The PCB establishes possession of three or more visual depictions of child pornography as prima facie evidence of an intent to promote. This significantly broadens the current statutory presumption, which provides that the possession of three or more *copies* of any photograph, motion picture, representation, or presentation is prima facie evidence of an intent to promote.

Cumulatively, the above-described changes make it a crime to possess, promote, or transmit morphed child pornography in Florida.

The PCB also makes numerous conforming changes that reflect the repeal of s. 827.071, F.S., the creation of s. 847.003, F.S., and the expansion of s. 847.0137, F.S.

Computer Pornography and Transmission of Child Pornography

Computer Pornography

Section 847.0135, F.S., entitled the "Computer Pornography and Child Exploitation Prevention Act," provides, in relevant part, that a person who:

- (a) Knowingly compiles, enters into, or transmits by use of computer;
- (b) Makes, prints, publishes, or reproduces by other computerized means;
- (c) Knowingly causes or allows to be entered into or transmitted by use of 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,⁴⁹ or the visual depiction of such conduct, commits a felony of the third degree....^{50, 51}

⁴⁹ "Minor" is defined to mean "**any** person under the age of 18 years." S. 847.001(8), F.S. (emphasis added).

⁵⁰ S. 847.0135(2), F.S. (emphasis added).

⁵¹ 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.

Transmission of Child Pornography

Section 847.0137, F.S., provides that any person in:

- This state who knew or reasonably should have known that he or she was transmitting child pornography⁵² to another person in this state or in another jurisdiction commits a felony of the third degree.⁵³
- Any jurisdiction other than this state who knew or reasonably should have known that he or she was transmitting child pornography to any person in this state commits a felony of the third degree.⁵⁴

For purposes of these offenses, the term “transmit” is defined as “the act of sending and causing to be delivered **any** image, information, or data from one or more persons or places to one or more other persons or places over or through any medium, including the Internet, by use of any electronic equipment or device.”^{55, 56}

Computer Pornography and Transmission of Child Pornography: Number of Counts

In 2015, the Fourth DCA in *State v. Losada*, considered the number of counts that may be charged for the offenses of computer pornography under s. 847.0135(2), F.S., and transmission of child pornography under s. 847.0137(2), F.S., where more than one image of child pornography is at issue.⁵⁷

In this case, the defendant sent an undercover police officer a single image containing child pornography through an online chat. On a subsequent day, the officer requested and received from the defendant access to files stored on the defendant’s computer, which contained 32 images of child pornography. Defendant was charged with and convicted of 33 counts of computer pornography in violation of s. 847.0135(2), F.S., and 33 counts of transmission of child pornography in violation of s. 847.0137(2), F.S. On motion of the defendant, the trial court later vacated all but four counts: one count of computer pornography and one count of transmission of child pornography for each of the two separate interactions with the officer.⁵⁸

The DCA affirmed the trial court’s dismissal of 31 counts of computer pornography and 31 counts of transmission of child pornography. According to the court, such dismissal was warranted based on the Florida Supreme Court’s (FSC) “a/any” test which holds that use of the word “a” before an item described in a statute evidences legislative intent to make each item subject to a separate prosecution; whereas, use of the word “any” before the item, is ambiguous and may evidence legislative intent that only one prosecution is intended for multiple items.⁵⁹

With respect to the statutes at issue in the case, the computer pornography offense applies to “**any** notice, statement, or advertisement” of specified information relating to a minor’s name and the transmission of child pornography offense applies to the transmission, meaning, “the act of sending and causing to be delivered **any** image, information, or data ...,” of child pornography, meaning “**any** image depicting a minor engaged in sexual conduct.” Due to the use of “any” in these provisions, the court

⁵² “Child pornography” is defined to mean “**any** image depicting a minor engaged in sexual conduct.” S. 847.001(3), F.S. (emphasis added).

⁵³ S. 847.0137(2), F.S.

⁵⁴ S. 847.0137(3), F.S.

⁵⁵ S. 847.0137(1)(b), F.S. (emphasis added).

⁵⁶ The section further specifies that it may not be construed to prohibit prosecution of the transmission of child pornography under any other law, including a law providing for greater penalties; that a person is subject to prosecution in Florida if he or she lives outside of Florida if he or she violates the prohibition against transmitting child pornography to any person in this state; and that the section does not apply to subscription-based transmissions such as list servers. S. 847.0137, F.S.

⁵⁷ 175 So.3d 911 (Fla. 4th DCA 2015).

⁵⁸ Id. at 912.

⁵⁹ Id. at 913-914.

concluded that the Legislature did not intend to make each individual image subject to separate prosecution.⁶⁰

Transmission of Child Pornography via File-Sharing Programs

Recently, the FSC resolved a conflict between two DCAs that considered whether the definition of “transmit” as used in s. 847.0137, F.S., to prohibit the transmission of child pornography includes transmission via a file-sharing program. According to the Fifth DCA in *Biller v. State*, the definition did not,⁶¹ whereas the Fourth DCA in *Smith v. State*,⁶² found that a file-sharing program could be used to transmit child pornography in violation of s. 847.0137, F.S.

In *Biller*, the defendant used a peer-to-peer sharing network known as Limewire to download pornographic images of children to his home computer. The files were obtained from other Limewire subscribers who permitted access to their files. Using Limewire, sheriff’s agents retrieved the images from an accessible folder in the defendant’s computer. Based on the retrieval of these images, the defendant was, in relevant part, charged with and convicted of one count of transmitting child pornography using an electronic device in violation of s. 847.0137(2), F.S.⁶³

The Fifth DCA reversed the defendant’s conviction, determining that the child pornography had not been transmitted in violation of the statute because the definition of “transmit” requires a violator to “send” the files to another person. According to the court, “send” could mean that the defendant purposefully acted to deliver the files or that the defendant effectively sent them by maintaining a shared folder and knowingly allowing other Limewire users to access them. As the statute was susceptible to more than one construction, the court held that it was required under s. 775.021, F.S.,⁶⁴ to construe the statute most favorable to the defendant.⁶⁵

Conversely, the Fourth DCA in *Smith v. State*,⁶⁶ found that a file-sharing program could be used to transmit child pornography in violation of s. 847.0137, F.S. In this case, the defendant used a file-sharing program that was designed to allow one-on-one access to stored data. The defendant loaded pornographic images into a specific computer file. Authorization was required to gain access to it. The defendant then sent a “friend request” to a Palm Beach County undercover detective which authorized the detective to access certain of Smith’s files that he had chosen to share with other users. The detective downloaded various images of child pornography from these files. Apart from the “friend request,” the defendant did not know that the files were actually downloaded. Ultimately, the defendant was convicted of 20 counts of transmitting child pornography.⁶⁷

After the defendant’s conviction, the Fifth District decided *Biller*. Based on *Biller*, the defendant filed a motion for postconviction relief, claiming in part that he had been convicted of a non-existent crime because he had not “sent” the images to the undercover detective. The Fourth DCA rejected this argument and affirmed the trial court’s order denying defendant’s motion. According to the court, “when the originator creates the shared file folder and specifically authorizes others to download the contents of that folder, he is ‘sending’ information in the form of the ‘friend’ request and is ‘causing’ the pornographic images to be delivered to another.”⁶⁸ Further, the court certified conflict with *Biller*.⁶⁹

⁶⁰ Id. at 914-915

⁶¹ 109 So. 3d 1240 (Fla. 5th DCA 2013).

⁶² 190 So.3d 94 (Fla. 4th DCA 2015).

⁶³ Id. at 1241.

⁶⁴ Section 775.021(1), F.S., states, “The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.”

⁶⁵ Id.

⁶⁶ 190 So.3d 94 (Fla. 4th DCA 2015).

⁶⁷ Id. at 95-96.

⁶⁸ Id. at 96-97.

⁶⁹ Id.

The FSC resolved the conflict in *Smith*, rejecting the Fifth DCA's decision in *Biller* and affirming the Fourth DCA's decision in *Smith*. The FSC held "that the use of a file-sharing program, where the originator affirmatively grants the receiver access to child pornography placed by the originator in files accessible through the file-sharing program, constitutes the transmission of child pornography under the plain meaning of s. 847.0137, F.S."⁷⁰ The court reasoned that by sending the "friend request" to the third party, the defendant purposefully "caused the delivery of the images to the third party to take place."⁷¹

Effect of Proposed Changes

The PCB amends s. 847.001, F.S., to change the definition of the term:

- "Child pornography" from "**any** image depicting a minor ..." to a cross-reference to the definition of "child pornography" created by the bill in s. 847.0137, F.S., which refers to "**a** visual depiction of sexual conduct" involving the use of "**a** minor"
- "Minor" or "child" from "**any** person under the age of 18..." to "**a** person under the age of 18..."

Likewise, the PCB also amends ss. 847.0135 and 847.0137, F.S., to change the term "any" to "an" where used in the provisions creating the computer pornography and transmission of child pornography offenses. Cumulatively, these amendments result in the ability to charge computer pornography offenses separately based upon each notice, statement, or advertisement and each minor affected, and transmission of child pornography offenses separately based upon each image, data, or information and each recipient.

With respect to the definition of "transmit" set forth in s. 847.0137(1), F.S., the PCB:

- Adds language specifying that "transmit" includes "the act of providing access for receiving and causing to be delivered" visual depictions of child pornography, thereby clarifying, in conformity with the FSC's 2016 decision in *Smith*, that the sharing of child pornography through file-sharing programs constitutes a prohibited transmission under the section.
- Deletes "from one or more persons or places to one or more other persons or places" as such verbiage is unneeded given that s. 847.0137(3), F.S., refers to the fact that the transmission must be sent to "another person" and "a person," respectively.
- Adds "interconnected network" as an example of a medium over or through which child pornography may not be transmitted.

Subpoenas in Investigations Involving Sexual Offenses against Children

Subpoenas

A subpoena is an order directed to a person which requires his or her attendance at a particular time and place to testify as a witness. A subpoena may also require the witness to bring documents or other tangible evidence that may be introduced as evidence in a case.⁷² The Sixth Amendment to the United States Constitution guarantees the defendant in a criminal case the right to have compulsory process for obtaining witnesses in his or her favor.⁷³ Subpoenas may be issued in a criminal investigation⁷⁴ or in a criminal prosecution during discovery⁷⁵ or for trial⁷⁶ by the defendant, his or her counsel, or the state

⁷⁰ 204 So. 3d 18, 19 (Fla. 2016).

⁷¹ Id. at 22.

⁷² BLACK'S LAW DICTIONARY, *What is Subpoena?*, <http://thelawdictionary.org/subpoena/> (last visited Nov. 29, 2017).

⁷³ U.S. Const. am. 6

⁷⁴ Florida law authorizes certain entities to use subpoenas for the purpose of conducting criminal investigations, including, but not limited to, S. 409.920, F.S. (authorizing the Attorney General to subpoena witnesses or materials, including medical records, during an investigation for Medicaid fraud); S. 415.107, F.S. (authorizing a criminal justice agency investigating a report related to abuse, neglect, or exploitation of a vulnerable adult to subpoena related records); and S. 414.411, F.S. (authorizing Department of Financial Services to subpoena witnesses and records related to a public assistance fraud investigation).

⁷⁵ Fla. R. Crim. P. 3.220 (h), allows any party to conduct a deposition by oral examination of any person authorized by the rule, generally including listed witnesses, co-defendants, or unlisted witnesses who have information relevant to the offense charged. The rule provides that the issuance of the subpoena for deposition is the same as provided for in the Florida Rules of Civil Procedure.

attorney. Generally, a subpoena must state the name of the court and the title of action and the time and the place at which the witness is commanded to give testimony or produce evidence.⁷⁷ Once a witness is subpoenaed by either party, he or she must remain available for attendance until the case is resolved or until he or she is excused by the court hearing the case.⁷⁸ A witness's failure to do so could result in being held in contempt of court.⁷⁹

In some cases, a subpoena may require the recipient of the subpoena to not disclose the existence or contents of the subpoena. For example, Florida statute authorizes an agency that is investigating⁸⁰ a violation of Florida's Racketeer Influenced and Corrupt Organizations (RICO) Act⁸¹ to issue a civil investigative subpoena for testimony or documents.⁸² This subpoena is confidential for 120 days, meaning the recipient of the subpoena may not disclose its contents or existence to any person or entity other than his or her attorney during that period.⁸³ The 120-day period may be extended by a circuit court upon showing of good cause by the investigative agency.⁸⁴ For good cause to exist, there must be a showing:

- Of sufficient factual grounds to reasonably indicate a violation of ss. 895.01 – 895.06, F.S.;
- That the documents or testimony requested appear reasonably calculated to lead to the discovery of admissible evidence; and
- Of facts that reasonably indicate that disclosure of the subpoena would hamper or impede the investigation, or would result in a flight from prosecution.⁸⁵

Upon failure of the person or enterprise to comply with the subpoena, the investigative agency may apply to the circuit court to enforce the subpoena.⁸⁶

Similarly, federal law authorizes the Federal Bureau of Investigation (FBI) to issue a National Security Letter (NSL), which is an administrative subpoena that allows the FBI to obtain records from wire or electronic communication service providers if the records are relevant to investigations related to terrorism or clandestine intelligence activities.⁸⁷ For such subpoenas, the FBI may require nondisclosure if it certifies that disclosure may result in danger to the national security of the United States; interference with a criminal counterterrorism, or counterintelligence investigation; interference with diplomatic relations; or danger to the life or physical safety of any person.⁸⁸

To avoid potential First Amendment concerns with such a restraint on speech, Congress passed the USA FREEDOM Act of 2015, which in relevant part authorizes a recipient of a NSL/subpoena to notify the federal government or file a petition for judicial review if the recipient wishes to have a court review a nondisclosure requirement in such subpoena.⁸⁹ Courts have upheld the FBI's authority to issue the subpoenas and the accompanying nondisclosure requirements because of the government interest in protecting national security and the provisions for judicial review included in the Act.⁹⁰

Effect of Proposed Changes

⁷⁶ Fla. R. Crim. P. 3361(a), provides that subpoenas for testimony before the court and subpoenas for production of tangible evidence before the court may be issued by the clerk of the court or by any attorney of record in the case.

⁷⁷ Id.

⁷⁸ S. 914.03, F.S.

⁷⁹ Id.

⁸⁰ In order to issue a subpoena, the level of proof required is that there must be "something more than a fishing expedition, and something less than probable cause." *Check 'n Go of Florida, Inc. v. State* 790 So.2d 454, 458 (Fla. 5th DCA 2001).

⁸¹ The Racketeer Influenced and Corrupt Organizations Act was passed by Congress in 1970 as part of the Organized Crime Control Act of 1970. Florida passed its own RICO Act in 1977.

⁸² S. 895.06, F.S.

⁸³ S. 895.06(2), F.S.

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ S. 895.06(4), F.S.

⁸⁷ 18 USC § 2709(b)(1).

⁸⁸ Id. at § 2709(c)(1)(B).

⁸⁹ 18 USC § 3511(b)(1)(A).

⁹⁰ *In re Nat'l Sec. Letters*, 2016 WL 7017215 (D.D.C. July 25, 2016); *In re Nat'l Sec. Letter*, 165 F.Supp.3d 352 (D. Md. 2015).

The PCB authorizes a criminal justice agency to issue a subpoena for any investigation of an offense involving:

- The sexual exploitation or abuse of a child;
- A sexual offense alleged to have been committed by a sexual offender who has not properly registered; or
- An offense under ch. 847, F.S., involving a child who doesn't qualify under the first two prongs.

The subpoena may require the production of any relevant record, object, or other information relevant to the investigation and may also require the custodian of the record to testify as to its authenticity. The subpoena must identify and describe any record, object, or other information that is required to be produced or testified to and provide a reasonable return date by which the record, object, or information must be submitted.

The PCB defines:

- "Child" as a person who is less than 18 years of age.
- "Criminal justice agency" as a law enforcement agency, court, or prosecutor in this state.
- "Sexual exploitation or abuse of a child" as a criminal offense based on any conduct described in s. 39.01(70), F.S. This definition includes sexual abuse of a child, engaging in sexual acts in front of or with a child, and engaging in human trafficking of a child.
- "Sexual offender" as a person who has been convicted of a sexual offense⁹¹ against a child.

Nondisclosure Requirement

The PCB allows a criminal justice agency to require that the recipient of the subpoena not disclose the existence or contents of the subpoena. In order for the subpoena to be subject to a nondisclosure requirement, it must be accompanied by a written certification that disclosure of the subpoena may result in one of the following circumstances:

- Endangering a person's life or physical safety;
- Encouraging a person's flight from prosecution;
- Destruction of or tampering with evidence;
- Intimidation of potential witnesses; or
- Otherwise seriously jeopardizing an investigation or unduly delaying a trial.

Upon such written certification, the recipient is prohibited from disclosing the contents or existence of the subpoena for 180 days, except that a recipient may disclose the subpoena and its contents to:

- A person to whom disclosure is necessary in order to comply with the subpoena;
- An attorney to obtain legal advice or assistance regarding the subpoena; or
- Any other person authorized by the state official issuing the subpoena.

A person to whom such disclosure is made is bound by the same nondisclosure requirements as the original recipient. A criminal justice agency may require the person disclosing the subpoena to provide

⁹¹ The specified sexual offenses are the offenses for which a person must register as a sexual offender under S. 943.0435(1)(h)1.a.(I), F.S. These offenses include: S. 393.135(2), F.S. (sexual misconduct with an individual with a developmental disability); S. 394.4593(2), F.S. (sexual misconduct with a patient); SS. 787.01, (kidnapping), 787.02, (false imprisonment), or 787.025(2)(c), F.S. (luring or enticing a child), where the victim is a minor; S. 787.06(3)(b),(d),(f),(g), or former (h), F.S. (relating to human trafficking); S. 794.011, F.S. (sexual battery) excluding S. 794.011(10), F.S.; S. 794.05, F.S. (unlawful activity with certain minors); former S. 796.03, F.S. (procuring a person under the age of 18 for prostitution); former S. 796.035, F.S. (selling or buying of minors into sex trafficking or prostitution); S. 800.04, F.S. (lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age); S. 810.145(8), F.S. (relating to video voyeurism); S. 825.1025, F.S. (lewd or lascivious offenses committed upon or in the presence of an elderly person or disabled person); S. 827.071, F.S. (sexual performance by a child); S. 847.0133, F.S. (prohibition of certain acts in connection with obscenity); S. 847.0135, F.S. (computer pornography and traveling to meet a minor) excluding S. 847.0135(6), F.S.; S. 847.0137, F.S. (transmission of pornography by electronic device or equipment); S. 847.0138, F.S. (transmission of material harmful to minors to a minor by electronic device or equipment); S. 847.0145, F.S. (selling or buying of minors); S. 916.1075(2), F.S. (sexual misconduct with a forensic client); or S. 985.701(1), F.S. (sexual misconduct with a juvenile offender).

the identity of the person to whom he or she is disclosing. If a person refuses to comply with the subpoena, the criminal justice agency may request that the circuit court issue an order to comply. The circuit court may then issue an order, a violation of which may be punishable as contempt of court.

Petition Process and Judicial Review

The PCB allows the subpoena recipient to challenge its requirements at any time before the return date by petitioning the circuit court of the county in which he or she lives. The PCB also allows the subpoena recipient to challenge a nondisclosure requirement by filing a petition for judicial review in the circuit court or notifying the criminal justice agency that issued the subpoena. The petition may be for an order to modify or set aside the subpoena, or to modify or set aside the prohibition of disclosure of information.

Other Effects

Witnesses subpoenaed to testify are reimbursed for fees and mileage at the same rate at which witnesses appearing before Florida courts are reimbursed.⁹² A subpoena issued under the PCB must not require the production of anything that is protected from production with a subpoena duces tecum issued by a Florida court.⁹³

The PCB allows criminal justice agencies to require the production of documents as soon as possible, but the recipient of the subpoena must be given at least 24 hours after he or she is served to comply. The criminal justice agency must return any original documents or objects upon request, within a reasonable time, if prosecution does not occur.

The PCB provides that the service of a subpoena under this section may be served as provided in ch. 48, F.S.

The PCB provides immunity from civil liability for persons disclosing information requested in the subpoena. This allows persons with information needed by the criminal justice agency to disclose it without fear that the person being investigated may sue them for disclosing the information.

The PCB provides an effective date of October 1, 2018.

B. SECTION DIRECTORY:

Section 1: Amends s. 16.56, F.S., relating to Office of Statewide Prosecution.

Section 2: Amends s. 39.01, F.S., relating to definitions.

Section 3: Amends s. 39.0132, F.S., relating to oaths, records, and confidential information.

Section 4: Amends s. 39.0139, F.S., relating to visitation or other contact; restrictions.

Section 5: Amends s. 39.301, F.S., relating to initiation of protective investigations.

Section 6: Amends s. 39.509, F.S., relating to grandparents rights.

Section 7: Amends s. 90.404, F.S., relating to character evidence; when admissible.

Section 8: Amends s. 92.56, F.S., relating to judicial proceedings and court records involving sexual offenses and human trafficking.

Section 9: Amends s. 92.561, F.S., relating to prohibition on reproduction of child pornography.

Section 10: Amends s. 92.565, relating to admissibility of confession in sexual abuse cases.

Section 11: Amends s. 435.04, relating to Level 2 screening standards.

Section 12: Amends s. 435.07, F.S., relating to exemptions from disqualification.

⁹² Section 92.142, F.S. establishes the amount that witnesses in a court in Florida will be reimbursed for their time. Consideration is given to the length of testimony, the distance traveled, and the reason testifying.

⁹³ A subpoena may request evidence that is relevant and admissible or is reasonably calculated to lead to admissible evidence. *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995). Certain documents, such as materials prepared for trial or work products, are not discoverable under the Florida Rules of Civil Procedure. Fla. R. Civ. P. 1.280.

- Section 13:** Amends s. 456.074, F.S., relating to certain health care practitioners; immediate suspension of license.
- Section 14:** Amends s. 480.041, F.S., relating to massage therapists; qualifications; licensure; endorsement.
- Section 15:** Amends s. 480.043, F.S., relating to massage establishments; requisites; licensure; inspection.
- Section 16:** Amends s. 743.067, F.S., relating to certified unaccompanied homeless youths.
- Section 17:** Amends s. 772.102, F.S., relating to definitions.
- Section 18:** Amends s. 775.082, F.S., relating to penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison.
- Section 19:** Amends s. 775.0847, F.S., relating to possession or promotion of certain images of child pornography; reclassification.
- Section 20:** Amends s. 775.0877, F.S., relating to criminal transmission of HIV; procedures; penalties.
- Section 21:** Amends s. 775.21, F.S., relating to the Florida Sexual Predators Act.
- Section 22:** Amends s. 775.215, F.S., relating to residency restriction for persons convicted of certain sex offenses.
- Section 23:** Amends s. 784.046, F.S., relating to action by victim of repeat violence, sexual violence, or dating violence for protective injunction; dating violence investigations, notice to victims, and reporting; pretrial release violations; public records exemption.
- Section 24:** Amends s. 794.0115, F.S., relating to dangerous sexual felony offender; mandatory sentencing.
- Section 25:** Amends s. 794.024, F.S., relating to unlawful to disclose identifying information.
- Section 26:** Amends s. 794.056, F.S., relating to Rape Crisis Program Trust Fund.
- Section 27:** Creates s. 794.10, F.S., relating to investigative subpoenas in certain cases involving child victims.
- Section 28:** Amends s. 796.001, F.S., relating to offenses by adults involving minors; intent.
- Section 29:** Repeals s. 827.071, F.S., relating to sexual performance by a child; penalties.
- Section 30:** Amends s. 847.001, F.S., relating to definitions.
- Section 31:** Creates s. 847.003, F.S., relating to sexual performance by a child; penalties.
- Section 32:** Amends s. 847.0135, F.S., relating to prohibited computer usage, traveling to meet minor, penalties.
- Section 33:** Amends s. 847.01357, F.S., relating to exploited children's civil remedy.
- Section 34:** Amends s. 847.0137, F.S., relating to transmission of pornography by electronic device or equipment prohibited; penalties.
- Section 35:** Amends s. 856.022, F.S., relating to loitering or prowling by certain offenders in close proximity to children; penalty.
- Section 36:** Amends s. 895.02, F.S., relating to definitions.
- Section 37:** Amends s. 905.34, F.S., relating to powers and duties; law applicable.
- Section 38:** Amends s. 934.07, F.S., relating to authorization for interception of wire, oral, or electronic communications.
- Section 39:** Amends s. 938.085, F.S., relating to additional cost to fund rape crisis centers.
- Section 40:** Amends s. 938.10, F.S., relating to additional court cost imposed in cases of certain crimes.
- Section 41:** Amends s. 943.0435, F.S., relating to sexual offenders required to register with the department; penalty.
- Section 42:** Amends s. 943.04354, F.S., relating to removal of the requirement to register as a sexual offender or sexual predator in special circumstances.
- Section 43:** Amends s. 943.0585, F.S., relating to court-ordered expunction of criminal history records.
- Section 44:** Amends s. 943.059, F.S., relating to court-ordered sealing of criminal history records.
- Section 45:** Amends s. 944.606, F.S., relating to sexual offenders; notification upon release.
- Section 46:** Amends s. 944.607, F.S., relating to notification to Department of Law Enforcement of information on sexual offenders.
- Section 47:** Amends s. 947.1405, F.S., relating to conditional release program.
- Section 48:** Amends s. 948.03, F.S., relating to terms and conditions of probation.

- Section 49:** Amends s. 948.04, F.S., relating to period of probation; duty of probationer; early termination.
- Section 50:** Amends s. 948.06, F.S., relating to violation of probation or community control; revocation; modification; continuance; failure to pay restitution or cost of supervision.
- Section 51:** Amends s. 948.062, F.S., relating to reviewing and reporting serious offenses committed by offenders placed on probation or community control.
- Section 52:** Amends s. 948.101, F.S., relating to terms and conditions of community control.
- Section 53:** Amends s. 948.30, F.S., relating to additional terms and conditions of probation or community control for certain sex offenses.
- Section 54:** Amends s. 948.32, F.S., relating to requirements of law enforcement agency upon arrest of persons for certain sex offenses.
- Section 55:** Amends s. 960.03, F.S., relating to definitions; ss 960.01-960.28.
- Section 56:** Amends s. 960.197, F.S., relating to assistance to victims of online sexual exploitation and child pornography.
- Section 57:** Amends s. 985.04, F.S., relating to oaths; records; confidential information.
- Section 58:** Amends s. 985.475, F.S., relating to juvenile sexual offenders.
- Section 59:** Amends s. 1012.315, F.S., relating to disqualification from employment.
- Section 60:** Amends s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity ranking chart.
- Section 61:** Directs the Division of Law Revision and Information to rename chapter 847, F.S., as "Obscenity; Child Exploitation."
- Sections 62-133:** Reenact sections of law to incorporate the PCB's amendments to statutes that are cross-referenced in the reenacted sections.
- Section 134:** Provides an effective date of October 1, 2018.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference (CJIC) has not yet considered this PCB; however, the CJIC met on March 29, 2017, and considered a similar version of this PCB filed last year during the 2017 Regular Session, which the CJIC determined would have a positive significant impact on the need for prison beds.⁹⁴

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

⁹⁴ A positive significant impact means a need for more than 25 prison beds.

2. Expenditures:

The PCB may increase the number of defendants sentenced to local jails because the PCB expands the definition of “sexual conduct,” which expands the elements of certain 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 PCB appears to be exempt from the requirements of Article VII, section 18 of the Florida Constitution because it is a criminal law.

2. Other:

Although numerous First Amendment challenges have been made to government regulation of pornography, the Supreme Court has definitively ruled that the First Amendment does not attach to the dissemination of child pornography. “[T]he use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.”⁹⁵

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

⁹⁵ *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (upholding as a compelling state interest the protection of the physical and psychological well-being of children).