

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 365 Transmission of Pornography

SPONSOR(S): Kerner

TIED BILLS: None **IDEN./SIM. BILLS:** SB 656

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee		Clark	White
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Sections 847.0135(2) and 847.0137, F.S., create third degree felony offenses relating to computer pornography and transmission of child pornography. In recent case law, the Fourth District Court of Appeals held that such offenses cannot be separately charged based upon each image of child pornography because the statutory language establishing the offenses uses the modifier “any,” rather than “a” or “an” before the term “image” and other proscribed items. As such, only one offense may be charged even though a violation may involve hundreds of images or other proscribed items.

The bill amends ss. 847.011(3) and (8), 847.0135(2), and 847.0137, F.S., to change terminology from “any” to “a” or “an” and to specifically state in the definition of “transmit” set forth in s. 847.0137(1)(b), F.S., that: “Each act of sending and causing to be delivered such image, information, or data is a separate offense.” Cumulatively, the bill’s amendments result in the ability to charge: computer pornography offenses separately based upon each proscribed notice, statement, or advertisement and each minor affected; and transmission of child pornography offenses separately based upon each proscribed image, data, or information.

The Criminal Justice Impact Conference met on October 28, 2015, and determined that this bill will have a positive indeterminate prison bed impact on the Department of Corrections (i.e., the bill will increase the number of prison beds needed by an indeterminate number).

This bill is effective October 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Chapter 847, F.S., entitled "Obscenity," contains a variety of provisions that proscribe offenses related to pornography and minors. Relevant to this bill are the third degree felony offenses created to prohibit computer pornography and the transmission of child pornography pursuant to ss. 847.0135(2) and 847.0137(2) and (3), F.S., respectively.

For purposes of the chapter, the term:

- "Child pornography" is defined to mean "**any** image depicting a minor engaged in sexual conduct."¹
- "Minor" is defined to mean "any person under the age of 18 years."²

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, or the visual depiction of such conduct, commits a felony of the third degree....^{3, 4}

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 pornography to another person in this state or in another jurisdiction commits a felony of the third degree.⁵
- 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.⁶

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."^{7, 8}

¹ s. 847.001(3), F.S. (emphasis added).

² s. 847.001(3) and (8), F.S.

³ s. 847.0135(2), F.S. (emphasis added).

⁴ 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.

⁵ s. 847.0137(2), F.S.

⁶ s. 847.0137(3), F.S.

⁷ s. 847.0137(1)(b), F.S. (emphasis added).

⁸ 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

Charging of Computer Pornography and Transmission of Child Pornography – Number of Counts
Recently, the Fourth District Court of Appeals 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.⁹

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. The defendant appealed his convictions, arguing, in relevant part, that he could not be prosecuted for 33 counts of each offense because the Legislature did not intend for these offenses to be charged on an image-by-image basis.¹⁰

The court agreed with the defendant and 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 "a/any" test which holds that use of the word "a" before an item described in a statute evidences the intent of the Legislature 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.¹¹

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 concluded that the Legislature did not intend to make each individual image subject to separate prosecution.¹²

Effect of the Bill

The bill amends ss. 847.001, F.S., to change the definition of the term:

- "Child pornography" from "**any** image depicting a minor ..." to "**an** image depicting a minor"
- "Minor" from "**any** person under the age of 18..." to "**a** person under the age of 18...."

Likewise, the bill also amends ss. 847.0135(2) and 847.137, F.S., to change the term "any" to "an" where used in the provisions creating the offenses of computer pornography and transmission of child pornography and to add the following to the definition of "transmit" in s. 847.137(1)(b), F.S.: "Each act of sending and causing to be delivered such image, information, or data is a separate offense."

Cumulatively, the bill's 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.

Finally, the bill reenacts ss. 775.0847(2) and 856.022(1), F.S., to incorporate amendments by the bill to statutes that are cross-referenced in the reenacted sections.

B. SECTION DIRECTORY:

Section 1. Amends s. 847.001, F.S., relating to definitions.

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.

⁹ *State v. Losada*, No. 4D14-2098, 2015 WL 5603461 (Fla. 4th DCA Sept. 24, 2015).

¹⁰ *Id.* at 1-2.

¹¹ *Id.* at 2-4.

¹² *Id.*

Section 2. Amends s. 847.0135(2), F.S., relating to computer pornography; prohibited computer usage; traveling to meet minor; penalties.

Section 3. Amends s. 847.0137, F.S., relating to transmission of pornography by electronic device or equipment prohibited; penalties.

Section 4. Reenacts s. 775.0847(2), F.S., relating to possession or promotion of certain images of child pornography; reclassification.

Section 5. Reenacts s. 856.022(1), F.S., relating to loitering or prowling by certain offenders in close proximity to children; penalty.

Section 6. Provides an effective date of October 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not appear to have any impact on state revenues.

2. Expenditures:

The Criminal Justice Impact Conference met on October 28, 2015, and determined that this bill will have a positive indeterminate prison bed impact on the Department of Corrections (i.e., the bill will increase the number of prison beds needed by an indeterminate number).

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have an impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Although numerous First Amendment challenges have been made to government regulation of pornography, the United States 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.”¹³

B. RULE-MAKING AUTHORITY:

This bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill’s short title is “an act relating to transmission of pornography.” Section 2. of the bill, however, amends s. 847.0135(2), F.S., which establishes the offense of computer pornography and which offense does not necessarily require transmission for a violation. It may be desirable to amend the bill’s title to read “an act relating to pornography.”

Sections 92.561(1), 847.012(3)(b), and 960.197(1)(b), F.S., contain cross-references to definitions set forth in s. 847.001, F.S., which are amended by the bill and, as such, should be reenacted by the bill.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

¹³ New York v. Ferber, 458 U.S. 747, 756-57 (1982). In Ferber, the Court upheld as a compelling state interest protection of the physical and psychological well-being of children.