

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 365 Transmission of Pornography

SPONSOR(S): Criminal Justice Subcommittee; Kerner

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N, As CS	Clark	White
2) Justice Appropriations Subcommittee		McAuliffe	Lloyd
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 (DCA) 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 Fifth DCA held that use of a file-sharing program to share child pornography does not constitute prohibited transmission within the meaning of s. 847.0137, F.S. Thereafter, the Fourth DCA held that such file sharing is prohibited within the meaning of that statute and certified conflict with the Fifth DCA. The Florida Supreme Court has granted review.

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.” Cumulatively, these 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 and each recipient.

With respect to the definition of “transmit” set forth in s. 847.0137(1), F.S., the bill adds language specifying that the term means “the act of providing access for receiving and causing to be delivered” child pornography; thereby, clarifying that the sharing of child pornography through file-sharing programs constitutes a prohibited transmission under the section. The bill also adds “interconnected network” as an example of a medium over or through which child pornography may not be transmitted.

The Criminal Justice Impact Conference (CJIC) met on October 28, 2015, and determined that this bill will have an indeterminate prison bed impact on the Department of Corrections increasing the number of prison beds needed. The CJIC met again on January 6, 2016, to determine if amendments adopted subsequently would affect the prior prison bed impact estimate and found that the estimate would not change.

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

Transmission of Child Pornography via File-Sharing Programs

In recent case law, two District Courts of Appeals have 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 District Court of Appeals in *Biller v. State*, the definition does not.¹³

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.¹⁴

The Fifth District Court 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

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.*

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

¹⁴ *Id.* at 1241.

susceptible to more than one construction, the Court held that it was required under s. 775.021, F.S.,¹⁵ to construe the statute most favorable to the defendant.¹⁶

Conversely, the Fourth District Court of Appeals in *Smith v. State*,¹⁷ 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.¹⁸

After the defendant’s conviction, the Fifth District decided *Biller, infra*. 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 District Court of Appeals 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.”¹⁹ Further, the Court certified conflict with *Biller*.²⁰ The Florida Supreme Court has accepted jurisdiction and granted review on November 10, 2015.²¹

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. 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 bill:

- Adds language specifying that “transmit” means “the act of providing access for receiving and causing to be delivered” child pornography; thereby, clarifying 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(2) and (3), F.S., refer 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.

¹⁵ 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.”

¹⁶ *Id.*

¹⁷ No. 4D14–438, 2015 WL 1334323 (Fla. 4th DCA March 25, 2015).

¹⁸ *Id.* at 2-3.

¹⁹ *Id.* at 3.

²⁰ *Id.*

²¹ *Smith v. State*, No. SC15-782, 2015 WL 7074756, at *1 (Fla. Nov. 10, 2015).

Finally, the bill deletes a duplicative definition in s. 847.0137(1), F.S., and reenacts ss. 92.561(1), 960.197(1)(b), 775.0847(2), 794.056(1), 856.022(1), 905.34(8), 938.085, 943.0435(1)(a), 944.606(1)(b), 944.607(1)(a), 948.06(8)(c), 960.03(3)(e), 960.197(1)(a), and 921.0022(3)(e), 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.

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. 92.561(1), F.S., relating to the prohibition on reproduction of child pornography.

Section 5. Reenacts s. 960.197(1), F.S., relating to assistance to victims of online sexual exploitation and child pornography.

Section 6. Reenacts s. 775.0847(2), F.S., relating to possession or promotion of certain images of child pornography; reclassification.

Section 7. Reenacts s. 794.056(1), F.S., relating to the Rape Crisis Program Trust Fund.

Section 8. Reenacts s. 856.022(1), F.S., relating to loitering or prowling by certain offenders in close proximity to children; penalty.

Section 9. Reenacts s. 905.34(8), F.S., relating to powers and duties; law applicable.

Section 10. Reenacts s. 938.085, F.S., relating to additional cost to fund rape crisis centers.

Section 11. Reenacts s. 943.0435(1)(a), F.S., relating to sexual offenders required to register with the department; penalty.

Section 12. Reenacts s. 944.606(1)(b), F.S., relating to sexual offenders; notification upon release.

Section 13. Reenacts s. 944.607(1)(a), F.S., relating to notification to Department of Law Enforcement of information on sexual offenders.

Section 14. Reenacts s. 948.06(8)(c), F.S., relating to violation of probation or community control; revocation; modification; continuance; failure to pay restitution or cost of supervision.

Section 15. Reenacts s. 960.03(3)(e), F.S., relating to definitions.

Section 16. Reenacts s. 960.197(1)(a), F.S., relating to assistance to victims of online sexual exploitation and child pornography.

Section 17. Reenacts s. 921.0022(3)(e), F.S., relating to Criminal Punishment Code; offense severity ranking chart.

Section 18. 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 an indeterminate prison bed impact on the Department of Corrections increasing the number of prison beds needed. The CJIC met again on January 6, 2016, to determine if amendments adopted subsequently would affect the prior prison bed impact estimate and found that the estimate would not change.

In Fiscal Year 2014-15, there were five offenders sentenced under s. 847.0137(2), F.S., for transmitting child pornography to someone in this state or another jurisdiction, and none sentenced under s. 847.0137(3), F.S., for transmitting child pornography into this state from a jurisdiction outside of the state. One of these offenders was sentenced to prison (mean sentence length of 24 months). The number of acts is unknown among these offenders, but this bill could increase the average sentence length since each offense could be charged separately, with a potentially greater increase at ten or more acts. Furthermore, it is unknown how many more offenders might be charged by extending the definition of transmission of child pornography to file-sharing programs.

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:

This bill appears to be exempt from the requirements of Article VII, section 18 of the Florida Constitution because it is a criminal law.

2. Other:

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."²²

B. RULE-MAKING AUTHORITY:

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

²² *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.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On November 17, 2016, the Criminal Justice Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. This amendment revised definitions and deleted unneeded terminology in s. 847.0137(1), F.S., and reenacted sections of law to incorporate amendments by the bill to statutes that are cross-referenced in the reenacted sections.

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