HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7049 PCB CRJ 17-03 Child Exploitation
SPONSOR(S): Criminal Justice Subcommittee, Spano
TIED BILLS: HB 7053 **IDEN./SIM. BILLS:** SB 1558

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Criminal Justice Subcommittee	15 Y, 0 N	Fields	White
1) Justice Appropriations Subcommittee		Smith	Gusky
2) Judiciary Committee			

SUMMARY ANALYSIS

The bill 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 bill 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. In recent years, individuals have started using this technique to create "morphed" child pornography. This includes sexually explicit images in which an actual 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 bill provides that offenses relating to the possession and transmission of child pornography may be charged as separate offenses based upon each image of child pornography and other proscribed items. Currently, due to the fact that the statutory language establishing the offenses uses the modifier "any," rather than "a" or "an" before the term "image" and other proscribed items, Florida courts have held that separate offenses may not be charged. The bill also clarifies in conformity with a recent Florida Supreme Court decision that the sharing of child pornography via file servers is criminally prohibited.

- *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. Meanwhile, one section of law, which prohibits the direction or promotion of sexual performances by children and the possession of child pornography, is incongruously set forth in s. 827.071, F.S., in the chapter entitled "Child Abuse." To address this issue, the bill moves the provisions of s. 827.071, F.S., to ch. 847, F.S. Numerous other provisions of law that cite to s. 827.071, F.S., are also amended to conform with the bill's changes. The bill also renames ch. 847, F.S., as "Obscenity; Child Exploitation" so that the chapter title more accurately reflects its contents.

The Criminal Justice Impact Conference (CJIC) met on March 29, 2017, and determined the bill would have a positive significant impact on the need for prison beds.

This bill provides an effective date of October 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Overview

Chapter 847, F.S., entitled "Obscenity," contains a variety of provisions that proscribe offenses related to pornography and minors. As discussed below, this bill: creates new offenses in ch. 847, F.S., relating to morphed child pornography; repeals s. 827.071, F.S., relating to offenses for sexual performance by a child, and moves the contents of that section to ch. 847, F.S., so that it is logically organized with other related child pornography and exploitation offenses; amends offenses of computer pornography and transmission of child pornography so that such offenses may be separately charged based on each advertisement, minor affected, image, data, recipient involved, etcetera, as applicable; amends the definition of "transmit" to clarify, in conformity with the Florida Supreme Court's 2016 decision in *Smith v. State,* that the sharing of child pornography through file-sharing programs is prohibited; and renames ch. 847, F.S., as "Obscenity; Child Exploitation."

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. In recent years, individuals have started using this technique to create "morphed" child pornography, e.g., images depicting sexually explicit conduct in which an actual child's head has been superimposed onto an adult's body.

Federal Statutes and Case Law

Generally, the First Amendment does not protect child pornography. In *New York v. Ferber*,[1] the United States 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 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 constitutionally been able to criminalize the possession, distribution, etc., of 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 such material as images created using an actual minor.[4] In 1996, Congress passed the Child Pornography Prevention Action of 1996 (CPPA),[5] which created a definition of "child pornography" which 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:

[1] 458 U.S. 747 (1982).
[2] *Id*. at 762-63.
[3] *See, e.g.,* 18 U.S.C. §2252 (1994 ed.).
[4] *U.S. v. Hotaling*, 599 F.Supp.2d 306, 309 (N.D.N.Y. 2008); *see also* 18 U.S.C. §§ 2252 and 2256 (1994 ed.).
[5] Pub. L. No. 104-208.
[6] 18 U.S.C. §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.

(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 minor[7] is engaging in sexually explicit conduct (i.e., morphed child pornography); or
(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 United States 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. As noted above, 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 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 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 the *Ashcroft* court would have deemed morphed child pornography as 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 virtual or computer-generated images that are "indistinguishable from" images of actual minors engaging in sexually explicit conduct.[16]

Notably, the definition of "morphed" child pornography contained in section 2256(8)(C) remained unchanged between the CPPA and the Protect Act.

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[7] 18 U.S.C. §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.
[8] 18 U.S.C. §2556(8) (1996 ed.).
[9] 535 U.S. 234 (2002).
[10] 18 U.S.C. §2556(8) (1996 ed.).
[11] *Ashcroft*, 535 U.S. 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 U.S.C. §2256(8)(B).

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 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 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 government's compelling interest in protecting minors.[28] Using this reasoning, the court held that the definition of morphed child pornography was constitutional.

Florida Statutes

Florida law currently contains a variety of statutes that prohibit acts relating to child pornography. Currently, these statutes are found in two different chapters. 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 felony[29] 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]

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[17] *See 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*.
[21] *Id*. at 632.
[22] *Id*.
[23] *See also 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.

Section 827.071(5), F.S., makes it a third degree felony[31] for any person to knowingly possess, control, or intentionally view[32] a photograph, motion picture, etc., which, in whole or in part, he or she knows to include any sexual conduct by a child.[33]

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; and
- "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; and
- "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]

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

Florida Case Law
In 2010, Florida's Second DCA decided *Stelmack v. State*,[36] a case in which the defendant was charged with violating s. 827.071(5), F.S. (possession of child pornography). The images at issue showed the faces and heads of two girls, ages 11 and 12, which were cut and pasted onto images of a 19-year old woman lewdly exhibiting her genitals.[37] The court closely examined the definition of "sexual conduct," and determined that it requires images to include actual lewd exhibition of the genitals *by a*

[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 over any period of time.
[33] The statute also specifies that the possession, control, or intentional viewing of each such photograph, etc., is a separate offense. If such photograph, etc., includes sexual conduct by more than one child, then each child in each photograph, etc., that is knowingly possessed, controlled, or intentionally viewed is a separate offense.
[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] *Id*. at 875.

child.[38] 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.[39]

The court also noted that the images depicted *simulated* lewd exhibition of the genitals by a child. The state, citing the *Bach* decision, discussed *supra,* 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."[40] The 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.[41] In fact, child pornography has been defined in the federal statutes to specifically include composite images…[42]

Shortly after the *Stelmack* decision, the Second DCA reviewed another case in which the defendant was convicted of possessing child pornography in violation of s. 827.071(5), F.S.[43] 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."[44]

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.[45] 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.[46] 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."[47]

Effect of Bill

As noted above, s. 827.071, F.S., currently contains provisions relating to sexual performance by a child, as well as provisions relating to child pornography. The bill repeals this section of statute and moves all of its provisions to statutes in ch. 847, F.S., relating to obscenity and child pornography.

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[38] *Id*. at 877
[39] *Id*.
[40] *Id*.
[41] 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.
[42] *Id*.
[43] *Parker v. State*, 81 So. 3d 451 (Fla. 2d DCA 2011).
[44] *Id*. at 453.
[45] *Id*. at 455-57.
[46] *Id*.
[47] *Id*. at 457.

The bill 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 bill does not change the elements of these offenses.

The bill moves the provisions of s. 827.071(4) and (5), F.S., which criminalize the possession and promotion of child pornography, into s. 847.0137, F.S., and defines a variety of 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
    - 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 bill 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 bill expands the definition of "sexual conduct" applicable to all of ch. 847, F.S., to include "simulated" lewd exhibition of the genitals.

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

The bill 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. To better clarify the contents of ch. 847, F.S., the bill also directs the Division of Law Revision and Information to rename the chapter as "Obscenity; Child Exploitation."

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,[48] or the visual depiction of such conduct, commits a felony of the third degree….[49, 50]

Transmission of Child Pornography
As discussed above, s. 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[51] to another person in this state or in another jurisdiction commits a felony of the third degree.[52]
- 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.[53]

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."[54, 55]

Charging of Computer Pornography and Transmission of Child Pornography – Number of Counts
In 2015, the Fourth District Court of Appeal (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.[56]

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.[57]

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.[58]

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[48] "Minor" is defined to mean "***any*** person under the age of 18 years." s. 847.001(8), F.S. (emphasis added).
[49] s. 847.0135(2), F.S. (emphasis added).
[50] 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.
[51] "Child pornography" is defined to mean "***any*** image depicting a minor engaged in sexual conduct." s. 847.001(3), F.S. (emphasis added).
[52] s. 847.0137(2), F.S.
[53] s. 847.0137(3), F.S.
[54] s. 847.0137(1)(b), F.S. (emphasis added).
[55] 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.
[56] *State v. Losada*, 175 Do.3d 911 (Fla. 4th DCA Sept. 24, 2015).
[57] *Id.* at 912.
[58] *Id.* at 913-914.

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.[59]

Transmission of Child Pornography via File-Sharing Programs
Recently, the Florida Supreme Court (FSC) resolved a conflict between two District Courts of Appeal (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;[60] whereas, the Fourth DCA in *Smith v. State*,[61] 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.[62]

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.,[63] to construe the statute most favorable to the defendant.[64]

Conversely, the Fourth DCA in *Smith v. State*,[65] 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.[66]

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 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

[59] *Id.* at 914-915
[60] 109 So. 3d 1240 (Fla. 5th DCA 2013).
[61] 190 So.3d 94 (Fla. 4th DCA 2015).
[62] *Id.* at 1241.
[63] 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."
[64] *Id.*
[65] 190 So.3d 94 (Fla. 4th DCA 2015).
[66] *Id.* at 95-96.

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."[67] Further, the court certified conflict with *Biller.*[68]

The FSC resolved the conflict in *Smith v. State*, 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."[69] 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."[70]

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 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 bill 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 bill:

- 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 Florida Supreme Court's 2016 decision in *Smith v. State,* 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.

B. SECTION DIRECTORY:

Section 1. Amends s. 16.56, F.S., relating to the 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.

[67] *Id.* at 96-97.
[68] *Id.*
[69] 204 So. 3d 18, 19 (Fla. 2016).
[70] *Id.* at 22.

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, F.S., relating to admissibility of confession in sexual abuse cases.

Section 11. Amends s. 435.04, F.S., relating to level 2 screening standards.

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

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 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 visual depictions 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 restrictions 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. Amends s. 796.001, F.S., relating to offenses by adults involving minors; intent.

Section 28. Repeals s. 827.071, F.S., relating to sexual performance by a child; penalties.

Section 29. Amends s. 847.001, F.S., relating to definitions.

Section 30. Creates s. 847.003, F.S., relating to sexual performance by a child; penalties.

Section 31. Amends s. 847.0135, F.S., relating to computer pornography; child exploitation; penalties.

Section 32. Amends s. 847.01357, F.S., relating to exploited children's civil remedy.

Section 33. Amends s. 847.0137, F.S., relating to child pornography; prohibited acts; penalties.

Section 34. Amends s. 856.022, F.S., relating to loitering or prowling by certain offenders in close proximity to children; penalty.

Section 35. Amends s. 895.02, F.S., relating to definitions.

Section 36. Amends s. 905.34, F.S., relating to powers and duties; law applicable.

Section 37. Amends s. 934.07, F.S., relating to authorization for interception of wire, oral, or electronic communications.

Section 38. Amends s. 938.085, F.S., relating to additional cost to fund rape crisis centers.

Section 39. Amends s. 938.10, F.S., relating to additional court cost imposed in cases of certain crimes.

Section 40. Amends s. 943.0435, F.S., relating to sexual offenders required to register with the department; penalty.

Section 41. 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 42. Amends s. 943.0585, F.S., relating to court-ordered expunction of criminal history records.

Section 43. Amends s. 943.059, F.S., relating to court-ordered sealing of criminal history records.

Section 44. Amends s. 944.606, F.S., relating to sexual offenders; notification upon release.

Section 45. Amends s. 944.607, F.S., relating to notification to Department of Law Enforcement of information on sexual offenders.

Section 46. Amends s. 947.1405, F.S., relating to conditional release program.

Section 47. Amends s. 948.013, F.S., relating to administrative probation.

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. Reenacts sections of law to incorporate the bill's amendments to statutes that are cross-referenced in the reenacted sections.

Section 134. Provides an effective date of October 1, 2017.

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 (CJIC) met on March 29, 2017, and determined the bill would have a positive significant impact on the need for prison beds[71].

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 may increase the number of defendants sentenced to local jails because the bill expands the definition of "sexual conduct," which expands the elements of misdemeanor offenses.

[71] A positive significant impact means a need for more than 25 prison beds.

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."[72]

B. RULE-MAKING AUTHORITY: This bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

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