

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1335

Offense of Sexting

SPONSOR(S): Abruzzo

TIED BILLS:

IDEN./SIM. BILLS: SB 2560

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Public Safety & Domestic Security Policy Committee		Cunningham	Cunningham
2) Criminal & Civil Justice Appropriations Committee			
3) Criminal & Civil Justice Policy Council			
4)			
5)			

SUMMARY ANALYSIS

The act of electronically sending sexually explicit messages or photos is generally referred to as "sexting." There are no statutes that specifically address "sexting." Under current law, a person who "sexts" another could be charged with one of the various statutes that prohibit the creation, possession, and transmission of child pornography.

In 2007, 18-year old Phillip Alpert was charged with a violation of s. 847.0137(2), F.S., (transmitting child pornography) after he sent a nude photograph of his then 16-year old girlfriend to his girlfriends' friends and family. The girlfriend had taken the photograph and sent it to Alpert. Alpert was sentenced to more than four years probation and was required to register as a sexual offender.

The bill creates the offense of "sexting." It specifies that a minor commits "sexting" if he or she knowingly:

- (a) Uses a computer, or any other device capable of electronic data transmission or distribution, to transmit or distribute to another person any photograph or video of himself or herself which depicts nudity and is harmful to minors; or
- (b) Possesses a photograph or video that was transmitted or distributed by another minor as described in paragraph (a).

The bill provides the following penalties:

- A first violation is a non-criminal violation punishable by 8 hours of community service and a \$25 fine. Additionally, the court may order the minor to participate in suitable training or instruction in lieu of community service.
- A second violation is a 2<sup>nd</sup> degree misdemeanor punishable by up to 60 days in jail and a \$500 fine.
- A third violation is a 1<sup>st</sup> degree misdemeanor punishable by up to one year in jail and a \$1,000 fine.
- A fourth or subsequent violation is a 3<sup>rd</sup> degree felony punishable by up to five years imprisonment and a \$5,000 fine.

The bill specifies that the "sexting" provisions do not prohibit the prosecution of a minor for conduct relating to material that includes the depiction of sexual conduct or sexual excitement, and does not prohibit the prosecution of a minor for stalking.

The bill creates new misdemeanor offenses which could impact local jails. The bill also creates a 3<sup>rd</sup> degree felony. The Criminal Justice Impact Conference has not met to determine the prison bed impact of this bill.

The bill takes effect October 1, 2010.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Florida's Child Pornography Laws**

Florida law currently contains various statutes that prohibit the creation, possession, and transmission of child pornography. A summary of these laws follows:

##### *Sexual Performance by a Child*

Section 827.071(5), F.S., makes it a 3<sup>rd</sup> degree felony<sup>1</sup> for any person to knowingly possess a photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, he or she knows to include any sexual conduct<sup>2</sup> by a child. The statute specifies that each photograph, motion picture, exhibition, show, representation, or presentation is a separate offense.

##### *Prohibition of Acts Relating to Obscene and Lewd Materials*

Section 847.011(1)(a), F.S., makes it a 1<sup>st</sup> degree misdemeanor<sup>3</sup> for a person to knowingly sell, lend, give away, distribute, transmit, show, or transmute; or have in his or her possession, custody, control with intent to sell, lend, give away, distribute, transmit, show, or transmute; specified obscene items, including pictures, photographs, and images. It is a 3<sup>rd</sup> degree felony if the obscene item used depicts a minor engaged in any act or conduct that is harmful to minors.<sup>4</sup>

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<sup>1</sup> A 3<sup>rd</sup> degree felony is punishable by up to five years imprisonment and a \$5,000 fine. ss. 775.082, 775.083, and s. 775.084, F.S.

<sup>2</sup> The term "sexual conduct" is defined as 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. A mother's breastfeeding of her baby does not under any circumstance constitute sexual conduct. See s. 827.071(1), F.S.

<sup>3</sup> A 1<sup>st</sup> degree misdemeanor is punishable by a term of imprisonment not exceeding 1 year and a \$1,000 fine. ss. 775.082 and 775.083.

<sup>4</sup> S. 847.011(1)(c), F.S. The term "harmful to minors" is defined by s. 847.001, F.S., as any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

- Predominantly appeals to a prurient, shameful, or morbid interest;
- Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and
- Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

A mother's breastfeeding of her baby is not under any circumstance "harmful to minors."

Section 847.011(2), F.S., makes it a 2<sup>nd</sup> degree misdemeanor<sup>5</sup> for a person to have in his or her possession, custody, control specified obscene items, including pictures, photographs, and images, without the intent to sell such items.

The statute specifies that every prohibited act or transaction constitutes a separate offense.<sup>6</sup>

#### *Protection of Minors*

Section 847.0133, F.S., makes it a 3<sup>rd</sup> degree felony for a person to knowingly sell, rent, loan, give away, distribute, transmit, or show any obscene<sup>7</sup> material to a minor.<sup>8</sup> The term material includes pictures, photographs, and images.

#### *Computer Pornography*

Section 847.0135, F.S., makes it a 3<sup>rd</sup> degree felony for a person to:

- Knowingly compile, enter into, or transmit the visual depiction of sexual conduct with a minor by use of computer;
- Make, print, publish, or reproduce by other computerized means the visual depiction of sexual conduct with a minor;
- Knowingly cause or allow to be entered into or transmitted by use of computer the visual depiction of sexual conduct with a minor; or
- Buy, sell, receive, exchange, or disseminate the visual depiction of sexual conduct with a minor.

#### *Transmission of Pornography*

Section 847.0137(2), F.S., specifies that any person who knew or reasonably should have known that he or she was transmitting child pornography<sup>9</sup> to another person commits a 3<sup>rd</sup> degree felony.

#### *Transmission of Material Harmful to Minors*

Section 847.0138, F.S., specifies that any person who knew or believed that he or she was transmitting an image, information, or data that is harmful to minors to a specific individual known by the defendant to be a minor commits a 3<sup>rd</sup> degree felony.

Both minors and adults can be charged with any of the above-described offenses. None of the above-described offenses specifically require that the offense be committed by a minor, and with the exception of s. 847.0138, F.S., none of the above-described offenses require that a prohibited image, photograph, etc., be sent or possessed by a minor.

#### **“Sexting”**

The act of electronically sending sexually explicit messages or photos is generally referred to as “sexting.” In a 2008 survey of 1,280 teenagers and young adults of both sexes, 20% of teens (ages 13-19) and 33% of young adults (ages 20-26) had sent nude or semi-nude photographs of themselves electronically.<sup>10</sup> Additionally, 39% of teens and 59% of young adults had sent sexually explicit text messages.<sup>11</sup>

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<sup>5</sup> A 2<sup>nd</sup> degree misdemeanor is punishable by a term of imprisonment not exceeding 60 days and a \$500 fine. ss. 775.082 and 775.083.

<sup>6</sup> s. 847.011(5), F.S.

<sup>7</sup> Section 847.001, F.S., defines the term “obscene” as the status of material which:

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

A mother's breastfeeding of her baby is not under any circumstance "obscene."

<sup>8</sup> Section 847.011, F.S., defines the term “minor” as any person under the age of 18 years.

<sup>9</sup> Section 847.001, F.S., defines the term “child pornography” as any image depicting a minor engaged in sexual conduct. The statute also defines the term “sexual conduct.” See footnote 2.

<sup>10</sup> “Sex and Tech: Results from a survey of teens and young adults.” The National Campaign to Prevent Teen and Unplanned Pregnancy. December 10, 2008.

<sup>11</sup> *Id.*

There are no statutes that specifically address “sexting.” Under current law, a person who “sexts” another could be charged with one of the above-described offenses, regardless of the age of the person sending the image. Additionally, a person who receives and possesses an image that is the result of “sexting” could be charged with one of the above-described offenses.

In 2007, 18-year old Phillip Alpert was charged with a violation of s. 847.0137(2), F.S., (transmitting child pornography) after he sent a nude photograph of his then 16-year old girlfriend to his girlfriends’ friends and family. The girlfriend had taken the photograph and sent it to Alpert. Alpert was sentenced to more than four years probation and was required to register as a sexual offender.

### **Effect of the Bill**

The bill creates the offense of “sexting.” It specifies that a minor commits “sexting” if he or she knowingly:

- (c) Uses a computer, or any other device capable of electronic data transmission or distribution, to transmit or distribute to another person any photograph or video of himself or herself which depicts nudity and is harmful to minors; or
- (d) Possesses a photograph or video that was transmitted or distributed by another minor as described in paragraph (a).

The bill provides the following penalties:

- A first violation is a non-criminal violation punishable by 8 hours of community service and a \$25 fine. Additionally, the court may order the minor to participate in suitable training or instruction in lieu of community service.
- A second violation is a 2<sup>nd</sup> degree misdemeanor punishable by up to 60 days in jail and a maximum \$500 fine.<sup>12</sup>
- A third violation is a 1<sup>st</sup> degree misdemeanor punishable by up to one year in jail and a maximum \$1,000 fine.<sup>13</sup>
- A fourth or subsequent violation is a 3<sup>rd</sup> degree felony punishable by up to five years imprisonment and a maximum \$5,000 fine.<sup>14</sup>

The bill specifies that the “sexting” provisions do not prohibit the prosecution of a minor for conduct relating to material that includes the depiction of sexual conduct or sexual excitement, and does not prohibit the prosecution of a minor for stalking under s. 784.048, F.S.

## **B. SECTION DIRECTORY:**

**Section 1.** Creates the offense of sexting and provides non-criminal and criminal penalties.

**Section 2.** This bill takes effect October 1, 2010.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

See “Fiscal Comments.”

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<sup>12</sup> See ss. 775.082 and 775.083, F.S.

<sup>13</sup> *Id.*

<sup>14</sup> See ss. 775.082, 775.083, and s. 775.084, F.S.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

See "Fiscal Comments."

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

The bill creates new misdemeanor offenses which could impact local jails. The bill also creates a 3<sup>rd</sup> degree felony. The Criminal Justice Impact Conference has not met to determine the prison bed impact of this bill.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

The bill creates the offense of "sexting" but does not specify where in statute the language should be placed. It is recommended that it be placed in ch. 847, F.S.

The bill uses the terms "minor" and "harmful to minors" but does not define the terms. Section 847.001, F.S., contains definitions of these terms that apply to the entire chapter. Should the "sexting" language be placed in ch. 847, F.S., there would be no need to define these terms.

It is unclear whether a person who transmits multiple photographs of himself or herself at one time could be charged with multiple counts of "sexting" (and thus be subject to the enhanced penalties) or whether it was intended that such activity be charged as a single "sexting" offense.

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**