

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL: CS/SB 2560

INTRODUCER: Criminal Justice Committee and Senators Aronberg and Sobel

SUBJECT: The Offense of Sexting

DATE: April 7, 2010

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	Fav/CS
2.	_____	_____	JU	_____
3.	_____	_____	JA	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

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|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill creates a new offense that applies to minors who engage in “sexting,” beginning with a noncriminal violation for a first offense and escalating with subsequent offenses. Currently, acts that are covered by the bill could be prosecuted as a felony and result in a requirement that the minor register as a sexual offender and be subject to residency restriction laws.

This bill creates a new section of the Florida Statutes.

II. Present Situation:

“Sexting” is a recently coined term that combines the words “sex” and “texting.” It is used to describe the act of sending sexually explicit messages, photographs, or videos by electronic means. As the name suggests, sext messages are most commonly sent by a cell phone text message. Media reports and other studies indicate that sexting is a growing trend among teenagers.¹

¹ See “Teens and Sexting: How and why minor teens are sending sexually suggestive nude or nearly nude images via text messaging.” December 15, 2009. Amanda Lenhart, Pew Research Center, Pew Internet and Family Life Project. http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Teens_and_Sexting.pdf . Last viewed on April 5, 2010.

There are no known Florida cases in which a minor has been convicted for activity that constitutes sexting. However, there are anecdotal reports that prosecutors have required minors who have sexted to participate in some form of pretrial diversion as an alternative to prosecution. Reportedly, this pretrial diversion often requires the minor to participate in a program to educate him or her on the potential dangers of sexting.

Florida Laws that Apply to Sexual Material Depicting Minors

Florida law currently contains various statutes that prohibit the creation, possession, and transmission of sexual materials depicting minors. Some of these laws address photographs or videos that do not rise to the level of child pornography, which is statutorily defined as “any image that depicts a minor engaged in sexual conduct.”² Section 847.001(16), F.S., defines “sexual conduct” as:

[A]ctual 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.”³

The following is a summary of Florida laws that proscribe possession and transmission of sexual materials that depict minors:

Sexual Performance by a Child

Section 827.071(5), F.S., makes it a 3rd degree felony 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 by a child.

Prohibition of Acts Relating to Obscene and Lewd Materials

Section 847.011(1)(a), F.S., makes it a 1st degree misdemeanor 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 3rd degree felony if the obscene item used depicts a minor⁴ engaged in any act or conduct that is harmful to minors.⁵

Section 847.011(2), F.S., makes it a 2nd degree misdemeanor 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.

² The term “child pornography” is defined in ss. 775.0847 and 847.001, F.S. The term “sexual conduct” is also defined in those sections, and the definition in s. 847.001(16), F.S., is set forth in Section III of this analysis.

³ “Sexual conduct” is also defined identically in ss. 775.0847 and 827.071, F.S. It has a more limited definition in s. 365.161, F.S., which relates to obscene or indecent communications made by a telephone that describe certain sexual acts.

⁴ The term “minor” is defined as “any person under the age of 18 years.” s. 847.001, F.S.

⁵ The term “harmful to minors” is defined by s. 847.001(6), F.S., and is set forth in Section III of this analysis.

Protection of Minors

Section 847.0133, F.S., makes it a 3rd degree felony for a person to knowingly sell, rent, loan, give away, distribute, transmit, or show any obscene⁶ material to a minor. “Material” includes pictures, photographs, and images.

Computer Pornography

Section 847.0135(2), F.S., makes it a 3rd 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 to another person commits a 3rd degree felony. To be child pornography, the image must depict a minor engaging in sexual conduct.⁷

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 3rd degree felony.

Both minors and adults can be charged with any of the above-described offenses. The penalty for violation of s. 847.0137, F.S. (transmission of pornography by electronic device or equipment), is greater if the material is transmitted to a minor, and s. 847.0138, F.S., (transmission of material harmful to minors to a minor by electronic device or equipment) applies only when the material is transmitted to a minor.

III. Effect of Proposed Changes:

The bill creates a new offense that applies to “sexting” by a minor. A minor who commits sexting is subject to penalties that are less than the punishment that could be assessed for the same conduct under existing statutes. Also, conviction of sexting would not result in a

⁶ 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.”

⁷ “Child pornography” is defined in s. 847.001(3), F.S.

requirement to register as a sexual offender or to comply with existing residency restriction laws and other laws that apply to persons who are convicted of certain sexual offenses.

Description of the offense: Sexting occurs when a minor:

- *Uses a computer, or any other device capable of electronic data transmission or distribution* – This definition includes cellular phone, the most common means used for sexting.
- *To transmit or distribute to another minor a photograph or video of himself or herself which depicts nudity and is harmful to minors.* - The terms “harmful to minors” and “nudity” are defined in s. 847.001(6) and (9), F.S., respectively.⁸ “Harmful to minors” is defined as:

any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

- (a) Predominantly appeals to a prurient, shameful, or morbid interest;
- (b) 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
- (c) 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.”

The new offense of sexting includes only those photographs or videos that are harmful to minors and that depict nudity. “Nudity” means:

the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. A mother’s breastfeeding of her baby does not under any circumstance constitute “nudity,” irrespective of whether or not the nipple is covered during or incidental to feeding.

Photographs or videos that depict sexual conduct or sexual excitement are not included within the definition of sexting, so the state attorney would have the discretion to prosecute conduct that includes such depictions under any applicable statute. Section 847.001(16), F.S., defines “sexual conduct” 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

⁸ A reference to these statutes, as well as the statutes defining “sexual conduct” and “sexual excitement,” should be added if the new statute is not placed in ch. 847, F.S.

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."

"Sexual excitement" is defined by s. 847.001(17), F.S., as "the condition of the human male or female genitals when in a state of sexual stimulation or arousal."

It should be noted that the offense of sexting, and its reduced penalties, does not include the conduct of a minor who retransmits a sexted photograph or video. Such conduct could also result from immaturity and poor decision-making, but there are many possible motivations and the extent of harm could vary greatly. The state attorney would continue to have discretion in the prosecution of such conduct.

The new statute provides that the new offense would not prohibit prosecution of a minor for stalking under s. 784.148, F.S., if the sexting is used in the course of committing the offense of stalking.

Penalties for sexting: The conduct that is described as sexting by the bill is currently a third degree felony violation of s. 847.0138, F.S. (transmission of material harmful to minors to a minor by electronic device or equipment), when it involves transmission or distribution of the described materials. The new offense includes a graduated punishment schedule:

- A first offense is a noncriminal violation, punishable by 8 hours of community service or a \$60 fine. The \$60 fine is roughly equivalent to payment at minimum wage for 8 hours of community service. The court can also order participation in suitable training or instruction instead of, or in addition to, the community service or fine.
- An offense that occurs after the minor is found to have committed a noncriminal violation for sexting is a second degree misdemeanor. A second degree misdemeanor is punishable by a jail term of no more than 60 days and a fine of no more than \$500. The term "found to have committed" would include cases in which the minor is found guilty or adjudicated delinquent, regardless of whether adjudication is withheld.
- An offense that occurs after the minor is found to have committed a second degree misdemeanor for sexting is a first degree misdemeanor. A first degree misdemeanor is punishable by a jail term of no more than one year and a fine of no more than \$1000.
- An offense that occurs after the minor is found to have committed a first degree misdemeanor for sexting is an unranked third degree felony. A third degree felony is punishable by imprisonment for no more than 5 years and a fine of no more than \$5000. However, because the felony is unranked the offender may commonly be sentenced to a term of probation under supervision by the Department of Corrections.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill avoids potential constitutional issues by not applying to transmission of nudity unless the nudity is harmful to minors.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill creates new misdemeanor offenses for minors who commit the offense a second or third time that could impact local jails.

The Criminal Justice Impact Conference has not yet determined whether the new felony for a fourth conviction would have an impact on the prison population. However, it is unlikely that it would have a significant impact because the activity is currently prosecutable as a felony under existing statutes, and it is only applicable to minors.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by the Criminal Justice on April 7, 2010:

- The bill provides that the new offense only applies to a minor sending a picture to a minor and removes possession of a sexted message by a minor from the new offense.
- The bill changes the punishment for a noncriminal violation for sexting to include either 8 hours of community service or a \$60 fine, and a suitable program of training in lieu of or in addition to either the community service or fine.
- The bill relates the escalation of punishment to a finding that the offender committed the most recent offense, rather than to a specified time period. It also changes the term “conviction” to “found to have committed” to include withheld adjudications and findings of delinquency for purposes of escalation of punishment.

- B. **Amendments:**

None.