

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 595 Sexual Performance by a Child
SPONSOR(S): Criminal Justice Subcommittee; Pafford and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 846

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	14 Y, 0 N, As CS	Cunningham	Cunningham
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Currently, Florida law prohibits a person from *possessing* child pornography – it does not specifically prohibit a person from *viewing* child pornography.

Section 827.071(5), F.S., makes it a 3rd degree felony, ranked in Level 5 of the offense severity ranking chart, for any person to knowingly possess any of the following, which, in whole or in part, he or she knows to include any sexual conduct by a child:

- Photograph,
- Motion picture,
- Exhibition,
- Show,
- Representation, or
- Other presentation.

CS/HB 595 amends s. 827.071(5), F.S., to prohibit a person from *controlling or intentionally viewing* child pornography. The bill also expands the list of items that cannot be possessed, controlled, or viewed to include images, data, and computer depictions, if such items contain sexual conduct by a child. The bill defines the term “intentionally view” as “to deliberately, purposefully, and voluntarily view,” and keeps the offense ranked in Level 5 of the offense severity ranking chart.

The bill specifies that the above prohibition does not apply to material possessed, controlled, or intentionally viewed as part of a law enforcement investigation.

On March 2, 2011, the Criminal Justice Impact Conference determined that this bill would have an indeterminate prison bed impact on the Department of Corrections.

The bill is effect October 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation.

Currently, Florida law does not specifically prohibit a person from *viewing* child pornography. Florida law does currently prohibit a person from *possessing* child pornography.

Section 827.071(5), F.S., makes it a 3rd degree felony¹ for any person to knowingly possess any of the following, which, in whole or in part, he or she knows to include any sexual conduct² by a child:

- Photograph,
- Motion picture,
- Exhibition,
- Show,
- Representation, or
- Other presentation.³

The statute specifies that the possession of each photograph, motion picture, exhibition, show, representation, or presentation is a separate offense.⁴ This offense is ranked in Level 5 of the offense severity ranking chart.⁵

In 2006, Florida's 4th District Court of Appeal held that the passive viewing on the Internet of child pornography does not violate the law because viewing does not constitute possession.⁶ Similarly, federal courts have analyzed the issue of temporary Internet files in the context of the federal child pornography statutes and have held that the mere viewing of a child pornographic image does not constitute knowing possession of the image.⁷ However, the court acknowledged that "knowing possession" should be based upon the manner in which the defendant manages the files.⁸

As of August 2010, eight states had enacted statutes that prohibited a person from viewing child pornography.⁹ Federal law prohibits a person from knowingly accessing with the intent to view specified items that contain child pornography.¹⁰

¹ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

² Section 827.071(1)(g), F.S., defines the term "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 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 Florida's 4th DCA has held that "a pornographic computer image of an actual child constitutes a photograph, representation or other presentation" under s. 827.071(5), F.S. *State v. Cohen*, 696 So.2d 435, 436 (Fla. 4th DCA 1997).

⁴ Section 827.071(5), F.S.

⁵ Criminal offenses are ranked in the "offense severity ranking chart" from level one (least severe) to level ten (most severe) and are assigned points based on the severity of the offense as determined by the legislature. A defendant's sentence is calculated based on points assigned for factors including: the offense for which the defendant is being sentenced; injury to the victim; additional offenses that the defendant committed at the time of the primary offense; the defendant's prior record and other aggravating factors. The points are added in order to determine the "lowest permissible sentence" for the offense.

⁶ *Strouse v. State*, 932 So.2d 326, 328 (Fla. 4th DCA 2006).

⁷ *United States v. Perez*, 247 F.Supp.2d 459, 484 (S.D.N.Y. 2003) (citing *United States v. Zimmerman*, 277 F.3d 426, 435 (3d Cir. 2002)).

⁸ *Id.* (citing *United States v. Tucker*, 305 F.3d 1193, 1205 (10th Cir. 2002) (upholding a conviction based on automatically stored files because the defendant habitually deleted the temporary files manually, demonstrating that he exercised control over them), *cert. denied*, 537 U.S. 1223 (2003)).

⁹ The eight states are Alaska, Arkansas, Delaware, New Jersey, Ohio, Pennsylvania, Utah, and Washington. National Center for Prosecution of Child Abuse. National District Attorneys Association, *Viewing Child Pornography Statutes* (Updated August 2010), <http://www.ndaa.org/pdf/Viewing%20Child%20Pornography%208-2010.pdf> (last accessed March 30, 2011).

¹⁰ 18 U.S.C. s. 2252A (2010)

Effect of the Bill

The bill amends s. 827.071(5), F.S., to prohibit a person from controlling or intentionally viewing child pornography and expands the list of items that cannot be possessed, controlled, or viewed if such items contain sexual conduct by a child. Specifically, the bill makes it a 3rd degree felony for a person to possess, *control*, or *intentionally view* any of the following, which, in whole or in part, he or she knows to include any sexual conduct by a child:

- Photograph,
- Motion picture,
- Exhibition,
- Show,
- Representation,
- *Image*,
- *Data*,
- *Computer depiction*, or
- Other presentation.

The bill defines the term "intentionally view" as "to deliberately, purposefully, and voluntarily view," and specifies that the control or viewing of each of the above-listed items is a separate offense. The bill keeps the offense ranked in Level 5 of the offense severity ranking chart.

The bill specifies that the above prohibition does not apply to material possessed, controlled, or intentionally viewed as part of a law enforcement investigation.

B. SECTION DIRECTORY:

Section 1. Amends s. 827.071, F.S., relating to sexual performance by a child; penalties.

Section 2. Amends s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity ranking chart.

Section 3. The bill is effective October 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

On March 2, 2011, the Criminal Justice Impact Conference determined that this bill would have an indeterminate prison bed impact on the Department of Corrections.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

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:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 6, 2011, the Criminal Justice Subcommittee adopted one amendment to the bill and reported the bill favorably as a Committee Substitute. The amendment clarified language relating to the types of material that cannot be possessed, controlled, or intentionally viewed if such material contains sexual conduct by a child. The amendment also added a provision specifying that the bill's prohibitions do not apply to material possessed, controlled, or intentionally viewed as part of a law enforcement investigation.

This analysis is drafted to the Committee Substitute.