

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 75 Offense of Sexting  
**SPONSOR(S):** Criminal Justice Subcommittee; Abruzzo  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 888

| REFERENCE                              | ACTION           | ANALYST    | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|--|------------------|------------|--|
| 1) Criminal Justice Subcommittee       | 11 Y, 0 N, As CS | Cunningham | Cunningham                               |
| 2) Justice Appropriations Subcommittee |                  |            |  |
| 3) Judiciary Committee                 |                  |            |  |

### SUMMARY ANALYSIS

The act of electronically sending sexually explicit messages or photos of oneself 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 recent years, there have been increasing accounts of minors engaging in sexting. 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 girlfriend's 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 an un-numbered section of statute relating to 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 minor 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 or, if ordered by the court in lieu of community service, a \$60 fine. Additionally, the court may order the minor to participate in suitable training or instruction in lieu of, or in addition to, community service or a fine.
- A minor commits a 2<sup>nd</sup> degree misdemeanor, punishable by up to 60 days in jail and a \$500 fine, for a violation that occurs after being found to have committed a noncriminal sexting offense.
- A minor commits a 1<sup>st</sup> degree misdemeanor, punishable by up to one year in jail and a \$1,000 fine, for a violation that occurs after being found to have committed a 2<sup>nd</sup> degree misdemeanor sexting offense.
- A minor commits a 3<sup>rd</sup> degree felony, punishable by up to five years imprisonment and a \$5,000 fine, for a violation that occurs after being found to have committed a 1<sup>st</sup> degree misdemeanor sexting offense.

On March 2, 2011, the Criminal Justice Impact Conference determined that SB 888, which contains provisions substantially similar to this bill, would have an insignificant prison bed impact on the Department of Corrections. The bill also creates new misdemeanor offenses which could impact local jails.

The bill is effective October 1, 2011.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0075a.CRJS

DATE: 3/23/2011

# 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, or 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<sup>4</sup> engaged in any act or conduct that is harmful to minors.<sup>5</sup>

Section 847.011(2), F.S., makes it a 2<sup>nd</sup> degree misdemeanor<sup>6</sup> for a person to have in his or her possession, custody, or control specified obscene items, including pictures, photographs, and images, without the intent to sell such items. 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.

The statute specifies that every prohibited act, thing, or transaction constitutes a separate offense.<sup>7</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>8</sup> material to a minor.<sup>9</sup> The term "material" includes pictures, photographs, and images.

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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, F.S.

<sup>4</sup> The term "minor" is defined as "any person under the age of 18 years." s. 847.001, F.S.

<sup>5</sup> Section 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."

<sup>6</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, F.S.

<sup>7</sup> Section 847.011(5), F.S.

<sup>8</sup> Section 847.001, F.S., defines the term "obscene" as the status of material which:

### *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<sup>10</sup> 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>11</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 of oneself 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>12</sup> Additionally, 39% of teens and 59% of young adults had sent sexually explicit text messages.<sup>13</sup>

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, depending on the nature of the image sexted and the age of the person to whom the image was sent. 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, depending on the nature of the image sexted. For example, in 2007, 18-year old Phillip Alpert was charged with a violation of s. 847.0137(2), F.S., (transmitting child pornography) after

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- 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>9</sup> Section 847.011, F.S., defines the term “minor” as any person under the age of 18 years.

<sup>10</sup> Section 847.001(16), 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.”

<sup>11</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>12</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>13</sup> *Id.*

he sent a nude photograph of his then 16-year old girlfriend to his girlfriend's friends and family after an argument. 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.

Similarly, in other jurisdictions, law enforcement officers and district attorneys have begun prosecuting teens who sext under laws generally reserved for those who produce, distribute, or possess child pornography. For example, in Pennsylvania, a district attorney gave 17 students who were either pictured in images or found with "provocative" images on their cell phones the option of either being prosecuted under child pornography laws or agreeing to participate in a 5-week after school program and probation.<sup>14</sup> Similar incidents have occurred in Massachusetts, Ohio, and Iowa.<sup>15</sup>

As a result, state legislatures have considered making laws that downgrade the charges for sexting from felonies to misdemeanors. In 2009, Vermont and Utah passed laws that downgraded the penalties for minors and first-time sexting perpetrators.<sup>16</sup>

### Effect of the Bill

The bill creates an un-numbered section of statute relating to 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 minor any photograph or video of himself or herself which depicts nudity<sup>17</sup> and is harmful to minors;<sup>18</sup> 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 or, if ordered by the court in lieu of community service, a \$60 fine. Additionally, the court may order the minor to participate in suitable training or instruction in lieu of, or in addition to, community service or a fine.
- A minor commits a 2<sup>nd</sup> degree misdemeanor, punishable by up to 60 days in jail and a \$500 fine, for a violation that occurs after being found to have committed a noncriminal sexting offense.<sup>19</sup>
- A minor commits a 1<sup>st</sup> degree misdemeanor, punishable by up to one year in jail and a \$1,000 fine, for a violation that occurs after being found to have committed a 2<sup>nd</sup> degree misdemeanor sexting offense.<sup>20</sup>
- A minor commits a 3<sup>rd</sup> degree felony, punishable by up to five years imprisonment and a \$5,000 fine, for a violation that occurs after being found to have committed a 1<sup>st</sup> degree misdemeanor sexting offense.<sup>21</sup>

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<sup>14</sup> Amanda Lenhart, *Teens and Sexting: How and why minor teens are sending sexually suggestive nude or nearly nude images via text messaging*, Pew Research Ctr., 3 (Dec. 15, 2009),

[http://www.pewinternet.org/~media/Files/Reports/2009/PIP\\_Teens\\_and\\_Sexting.pdf](http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Teens_and_Sexting.pdf) (last visited Jan. 24, 2011).

<sup>15</sup> *Id.* See also, Vicki Mabrey and David Perozzi, 'Sexting': Should Child Pornography Laws Apply?, ABC NEWS (Apr. 1, 2010), available at <http://abcnews.go.com/Nightline/phillip-alpert-sexting-teen-child-porn/story?id=10252790> (last visited Jan. 24, 2011)

<sup>16</sup> Lenhart, *supra* note 14, at 3.

<sup>17</sup> Section 847.001(9), F.S., defines the term "nudity" as "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."

<sup>18</sup> See footnote 5 for the definition of "harmful to minors."

<sup>19</sup> See ss. 775.082 and 775.083, F.S.

<sup>20</sup> *Id.*

<sup>21</sup> See ss. 775.082, 775.083, and s. 775.084, F.S.

The bill defines the term “found to have committed” as “a determination of guilt that is the result of a plea or trial, or a finding of delinquency that is the result of a plea or an adjudicatory hearing, regardless of whether adjudication is withheld.”

The bill specifies that the transmission or distribution of multiple photographs or videos is a single offense if the photographs or videos were transmitted or distributed by the minor within the same 24-hour period. The bill also provides that the possession of multiple photographs or videos that were transmitted or distributed by a minor is a single offense if such photographs or videos were transmitted or distributed by the minor in the same 24-hour period.

The bill specifies that the sexting provisions do not prohibit the prosecution of a minor for a violation of any law of the state if the photograph or video that depicts nudity also includes the depiction of sexual conduct or sexual excitement,<sup>22</sup> and does not prohibit the prosecution of a minor for stalking under s. 784.048, F.S.

**B. SECTION DIRECTORY:**

Section 1. Creates an unnumbered section of statute relating to sexting; prohibited acts; penalties.

Section 2. This bill takes effect October 1, 2011.

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

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

1. Revenues:

The bill may have a positive fiscal impact to the state in that it subjects minors who commit the offense of sexting to fines ranging from \$60 to \$5,000, depending on the number of times the minor has committed the offense.

2. Expenditures:

On March 2, 2011, the Criminal Justice Impact Conference determined that SB 888, which contains provisions substantially similar to this bill, would have an insignificant prison bed impact on the Department of Corrections.

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

1. Revenues:

None.

2. Expenditures:

The bill creates new misdemeanor offenses which could impact local jails.

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

None.

**D. FISCAL COMMENTS:**

None.

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<sup>22</sup> Section 847.001(17), F.S., defines the term “sexual excitement” as the condition of the human male or female genitals when in a state of sexual stimulation or arousal.

### 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:

According to the Florida Department of Law Enforcement (FDLE), because the bill makes a minor's first sexting offense a noncriminal violation, such minor will not have an FDLE record. Such records would only be possessed at the local level, or possibly at the Department of Juvenile Justice (DJJ). If a minor commits sexting offenses in multiple jurisdictions, prosecutors may be unaware of a previous noncriminal violation.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 22, 2011, the Criminal Justice Subcommittee adopted a strike-all amendment to the bill and reported the bill favorably as a Committee Substitute. The strike-all amendment:

- Specifies that a minor commits the offense of sexting if he or she knowingly uses a computer, or other device capable of electronic data transmission or distribution, to transmit or distribute *to another minor* any photograph or video which depicts nudity, as *defined in s. 847.001(9)*, and is harmful to minors, as *defined in s. 847.001(6)*.
- Specifies that a noncriminal sexting offense is punishable by 8 hours of community service or, if ordered by the court, a \$60 fine.
- Defines the term "found to have committed."

This analysis is drafted to the Committee Substitute.