

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 Judiciary Committee

BILL: CS/SB 888

INTRODUCER: Communications, Energy, and Public Utilities Committee and Senator Dean

SUBJECT: Offense of Sexting

DATE: March 31, 2011

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	Fav/1 amendment
2.	<u>Boland</u>	<u>Maclure</u>	<u>JU</u>	Fav/CS
3.	<u>Wiehle</u>	<u>Carter</u>	<u>CU</u>	Pre-meeting
4.	_____	_____	<u>BC</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

“Sexting” is a term that describes the act of sending sexually explicit messages, photographs, or videos of oneself or another person by electronic means. The bill creates a new offense that applies to minors who engage in sexting that involves knowingly using 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 any person that depicts nudity and is harmful to minors. A minor who commits this act is subject to penalties that begin with a noncriminal violation for the first offense and escalate with subsequent offenses. Under the only laws that are currently available for prosecution of acts that are covered by this bill, such acts could be prosecuted as a felony and result in the minor having to register as a sexual offender and be subject to residency restriction laws.

This bill creates an unnumbered section of the Florida Statutes.

II. Present Situation:

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 depicting a minor engaged in sexual conduct.”¹ Section 847.001(16), F.S., defines “sexual conduct” as:

¹ See ss. 775.0847(1)(b) and 847.001(3), F.S.

[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."²

Sexual Performance by a Child

Section 827.071(5), F.S., provides that it is a third-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. The statute specifies that the possession of 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., provides that it is a first-degree misdemeanor 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. However, s. 847.011(1)(c), F.S., provides that it is a third-degree felony if the violation of s. 847.011(1)(a) or (2), F.S., is based on materials that depict a minor³ engaged in any act or conduct that is harmful to minors.⁴

Section 847.011(2), F.S., provides that it is a second-degree misdemeanor 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, etc., such items.

Protection of Minors

Section 847.0133, F.S., provides that it is a third-degree felony for a person to knowingly sell, rent, loan, give away, distribute, transmit, or show any obscene⁵ material to a minor. "Material" includes pictures, photographs, and images.

Computer Pornography

Section 847.0135(2), F.S., provides that it is a third-degree felony for a person to:

² "Sexual conduct" is 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.

³ The term "minor" is defined as "any person under the age of 18 years." Section 847.001(8), F.S.

⁴ The term "harmful to minors" is defined in s. 847.001(6), F.S. For a more detailed definition, see the "Effect of Proposed Changes" section of this bill analysis.

⁵ Section 847.001(10), 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."

- 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., provides that any person in this state who knew or reasonably should have known that he or she was transmitting child pornography to another person in this state or another jurisdiction commits a third-degree felony.

Transmission of Material Harmful to Minors

Section 847.0138(2), F.S., provides 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 or believed by the defendant to be a minor commits a third-degree felony.

Both minors and adults can be charged with any of the offenses described above.

Sexting

“Sexting” is a recently coined term that combines the words “sex” and “texting.”⁶ It is used to describe the act of sending sexually explicit messages, photographs, or videos of oneself or another person 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. In a 2008 survey of 1,280 teenagers and young adults of both sexes, 20 percent of teens (ages 13-19) and 33 percent of young adults (ages 20-26) had sent nude or semi-nude photographs of themselves electronically.⁷ Additionally, 39 percent of teens and 59 percent of young adults had sent sexually explicit text messages.⁸

There is no Florida law that specifically addresses sexting. Under current law, a person who knowingly sends certain sexually explicit images of a minor to another person, or a person who knowingly receives such images, could be charged with any number of different offenses that relate to sexual material depicting minors. For example, in 2007, 18-year-old Phillip Alpert was arrested and charged with transmitting child pornography (among other things) after he sent a nude photo of his 16-year-old girlfriend to her friends and family after they had an argument. In

⁶ Stacey Garfinkle, Sex + Texting = Sexting, *The Washington Post*, Dec. 10, 2008, available at <http://voices.washingtonpost.com/parenting/2008/12/sexting.html> (last visited March 7, 2011).

⁷ National Campaign to Prevent Teen and Unplanned Pregnancy, Sex and Tech: Results from a Survey of Teens and Young Adults, 1, available at http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf (last visited March 7, 2011).

⁸ *Id.*

total, Alpert was charged with 72 offenses, sentenced to five years of probation, and was required to register as a sexual offender.⁹

Similarly, in other jurisdictions, some law enforcement officers and district attorneys have begun prosecuting teens who “sex” under laws generally reserved for producers and distributors of 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 five-week after school program and probation.¹⁰ Similar incidents have occurred in other states, e.g., Massachusetts, Ohio, and Iowa.¹¹

As a result, state legislatures have considered making laws that downgrade the charges for sexting from felonies to misdemeanors. For example, in 2009, Vermont and Utah passed laws that downgraded the penalties for minors and first-time perpetrators of sexting.¹² A Utah statute that generally makes it a crime to distribute pornography in the state (not specifying child pornography) now sets differing punishments for the same offense based on the age of the offender.¹³ If the offense is committed by someone over the age of 18, then the offense is a third-degree felony; if the offense is committed by someone 16 or 17 years of age, then the offense is a class A misdemeanor; and if the offense is committed by someone under the age of 16, then the offense is a class B misdemeanor.¹⁴

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 law. Also, a conviction of sexting would not result in the requirement to register as a sexual offender or to comply with existing residency restriction laws or other laws that apply to persons who are convicted of certain sexual offenses.

Sexting occurs when a minor knowingly 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 any person which depicts nudity, as defined in s. 847.001(9), F.S., and is harmful to minors, as defined in s. 847.0016, F.S.

The term “nudity” is defined in s. 847.001(9), F.S., to mean:

⁹ 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 March 2, 2011); Deborah Feyerick and Sheila Steffen, ‘Sexting’ lands teen on sex offender list, *CNN* (Apr. 8, 2009), available at <http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html> (last visited March 7, 2011).

¹⁰ 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), available at http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Teens_and_Sexting.pdf (last visited March 7, 2011).

¹¹ *Id.*; see also Mabrey and Perozzi, *supra* note 9.

¹² Lenhart, *supra* note 10, at 3.

¹³ UTAH CODE ANN. s. 76-10-1204.

¹⁴ *Id.*

[T]he 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.

Section 847.001(6), F.S., defines "harmful to minors" to mean:

[A]ny 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 transmission or distribution of multiple photographs or videos is a single offense if the photographs or videos were transmitted or distributed within the same 24-hour period.

The bill provides the following graduated punishment schedule for a violation of sexting:

- A first sexting violation is a noncriminal violation, punishable by eight hours of community service or, if ordered by the court in lieu of community service, a \$60 fine. The court may also order the minor to participate in suitable training or instruction¹⁵ in lieu of, or in addition to, the community service or fine.
- A sexting violation that occurs after being 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 not more than 60 days and may include a fine of not more than \$500.¹⁶
- A sexting violation that occurs after being found to have committed a second-degree misdemeanor violation for sexting is a first degree misdemeanor. A first-degree misdemeanor is punishable by a jail term of not more than one year and may include a fine of not more than \$1,000.¹⁷
- A sexting violation that occurs after being found to have committed a first-degree misdemeanor violation for sexting is an unranked third-degree felony. A third-degree felony is punishable by state imprisonment for not more than five years and may include a fine of not more than \$5,000.¹⁸ However, because the felony is unranked, the offender may be sentenced to a term of probation under supervision by the Department of Corrections.¹⁹

¹⁵ The bill does not define "suitable training or instruction," and it is unclear what type of training or instruction is anticipated under the bill.

¹⁶ Sections 775.082 and 775.083, F.S.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ "Unranked" is a descriptive term for a noncapital felony that is not specifically ranked in the offense severity ranking chart in s. 921.0022, F.S. If the felony is not ranked in the chart, it is ranked pursuant to s. 921.0023, F.S., based on its felony

Senate Bill 888 is substantially similar to a bill that passed the Senate last year (CS/SB 2560). According to an analysis prepared by the Florida Department of Law Enforcement (FDLE) on CS/SB 2560, because the first sexting violation is a noncriminal violation, the minor will not have an FDLE record. Therefore, if the offenses occur in different jurisdictions, prosecutors may be unaware of a previous noncriminal violation, and the minor may not be charged with the proper offense.²⁰

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.

The bill provides that it will take effect October 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of criminal legislation, estimates that the bill will have an insignificant prison

degree. An unranked third-degree felony is a Level 1 offense. *Id.* A first-time offender convicted of only the unranked third-degree felony would score a nonprison sanction as the lowest permissible sentence. Section 921.0024, F.S. Further, in this first-time offender scenario, a non prison sanction would be required unless the sentencing court made written findings that this sanction could present a danger to the public. Section 775.082(10), F.S.

²⁰ Florida Department of Law Enforcement, Senate Bill 2560 Relating to Sexting (Mar. 17, 2010) (on file with the Senate Committee on Criminal Justice).

bed impact.²¹ However, the bill creates new misdemeanor offenses, which could affect local jails, though the impact is unknown at this time.

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 Judiciary on March 28, 2011:

The committee substitute amends the original bill in the following ways:

- Changes language to make it an offense for a minor to transmit any photograph or video of any person, whereas the original bill made it an offense for a minor to transmit photographs or videos of himself or herself only;
- Removes a reference to a possession offense, as the bill does not create an offense for simple possession; and
- Changes the term being defined in the bill from “convicted” to “found to have committed.”

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

²¹ Office of Economic and Demographic Research, Criminal Justice Impact Conference, *Conference Results*, available at <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/index.cfm>, (last visited Mar. 29, 2011).