

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1385 Child Pornography  
**SPONSOR(S):** Trujillo  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1618

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	15 Y, 0 N	Cunningham	Cunningham
2) Justice Appropriations Subcommittee	14 Y, 0 N	Toms	Jones Darity
3) Judiciary Committee			

### SUMMARY ANALYSIS

Section 827.071, F.S., establishes four crimes that involve the sexual performance by a child. Two of these offenses are described below:

- Subsection (4) makes it a second degree felony for a person to possess with the intent to promote any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, includes any sexual conduct by a child.
- Subsection (5) makes it a third degree felony for a person to knowingly possess, control, or intentionally view a photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation which, in whole or in part, he or she knows to include any sexual conduct by a child.

In 2011, Florida's Second District Court of Appeal reviewed a case in which the defendant pled no contest to multiple counts of possessing child pornography in violation of s. 827.071(5), F.S., and appealed. The images at issue were "morphed" images in which photographs of children's heads were pasted onto photographs of nude women engaged in sexual intercourse, deviate sexual intercourse, or masturbation. After extensively reviewing the definition of "sexual conduct" and the elements of the offense, the court reversed the lower court's decision holding that "no child engaged in the sexual conduct" and that "no matter how one parses the words, section 827.071 requires that the depicted sexual conduct be that of a child."

The bill amends s. 827.071(4) and (5), F.S., to add "child pornography" to the list of items that it is unlawful to possess, possess with the intent to promote, control, or intentionally view.

The bill provides the following definitions, which largely mirror the definitions found in federal law:

- "Child pornography" means any visual depiction, including, but not limited to, any photograph, film, video, picture, computer or computer-generated image or picture, or digitally created image or picture, whether made or produced by electronic, mechanical, or other means, of sexual conduct, where the production of such visual depiction involves the use of a minor engaging in sexual conduct, or such visual depiction has been created, adapted, or modified to appear that a minor is engaging in sexual conduct. Proof of the identity of the minor is not required in order to find a violation of this section.
- "Minor" means a person who had not attained the age of 18 years at the time the visual depiction was created, adapted, or modified, or whose image while a minor was used in creating, adapting, or modifying the visual depiction, and who is recognizable as an actual person by the person's facial features, likeness, or other distinguishing characteristics.

On January 30, 2012, the Criminal Justice Impact Conference determined that the bill would have an indeterminate prison bed impact on the Department of Corrections.

The bill is effective October 1, 2012.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

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

Section 827.071, F.S, establishes four crimes that involve the sexual performance by a child. Two of these offenses are described below:

- Subsection (4) makes it a second degree felony<sup>1</sup> for a person to possess with the intent to promote any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, includes any sexual conduct by a child.
- Subsection (5) makes it a third degree felony<sup>2</sup> for a person to knowingly possess, control, or intentionally view a photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation which, in whole or in part, he or she knows to include any sexual conduct by a child.

The statute provides the following definitions that apply to the above-listed offenses:

- “Sexual conduct” means 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.”
- “Simulated” means the explicit depiction of conduct which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.<sup>3</sup>

##### **Federal Law – Child Pornography**

18 U.S.C. 2256 defines “child pornography” as any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:

- (A) The production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
- (B) Such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
- (C) Such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

“Identifiable minor” is defined as a person:

- Who was a minor at the time the visual depiction was created, adapted, or modified; or whose image as a minor was used in creating, adapting, or modifying the visual depiction; and
- Who is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristics, such as unique birthmark or other recognizable feature.<sup>4</sup>

The term “identifiable minor” shall not be construed to require proof of the actual identity of the identifiable minor.<sup>5</sup>

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<sup>1</sup> A second degree felony is punishable by up to 15 years imprisonment and up to a \$10,000 fine. Sections 775.082 and 775.083, F.S.

<sup>2</sup> A third degree felony is punishable by up to five years imprisonment and up to a \$5,000 fine. Sections 775.082 and 775.083, F.S.

<sup>3</sup> Section 827.071(1), F.S.

<sup>4</sup> 18 U.S.C. 2256(9).

<sup>5</sup> *Id.*

## Recent Caselaw

In 2011, Florida's Second District Court of Appeal reviewed a case in which the defendant pled no contest to multiple counts of possessing child pornography in violation of s. 827.071(5), F.S., and appealed.<sup>6</sup> The images at issue were "morphed" images in which photographs of children's heads were pasted onto photographs of nude women engaged in sexual intercourse, deviate sexual intercourse, or masturbation. After extensively reviewing the definition of "sexual conduct" and the elements of the offense, the court reversed the lower court's decision holding that "no child engaged in the sexual conduct" and that "no matter how one parses the words, section 827.071 requires that the depicted sexual conduct be that of a child."<sup>7</sup>

The dissent noted that the definition of "sexual conduct" included "*simulated* sexual intercourse, sexual bestiality, and masturbation," and concluded that "simulated sexual conduct by a child" included composites made by attaching children's heads to adult bodies engaged in sexual activity. The majority disagreed, citing a United States Supreme Court decision construing the word "simulated," which held that "a reasonable viewer [must] believe that the actors actually engaged in that conduct on camera" and "although the sexual intercourse may be simulated, it must involve actual children."<sup>8</sup>

In reversing the trial court's decision, the Second District Court of Appeal also reviewed the legislative history of the relevant federal statutes. The court noted that Congress had enacted child pornography legislation three times (in 1994, 1996, and 2003), each time broadening the definition of child pornography.<sup>9</sup> The latest iteration,<sup>10</sup> defines child pornography to include not only images of actual children engaged in sexually explicit conduct, but also images created by computer that are "indistinguishable" from images of actual minors engaging in such conduct and images that are created or modified to appear as though an identifiable minor was involved in the production of the depiction.<sup>11</sup> After noting that Congress specifically removed the defense that no actual minor was involved in the production of the depiction, the court stated that "if our legislature wants to follow Congress's example and prohibit the possession of the types of photographs involved here, we are confident that it can, and perhaps should, craft an appropriate statute."<sup>12</sup>

## Effect of the Bill

The bill amends s. 827.071(4) and (5), F.S., to add "child pornography" to the list of items that it is unlawful to possess, possess with the intent to promote, control, or intentionally view. The bill provides the following definitions, which largely mirror the definitions found in federal law:

- "Child pornography" means any visual depiction, including, but not limited to, any photograph, film, video, picture, computer or computer-generated image or picture, or digitally created image or picture, whether made or produced by electronic, mechanical, or other means, of sexual conduct, where the production of such visual depiction involves the use of a minor engaging in sexual conduct, or such visual depiction has been created, adapted, or modified to appear that a minor is engaging in sexual conduct. Proof of the identity of the minor is not required in order to find a violation of this section.
- "Minor" means a person who had not attained the age of 18 years at the time the visual depiction was created, adapted, or modified, or whose image while a minor was used in creating, adapting, or modifying the visual depiction, and who is recognizable as an actual person by the person's facial features, likeness, or other distinguishing characteristics.

The bill amends s. 775.0847, F.S., which reclassifies violations of s. 827.071, F.S., (and other sexual offenses) to the next higher degree of felony in specified instances, to include the above-described definitions.

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<sup>6</sup> *Parker v. State*, 2011 WL 4467635 (Fla. 2<sup>nd</sup> DCA 2011).

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.* at 2, citing *United States v. Williams*, 553 U.S. 285 at 297 (2008).

<sup>9</sup> *Supra* note 4 at 4-5.

<sup>10</sup> The PROTECT Act of 2003, Public Law 108-21, April 30, 2003.

<sup>11</sup> *Supra* note 4 at 4-5. *Also see*, 18 U.S.C. 2256(8)(b) and (c).

<sup>12</sup> *Supra* note 4 at 4-5.

The bill also makes conforming changes to s. 921.0022, F.S. (the offense severity ranking chart), and reenacts s. 794.0115, F.S. (dangerous sexual felony offender; mandatory sentencing), to incorporate the bill's changes to s. 827.071, F.S.

**B. SECTION DIRECTORY:**

Section 1. Amends s. 775.0847, F.S., relating to possession or promotion of certain images of child pornography; reclassification.

Section 2. Amends s. 827.071, F.S., relating to sexual performance by a child; penalties.

Section 3. Amends s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity ranking chart.

Section 4. Reenacts s. 794.0115, F.S., relating to dangerous sexual felony offender; mandatory sentencing.

Section 5. Provides an effective date of October 1, 2012.

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

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

1. Revenues:

None.

2. Expenditures:

See "fiscal comments" section.

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

1. Revenues:

None.

2. Expenditures:

None.

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

None.

**D. FISCAL COMMENTS:**

On January 30, 2012, the Criminal Justice Impact Conference determined that the bill would have an indeterminate prison bed impact on the Department of Corrections. In Fiscal Year 2010-11 there were 22 offenders sentenced, 10 of which were sentenced to prison with a similar charge as described in the bill. This bill may cause a fiscal impact to the Department of Corrections.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

The 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:

The First Amendment to the United States Constitution provides that “Congress shall make no law ...abridging the freedom of speech.” However, the United States Supreme Court has held that child pornography is unprotected by the First Amendment and that states have greater leeway in regulating it than other obscenity or adult pornography. This is so because of the compelling state interest in the prevention of sexual exploitation of children and child abuse.<sup>13</sup> In contrast, “sexual expression which is indecent but not obscene is protected by the First Amendment...”<sup>14</sup>

As explained by the Florida Supreme Court, “the doctrines of overbreadth and vagueness are separate and distinct.”<sup>15</sup> The overbreadth doctrine applies only if the legislation is susceptible of application to conduct protected by the First Amendment.<sup>16</sup> The overbreadth doctrine contemplates the pragmatic judicial assumption that an overbroad statute will have a chilling effect on protected expression.<sup>17</sup> As the United States Supreme Court has explained, “[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”<sup>18</sup> Put another way, statutes cannot be so broad that they prohibit constitutionally protected conduct as well as unprotected conduct.<sup>19</sup>

The vagueness doctrine has a broader application because it was developed to ensure compliance with the Due Process Clause in the Fifth Amendment of the United States Constitution.<sup>20</sup> A criminal law may violate due process if it fails to give a potential offender fair notice that his or her contemplated conduct is forbidden or if it encourages arbitrary enforcement and gives the police too much discretion in determining whether it is applicable to a particular individual.<sup>21</sup> When the law fails these tests, it is “void for vagueness.”<sup>22</sup> Because of its imprecision, a vague statute may also invite arbitrary or discriminatory enforcement.<sup>23</sup> A statute is not void for vagueness if the language conveys a “sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.”<sup>24</sup> However, the Supreme Court has indicated that a statute that lends itself to arbitrary enforcement can be void for vagueness even if it gives fair notice of what conduct it prohibits.<sup>25</sup> Further, the need for definiteness is even greater when the ordinance imposes criminal penalties on individual behavior or when it implicates constitutionally protected rights.<sup>26</sup>

As noted above, the definition of “child pornography” contained in 18 U.S.C. 2256 has been amended numerous times throughout the past fifteen years to broaden its reach. As expected, there has been extensive caselaw relating to these various versions of the definition. In many instances, the definition as applied to what is commonly referred to as “morphed” images of child pornography has been held to be unconstitutionally overbroad.<sup>27</sup> However, the most recent version of the definition as applied to such images has been upheld.<sup>28</sup>

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<sup>13</sup> *State v. Beckman*, 547 So.2d 210 (Fla. 5<sup>th</sup> DCA 1989). Also see, *New York v. Ferber*, 458 U.S. 747 (1982).

<sup>14</sup> *Simmons v. State*, 944 So.2d 317, 323 (Fla. 2006)(quoting *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

<sup>15</sup> *Southeastern Fisheries Ass'n v. Dep't of Natural Res.*, 453 So.2d 1351, 1353 (Fla.1984).

<sup>16</sup> *Id.*

<sup>17</sup> See *City of Daytona Beach v. Del Percio*, 476 So.2d 197, 202 (Fla.1985).

<sup>18</sup> *NAACP v. Button*, 371 U.S. 415, 433 (1963).

<sup>19</sup> *Firestone v. News-Press Publ'g Co.*, 538 So.2d 457, 459 (Fla.1989).

<sup>20</sup> See *Simmons*, 944 So.2d at 324. Florida's Constitution includes a similar due process guarantee in Article I, Section 9.

<sup>21</sup> See *Simmons*, 944 So.2d at 324.

<sup>22</sup> See *Simmons*, 944 So.2d at 324 (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972)).

<sup>23</sup> See *Southeastern Fisheries*, 453 So.2d at 1353.

<sup>24</sup> *Hitchcock v. State*, 413 So.2d 741, 747 (Fla.1982)(quoting *United States v. Petrillo*, 332 U.S. 1, 8 (1947)).

<sup>25</sup> See *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)(stating that the “more important aspect of the vagueness doctrine is not actual notice, but the ... requirement that a legislature establish minimal guidelines to govern law enforcement”).

<sup>26</sup> See *Simmons*, 944 So.2d at 324.

<sup>27</sup> See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

<sup>28</sup> See, e.g., *United States v. Hotaling*, 599 F.Supp.2d 306 (N.D.N.Y 2008)(holding that federal statute prohibiting possession of morphed images was not unconstitutionally overbroad or vague); *affirmed by*, 634 F.3d 725; *cert. denied*, 2011 WL 2174374 (2011).

The bill amends s. 827.071, F.S., to add “child pornography” to the list of items that it is unlawful to possess, possess with the intent to promote, control, or intentionally view, and defines “child pornography” as:

Any visual depiction, including, but not limited to, any photograph, film, video, picture, computer or computer-generated image or picture, or digitally created image or picture, whether made or produced by electronic, mechanical, or other means, of sexual conduct, where the production of such visual depiction involves the use of a minor engaging in sexual conduct, or such visual depiction has been created, adapted, or modified to appear that a minor is engaging in sexual conduct. Proof of the identity of the minor is not required in order to find a violation of this section.

Although this definition largely mirrors the definition found in 18 U.S.C. 2256, which has thus far been upheld, it may subject the offenses in s. 827.071, F.S., that involve “child pornography” to overbreadth and vagueness challenges. As noted in a decision by Florida’s 2<sup>nd</sup> DCA interpreting the current definition of child pornography in s. 827.071, F.S.,<sup>29</sup> “[i]f the legislature had intended to proscribe the possession of composite images that simulate lewd and lascivious exhibition of the genitals, it could have included a provision doing so. We leave for another day a discussion of the constitutionality of such a provision.”

**B. RULE-MAKING AUTHORITY:**

The bill does not appear to create a need for rulemaking or rulemaking authority.

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

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

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<sup>29</sup> *Stelmack v. State*, 58 So.3d 874, at 876 (Fla. 2<sup>nd</sup> DCA 2010).