

**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.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: CS/SB 182

INTRODUCER: Children, Families, and Elder Affairs Committee and Senator Stargel

SUBJECT: Sexual Offenders

DATE: March 3, 2014

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Clodfelter</u>	<u>Cannon</u>	<u>CJ</u>	<b>Favorable</b>
2.	<u>Hendon</u>	<u>Hendon</u>	<u>CF</u>	<b>Fav/CS</b>
3.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	<b>Pre-meeting</b>

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 182 redefines what constitutes child pornography. Under current law, child pornography means “any image depicting a minor engaged in sexual conduct.” Under the bill, child pornography also includes a “visual depiction that has been created, adapted, or modified to appear that a minor is engaging in sexual conduct.” As a result of the revised definition, child pornography will include composite images that combine or morph the image of an actual minor’s face onto the body of an adult. The revised definition applies to criminal offenses relating to the possession or promotion of child pornography and sexual performance by a child.

The bill also generally prohibits certain sexual offenders who are on parole, probation, or community control from viewing or possessing any obscene, pornographic, or sexually stimulating material. In contrast, current law generally prohibits a sexual offender from viewing or possessing only those materials that are relevant to an offender’s deviant behavior pattern.

**II. Present Situation:**

**Child Pornography and Child Abuse**

Section 775.0847, F.S., prohibits the possession and promotion of child pornography. This provision defines the term “child pornography” as “any image depicting a minor engaged in

sexual conduct.”<sup>1</sup> A minor is defined as a child under the age of 18.<sup>2</sup> Violations of certain offenses<sup>3</sup> are reclassified to the next higher degree, either from a third degree to a second degree felony or from a second degree to a first degree felony, if the offender possesses 10 or more images of child pornography and at least one image portrays:

- A child under the age of 5;
- Sadomasochistic abuse of a child;
- Sexual battery of a child; or
- Sexual bestiality involving a child.<sup>4</sup>

Section 827.071, F.S., makes conduct involving the sexual performance of a child punishable as a second degree felony.<sup>5</sup> Sexual performance of a child involves:

- Employing, authorizing, or inducing a child under 18 to engage in a sexual performance;
- Consenting as a parent to participation of their child in a sexual performance; or
- Promoting a sexual performance involving a child.<sup>6</sup>

In *Parker v. State*, the Second District Court of Appeal reviewed a case in which the defendant created composite images of children’s heads on adult women’s nude or partially nude bodies engaged in sexual activity.<sup>7</sup> Prosecuted under s. 827.071(5), F.S., as an unlawful sexual performance of a child, the court ruled that the defendant did not violate the law:

It bears repeating that a person is guilty of possessing child pornography if he “knowingly possess[es] a photograph, . . . representation, or other presentation in which, in whole or in part, he or she knows to include *any sexual conduct by a child.*” . . . (emphasis added). No matter how one parses the words, section 827.071 requires that the depicted sexual conduct be that of a child.<sup>8</sup>

Citing the reasoning of *Stelmack v. State*,<sup>9</sup> the *Parker* court ruled as dispositive that the legislative history of s. 827.071, F.S., as documented in a Florida House of Representatives staff analysis, indicates a clear intent to prevent exploitation of children in sexual performances.<sup>10</sup>

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<sup>1</sup> Section 775.0847(1)(b), F.S.

<sup>2</sup> Section 775.0847(1)(a), F.S.

<sup>3</sup> These offenses are: Computer pornography involving a child, including traveling to meet a minor after Internet contact (s. 847.0135, F.S.); Transmission of child pornography (s. 847.0137, F.S.); Email transmission of material harmful to a minor (s. 847.0138, F.S.); and Sexual performance by a child (s. 827.071, F.S.). A child is defined as a person under the age of 18 (s. 827.071(2) and (3), F.S.).

<sup>4</sup> Section 775.0847(2) and (3), F.S.

<sup>5</sup> Section 827.071(2) and (3), F.S.

<sup>6</sup> A sexual performance is defined as actual or simulated sexual conduct depicting a series of images, including through a play, motion picture, photograph, or dance Sections 827.071(1)(h) and (i), (2), and (4) F.S.

<sup>7</sup> *Parker v. State*, 81 So. 3d 451, 452 (Fla. 2d DCA 2011).

<sup>8</sup> *Id.* at 453.

<sup>9</sup> *Stelmack v. State*, 58 So. 3d 874, 876 (Fla. 2d DCA 2010).

<sup>10</sup> “The intent of this legislation is to facilitate the prosecution of persons who use or promote any *sexual performance by a child*, which is not necessarily obscene. A distinction is drawn between child abuse and pornography, with the focus on the child abuser. This legislation is directed at two types of people—those who use children *in sexual performances* and those

The *Parker* court acknowledged that a federal court may have reached a different result, based on the broad sweep of the federal child pornography law.<sup>11</sup>

As the federal experience reflects, 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>

### **Conditional Release**

Conditional release requires mandatory post-incarceration supervision for offenders who are sentenced for certain violent crimes and have served a prior felony commitment, or are sentenced as a habitual offender, violent habitual offender, violent career criminal, or sexual predator.<sup>13</sup> An offender who is subject to conditional release is supervised for a period of time equal to the gain-time he or she received in prison.

The Department of Corrections supervises persons on conditional release under s. 947.1405, F.S. The Parole Commission sets the conditions of release for persons who have served 85 percent of their sentence. The remaining 15 percent of the sentence can be served under conditional release. Any violations of the conditions can return the inmate to prison to serve the remainder of his or her term.

### **Community Supervision through Probation and Community Control**

Probation is a form of community supervision requiring specified contacts with parole and probation officers.<sup>14</sup> Community control is intensive, supervised custody in the community, which includes surveillance on weekends and holidays.<sup>15</sup> Sex offender probation and sex offender community control are forms of intensive supervision, with or without electronic monitoring, which emphasize treatment and supervision of a sex offender based on an individualized treatment plan.<sup>16</sup> Terms and conditions of probation and community control are set by the court.<sup>17</sup>

Community supervision may be ordered either as an alternative to prison or following a period of incarceration as part of a split sentence.

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who, being the parent or guardian of the child, "consent" to the child's participation *in such activities*. Fla. H.R. Comm. on Crim. Just., HB 148 (1983 Staff Analysis (April 14, 1983)).

<sup>11</sup> 18 U.S.C.A. s. 2256(8), defines child pornography to read, in part, 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—(C) such visual depiction has been created, *adapted, or modified to appear* that an identifiable minor is engaging in sexually explicit conduct" (emphasis added).

<sup>12</sup> *Parker*, 81 So. 3d at 457.

<sup>13</sup> Florida Parole Commission, *Conditional Release*, <https://fpc.state.fl.us/Postrelease.htm> (Last visited February 26, 2014).

<sup>14</sup> Section 948.001(8), F.S.

<sup>15</sup> Section 948.001(3), F.S.

<sup>16</sup> Section 948.001(13), F.S.

<sup>17</sup> Sections 948.03(1) and 948.101(1), F.S.

The Department of Corrections supervises all persons who are sentenced to community supervision by the circuit court. Section 948.03, F.S., provides a list of standard conditions of probation and s. 948.101, F.S., provides a list of standard conditions of community control. The court also has the discretion to order special conditions in particular cases.

Sections 947.1405 and 948.30, F.S., set forth additional standard conditions of probation and community control that must be ordered for any offender who is sentenced to community supervision for designated sexual offenses.<sup>18</sup> Section 947.1405, F.S., requires an offender convicted of one of the designated sexual offenses to comply with conditions such as:

- A curfew of 10 p.m. to 6 a.m.;
- A prohibition on living within 1,000 feet of a school, child care facility or other place where children congregate if the victim was under the age of 18;
- Successful completion of a sex offender treatment program;
- A prohibition on contact with the victim;
- A prohibition on contact with children under the age of 18 if the victim was under the age of 18; and
- A prohibition on viewing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs, or computer services *relevant to the offender's deviant behavior pattern unless otherwise indicated in the treatment plan.*<sup>19</sup>

Section 948.30(1)(g), F.S., also prohibits, unless otherwise part of the treatment plan, the offender from “viewing, accessing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs, or computer services that are *relevant to the offender's deviant behavior pattern.*”<sup>20</sup>

In *Kasischke v. State*, the Florida Supreme Court reviewed conflicting decisions from two appellate courts on the issue on the restriction on sexual offenders from having access to pornography as a condition of community supervision.<sup>21</sup> The Third District Court of Appeal held that offenders are prohibited from viewing any material regardless of whether the materials are part of a deviant behavior pattern.<sup>22</sup> The Second District Court of Appeal reached the opposite finding, however, and required the state to establish a nexus between the materials and the deviant behavior pattern of the offender.<sup>23</sup> The Supreme Court approved the holding of the Second District Court of Appeal: “We hold that the phrase “relevant to the offender’s deviant behavior pattern” qualifies each of the prohibitions ... .”<sup>24</sup> In so doing, the Court acknowledged

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<sup>18</sup> The designated offenses are: chapter 794, F.S. (sexual battery); s. 800.04, F.S. (lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age); s. 827.071, F.S. (using a child in a sexual performance or promoting sexual performance by a child); s. 847.0135(5), F.S. (computer pornography, computer offenses against children, and traveling to meet a minor for sexual purposes); and s. 847.0145, F.S. (selling or buying of minors for sexual purposes).

<sup>19</sup> Section 947.1405(7), F.S.

<sup>20</sup> The statute includes an exception for the prohibited materials if “otherwise indicated in the treatment plan provided by a qualified practitioner in the sexual offender treatment program.” There are no reported opinions of cases in which this exception was raised as a defense.

<sup>21</sup> *Kasischke v. State*, 991 So. 2d 803, 805 (Fla. 2008),

<sup>22</sup> *Id.* at 805.

<sup>23</sup> *Id.* at 806.

<sup>24</sup> *Id.* at 815.

ambiguity in the law and the need to resort to the rule of lenity in reaching its decision.<sup>25</sup>The Court's decision was based on its interpretation of the relevant statutes, not on a finding that a sexual offender has a constitutional right to pornography.

### III. Effect of Proposed Changes:

This bill redefines what constitutes child pornography and generally prohibits certain sexual offenders from accessing any pornography.

#### Child Pornography

Under current law, child pornography means "any image depicting a minor engaged in sexual conduct." Under the bill, child pornography also includes a "visual depiction that has been created, adapted, or modified to appear that a minor is engaging in sexual conduct." The revised definition closely tracks the definition of child pornography in federal law.<sup>26</sup>

As a result of the revised definition, child pornography under Florida law will include composite images that combine or morph the image of an actual minor's face onto the body of an adult. However, proving the identity of the child is not required to successfully prosecute a person for an offense.<sup>27</sup> The revised definition of child pornography applies to criminal offenses relating to the possession or promotion of child pornography and sexual performance by a child.

The bill also prohibits certain sexual offenders who are on parole, probation, or community control from viewing or possessing any obscene, pornographic, or sexually stimulating material unless authorized by a qualified practitioner in the sexual offender treatment program. Current law prohibits a sexual offender from viewing or possessing only those materials that are relevant to an offender's deviant behavior pattern unless otherwise indicated in the offender's treatment plan.

With respect to the offense of sexual performance by a child, the bill defines the medium on which child pornography may be created to include a "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." This is also consistent with the definition of child pornography under federal law.<sup>28</sup>

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<sup>25</sup> The rule of lenity, a rule of statutory construction cited in Florida law, provides "The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused" (s. 775.021(1), F.S.) The Court recognized difficulty in interpreting the law and noted that even the dissenting opinion in the case reaches yet a third conclusion, other than the appellate courts' interpretations of the statute. *Id.* at 808.

<sup>26</sup> See 18 U.S.C. s. 2256(8)(A) and (C). The revised definition does not include virtual child pornography or exclusively computer-generated child pornography as described in 18 U.S.C. 2256(8)(B) which was found unconstitutional by the U.S. Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). No actual children are filmed in virtual child pornography and the government could not sufficiently prove the connection between viewing virtual child pornography and child abuse. *Id.* at 253.

<sup>27</sup> Similarly, a prosecution for a child pornography offense under federal law does not require proof of the identity of the minor used in the pornography. See 18 U.S.C. s. 2256(9)(B).

<sup>28</sup> See 18 U.S.C. s. 2256(8).

### **Access to Pornography by Sexual Offenders**

The bill requires the Parole Commission to prohibit certain sexual offenders on conditional release, and the court to prohibit probationers and community controlees on community supervision, from owning, or possessing obscene, pornographic, or sexually stimulating visual or auditory material unless preserving access is part of a sexual offender treatment plan, when the original offense constituted:

- Sexual battery (ch. 794, F.S.);
- Lewd or lascivious offenses on a victim under the age of 16 (s. 800.04, F.S.);
- Sexual performance by a child as a form of child abuses (s. 827.071, F.S.);
- Certain computer transmissions if the defendant knows or should know that the transmission has been viewed by a victim under the age of 16 (s. 847.0135(5), F.S.); or
- The selling or buying of minors for the purpose of visually depicting the minor in sexually explicit conduct (s. 847.0145, F.S.).

In cases relating to a violation of community supervision or a violation of conditional release, this bill will effectively remove the requirement that the state prove that sexual materials accessed by the offender are relevant to the offender's deviant behavior pattern. Instead, the bill imposes a blanket prohibition on viewing or possessing these materials, unless access is authorized in the treatment plan provided by a qualified practitioner in the sexual offender treatment program.

### **Effective Date**

The bill takes effect October 1, 2014.

### **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:**

Although numerous First Amendment challenges have been made to government regulation of pornography, the United States Supreme Court has definitively ruled that

the First Amendment does not attach to the dissemination of child pornography.<sup>29</sup> “[T]he use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.”<sup>30</sup>

The court in *U.S. v. Hotaling* reviewed a First Amendment challenge to child pornography, in which the defendant was prosecuted for digitally altering, or morphing images of actual children’s faces onto bodies of adult females engaged in sexual activity.<sup>31</sup> The court held that morphed images are not protected speech.<sup>32</sup> In so doing, the court ruled the images different from virtual child pornography in that actual minors are portrayed and can be identified.<sup>33</sup>

the interests of actual minors are implicated when their faces are used in creating morphed images that make it appear that they are performing sexually explicit acts. . . . here we have six identifiable minor females who were at risk of reputational harm and suffered the psychological harm of knowing that their images were exploited and prepared for distribution by a trusted adult.<sup>34</sup>

However, in 2008, the New Hampshire Supreme Court reached a different conclusion in *State v. Zidel*.<sup>35</sup>

In cases upholding laws prohibiting composite child pornography, which is prohibited by the bill, the courts held that the government has a legitimate interest in protecting the reputation of the children whose faces were used in the making of the pornography.<sup>36</sup>

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

None.

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<sup>29</sup> *New York v. Ferber*, 458 U.S. 747, 756-757 (1982). In *Ferber*, the Court upheld as a compelling state interest protection of the physical and psychological well-being of children. *Id.* at 756, 761.

<sup>30</sup> *Id.* at 756-58.

<sup>31</sup> *U.S. v. Hotaling*, 634 F.3d 725, 727 (2d Cir. 2011).

<sup>32</sup> *Id.* at 730.

<sup>33</sup> *Id.* at 729.

<sup>34</sup> *Id.* at 729-730.

<sup>35</sup> See *State v. Zidel*, 940 A.2d 255 (2008).

<sup>36</sup> *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249 (2002), further included reputational harm in the psychological harm referred to in *Ferber*, similar to a defamatory statement. The principle enumerated in *Ashcroft* has been cited in other cases: *In re Grant*, 167 Cal.Rptr.3d, 401, 406 (CA 2014).; *U.S. v. Loreng*, 956 F. Supp. 2d 213, 221 (D.C. 2013).

**C. Government Sector Impact:**

Depending upon the compliance of offenders with the expanded prohibition against accessing pornography, the bill may result in more prosecutions for violations of conditions of community supervision. However, removing the requirement for the state to prove that the material is “relevant to the offender’s deviant behavior pattern” may also relieve the need to present expert testimony on that element of an offense. The Criminal Justice Impact Conference reviewed the impact of CS/HB 73 on prison beds on January 30, 2014. CS/HB 73, however, includes only the provisions of this bill which restrict the possession of any pornography by certain sexual offenders. The CJIC determined that CS/HB 73 would have an indeterminate fiscal impact.<sup>37</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends sections 775.0847, 827.071, 921.0022, 947.1405, and 948.30 of the Florida Statutes.

This bill reenacts subsection (2) of section 794.0115, F.S.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Children, Families, and Elder Affairs on February 11, 2014:**

- Amends s. 775.0847(1), F.S., relating to child pornography to amend the definition of “child pornography” to include a visual depiction that has been modified to appear that a minor is engaging in sexual conduct. The CS also creates a definition of “minor” to be a person less than 18 years old at the time the pornography was created whether the minor’s image was photographed or modified.
- Amends s. 827.071, F.S., to use the new definition of “child pornography” and “minor” in the penalties section for sexual performance by a child.
- Amends s. 921.0022(3), F.S., relating to the criminal code for felonies to clarify that viewing child pornography or other material including sexual conduct by a child is a 2nd and 3rd degree felony.
- Amends s. 947.1405, F.S., to add that on or after October 1, 2014, the Parole Commission must prohibit persons on conditional release convicted of certain sexual offenses from possessing any pornography.

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<sup>37</sup> Economic and Demographic Research website, online at <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/index.cfm> (last visited February 27, 2014).

B. Amendments:

None.

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

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