

**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 Fiscal Policy

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BILL: CS/SB 1270

INTRODUCER: Fiscal Policy Committee (Recommended by Appropriations Subcommittee on Criminal and Civil Justice) and Senator Soto

SUBJECT: Sexual Offenses

DATE: April 17, 2015

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Dugger</u>	<u>Cannon</u>	<u>CJ</u>	<b>Favorable</b>
2.	<u>Harkness</u>	<u>Sadberry</u>	<u>ACJ</u>	<b>Recommend: Fav/CS</b>
3.	<u>Jones</u>	<u>Hrdlicka</u>	<u>FP</u>	<b>Fav/CS</b>

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

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 1270 amends multiple statutes relating to criminal law. Specifically the bill:

- Increases the penalty for third or subsequent violations of an injunction for protection to a third degree felony if a person has two or more prior convictions for the same offense;
- Expands who the Department of Corrections or local law enforcement agency are permitted to electronically monitor;
- Amends punishment schedule in s. 847.0141, F.S., by including the issuance of a citation for first violation for the crime of sexting;
- Provides requirements for the sexting citation;
- Provides all court records and information obtained or produced in relation to a noncriminal sexting violation to be afforded the same level of confidentiality provided under ss. 985.04 and 985.045, F.S., and all noncriminal sexting violations that occurred on or after October 1, 2011, are confidential; and
- Reduces the statute of limitations from 10 years to 6 years.

Please see Section V for the bill's fiscal impact.

## II. Present Situation:

### Violations of Injunctions

It is a first degree misdemeanor<sup>1</sup> to violate the terms of an injunction for the protection against:

- Domestic violence;<sup>2</sup>
- Repeat violence, sexual violence or dating violence;<sup>3</sup> or
- Stalking or cyberstalking.<sup>4</sup>

It is a first degree misdemeanor regardless of how many times a person is convicted of this offense.

### Electronic Monitoring

Section 948.11, F.S., provides that the Department of Corrections may, at its discretion, electronically monitor an offender sentenced to community control. Community Control is a form of intensive supervised “house arrest” including weekends and holidays.

### Sexting

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.

Following is the 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 instruction 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 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.
- 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. However, because the felony is unranked, the offender may be sentenced to a term of probation under supervision by the Department of Corrections.

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.

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<sup>1</sup> A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. See ss. 775.082, and 775.083, F.S.

<sup>2</sup> Issued pursuant to s. 741.30, F.S.

<sup>3</sup> Issued pursuant to s. 784.046, F.S.

<sup>4</sup> Issued pursuant to s. 784.0484, F.S.

***State v. C.M.***

In January 2015, Florida's Fourth District Court of Appeal (DCA) decided *State v. C.M.*,<sup>5</sup> which involved a minor who was charged via a delinquency petition with committing a first-time violation of the sexting statute – a noncriminal violation. At trial, the defense filed a motion to dismiss arguing that because the minor did not commit a delinquent act, she could not be subject to prosecution through a petition for delinquency. The trial court agreed and granted the motion.

On appeal, the Fourth DCA recognized that under the delinquency statutes, the state attorney files a petition for delinquency to obtain a finding that a child has committed a delinquent act or violation of law. The court held that because a first offense of sexting (a noncriminal violation) does not fit within the definition of “delinquent act” or “violation of law,” a petition for delinquency was not the proper method to prosecute such offense.<sup>6</sup>

The state argued that the trial court's dismissal left them without a remedy, and asserted that the court should authorize the use of a petition for delinquency. The Fourth DCA disagreed reasoning that courts “are not at liberty to add words to statutes that were not placed there by the Legislature.” The court went on to state:

[O]nly the legislature can add to the sexting statute to set out the procedure for the prosecution and determination if there has been a violation of the first offense. Until that is effectuated by the legislature, we are bound to the letter of the law and “must apply a statute as [we] find it, leaving to the legislature the correction of assorted inconsistencies and inequalities in its operation.”<sup>7</sup>

**Statutes of Limitations*****Historical Perspective***

At common law, there was no time limit restriction under which a criminal charge was barred from prosecution. Time limitations, or statutes of limitation, for criminal prosecutions exist only as a creation of statute and are considered to be acts of grace by the sovereign.<sup>8</sup>

In *State v. Hickman*, the court stated:

The only purpose of a Statute limiting the time within which a criminal charge may be prosecuted is to protect every person from being interminably under the threat or cloud of possible criminal prosecution, which otherwise might be indefinitely delayed until the time when defense witnesses might die, disappear or otherwise become unavailable, judges would change office, or innumerable other time hazards might develop,

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<sup>5</sup> *State v. C.M.*, 154 So. 3d 1177 (Fla. 4th DCA 2015).

<sup>6</sup> *Id.*

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

<sup>8</sup> *State v. Hickman*, 189 So. 2d 254, 261 (Fla. 2d DCA 1966).

which could conceivably defeat, or at least hamper, an otherwise good defense.<sup>9</sup>

Since the creation of statutes of limitation, courts have held that:

- Generally, the statute of limitation that was in effect when a crime was committed controls.<sup>10</sup>
- Statutes of limitation in criminal cases should be construed liberally in favor of the defendant.<sup>11</sup>
- The Legislature may extend the limitations period without violating the ex post facto clause of the State Constitution<sup>12</sup> if the Legislature makes the change before the prosecution is barred under the old statute and clearly demonstrates that the new statute applies to cases pending when the extension takes effect.<sup>13</sup>

### ***Existing Provisions***

Section 775.15, F.S., sets forth time limitations, or statutes of limitation, after which criminal prosecutions are barred.

The statute of limitation for prosecuting a criminal case begins to run on the day after the offense is committed.<sup>14</sup> An offense is deemed to have been committed when either every element of the offense has occurred or, if it plainly appears that the legislative purpose is to prohibit a continuing course of conduct, at the time when the course of conduct or the defendant's complicity therein is terminated.<sup>15</sup>

Section 775.15, F.S., provides the following time limitations for initiating a criminal prosecution for a felony offense:

- There is no time limitation for prosecuting a capital felony, a life felony, a felony resulting in death,<sup>16</sup> any sexual battery on a victim younger than 16,<sup>17</sup> a first degree felony sexual battery on a victim younger than 18,<sup>18</sup> or a first or second degree felony sexual battery when the victim reports the crime to law enforcement within 72 hours.<sup>19</sup>
- A 10-year time limitation applies to prosecutions for any felony that results in injury to a person when the felony arises from the use of a destructive device.<sup>20</sup>
- A 4-year time limitation applies to prosecutions for a first degree felony.<sup>21</sup>
- A 3-year time limitation applies to prosecutions for any other felony.<sup>22</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> *Beyer v. State*, 76 So. 3d 1132, 1135 (Fla. 4th DCA 2012).

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

<sup>12</sup> FLA. CONST. art. I, s.10.

<sup>13</sup> *Andrews v. State*, 392 So. 2d 270, 271 (Fla. 2d DCA 1980).

<sup>14</sup> Section 775.15(3), F.S.

<sup>15</sup> *Id.*

<sup>16</sup> Section 775.15(1), F.S.

<sup>17</sup> Section 775.15(13)(c), F.S.

<sup>18</sup> Section 775.15(13)(b), F.S.

<sup>19</sup> Section 775.15(13) and (14), F.S.

<sup>20</sup> Section 775.15(7), F.S.

<sup>21</sup> Section 775.15(2)(a), F.S.

<sup>22</sup> Section 775.15(2)(b), F.S.

In addition to these enumerated time periods, the offenses of sexual battery, lewd or lascivious acts, and certain other felony offenses<sup>23</sup> may be prosecuted at any time after the date on which the offender's identity is established, or should have been established through the exercise of due diligence, through the analysis of deoxyribonucleic acid (DNA) evidence collected at the time of the original investigation. The DNA sample for these prosecutions must be available for testing by the accused.<sup>24</sup>

There is also an extension of time if a victim of sexual battery, lewd or lascivious behavior, incest, "statutory rape" under former s. 794.05, F.S., or computer pornography where the victim is under the age of 18. In these cases, the applicable period of limitation does not begin to run until the victim reaches the age of 18 or the violation is reported to a law enforcement or governmental agency, whichever occurs first.<sup>25</sup> There is no limitation period for victims of a first degree felony sexual battery who are under 18 or victims of any sexual battery who are under 16 regardless of whether they report the crime.<sup>26</sup>

If a 16 or 17 year old who is a victim of a second degree felony sexual battery does not report the crime within 72 hours, the applicable time period to bring a prosecution is 3 years.<sup>27</sup> There is also no limitation period if such a victim reports within 72 hours of being a victim of second degree felony sexual battery.<sup>28</sup>

If a victim 18 years or older reports a first or second degree felony sexual battery within 72 hours of the crime, there is no statute of limitation. However, if the victim does not report the crime within this time period, the statute of limitation is 4 years for a first degree felony sexual battery<sup>29</sup> and 3 years for a second degree felony sexual battery.<sup>30</sup>

### **III. Effect of Proposed Changes:**

#### **Violations of Injunctions**

The bill amends s. 741.31(4), F.S., increasing the penalty for third or subsequent violations of an injunction for protection<sup>31</sup> to a third degree felony if a person has two or more prior convictions for the same offense.

The bill defines "conviction" to mean a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld or a plea of nolo contendere is entered.

<sup>23</sup> These other felony offenses include aggravated battery or any felony battery offense under ch. 784, F.S., kidnapping or false imprisonment, sexual battery, lewd or lascivious offense, burglary, robbery, carjacking, and aggravated child abuse.

<sup>24</sup> Section 775.15(16)(a), F.S.

<sup>25</sup> Section 775.15(13)(a), F.S.

<sup>26</sup> Section 775.15(13)(b), F.S.

<sup>27</sup> The 3 year limitation does not commence until the earlier of the date that the victim turns 18 or the crime is reported.

Section 775.15(13)(a), F.S.

<sup>28</sup> Section 775.15(13)(a), F.S.

<sup>29</sup> Section 775.15(14), F.S. First degree felony sexual battery is a non-consensual sexual battery under certain enumerated circumstances, including in part, when the victim is physically helpless to resist, the victim is threatened, the victim is physically or mentally incapacitated, or the offender is in law enforcement. s. 794.011(4), F.S.

<sup>30</sup> Section 775.15(14), F.S. Second degree felony sexual battery is a non-consensual sexual battery without the use of physical force or violence likely to cause serious personal injury. s. 794.011(5)(b), F.S.

<sup>31</sup> Issued pursuant to ss. 741.30, 784.046, and 784.0484, F.S.

### **Electronic Monitoring**

The bill expands who the Department of Corrections or local law enforcement agency are permitted to electronically monitor. In addition to an offender sentenced to community control the bill allows electronic monitoring of an offender:

- Ordered to comply with house arrest who is wearing electronic monitoring equipment as a condition of bond or pretrial release or
- Who is otherwise wearing electronic monitoring equipment pursuant to a court order for a protective injunction issued for domestic violence; repeat violence, sexual violence, or dating violence; or stalking.

### **Sexting**

The bill amends the punishment schedule in s. 847.0141, F.S., by including the issuance of a citation for first violations. The bill specifies that for a first violation of sexting the minor must sign and accept a citation indicating a promise to appear before the juvenile court. In lieu of appearing in court, the minor may complete 8 hours of community service work, pay a \$60 civil penalty, or participate in a cyber-safety program, if such a program is locally available. The minor must satisfy any penalty within 30 days after receipt of the citation.

The citation must be in a form prescribed by the issuing law enforcement agency, must be signed by the minor, and must contain:

- The date and time of issuance;
- The name and address of the minor to whom the citation is issued;
- A thumbprint of the minor to whom the citation is issued;
- Identification of the noncriminal violation and the time it was committed;
- The facts constituting reasonable cause;
- The specific section of law violated;
- The name and authority of the citing officer; and
- The procedures that the minor must follow to contest the citation, perform the required community service, pay the civil penalty, and participate in a cyber-safety program.

If the citation is contested and the court determines that the minor committed a noncriminal violation under this section, the court may order the minor to perform 8 hours of community service, pay a \$60 civil penalty, or participate in a cyber-safety program, or any combination thereof.

A minor who fails to comply with the citation waives the right to contest it and the court may impose any of the stated penalties or issue an order to show cause. Upon a finding of contempt, the court may impose additional age-appropriate penalties, which may include issuance of an order to the Department of Highway Safety and Motor Vehicles to withhold issuance of, or suspend the driver license or driving privilege of, the minor for 30 consecutive days. The court may not impose incarceration.

The bill provides that a minor commits a first degree misdemeanor for a violation that occurs after the minor has been found to have committed a noncriminal violation or has satisfied the

penalty imposed in lieu of a court appearance unless a law enforcement officer elects to issue a civil citation as provided in this section.

The bill requires all court records and information obtained or produced in relation to a noncriminal sexting violation to be afforded the same level of confidentiality provided under ss. 985.04 and 985.045, F.S. All noncriminal sexting violations that occurred on or after October 1, 2011, are considered confidential.

The bill also requires 80 percent of all civil penalties received by a juvenile court pursuant to the citation process outlined above to be remitted by the clerk of the court to the county commission to provide training on cyber safety for minors. The remaining 20 percent must remain with the clerk of the court to defray administrative costs.

The bill specifically addresses the holding in *State v. C.M.*<sup>32</sup> by amending s. 985.0301, F.S., to provide that the circuit court has exclusive original jurisdiction of proceeding in which a child is alleged to have committed a noncriminal violation that has been assigned to juvenile court by law.

### **Statute of Limitations**

The bill amends s. 775.15, F.S., by extending the current statute of limitations for a first or second degree felony sexual battery when the victim is 16 years of age or older and does not report the crime within 72 hours. The bill provides a statute of limitation of 6 years for these offenses instead of the previous 3 or 4 year time period.

The bill does not change the provision that provides that is no statute of limitation in cases where a 16 year old or older victim of *second* degree felony sexual battery or an 18 year old or older victim of *first* degree felony sexual battery reports the crime within 72 hours.

The bill applies to any such offense except one already time-barred on or before July 1, 2015 (meaning it applies retroactively to previously committed offenses as long as the statute of limitation has not run on these offenses prior to July 1, 2015).

The bill also provides that this act may be cited as the “43 Days Initiative Act.”

The bill is effective July 1, 2015.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

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<sup>32</sup> *State v. C.M.*, 154 So. 3d 1177 (Fla. 4th DCA 2015).

**B. Public Records/Open Meetings Issues:**

The bill requires all court records and information obtained or produced in relation to a noncriminal sexting violation to be afforded the same level of confidentiality provided under ss. 985.04 and 985.045, F.S. All noncriminal sexting violations that occurred on or after October 1, 2011, are considered confidential. Art. 1, s. 24 of the Florida Constitution permits the Legislature to enact exemptions from public records requirements, provided they meet certain conditions. However, laws creating exemptions may contain only exemptions from public records requirements and must relate to one subject. Bills that are filed that contain substantive provisions and a public records exemption violate the Constitution.

**C. Trust Funds Restrictions:**

None.

**D. Other Constitutional Issues:**

The Legislature may extend the limitations period without violating the ex post facto clause of the State Constitution<sup>33</sup> if the Legislature makes the change before the prosecution is barred under the old statute and clearly demonstrates that the new statute applies to cases pending when the extension takes effect.<sup>34</sup>

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:****Violations of Injunctions**

The Criminal Justice Impact Conference (CJIC) met on March 11, 2015, and gave a recommended estimate of positive indeterminate (an increase in prison beds). The Florida Department of Law Enforcement reported that in FY 2013-2014, there were 183 guilty/convicted counts and 6 adjudication withheld counts for repeat offenders violating s. 741.31, F.S. It is unknown what number of these repeat offenses were third or subsequent violations.

**Electronic Monitoring**

The bill expands who the Department of Corrections and local law enforcement agencies can electronically monitor and has an indeterminate fiscal impact.

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<sup>33</sup> FLA. CONST. art. I, s.10.

<sup>34</sup> *Andrews v. State*, 392 So. 2d 270, 271 (Fla. 2d DCA 1980).



**Sexting**

The bill requires 80 percent of all civil penalties received by a juvenile court pursuant to the citation process be remitted by the clerk of the court to the county commission to provide training on cyber safety for minors.

**Statute of Limitations**

The CJIC met February 27, 2015, and determined that SB 1270 would have a positive moderate impact on state prison beds (meaning the CJIC estimates that it may increase the prison population by more than 10 but less than 25 inmates annually). Accordingly, the projected prison bed impact would create an insignificant fiscal impact to the General Revenue Fund not to exceed \$450,000, which the Department of Corrections could absorb within existing resources. No additional fixed capital outlay costs are anticipated for these additional prison beds because the prison population is below the capacity of the correctional system.

The bill was amended reduced the statute of limitations in the bill from 10 years to 6 years, which “would likely lower the effect and bring the moderate [prison bed] effect closer to insignificant.”<sup>35</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Typically bills relating to criminal law have an effective date of October 1. The bill is currently effective July 1, 2015.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 741.31, 775.15, 784.047, 784.0487, 847.0141, 948.11, and 985.0301.

**IX. Additional Information:**

**A. Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Fiscal Policy on April 15, 2015:**

The committee substitute:

- Increases the penalty for third or subsequent violations of an injunction for protection to a third degree felony if a person has two or more prior convictions for the same offense.
- Expands who the Department of Corrections or local law enforcement agency are permitted to electronically monitor.

<sup>35</sup> Email from Matthew Hasbrouck, Office of Economic and Demographic Research, The Florida Legislature (April 6, 2015) (on file with the Senate Appropriations Subcommittee on Civil and Criminal Justice).

- Amends punishment schedule in s. 847.0141, F.S., by including the issuance of a citation for first violation for the crime of sexting.
- Provides requirements for the sexting citation.
- Provides all court records and information obtained or produced in relation to a noncriminal sexting violation to be afforded the same level of confidentiality provided under ss. 985.04 and 985.045, F.S., and all noncriminal sexting violations that occurred on or after October 1, 2011, are confidential.
- Reduces the statute of limitations from 10 years to 6 years.

B. Amendments:

None.