

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government – This bill provides the Office of Statewide Prosecution jurisdiction over additional offenses.

Promote Personal Responsibility – This bill reclassifies certain offenses involving child pornography and failing to register as a convicted felon.

B. EFFECT OF PROPOSED CHANGES:

Office of Statewide Prosecution

The Office of Statewide Prosecution (OSP) was created by constitutional amendment passed by the voters in 1986. Article IV, Section 4 of the Florida Constitution, together with s. 16.56, F.S., sets forth the jurisdiction and authority of the OSP.¹

In order for the Statewide Prosecutor to handle a case, the crime must have occurred in more than one judicial circuit or be part of a conspiracy affecting more than one judicial circuit, and it must be one of the offenses enumerated in the law: bribery; burglary; usury; extortion; gambling; kidnapping; theft; murder; prostitution; perjury; robbery; home-invasion robbery; car-jacking; narcotics violations; antitrust violations; anti-fencing violations; crimes involving fraud and deceit; certain computer crimes; racketeering; and attempts, solicitations, or conspiracies to commit these offenses.² The cases are filed where the majority of offenses are committed, where the criminal organization's center is operational, or where the case is allowed to be tried by general venue law.³ Currently, the OSP does not have specific authority to investigate and prosecute all crimes facilitated by or connected to the use of the Internet, or criminal violations of chapter 827, F.S.

HB 573 provides the Office of Statewide Prosecution jurisdiction over offenses facilitated by or connected to the use of the Internet. The bill also provides the OSP jurisdiction over any violation of chapter 827, F.S., where the crime is facilitated by or connected to the use of the Internet or any device capable of electronic data storage or transmission.

Crimes Related to Possession, Production, or Transmission of Child Pornography

The 2006 Florida Statutes currently contain the following crimes relating to the possession, production, or transmission of child pornography:

- Section 827.071, F.S.
 - o Subsection (2) provides that a person is guilty of the use of a child in a sexual performance if, knowing the character and content thereof, he or she employs, authorizes, or induces a child less than 18 years of age to engage in a sexual performance⁴ or, being a parent, legal guardian, or custodian of such child, consents to the participation by such child in a sexual performance. Whoever violates this

¹ <http://myfloridalegal.com/swp>

² *Id.*

³ *Id.*

⁴ Section 827.071, F.S., defines “sexual performance” as “any performance or part thereof which includes sexual conduct by a child of less than 18 years of age.”

subsection commits a felony of the second degree. This offense is ranked in Level 6 of the Criminal Punishment Code.⁵

- Subsection (3) provides that a person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct⁶ by a child less than 18 years of age. Whoever violates this subsection commits a felony of the second degree. This offense is ranked in Level 6 of the Criminal Punishment Code.
 - Subsection (4) provides that it is unlawful for any person to possess with the intent to promote⁷ any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, includes any sexual conduct by a child. Whoever violates this subsection is guilty of a felony of the second degree. This offense is ranked in Level 5 of the Criminal Punishment Code.
 - Subsection (5) provides that it is unlawful 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 possession of each such photograph, motion picture, exhibition, show, representation, or presentation is a separate offense. Whoever violates this subsection is guilty of a felony of the third degree. This offense is ranked in Level 5 of the Criminal Punishment Code.
- Section 847.0137, F.S.
- Provides that any person in this state who knows or reasonably should have known that he or she was transmitting child pornography⁸ to another person in this state or another jurisdiction commits a felony of the third degree. This offense is ranked in Level 5 of the Criminal Punishment Code.
 - Provides that any person in any jurisdiction other than this state who knew or reasonably should have known that he or she was transmitting child pornography to any person in this state commits a felony of the third degree. This offense is ranked in Level 5 of the Criminal Punishment Code.
- Section 847.0138, F.S.
- Provides that any person in this state who knew or believed that he or she was transmitting an image, information, or data that is harmful to minors⁹ to a specific individual known by the defendant to be a minor in this state commits a felony of the third degree. This offense is ranked in Level 5 of the Criminal Punishment Code.
 - Provides that any person in any jurisdiction other than this state 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 in this state commits a felony of the third degree. This offense is ranked in Level 5 of the Criminal Punishment Code.

⁵ The Criminal Punishment Code applies to sentencing for felony offenses committed on or after October 1, 1998. Offenses are ranked in the “offense severity ranking chart” from level one (least severe) to level ten (most severe) and are assigned points based on the severity of the offense as determined by the legislature.

⁶ Section 827.071, F.S., defines “sexual conduct,” in part, as “actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition or the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is 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.”

⁷ “Promote” means “to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer or agree to do the same. See s. 827.071, F.S.

⁸ “Child pornography” is defined in s. 847.001, F.S., as “any image depicting a minor engaged in sexual conduct.”

⁹ “Harmful to minors” is defined in 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:

- (a) Predominantly appeals to the prurient, shameful, or morbid interest of minors;
- (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors;
- (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.”

HB 573 reclassifies felony offenses involving the possession, production, or transmission of an image of child pornography or the sexual performance of a child if such image contains one or more of the following:

- A child who is under the age of 5 years.
- Sadoomasochistic abuse involving a child.
- Sexual battery involving a child.
- Sexual bestiality involving a child.
- Any video or live movie involving a child.

Specifically, the bill requires that such offenses be reclassified to the next higher degree, and would have the effect of increasing the maximum penalty that could be imposed (e.g. a felony of the third degree, which is punishable by up to 5 years in prison and a fine of \$5,000 or less, would be reclassified to a felony of the second degree, which is punishable by up to 15 years in prison and a fine of \$10,000 or less – a felony of the second degree would be reclassified as a felony of the first degree, which is punishable by up to 30 years and a fine of \$10,000 or less).¹⁰

HB 573 also requires that a felony offense that is reclassified be ranked one level higher than the ranking under the Criminal Punishment Code of the offense committed (e.g. the offense of transmitting child pornography to another person in this state is currently ranked in Level 5 of the Criminal Punishment Code. However, under the bill's provisions, if such transmission contained an image of a child under the age of 5, the offense would be ranked in Level 6).

Registration of Convicted Felons

Currently, s. 775.13, F.S., requires any person who has been convicted of a felony to, within 48 hours after entering any county in this state, register with the sheriff of such county or with the Florida Department of Law Enforcement (FDLE). Failure to register constitutes a misdemeanor of the second degree.¹¹ HB 573 reclassifies this offense from a second degree misdemeanor to a third degree felony.

Section 847.0135, F.S. - The "Computer Pornography and Child Exploitation Act"

Subsection (3) of s. 847.0135, F.S., currently provides the following:

(3) CERTAIN USES OF COMPUTER SERVICES PROHIBITED.--Any person who knowingly utilizes a computer on-line service, Internet service, or local bulletin board service to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child or another person believed by the person to be a child, to commit any illegal act described in chapter 794, relating to sexual battery; chapter 800, relating to lewdness and indecent exposure; or chapter 827, relating to child abuse, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

HB 537 amends this subsection by:

- Adding "any other device capable of electronic data storage or transmission" to the list of devices that may not be used to seduce, solicit, lure, or entice a child to commit certain illegal acts;
- Adding "a child's guardian" to the list of persons that may not be seduced, solicited, lured, or enticed to commit certain illegal acts;
- Adding "unlawful sexual conduct with a child or with another person believed by the person to be a child" to the list of offenses which a person is prohibited from seducing, soliciting, luring, or enticing a child into engaging in.

¹⁰ See ss. 775.082 and 775.083, F.S.

¹¹ A second degree misdemeanor is punishable by up to 60 days in jail and a fine of \$500 or less. See ss. 775.082 and 775.083, F.S.

- Providing that each conversation in which a crime is committed may be charged as a separate offense.

HB 573 creates subsection (4) which provides that any person who uses a computer on-line service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to seduce, solicit, lure, or entice a child or a child's guardian to engage in certain illegal acts¹² and then travels or attempts to travel (or causes another to travel or attempt to travel) with the purpose of engaging in such acts commits a second degree felony.

HB 573 amends subsection (6), relating to the state's criminal jurisdiction, to add the phrase, "a child's guardian," to be consistent with the bill's other amendments.

HB 573 also creates subsection (7) to provide that prosecution of a person for an offense under s. 847.0135, F.S., does not prohibit prosecution of that person in this state or another jurisdiction for a violation of any law of this state, including a law providing for greater penalties than s. 847.0135, F.S., prescribes.

Section 910.15, F.S. - Theft and Fraudulent Practices Concerning Communication Systems

Chapter 910, F.S., covers jurisdiction and venue issues. Section 910.15, F.S., currently provides that persons charged with committing:

1. A fraudulent practice in a manner in which it may reasonably be assumed that a communication made to facilitate the fraudulent practice could or would be disseminated across jurisdictional lines; or
2. Theft that involves the use of the mail, telephone, newspaper, radio, television, or other means of communication;

may be tried in the county in which the dissemination originated, in which the dissemination was made, or in which any act necessary to consummate the offense occurred.

HB 573 rewrites subsection (1) of s. 910.15, F.S., to provide that crimes facilitated by a communication through the use of mail, telephone, or newspaper, or by radio, television, Internet, or other means of electronic data communication may be tried in the county in which the dissemination originated, in which the dissemination was made, or in which any act necessary to consummate the offense occurred.

Section 922.0022 - The Criminal Punishment Code

HB 573 adds the offense of failing to register as a convicted felon to Level 3 of the Offense Severity Ranking Chart.

C. SECTION DIRECTORY:

Section 1. Amends s. 16.56, F.S., expanding the jurisdiction of the Office of Statewide Prosecution.

Section 2. Amends s. 775.0847, F.S., reclassifying certain offenses related to child pornography.

Section 3. Amends s. 775.13, F.S., reclassifying the offense of failing to register as a convicted felon.

Section 4. Amends s. 847.0135, F.S., revising prohibitions on the use of computer services to facilitate sexual conduct to include electronic storage devices, additional persons, and additional conduct; authorizing separate charges for each conversation in which certain conduct occurs; prohibiting traveling to meet minors for certain purposes; providing criminal penalties.

Section 5. Amends s. 910.15, F.S., revising provisions relating to offenses facilitated by communications systems.

¹² Acts described in ch. 794, 800, or 827, F.S., or other unlawful sexual conduct.

Section 6. Amends s. 921.0022, F.S., conforming the Criminal Punishment Code offense severity ranking chart.

Section 7. This bill takes effect October 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See "Fiscal Comments."

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

According to the Office of the Attorney General/Department of Legal Affairs, the agency does not anticipate the need for additional resources to implement this bill. However, it should be noted that in a related issue in the Department's Fiscal Year 2007-08 Legislative Budget Request, funding is requested for 50 full-time positions, OPS clerical support, and related expenses to enable the agency's recently created Child Predator CyberCrime Unit¹³ to investigate criminal activity relating to the victimization of children on the Internet.

Although the Criminal Justice Impact Conference has not yet met to consider the prison bed impact of this bill on the Department of Corrections, the Office of Economic and Demographic Research of the Florida Legislature estimates that the bill would have an indeterminate prison bed impact. The bill requires the reclassification of the felony degree of offenses involving child pornography in certain situations. This could have an impact on inmate population in the state prison system. However, no information is available to indicate the frequency with which images of child pornography involve the elements which would lead to the reclassification of the offense.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

¹³ The CyberCrime Unit was created as a pilot project in FY 2005-06 with a staff of four full-time equivalent positions. In the 2006 Legislative Session, the Unit was established in s. 16.61, Florida Statutes.

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 1

Section 905.34, F.S., outlines the powers and duties of statewide grand juries. Currently, the statute limits the subject matter jurisdiction of statewide grand juries to the same list of offenses provided for in s. 16.56, F.S. (the statute that provides the subject-matter jurisdiction of the Office of Statewide Prosecution). If HB 573, which expands the list of offenses that the Office of Statewide Prosecution has subject-matter jurisdiction over, is adopted, s. 905.34, F.S., may need to be similarly amended so that a statewide grand jury would have subject-matter jurisdiction over the same offenses.

Section 2 (line 110)

This portion of the bill reclassifies felony offenses involving the possession, production, or transmission of an image of child pornography or the sexual performance of a child if such image contains certain depictions. It is unclear what specific crimes involve the *possession, production, or transmission* of an image of child pornography or the sexual performance of a child. References to specific statutes might make this more clear.

Additionally, the term “child pornography” is not defined by the bill or elsewhere in this section of statute. This term could be defined in the same manner provided for in s. 847.001(3), F.S.

Section 4 (lines 165-180)

Although it appears that the intent of the bill is to capture offenders who approach the child’s parent in order to entice that parent to allow their child to engage in unlawful sexual conduct, the bill’s language could be clarified.

D. STATEMENT OF THE SPONSOR

The bill sponsor submitted the following statement:

HB 573 addresses the growing problem of online child predators by creating new penalties for traveling to meet a child for the purpose of sexual exploitation, enhancing penalties for possession and distribution of certain types of images of children being sexually abused, and clarifying that the Office of Statewide Prosecution has jurisdiction over these offenses.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES