

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Criminal Justice Committee

BILL: SB 1004

INTRODUCER: Senator Argenziano

SUBJECT: Relating to Child Pornography/Computers

DATE: February 8, 2007

REVISED: 02/20/07

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Clodfelter</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/2 amendments</u>
2.	<u></u>	<u></u>	<u>JA</u>	<u></u>
3.	<u></u>	<u></u>	<u></u>	<u></u>
4.	<u></u>	<u></u>	<u></u>	<u></u>
5.	<u></u>	<u></u>	<u></u>	<u></u>
6.	<u></u>	<u></u>	<u></u>	<u></u>

## Please see last section for Summary of Amendments

- Technical amendments were recommended
- Amendments were recommended
- Significant amendments were recommended

### I. Summary:

This bill enhances the tools available to prosecute sexual abuse of children. Its provisions:

- Enhance penalties for existing crimes related to possession of images of sexual abuse of children (commonly referred to as child pornography) when the offender possesses 10 or more images and at least one image includes a child under the age of 5; sadomasochistic abuse, sexual battery or sexual bestiality involving a child; or any video or live movie involving a child.
- Expand the scope of s. 847.0135, F.S., concerning use of the Internet to seduce, solicit, lure or entice a child or a person thought to be a child to commit certain acts relating to sexual abuse of children. The expanded scope includes all acts of sexual conduct with a child or a person thought to be a child, includes actions directed at the child's guardian, and provides that each separate contact is a separate offense.
- Create a new felony offense of traveling to meet a minor for the purpose of committing specified crimes of sexual abuse of a child or any other unlawful sexual conduct with a child.
- Authorize prosecutors to charge an act that violates s. 827.071, F.S., (relating to sexual performance of a child) or s. 847.0135, F.S., (relating to child pornography) under any other applicable statute, including one with greater penalties.

- Expand the investigative and prosecutorial authority of the Office of Statewide Prosecution (OSP) and the subject matter jurisdiction of the statewide grand jury to include violations of ch. 827, F.S., (concerning abuse of children) when the crime is facilitated by or connected to use of the Internet or an electronic data storage or transmission device, and by deeming that crimes facilitated by or connected to use of the Internet occur simultaneously in every Florida judicial circuit.
- Update statutes to incorporate newer technologies that are used to facilitate sexual abuse of children and transfer of images of sexual abuse of children.

This bill substantially amends sections 16.56, 827.071, 847.0135, 905.34, and 910.15, and creates section 775.0847, of the Florida Statutes.

## II. Present Situation:

The accessibility and apparent anonymity of the Internet has expanded opportunities for sexual abusers to victimize children. In response, law enforcement agencies throughout the United States and in other developed countries have increased their efforts to thwart these attempts. In Florida, the Child Predator CyberCrime Unit was established within the Attorney General's Office of Statewide Prosecution in 2005. The unit includes law enforcement investigators and prosecutors whose primary mission is to target child predators, child pornography, and Internet-based sexual exploitation of children. The unit has reportedly shown success despite being hampered by jurisdictional limitations and the inapplicability of current laws to some new technologies and methods.

The following sections of the Florida Statutes include the offenses most commonly charged in relation to the possession, production, or transmission of child pornography:

- Section 827.071(4), F.S., provides that it is a 2nd degree felony, ranked at Level 5 of the Criminal Punishment Code, to possess a photograph, motion picture, exhibition, show, representation, or other presentation that includes any sexual conduct by a child with intent to promote the item. Possession of 3 or more copies of such items is prima facie evidence of intent to promote.
- Section 827.071(5), F.S., makes possession of any item listed in subsection (5) with knowledge that it includes sexual conduct by a child a 3rd degree felony ranked at Level 5 of the Criminal Punishment Code. Possession of each item is a separate offense.
- Section 847.0135(2), F.S., prohibits any use of a computer in connection with distributing information about any minor for the purpose of facilitating, encouraging, offering, or soliciting sexual conduct of or with a minor, or a visual depiction of such conduct. Violation is a 3rd degree felony ranked at Level 6.
- Section 847.0135(3), F.S., makes it a 3rd degree felony ranked at Level 7 to knowingly use an on-line service, Internet service, or local bulletin board service in order to try to get a child or person thought to be a child to commit an illegal act of sexual battery, lewdness or indecent exposure, or child abuse.

- Section 847.0137, F.S., provides that a person commits a 3rd degree felony ranked at Level 5 by transmitting child pornography to another person when the transmitter knew or should have known that the item was child pornography. The term “transmit” includes sending any image, information, or data through the Internet or other medium by use of electronic equipment or an electronic device.
- Section 847.138, F.S., prohibits knowingly sending, or believing that one has sent, material that is harmful to minors by means of electronic mail to a specific individual known to be a minor. “Harmful to minors” is defined in s. 847.001, F.S., and includes any kind or form of representation that depicts nudity, sexual conduct, or sexual excitement predominately appealing to the prurient, shameful, or morbid interest of minors; that is patently offensive to prevailing standards in the adult community as to what is suitable material for minors; and that is without serious literary, artistic, political, or scientific value for minors when considered as a whole. The offense is a 3rd degree felony ranked at Level 5.

Chapter 910, F.S., covers jurisdiction and venue issues. Section 910.15, F.S., provides that persons charged with committing 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 theft involving use of mail, telephone, newspaper, radio, television, or other means of communication, may be tried in the county where the dissemination originated, where it was made, or where any act necessary to consummate the offense occurred.

The Office of Statewide Prosecution was created by constitutional amendment in 1986. Its jurisdiction and authority are set forth in s. 16.56, F.S. and Article IV, Section 4 of the Florida Constitution. In order for OSP to handle a case, the crime must have occurred in more than one judicial circuit or be part of an organized conspiracy affecting more than one judicial circuit, and it must be an offense enumerated in the law. Violations of s. 847.0135, F.S., and offenses relating to violation of s. 847.0135, F.S., are included within the OSP’s jurisdiction. OSP does not have authority to investigate or prosecute violations of ch. 827, F.S.

The subject matter jurisdiction of the statewide grand jury as set forth in s. 905.34, F.S., parallels the OSP’s investigative and prosecutorial authority.

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

Section 1 of the bill amends s. 16.56, F.S., to include violations of ch. 827, F.S., concerning abuse of children, within the authority of the Office of Statewide Prosecution when the crime is facilitated by or connected to use of the Internet or an electronic data storage or transmission device. It also amends the statute to provide that crimes facilitated by or connected to use of the Internet are deemed to occur simultaneously in every Florida judicial circuit. This means that the crime occurs in more than one judicial circuit, allowing OSP to investigate and prosecute any offense that has a nexus to Internet use and is within its subject matter jurisdiction. Currently, OSP does not have jurisdiction unless the crime occurs in two or more judicial circuits in a related transaction or is part of an organized conspiracy affecting two or more circuits.

Section 2 creates a new s. 775.0847, F.S., that reclassifies existing crimes related to child pornography to a higher offense level. The trigger for reclassification is possession of 10 or more images of any form of child pornography, with at least one image including one or more of the following:

- A child under the age of 5.
- Sadoomasochistic abuse involving a child, sexual battery involving a child, or sexual bestiality involving a child.
- Any video or live movie involving a child.

The section includes relevant definitions, which are similar or identical to the definitions of the same terms found in s. 847.001, F.S.

Reclassification will result in raising the offense by one level in the Criminal Punishment Code's Offense Severity Ranking Chart, found in s. 921.0022, F.S. The effect of this would be to increase the Total Offense Score that is derived from the Criminal Punishment Code Worksheet. As an example, enhancement of a violation of s. 847.0135(2), F.S., a Level 6 offense, would increase the lowest permissible sentence for an offender with no prior criminal record from a non-prison sanction to 21 months in prison. Enhancement of the other offenses affected by the provision would have less dramatic effect, but could still result in imprisonment for an offender who would otherwise get probation, or a longer sentence for an offender who is sentenced to prison.

Section 3 amends s. 827.071, F.S., to expressly state that a prosecutor can charge a person whose acts violate this provision of law under any other statute that is also violated by the acts. The purpose of this amendment is to allow the prosecutor to charge the offense with the greatest penalty, rather than being restricted to charging under the statute that most specifically includes the conduct.

Section 4 of the bill includes significant amendments to the Computer Pornography and Child Exploitation Prevention Act which constitutes s. 847.0135, F.S., and is within the subject matter jurisdiction of OSP and the statewide grand jury. Subsection (3) is amended 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 illegal acts related to sexual battery, lewdness or indecent exposure, or child abuse.
- Adding "a child's guardian" to the list of persons that may not be seduced, solicited, lured, or enticed to commit the illegal acts.
- Expanding the list of illegal acts to include unlawful sexual conduct with a child or with another person believed by the person to be a child.
- Stating that each contact in violation of the section can be charged as a separate offense.

New subsection (4) creates a felony offense of traveling to meet a minor for the purpose of committing a crime of sexual abuse of a child. The new offense is a 2nd degree felony that defaults to a Level 4 offense severity ranking because it is not specifically ranked. It applies to any person who travels, attempts to travel, or causes another person to travel or attempt to travel,

any distance to engage in an illegal act described in ch. 794, F.S. (sexual battery), ch. 800, F.S., (lewdness or indecent exposure), or ch. 827, F.S., (child abuse). It also applies to any person who engages in other unlawful sexual conduct with a child, or a person believed by the offender to be a child, after using any of a broad range of electronic means to seduce, solicit, lure, or entice a child or a child's guardian or person believed to be a child or a child's guardian.

The addition of persons who are believed to be a child or a child's guardian as victims makes it clear that a crime is committed even if the perpetrator is actually communicating with an adult. This is often the case in investigations conducted by OSP's Child Predator CyberCrime Unit and other law enforcement agencies, as well as efforts by organizations without law enforcement status.

This section also adds the provision stating that a person who violates s. 847.0135, F.S., can be charged with another offense that is violated by the same acts, even if the penalty is more severe.

Section 5 of the bill amends s. 905.34, F.S., which states the jurisdiction of the statewide grand jury, exactly the same as the amendments to the subject matter jurisdiction of the Office of Statewide Prosecution that are made in Section 1 of the bill.

Section 6 significantly expands the application of s. 910.15, F.S., which currently deals with jurisdiction and venue of criminal trials relating to fraudulent practices and thefts. The section currently provides that a person charged with a fraudulent practice or a theft involving use of certain communications systems may be tried in the county where the dissemination originated, where it was made, or in which any act necessary to consummate the offense occurred. Communications made by or made available through the Internet are considered to have been made in every Florida county. The amendment removes the limitation to only fraudulent practices and thefts, and makes the multi-jurisdiction provision (and statewide Internet provision) applicable to the trial of any crime facilitated by a communication using mail, telephone, newspaper, radio, television, Internet, or another means of electronic data communication.

The bill includes an effective date of July 1, 2007.

#### **IV. Constitutional Issues:**

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

None.

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

None.

##### **C. Trust Funds Restrictions:**

None.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

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 Unit 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 the 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.

**VI. Technical Deficiencies:**

The part of Section 4 of the bill creating the offense of traveling to meet a minor (new s. 847.0135(4), F.S.) should be reworded for clarification. Also, the new offense is unranked and thus defaults to a Level 4 offense severity ranking under the Criminal Punishment Code. This is significantly less than the Level 7 ranking of s. 847.0135(3), F.S., which appears to be no more serious. If this is unintentional, the new offense should be ranked in s. 921.0024, F.S.

**VII. Related Issues:**

None.

## VIII. Summary of Amendments:

### **Barcode 450214 by Criminal Justice:**

This amendment deletes all of the bill except for the effective date. However, only sections 1 and 8 of the amendment are completely without a corresponding provision in the bill.

Section 1 names the act the “Cybercrimes Against Children Act of 2007.”

Section 2 amends s. 16.56, F.S. This includes the amendments made to s. 16.56, F.S., in the bill, and additionally expands OSP’s jurisdiction to include any crime that is facilitated by or connected to use of the Internet. Placing such crimes in OSP’s subject-matter jurisdiction and providing that the crime occurs in more than one judicial circuit allows OSP to investigate and prosecute any Internet-related offense. The provision deeming that an Internet-related crime is committed in every judicial circuit in the state has been reworded with no substantive change.

Section 3 makes minor changes to the newly-created penalty enhancement statute for certain sexual offenses involving children. The original language for this new s. 775.0847, F.S., is found in Section 2 of the bill. The amendment adds reference to deriving satisfaction from sadistic violence to the definition of sadomasochistic abuse. It also removes references to the sentencing guidelines and gain time accrual for inmates that do not apply to current offenses.

Section 4 is identical to Section 3 of the bill.

Section 5 includes additional amendments to s. 847.0135, F.S., which is addressed in Section 4 of the bill. Violation of the prohibitions in s. 847.0135(3), F.S., is a 3rd degree felony. The amendment creates a new 2nd degree felony offense that applies when an offender misrepresents his or her age in committing the crime. It also clarifies that it is illegal for an offender to seduce, solicit, lure, or entice a child’s parent, legal guardian, or custodian to consent to the child’s participation in sexual conduct. In addition, the amendment provides that each separate use of certain types of technological devices or services to commit an offense under the statute may be charged as a separate offense, while the bill provides that each “separate contact” with a child or person believed to be a child is a separate offense.

Section 6 is identical to Section 5 of the bill.

Section 7 does not substantively change Section 6 of the bill. It differs only in amending the tagline of s. 910.15, F.S., to conform to the amendments made to the statute.

Section 8 amends s. 921.0022, F.S., which is the Criminal Punishment Code Offense Severity Ranking Chart. It ranks the new offense of “traveling to meet a minor to commit an unlawful sex act” created in s. 847.0135, F.S., as a Level 7 offense.

### **Barcode 144798 by Criminal Justice:**

The amendment does not alter the provisions of the bill or those of 450214 except for changing the effective date. It adds language beginning with Section 7 as follows:

Sections 7 and 8 amend ss. 775.21, F.S. (the Florida Sexual Predators Act), and s. 943.0435, F.S. (concerning sexual offenders), respectively, to require a sexual predator or sexual offender to register any electronic mail address and any instant message name that he or she has with FDLE. Sexual predators and sexual offenders are also required to keep the information up-to-date in the same manner as is required for a change of residence. This includes providing the information within 48 hours of establishing or changing an electronic mail address or instant message name.

Section 9 amends s. 944.606, F.S., to include a sexual offender's e-mail addresses and instant message names in the personally-identifying information that must be provided by DOC upon the offender's release from a correctional facility. The information must be provided within six months prior to release (when possible) to law enforcement agencies in the county where the offender was sentenced and where he or she intends to reside, FDLE, victims or designated family members when requested, and any other person who requests the information. It should be noted that the term sexual offender in this statute includes those who are defined as sexual offenders or sexual predators for registration purposes.

Section 10 amends s. 944.607, F.S., which concerns requirements for various law enforcement and correctional agencies or departments to provide information to FDLE about offenders who are required to register as sexual offenders. It includes a sexual offender's e-mail addresses and instant message names in the personally-identifying information that must be provided.

Section 11 creates a new s. 943.0437, F.S., authorizing FDLE to provide the registered e-mail addresses and instant message names of sexual offenders and sexual predators to social networking Internet sites, which will enable operators of the sites to screen for those users. The information can be used by site operators to block offenders from using the site and to report any detected use of the site. The amendment includes a provision that its terms are not to be construed to impose civil liability on a commercial social networking site.

Section 12 establishes an effective date of October 1, 2007.