

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.)

Prepared By: The Professional Staff of the Criminal and Civil Justice Appropriations Committee

BILL: CS/CS/CS/SB 1442

INTRODUCER: Criminal and Civil Justice Appropriations Committee; Judiciary Committee; Criminal Justice Committee; and Senators Dockery and Baker

SUBJECT: Exploited Children

DATE: April 15, 2008 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon	CJ	Fav/CS
2.	Toman	Jameson	CF	Fav/1 amendment
3.	Daniell	Maclure	JU	Fav/CS
4.	Butler	Sadberry	JA	Fav/CS
5.				
6.				

Please see Section VIII. for Additional Information:

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|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill provides additional protections in civil and criminal proceedings, as well as a civil remedy for victims of child pornography. Specifically, the bill:

- Allows for the use of a pseudonym in court records and proceedings instead of revealing the victim's name;
- Removes a requirement that the prosecution prove that the person who sells or transfers custody of a minor knew that "force, fraud, or coercion" would be used to cause the minor to engage in prostitution. Instead, the prosecution would only need to prove that the person selling or transferring the custody of a minor knew that the minor being sold would engage in prostitution, perform naked for compensation, or otherwise participate in the trade of sex trafficking.
- Relocates a provision in s. 800.04(7)(b), F.S., proscribing the offense of lewd or lascivious exhibition live over a computer online service, to the computer pornography statute in s. 847.0135(5), F.S. (This is a technical restructuring; the current criminal penalties are not affected by this transfer.);

- Requires law enforcement officers who recover child pornography images or movies during an investigation to provide these images and other identifying information to the National Center for Missing and Exploited Children, Child Victim Identification Program;
- Requires prosecutors to enter certain information into the Victims in Child Pornography Tracking Repeat Exploitation database to be developed and maintained by the Office of the Attorney General;
- Creates a new state civil remedy, allowing victims of child pornography to recover actual damages and costs against a producer, promoter, or possessor of images involving the victim;
- Provides that these victims of child pornography shall be deemed to have sustained minimum damages of \$150,000;
- Allows the Office of the Attorney General to pursue cases on behalf of child pornography victims, and to seek any reasonable attorney's fees and costs; and
- Allows identified victims of child pornography and child victims of online sexual exploitation who suffer psychiatric or psychological injury as a direct result of the crime to file a victim's compensation claim under ch. 960, F.S.

According to the Office of the Attorney General (OAG), the bill has a minimal fiscal impact, as follows:

- The OAG will use existing staff and technology to develop and maintain the database contemplated by the bill, resulting in an insignificant cost.
- The OAG estimates that the current number of victims in Florida is approximately 30 to 40. An indeterminate number of these victims may seek OAG representation in civil cases to seek damages against the producers, promoters, and possessors of child pornography. The OAG expects that this additional casework will be handled by current staff from its Civil Litigation and Child Predator Cybercrime units. The bill also allows the OAG to seek reasonable attorney's fees and costs, which will help offset costs of pursuing litigation on behalf of the victims.
- The OAG estimates that there are currently 30 victims in Florida that would qualify for victim compensation for mental health services. Current law allows a maximum of \$10,000 per victim to be used for mental health services, and if 80 percent of the victims seek compensation assistance, the OAG estimates a cost of \$240,000. However, the OAG expects that this will be an insignificant impact upon the Crime Compensation Trust Fund.

This bill substantially amends the following sections of the Florida Statutes: 90.404, 92.56, 92.565, 394.912, 409.2355, 775.082, 775.084, 775.15, 775.21, 784.048, 787.01, 787.02, 787.025, 794.065, 800.04, 847.0135, 914.16, 921.0022, 921.244, 938.10, 943.04354, 947.1405, 948.03, 948.06, 948.101, 948.30, 948.31, and 960.03. This bill creates the following sections of the Florida Statutes: 847.002, 847.01357, and 960.197.

II. Present Situation:

Child Pornography

Chapter 847, F.S., proscribes child pornography offenses, including computer pornography and

traveling to meet a minor after meeting online. The definition of “child pornography” means “any image depicting a minor engaged in sexual conduct.”¹ “Sexual conduct” includes, in part, such conduct as: deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, sexual battery, actual lewd exhibition of the genitals, and actual physical contact with clothed or unclothed genitals.²

Child pornography has a devastating and lasting effect on children. In addition to the physical injuries they often suffer when they are abused, such as genital bruising, lacerations, or exposure to sexually transmitted diseases, child victims also often experience depression, withdrawal, anger, and other psychological disorders, often into adulthood.³

According to the National Center for Missing and Exploited Children (NCMEC):

The lives of children featured in these illegal images are forever altered, not only by the molestation but by the permanent record of the exploitation. Once sexual exploitation takes place, the molester may document these encounters on film or video. This documentation can then become the “ammunition” needed to blackmail the child into further submission, which is necessary to continue the relationship and maintain its secrecy. In addition these documented images allow molesters to “relive” their sexual fantasies with children long after the exploitation has stopped.

A greater number of child molesters are now using computer technology to organize and maintain their collections of these illegal images. In addition they are also using the Internet to increase the size of these collections. . . . When these images reach cyberspace, they are irretrievable and can continue to circulate forever. Thus the child is revictimized as the images are viewed again and again.⁴

In 2002, the United States Supreme Court held that computer-generated child pornography is not illegal if no actual child was used in the production of the images.⁵ This ruling allows defendants to argue that the child pornography images found on their computers are images of virtual children, not real children, and, therefore, are not criminal. Prosecutors must then establish the identity of the children in order to win a conviction.⁶

The NCMEC’s Child Victim Identification Program (CVIP) serves as the national clearinghouse for child-pornography cases, providing a central repository for information regarding children

¹ Section 847.001(3), F.S.

² Section 847.001(16), F.S.

³ Nat’l Ctr. for Missing and Exploited Children, *What is Child Pornography?*, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1504 (last visited March 30, 2008).

⁴ *Id.*

⁵ *Ashcroft v. The Free Speech Coalition*, 535 U.S. 234 (2002).

⁶ Nat’l Ctr. for Missing and Exploited Children, *Child Victim Identification Program (CVIP)*, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=2444 (last visited March 30, 2008).

who have been identified as victims seen in child pornography. The CVIP analysts work with law enforcement agencies and prosecutors to identify the children who have been victimized and to ensure the successful conviction of the child pornographers.⁷

Online Sexual Exploitation

While the Internet can provide vast knowledge and opportunities to people, it has also greatly impacted sexual exploitation of children. Home-computer technology has made it easier and cheaper to distribute images of sexual exploitation.⁸ More than 77 million children regularly use the Internet,⁹ and one study found that “as much as 20 percent of all pornographic activity on the Internet may involve children.”¹⁰ Nationwide, approximately one in seven children between the ages of 10 and 17 have received a sexual solicitation online.¹¹ According to the Federal Internet Crimes Against Children Task Force, Florida ranks fourth in the nation in volume of child pornography.¹²

Section 800.04(7)(b), F.S., proscribes the offense of lewd or lascivious exhibition live over a computer online service. Currently, it is a third-degree felony for an offender less than 18 years of age to intentionally masturbate, lewdly or lasciviously expose the genitals, or intentionally commit other sexual acts not involving actual contact with the victim, provided the person knows or should know, or has reason to believe, that the transmission is being viewed by a victim under 16 years of age. If the offender is 18 years of age or older and commits a lewd or lascivious exhibition live over a computer online service, it is a second-degree felony.

Additionally, the CyberCrimes Against Children Act of 2007 went into effect on October 1, 2007, “making Florida one of the leading states in the [nation] with laws against cybercrimes that target children.”¹³

Victim Assistance

The Florida Crimes Compensation Act (Compensation Act) is established in ss. 960.01-960.28, F.S. For purposes of the Compensation Act, the term “victim” is defined to include:

- A person who suffers personal physical injury or death as a direct result of a crime;
- A person less than 16 years of age who was present at the scene of a crime, saw or heard the crime, and suffered a psychiatric or psychological injury because of the crime, but who was not physically injured; or

⁷ *See id.*

⁸ *What is Child Pornography?*, *supra* note 3.

⁹ Office of the Attorney General of Fla., *Child Predator CyberCrime Unit*, <http://myfloridalegal.com/pages.nsf/Main/DF75DF6F54BDA68E8525727B00645478> (last visited March 30, 2008).

¹⁰ *What is Child Pornography?*, *supra* note 3 (quoting Eva J. Klain, Heather J. Davies, and Molly A. Hicks, *Child Pornography: The Criminal-Justice-System Response*, March 2001, at 3).

¹¹ *Child Predator CyberCrime Unit*, *supra* note 9.

¹² *Id.*

¹³ *Id.*

- A person against whom a forcible felony was committed and who suffers a psychiatric or psychological injury as a direct result of that crime but who does not otherwise sustain a personal physical injury or death.¹⁴

Also for purposes of the Compensation Act, the term “crime” is defined to include a “felony or misdemeanor offense committed by either an adult or a juvenile which results in physical injury or death.”¹⁵

The Florida Attorney General’s Division of Victim Services¹⁶ serves as an advocate for crime victims and victims’ rights and administers a compensation program to ensure financial assistance for innocent victims of crime.¹⁷ Injured crime victims may be eligible for financial assistance for medical care, lost income, funeral expenses, and other out-of-pocket expenses directly related to the injury.¹⁸ Payment is made from the Crimes Compensation Trust Fund (Trust Fund),¹⁹ and awards to eligible victims are limited as follows:

- No more than \$10,000 for treatment;
- No more than \$10,000 for continuing or periodic mental health care of a minor victim whose normal emotional development is adversely affected by being the victim of a crime;
- No more than \$25,000 for all compensable costs; or
- No more than \$50,000 when there is a finding that a victim has suffered catastrophic injury.²⁰

The Department of Legal Affairs has rulemaking authority to establish limits on awards within the statutory guidelines.²¹

Confidentiality in Sex and Child Abuse Cases

Section 92.56, F.S., provides confidentiality protections for sexual and child abuse victims in criminal and civil court proceedings and records, including allowing the state to use a pseudonym instead of the victim’s name to designate a victim of sexual and child abuse.

¹⁴ Section 960.03(13), F.S.

¹⁵ Section 960.03(3), F.S.

¹⁶ The Division of Victim Services is housed within the Office of Attorney General, Department of Legal Affairs.

¹⁷ See s. 960.05, F.S.; see generally Office of the Attorney General of Fla., *Crime Victims’ Services*, <http://myfloridalegal.com/victims> (last visited March 30, 2008).

¹⁸ Office of the Attorney General of Fla., *Division of Victim Services*, <http://myfloridalegal.com/pages.nsf/main/1c7376f380d0704c85256cc6004b8ed3!OpenDocument> (last visited March 30, 2008).

¹⁹ Section 960.21, F.S.

²⁰ Section 960.13(9)(a), F.S.

²¹ Section 960.13(9)(b), F.S.

III. Effect of Proposed Changes:

Section 1

The bill amends s. 92.56, F.S., broadening the provision to allow the use of a pseudonym in court records and proceedings involving child pornography crimes.

Section 2

The bill amends s. 796.035, F.S. to removes the requirement that the prosecution prove that the person who sells or transfers custody of a minor knew that “force, fraud, or coercion” would be used to cause the minor to engage in prostitution. Instead, the prosecution would only need to prove that the person selling or transferring the custody of a minor knew that the minor being sold would engage in prostitution, perform naked for compensation, or otherwise participate in the trade of sex trafficking.

Sections 3 and 4

The bill makes a technical change by moving the provision in s. 800.04(7)(b), F.S., that proscribes the offense of lewd or lascivious exhibition live over a computer online service, to the computer pornography statute in s. 847.0135(5), F.S. The current criminal penalties are unchanged by this transfer.

Section 5

The bill creates s. 847.002, F.S., requiring law enforcement officers who recover child pornography images or movies during an investigation to provide these images and other identifying information to the National Center for Missing and Exploited Children, Child Victim Identification Program, and to request contact information from the national center for any recovered images which contain an identified victim of child pornography. The officer is then required to provide the prosecutor (who is pursuing a prosecution for producing, possessing, or promoting child pornography) with this contact information.

This section also requires the prosecutor, in every filed case involving an identified child pornography victim, to enter the following information into the Victims in Child Pornography Tracking Repeat Exploitation database to be developed and maintained by the Office of the Attorney General:

- Case number and agency file number,
- Named defendant,
- Circuit court division and county,
- Current court dates and case status,
- Contact information for the assigned prosecutor, and
- Verification that the prosecutor has a victim impact statement and will use it at sentencing.

Section 5

The bill creates a civil remedy for victims of child pornography by creating s. 847.01357, F.S. Specifically, a victim of any sexual abuse crime in chs. 794, 800, 827, or 847, F.S., where any portion of that abuse is used in the production of images of child pornography, and who suffers personal or psychological injury as a result of the production, promotion, or possession of such images, may sue the producer, promoter, or possessor and recover actual damages and costs, including attorney's fees.

The section further provides that such victims who receive damages shall be deemed to have sustained a minimum of \$150,000 in damages.

The bill provides that any action brought under the new section must be filed within three years after the later of:

- The conclusion of a related criminal case;
- The notification to the victim by a member of law enforcement of the creation, possession, or promotion of pornographic images; or
- In the case of a child under 18 years, within three years after such child turns 18 years of age.

This section prohibits a defendant from using the defense that he or she did not know the victim or did not commit the abuse depicted in the images. Furthermore, under the bill, victims with a bona fide claim will be provided a confidential pseudonym, upon request, to be used in all legal proceedings.

Finally, this section allows the Office of the Attorney General to pursue these cases on behalf of child pornography victims, and provides that any recovered damages will go to the victim, although the Attorney General may seek reasonable attorney's fees and costs.

Section 6

The bill amends the Florida Crimes Compensation Act (Compensation Act), expanding the definition of "crime" to include violations of s. 827.071,²² s. 847.0135,²³ s. 847.0137,²⁴ or s. 847.0138, F.S.,²⁵ relating to online sexual exploitation and child pornography.

The bill adds a definition for "identified victim of child pornography," to mean any person:

- Who, while under the age of 18, was depicted in any child pornography image;
- Who has been identified by law enforcement; and
- Whose image has been provided to the National Center for Missing and Exploited Children's Child Victim Identification Program.

²² Section 827.071, F.S., pertains to sexual performance by a minor.

²³ Section 847.0135, F.S., pertains to computer pornography and traveling to meet a minor.

²⁴ Section 847.0137, F.S., pertains to the transmission of pornography.

²⁵ Section 847.0138, F.S., pertains to the transmission of material harmful to minors.

The bill amends the definition of “victim” to include individuals under the age of 18 (rather than 16) who witness a crime and suffer psychological damage, but who are not physically injured.

Section 7

The bill creates s. 960.197, F.S., allowing the Office of the Attorney General to award compensation for counseling and other mental health services to treat psychological injury or trauma to identified victims of child pornography and to victims of online sexual exploitation who are under 18 years of age and who suffer psychiatric or psychological injury as a direct result of the crime. (Currently, these categories of victims are not eligible for compensation under the Compensation Act, because they do not suffer physical injury.) The section also provides that compensation is not contingent on pursuing a criminal investigation or prosecution.

Sections 8 through section 32

The bill contains technical conforming changes to other statutes affected by the bill, including the criminal punishment code to reflect the relocation of the law proscribing lewd or lascivious exhibition live over a computer online service.

Section 33

The bill provides an effective date of October 1, 2008.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill allows victims of child pornography to seek a civil remedy for actual damages against persons who produce, possess, or promote pornographic images of these victims.

Any victim who successfully pursues a claim will receive minimum damages in the amount of \$150,000.

C. Government Sector Impact:

According to the Office of the Attorney General (OAG), the bill has a minimal fiscal impact, as follows:

- The OAG will use existing staff and technology to develop and maintain the database contemplated by the bill, resulting in an insignificant cost.
- The OAG estimates that the current number of victims in Florida is approximately 30 to 40. An indeterminate number of these victims may seek OAG representation in civil cases to seek damages against the producers, promoters, and possessors of child pornography. The OAG expects that this additional casework will be handled by current staff from its Civil Litigation and Child Predator Cybercrime units. The bill also allows the OAG to seek reasonable attorney's fees and costs, which will help offset costs of pursuing litigation on behalf of the victims.
- The OAG estimates that there are currently 30 victims in Florida that would qualify for victim compensation for mental health services. Current law allows a maximum of \$10,000 per victim to be used for mental health services, and if 80 percent of the victims seek compensation assistance, the OAG estimates a cost of \$240,000. However, the OAG expects that this will be an insignificant impact upon the Crime Compensation Trust Fund.²⁶

VI. Technical Deficiencies:

None.

VII. Related Issues:

This bill is patterned after "Masha's Law" within the federal Adam Walsh Child Protection and Safety Act of 2006,²⁷ which allows child pornography victims to seek a civil remedy from persons who download their pornographic images. Masha's Law was named after Masha Allen, a Russian orphan adopted by Matthew Mancuso, an American pedophile who sexually abused her and shared photos of the abuse on the Internet. Although Mancuso was convicted of several sexual abuse-related crimes, the pornographic images he took of Masha are still widely disseminated on the Internet.²⁸ Prior to enactment of Masha's Law, federal law provided a civil cause of action for minors who were victims of certain sexual abuse-related crimes and who suffered personal injury as a result of such abuse. Those minors were deemed to have sustained damages of no less than \$50,000. Masha's Law raised the civil penalties from a minimum of

²⁶ John L. Hamilton, Legal Affairs/Attorney General, *Re: Senate Bill 1442 Relating to Exploited Children by Dockery* (Feb.26, 2008).

²⁷ Public Law 109-248, Title VII, Sec. 707.

²⁸ Associated Press, *Bush Signs Child Predator Law*, CBS NEWS, July 27, 2006, available at <http://www.cbsnews.com/stories/2006/07/27/politics/main1843910.shtml> (last visited March 30, 2008).

\$50,000 to \$150,000 and changed the law to allow persons 18 years of age or older to also recover damages from those who downloaded images of them while they were minors.²⁹

If passed, this bill will allow Florida citizens who have been identified by law enforcement as victims of child pornography, and who have suffered personal or psychological injury as a result of the possession and distribution of their pornographic images, to seek civil redress under Florida law.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

CS by Criminal and Civil Justice Appropriations on April 15, 2008:

The committee substitute:

- Removes a requirement that the prosecution prove that the person who sells or transfers custody of a minor knew that “force, fraud, or coercion” would be used to cause the minor to engage in prostitution. Instead, the prosecution would only need to prove that the person selling or transferring the custody of a minor knew that the minor being sold would engage in prostitution, perform naked for compensation, or otherwise participate in the trade of sex trafficking.
- Adds “or movie” to further define pornographic images.
- Makes technical corrections, and clarifies language in the bill referencing the National Center for Missing and Exploited Children.
- Changes the word “known” to “identified” when used in describing a victim of pornography.

CS by Judiciary on April 1, 2008:

The committee substitute clarifies that the Office of the Attorney General will develop, as well as maintain, the Victims in Child Pornography Tracking Repeat Exploitation database proposed by the bill.

CS by Criminal Justice on March 6, 2008:

The committee substitute:

- Narrows the potential pool of victims who will be eligible to receive crime compensation awards under ch. 960, F.S., to identified victims of child pornography and child victims of online sexual exploitation (who are under 18 years of age). They must also suffer psychiatric or psychological injury as a direct result of the crime.

²⁹ See GovTracks.us, *H.R. 4472 [109th]: Adam Walsh Child Protection and Safety Act of 2006*, available at <http://www.govtrack.us/congress/bill.xpd?tab=summary&bill=h109-4472> (last visited March 30, 2008).

- Adds a provision expanding the definition of “victim” to include a person under 18 years (rather than 16 years of age) who was present at the crime scene, suffered a psychiatric or psychological injury, but who was not physically injured.
- Deletes the public records exemption from Section 1 of the bill.
- Clarifies law enforcement’s responsibilities in Section 4 of the committee substitute.
- Clarifies the minimum damages award.
- Relocates the lewd or lascivious exhibition live over a computer offense to an existing computer pornography statute in ch. 847, F.S., rather than creating a new one in the same chapter.

B. Amendments:

None.