

**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 Children, Families, and Elder Affairs

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BILL: CS/SB 182

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

SUBJECT: Sexual Offenders

DATE: February 11, 2014

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Clotfelter</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>JU</u>	_____

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

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 182 amends statutes relating to child pornography and prohibits sex offenders from possessing any type of pornography. Specifically, the bill clarifies the definition to child pornography to include a visual depiction that has been modified to appear that a minor is engaging in sexual conduct. This new definition is added to other relevant statutes such as the criminal code. Sexual offenders after October 1, 2014 on community supervision are prohibited from possessing any type of pornography. The bill is likely to result in an increase in the number of alleged violations of community supervision for possessing prohibited materials. The potential fiscal impact of the bill is indeterminate. The bill has an effective date of July 1, 2014.

**II. Present Situation:**

Probation<sup>1</sup> and community control<sup>2</sup> are forms of community supervision that may be imposed as a sentence for a person who is found guilty or who enters a plea of guilty or nolo contendere to a criminal offense. 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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<sup>1</sup> "Probation" is defined as a form of community supervision requiring specified contacts with parole and probation officers and other terms and conditions as provided in s. 948.03, F.S. Section 948.001(5), F.S.

<sup>2</sup> "Community control" is defined as a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, administered by officers with restricted caseloads. Community control is an individualized program in which the freedom of an offender is restricted within the community, home, or noninstitutional residential placement and specific sanctions are imposed and enforced. Section 948.001(3), F.S.

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.

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., sets 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>3</sup> Section 948.30(1)(g), F.S., prohibits 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>4</sup>

In *Kasischke v. State*, 991 So.2d 803 (Fla. 2008), the Florida Supreme Court held that viewing, owning, or possessing any type of obscene, pornographic, or sexually stimulating visual or auditory material is not a violation of probation unless the state establishes that the material is “relevant to the offender’s deviant behavior pattern.” This resolved a conflict among lower appellate courts as to whether the relevance requirement applies to all materials or only certain types of materials. In reaching its decision, the Supreme Court found that the wording of the statute is ambiguous and that the Legislature’s intent could not be determined by examining the statute’s history. Therefore, the Court applied the rule of lenity to interpret the statute in favor of offenders who are subject to the prohibition.

The *Kasischke* decision creates uniformity in the courts’ interpretation of the requirement to prove relevance when a violation of s. 948.30(1)(g), F.S., is alleged. However, the Court’s application of the rule of lenity due to the statute’s ambiguity may not reflect the Legislature’s intent. This intent could be clarified by an amendment to the statute.

### III. Effect of Proposed Changes:

**Section 1** of the bill 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 bill adds a definition of “minor” as a person less than 18 years old at the time the image was created whether the minor’s image was photographed

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<sup>3</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>4</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.

or modified. This will now include altered images where a child image is modified to give the impression that the child is engaged in sexual conduct as child pornography.

**Section 2** of the bill 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.

**Section 3** of the bill 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 2<sup>nd</sup> and 3<sup>rd</sup> degree felony.

**Section 4** of the bill amends s. 947.1405, F.S., to add that for persons whose sexual crime was committed on or after October 1, 2014, the Parole Commission must prohibit persons on conditional release convicted of certain sexual offenses from possessing any pornography.

**Section 5** of the bill amends s. 948.30, F.S., to add that for persons whose sexual crime was committed on or after October 1, 2014, the court must prohibit persons on community supervision convicted of certain sexual offenses from possessing any pornography.

**Section 6** of the bill reenacts subsection (2) of section 794.0115, F.S. This is necessary to incorporate changes made to section 827.071, F.S. by the bill.

**Section 7** provides an effective date of July 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:

The prohibition against viewing, accessing, owning, or possessing pornography is susceptible to constitutional challenge. Federal courts and courts in other states are split on whether the term “pornography” is too vague to give notice of what is prohibited.<sup>5</sup> Even though the reference to pornography was in the statute even before the relevance clause was added in 1997, Florida courts have not been properly presented with the question of whether it is impermissibly vague.

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<sup>5</sup> See discussion in *Hostetter v. State*, 82 So.3d 1217 (Fla. 1st Dist. 2012), footnote 2.

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

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

Depending upon the compliance of offenders with the expanded prohibition, the bill could result in more prosecutions for violations of this condition of community supervision. However, removing the requirement for the state to prove that the material is “relevant to the offender’s deviant behavior pattern” would also relieve the need to present expert testimony on that element. The Criminal Justice Impact Conference reviewed the impact of the bill on the prison population on January 30, 2014. The conference found that the bill would have an indeterminate, but positive fiscal impact, meaning the bill would increase the costs to the prison system, but by an unknown amount.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 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 2<sup>nd</sup> and 3<sup>rd</sup> 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.

**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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