

**HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS**

BILL #: CS/HB 133

FINAL HOUSE FLOOR ACTION:

SPONSOR(S): Civil Justice Subcommittee;
Plasencia and others

117 Y's 1 N's

COMPANION CS/SB 1270
BILLS:

GOVERNOR'S ACTION: Pending

SUMMARY ANALYSIS

CS/HB 133 passed the House on April 9, 2015. The bill was amended by the Senate on April 24, 2015, amended by the House on April 28, 2015, and subsequently passed the Senate on April 29, 2015. The bill includes CS/HB 845. The bill amends laws related to sex crimes.

A criminal prosecution requires, among other things, that a court have jurisdiction over the defendant and that the prosecution occur within the statute of limitations. A statute of limitations is an absolute bar to the filing of a legal case after a date set by law. Some statutes of limitations related to felony sexual battery offenses are currently 4 years. The bill extends those statutes of limitations for sexual battery from 4 years to 8 years.

The act of electronically sending sexually explicit messages or photos to another is generally referred to as sexting. Current law provides that a minor who commits sexting for the first time commits a noncriminal violation. In response to a recent appellate court ruling regarding jurisdiction over sexting offenses committed by a minor, the bill provides that a circuit court has exclusive original jurisdiction over proceedings in which a minor is alleged to have committed a noncriminal violation that has been assigned to juvenile court by law.

Additionally, the bill revises penalties associated with a minor's first violation of the sexting statute. The minor must sign a citation promising to appear before the juvenile court. In lieu of appearing in court, the minor may complete community service, pay a fine, or participate in a cyber-safety program. The minor must satisfy the penalty within 30 days. If the minor fails to comply with the citation, the court may order the minor to perform community service, pay a fine, participate in a cyber-safety program, or initiate contempt proceedings. Upon a finding of contempt, the court may impose additional penalties including, suspending the minor's driver license. The court may not impose incarceration.

If the minor contests the citation and the court finds that the minor committed the act, 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.

The bill may have a positive fiscal impact on state and local government because it allocates to the clerk of court and the county commission specified percentages of all civil penalties received by a juvenile court pursuant to the citation process for sexting.

The Criminal Justice Impact Conference (CJIC) met February 27, 2015, and determined the extension of statute of limitations for sexual battery will have a positive moderate impact on state prison beds. This means CJIC estimates that this bill may increase the department's prison population by greater than 10, but less than 25 inmates annually. The bill does not appear to have a fiscal impact on local governments.

The bill has an effective date of July 1, 2015.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Statute of Limitations

A statute of limitations is an absolute bar to the filing of a legal case after a date set by law. The date is commonly based on the time that has elapsed since the action giving rise to the case occurred. Laws creating statutes of limitation specify when the time period begins, how long the limitations period runs, and circumstances by which the running of the statutes may be tolled (suspended).

The prohibition on ex post facto laws in the state and federal constitutions¹ applies to laws that extend a statute of limitations. A law that extends a statute of limitations may only delay the conclusion of the limitations period. It cannot revive a previously time-barred action. Accordingly, if the limitations period on a case has already expired, any extension created by this bill will not serve to revive the action.²

The title of the bill, the "43 Days Initiative Act," comes from a Florida resident who was the victim of a sexual battery. Unaware of the four-year criminal statute of limitations, the victim did not report the crime to law enforcement until four years and 43 days after the crime, which meant that no charges could be brought against the offender.³

Criminal Statutes of Limitation Applicable to Sexual Battery

Section 794.011, F.S., identifies numerous sexual battery⁴ crimes, commonly referred to as rape. Section 775.15, F.S., sets forth the statutes of limitation applicable to criminal prosecutions for sexual battery and provides that the time for prosecution of a criminal case starts to run on the day after the offense is committed. An offense is deemed to have been committed either when every element of the offense has occurred, or, if the legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity in the course of conduct is terminated.⁵

Under current law, there is no statute of limitations for first degree felony sexual battery crimes where the victim is a minor.⁶ Nor is there a statute of limitations for any sexual battery crime where the victim is under 16 years old.⁷ Only two sexual battery offenses where the victim is a minor aged 16 or 17 years have an applicable three-year statute of limitations under current law: sexual battery without the use physical force and violence likely to cause serious personal injury - a second degree felony;⁸ and solicitation of sexual battery by a person in a position of familial or custodial authority to a person less than 18 years of age - a third degree felony.⁹ As to these two offenses, the applicable statute of limitations does not commence until the earlier of the date that the minor reaches 18 years of age or the crime is reported to law enforcement.¹⁰ Moreover, if the sexual battery is a first or second degree felony and is reported to law enforcement within 72 hours after the commission of the crime, there is no statute of limitations.¹¹

¹ U.S. CONST. art. I, § 9; FLA.CONST. art. I, s. 10.

² *Stogner v. California*, 539 U.S. 607, 632-33 (2003)

³ 43 Days Initiative, My Story, <http://www.43daysinitiative.org/#!mystory/c1Inf> (last visited Feb. 4, 2015).

⁴ Section 794.011(1)(h), F.S., defines sexual battery as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose."

⁵ s. 775.15(3), F.S.

⁶ *Id.* at (13)(b).

⁷ *Id.* at (13)(c).

⁸ s. 794.011(5)(c), F.S.

⁹ s. 794.011(8)(a), F.S.

¹⁰ s. 775.15(13)(a), F.S.

¹¹ *Id.*

In cases of sexual battery crimes against victims 18 years of age or older, current law provides that if the offense is reported to law enforcement within 72 hours of the offense, there is no statute of limitations.¹² If the offense is not reported within 72 hours, the statute of limitations is either four years for first degree felony sexual battery or three years for second degree felony sexual battery.¹³

In addition to the time periods for minors and adults stated above, an offender may be prosecuted within one year after the date on which the identity of the offender is established, or should have been established by the exercise of due diligence, through the analysis of deoxyribonucleic acid (DNA) evidence, if a sufficient portion of the evidence collected at the time of the original investigation and tested for DNA is preserved and available for testing by the accused.¹⁴

Effect of Bill

This bill amends s. 775.15, F.S., the statute of limitations applicable to sexual battery criminal cases, to provide that the statute of limitations for first or second degree sexual battery committed against a victim 16 years of age or older is extended to 8 years from the date of the crime, except as otherwise provided in current law. The provision providing for no statute of limitations when the crime is reported within 72 hours of its commission is retained in law.

This change applies to any such offense except one already time-barred on or before July 1, 2015. This provision makes the change retroactive to previously committed offenses, provided that the statute of limitations did not run out prior to July 1, 2015.

Sexting

The act of electronically sending sexually explicit messages or photos of oneself to another is generally referred to as sexting. Sexting among youth is more prevalent than previously thought, according to a new study from Drexel University that was based on a survey of undergraduate students at a large northeastern university.¹⁵ More than 50 percent of those surveyed reported that they had exchanged sexually explicit text messages, with or without photographic images, as minors.

2011 Legislation

In 2011, the Legislature passed HB 75,¹⁶ which created s. 847.0141, F.S., relating to sexting. This statute specifies that a minor commits sexting if he or she 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 nudity¹⁷ and is harmful to minors¹⁸; or

¹² *Id.* at (14).

¹³ First degree felony sexual battery is defined in s. 794.011(4)(b), F.S., as non-consensual sexual battery under a list of enumerated circumstances, including, when the victim is physically helpless to resist, the victim is threatened, the victim is physically or mentally incapacitated, and the offender is a law enforcement officer. Second degree felony sexual battery is defined in s. 794.011(5)(b), F.S., as non-consensual sexual battery without the use of physical force or violence likely to cause serious personal injury.

¹⁴ s. 775.15(15)(a), F.S.

¹⁵ *Sexting among youth more prevalent than thought? Minors unaware of harsh legal consequences, survey shows*, Science Daily, June 18, 2014, <http://www.sciencedaily.com/releases/2014/06/140618122259.htm> (last visited March 13, 2015).

¹⁶ ch. 2011-180, Laws of Fla.

¹⁷ Section 847.001(9), F.S., defines the term “nudity” as “the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. A mother’s breastfeeding of her baby does not under any circumstance constitute ‘nudity,’ irrespective of whether or not the nipple is covered during or incidental to feeding.”

- Possess a photograph or video of any person that was transmitted or distributed by another minor which depicts nudity and is harmful to minors.

A minor who possesses a prohibited photograph or video does not commit sexting if:

- The minor did not solicit the photograph or video;
- The minor took reasonable steps to report the photograph or video to the minor's legal guardian or to a school or law enforcement official; and
- The minor did not transmit or distribute the photograph or video to a third party.¹⁹

The statute specifies that the transmission or distribution of multiple photographs or videos is a single offense if the photographs or videos were transmitted or distributed within the same 24-hour period. Additionally, the possession of multiple photographs or videos that were transmitted or distributed by a minor is a single offense if the photographs or videos were transmitted or distributed within the same 24-hour period.²⁰

The following penalties apply to sexting:

- A minor's first violation is a noncriminal violation punishable by 8 hours of community service or, if ordered by the court in lieu of community service, a \$60 fine. Additionally, the court may order the minor to participate in suitable training or instruction in lieu of, or in addition to, community service or a fine.
- A minor commits a first degree misdemeanor, punishable by up to one year in jail and a \$1,000 fine, for a violation that occurs after being found to have committed²¹ a noncriminal sexting offense.
- A minor commits a third degree felony, punishable by up to five years imprisonment and a \$5,000 fine, for a violation that occurs after being found to have committed a first degree misdemeanor sexting offense.²²

State v. C.M.

In January 2015, Florida's Fourth District Court of Appeal (DCA) decided *State v. C.M.*²³ The case 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.²⁴

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.²⁵ 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.²⁶

¹⁸ The term "harmful to minors" is defined by 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 predominantly appeals to a prurient, shameful, or morbid interest; is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

¹⁹ s. 847.0141(1)(b), F.S.

²⁰ s. 847.0141(2), F.S.

²¹ Section 847.0141(5), F.S., defines the term "found to have committed" as a determination of guilt that is the result of a plea or trial, or a finding of delinquency that is the result of a plea or an adjudicatory hearing, regardless of whether adjudication is withheld.

²² s. 847.0141(3), F.S.

²³ 154 So. 3d 1177 (Fla. 4th DCA 2015).

²⁴ *Id.*

²⁵ *Id.* at 1179.

²⁶ *Id.* at 1179-80.

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 because it was the only method to determine if a noncriminal first offense of sexting occurred.²⁷ The Fourth DCA disagreed reasoning that courts "are not at liberty to add words to statutes that were not placed there by the Legislature."²⁸ 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."²⁹

Effect of the Bill

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

The bill also addresses the holding in *State v. C.M.* by making a number of changes to the penalties associated with a first-time violation of the sexting statute.³⁰ For example, the bill specifies that first-time sexting violations remain a noncriminal violation. However, the bill requires a minor who commits a first-time sexting violation to sign and accept a citation indicating a promise to appear before the juvenile court. If the citation is contested and the court determines that the minor committed a noncriminal violation, 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).

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. A minor who fails to comply with the citation waives his or her right to contest it, and authorizes the court to:

- 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); 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 bill prohibits the court from imposing incarceration.

The bill requires the citation issued to a minor to be in a form prescribed by the issuing law enforcement agency, be signed by the minor, and to 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;

²⁷ *Id.* at 1180.

²⁸ *Id.* (citing *Bay Holdings, Inc. v. 2000 Island Blvd. Condo. Ass'n*, 895 So. 2d 1197, 1197 (Fla. 3d DCA 2005)).

²⁹ *Id.* (citing *Guilder v. State*, 899 So. 2d 412, 419 (Fla. 4th DCA 2005) (quoting *State v. Aiuppa*, 298 So. 2d 391, 404 (Fla. 1974)).

³⁰ The penalties associated with second and subsequent sexting offenses remain unchanged.

- 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.

The bill 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.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill requires 20 percent of all civil penalties received by a juvenile court pursuant to the citation process for sexting to be retained by the clerk of the court to defray administrative costs.

2. Expenditures:

The Criminal Justice Impact Conference (CJIC) met February 27, 2015, and determined this bill will have a positive moderate impact on state prison beds. This means CJIC estimates that this bill may increase the department's prison population by greater than 10, but less than 25 inmates annually. For fiscal year 2013-14, 83 people were sentenced to prison within a year of their offense, 89 within two years, 55 within three years, 26 within four years, and 11 within five years of the offense. The fewer offenders with each additional year imply a declining number over time, but data is not available on the number of unreported offenses that could be captured in an expanded statute of limitation. Furthermore, the CJIC was unable to separate those under 16 years old from the available data, causing the data to be skewed upwards.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.