SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

****

NOTE: This analysis reflects the nature of the bill as it left the Committee on Judiciary-Criminal. Any further changes to the bill are not included in this analysis. See the "Comments" section for the final procedural action taken by the Legislature.

****

	ANALYST	STAFF DIRECTOR		REFERENCE	ACTION
1.	E.Davis	Liepshutz	1.	JCR	Fav/CS
2.			2.		
3.			3.		

SUBJECT: Sexual Conduct Involving A Child

BILL NO. AND SPONSOR: CS/SB 307 by Committee on Judiciary-Criminal and Senator Grant

I. SUMMARY:

A. Present Situation:

"Sexual conduct" is defined in four separate sections of the Florida Statutes. These definitions occur at s. 827.071(1)(e) in the context of sexual performance by a child; s. 847.012(1)(c), prohibiting the sale or other distribution of harmful materials to persons under 18; s. 847.0125, the retail display of materials harmful to minors; and s. 847.013, exposing minors to harmful motion pictures, exhibitions, shows, presentations, or representations.

Although the identical term is being defined at these four locations, no single definition is used each time. Three separate definitions are used, and only in s. 847.0125 and s. 847.013 does the same definition appear.

B. Effect of Proposed Changes:

This legislation adopts a single definition of "sexual conduct" and uses that definition in each of the four sections where sexual conduct is defined. The definition is a composit created in part by using the various existing definitions of sexual conduct, editing them for constitutional purposes and duplication, and forging them into one comprehensive definition.

Additional terms are added to create the new definition of sexual conduct. By necessity, these terms are defined in each of the sections where they appear.

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

None.

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B. Government:

None.

III. COMMENTS:

In Leon County a photograph was recently circulated depicting a young girl fondling a young boy's sexual organs. The state attorney's office could not prosecute this under s. 827.071, sexual performance by a child, because the definition of sexual conduct in that section does not include "physical contact with a person's clothed or unclothed genitals." The phrase does occur in the three other sexual conduct definitions, but not in that definition.

Final Update: CS/HB 439 was substituted for CS/SB 307 on the Senate Calendar. CS/HB 439 passed both houses of the Legislature. It has been assigned Ch. 86-38, the Laws of Florida.

IV. AMENDMENTS:

None.

STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN
COMMITTEE SUBSTITUTE FOR
Senate Bill 307

1. Amends the definition of sexual conduct by deleting the unconstitutional term "the abominable and detestable crime against nature."

2. Supplies and makes uniform the different terms and definitions of sexual acts used in defining "sexual conduct."

3. Defines the term "sexual bestiality."

Committee on Judiciary-Criminal

M. Paul Lazenby
Staff Director

(FILE TWO COPIES WITH THE SECRETARY OF THE SENATE)

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

	ANALYST	STAFF DIRECTOR		REFERENCE	ACTION
1.	E.Davis CMD	Liepshutz MM	1.	JCR	Fav/CS
2.			2.		
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A. Public:

None.

B. Government:

None.

III. COMMENTS:

In Leon County a photograph was recently circulated depicting a young girl fondling a young boy's sexual organs. The state attorney's office could not prosecute this under s. 827.071, sexual performance by a child, because the definition of sexual conduct in that section does not include "physical contact with a person's clothed or unclothed genitals." The phrase does occur in the three other sexual conduct definitions, but not in that definition.

IV. AMENDMENTS:

None.

STORAGE NAME: 86-0439 CS/HB

Date: March 19, 1986
Revised: April 24, 1986
Final:

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HOUSE OF REPRESENTATIVES
COMMITTEE ON CRIMINAL JUSTICE
STAFF ANALYSIS

BILL #: CS/HB 439

RELATING TO: Child pornography: definitions

SPONSOR(S): Morgan

EFFECTIVE DATE: October 1, 1986

COMPANION BILL(S): SB 307 Identical

OTHER COMMITTEES OF REFERENCE: (1)

(2)

****

I. SUMMARY:

A. Present Situation:

Currently, "sexual conduct" is defined differently in Chapters 827 and 847, Florida Statutes. As defined under s. 827.071, "sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse or the lewd exhibition of the genitals.

However, under s. 847.012, "sexual conduct" is defined as an act of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or (if such person is a female) the breast. In addition, "sexual conduct" under s. 847.0125 and s. 847.013 is defined as acts of masturbation; homosexuality; sexual intercourse; or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or (if such person is a female) breast or any act or conduct which constitutes the commission of the abominable and detestable crime against nature or suggests that such crime is being or will be committed.

Under s. 827.071, "sexual performance" is any performance which includes sexual conduct by a child. Any person who knowingly employs or otherwise engages a child in a sexual performance is guilty of a second degree felony. In addition, if a person promotes a sexual performance by a child or possesses with the intent to promote certain photographic or motion picture representations which show any sexual conduct by a child, this person is also guilty of a second degree felony. Possession alone of any visual representation which a person knows to include sexual conduct by a child is a third degree felony.

Generally, chapter 847 proscribes offenses and subsequent penalties for persons who sell, distribute, display or expose harmful materials to minors. "Harmful to minors" (juveniles) means a particular quality of any representation of sexual activities in which the predominent appeal is to the prurient, shameful, or morbid interests of minors; is patently offensive to prevailing standards in the adult community with respect to what is suitable material for minors; and is, considered as a whole, without serious literary, artistic, political or scientific value for minors. The penalty for violation of s. 847.012 (Prohibition of sale or other distribution of harmful materials to persons under 18 years of age), s. 847.0125 (Retail display of materials harmful to minors) or s. 847.013 (Exposing minors to harmful motion pictures, exhibitions, shows, presentation, or representations) varies from a third degree felony under s. 847.012 to a first degree misdemeanor under the latter two sections.

B. Effect of Proposed Changes:

The definitions of certain acts relating to sexual performance and pornography are changed to provide consistency in chapters 827 and 847. The definition of "sadomasochistic abuse" is updated to state that this is the "flagellation or torture by or upon a person or the condition of being fettered, bound or otherwise physically restrained, for the purpose of deriving sexual satisfaction from inflicting harm on another or receiving such harm oneself".

A definition of the term "sexual bestiality" is added to chapters 827 and 847 to mean "any sexual act between a person and an animal involving the sex organ of the one and the mouth, anus or vagina of the other". In addition, the definition of "sexual conduct" is expanded and clarified by HB 439. The definitions under both chapters have been merged to provide a common definition. "Sexual conduct" means actual and simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

Finally, the definition of "sexually battery" has been added to both chapters. "Sexual battery" means oral, anal, or vaginal penetration by, or with, the sexual organ of another or the oral, anal, or vaginal penetration of another by any object, except an act done for bona fide medical purposes.

II. ECONOMIC IMPACT:

A. Public:

None.

B. Government:

None.

III. STATE COMPREHENSIVE PLAN IMPACT:

None.

IV. COMMENTS:

There has been some confusion as to the different definitions within chapters 827 and 847. This bill attempts to eliminate the confusion.

V. AMENDMENTS:

VI. PREPARED BY: Marie Mattox-Shelfer
Legislative Analyst

VII. STAFF DIRECTOR: J. Thomas Wright

Date: March 19, 1986
Revised: _____
Final: _____

HOUSE OF REPRESENTATIVES
COMMITTEE ON CRIMINAL JUSTICE
STAFF ANALYSIS

BILL #: HB 439

RELATING TO: Child pornography: definitions

SPONSOR(S): Morgan

EFFECTIVE DATE: October 1, 1986

COMPANION BILL(S): SB 307 Identical

OTHER COMMITTEES OF REFERENCE: (1) _____

(2) _____

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However, under s. 847.012, "sexual conduct" is defined as an act of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or (if such person is a female) the breast. In addition, "sexual conduct" under s. 847.0125 and s. 847.013 is defined as acts of masturbation; homosexuality; sexual intercourse; or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or (if such person is a female) breast or any act or conduct which constitutes the commission of the abominable and detestable crime against nature or suggests that such crime is being or will be committed.

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Generally, chapter 847 proscribes offenses and subsequent penalties for persons who sell, distribute, display or expose harmful materials to minors. "Harmful to minors" (juveniles) means a particular quality of any representation of sexual activities in which the predominent appeal is to the prurient, shameful, or morbid interests of minors; is patently offensive to prevailing standards in the adult community with respect to what is suitable material for minors; and is, considered as a whole, without serious literary, artistic, political or scientific value for minors. The penalty for violation of s. 847.012 (Prohibition of sale or other distribution of harmful materials to persons under 18 years of age), s. 847.0125 (Retail display of materials harmful to minors) or s. 847.013 (Exposing minors to harmful motion pictures, exhibitions, shows, presentation, or representations) varies from a third degree felony under s. 847.012 to a first degree misdemeanor under the latter two sections.

B. Effect of Proposed Changes:

This bill redefines "sexual conduct" in Chapters 827 and 847 to provide a common definition in the aforementioned sections. The new definition states that "sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, lewd exhibition of the genitals, homosexuality, physical conduct with a person's clothed or unclothed genitals, pubic area, buttocks, or (if such person is a female) breast, or any act or conduct which constitutes the commission of the abominable and detestable crime against nature or suggests that such crime is being committed.

To understand fully the import of this new "unified" definition of sexual conduct, several of the individual terms merit attention apart from their context within this bill. A "homosexual" is one whose sexual inclination is toward those of the individual's own sex rather than the opposite sex. State v. Rose, 382 P.2d 513 (Wash. 1963). The "lewd exhibition of the genitals" connotes a wicked, lustful, unchaste, licentious or sexual design on the part of the perpetrator. Boles v. State, 27 So.2d 293 (Fla. 1946). "Any act or conduct which constitutes the commission of the abominable and detestable crime against nature" has been incapable of definition by the courts of this state Franklin v. State, 257 So.2d 21 (Fla. 1971).

II. ECONOMIC IMPACT:

A. Public:

None.

B. Government:

None.

III. STATE COMPREHENSIVE PLAN IMPACT:

None.

IV. COMMENTS:

The Florida Supreme Court, in Franklin v. State, 257 So.2d 21 (Fla. 1971), held unconstitutional s. 800.01, F.S.A., which read as follows:

> "Whoever commits the abominable and detestable crime against nature, either with mankind or with beast, shall be punished by imprisonment in the state prison not exceeding twenty years."

The question raised in Franklin was whether the statute met the required constitutional test that the language inform the average person of common intelligence as to what is prohibited so that he need not speculate as to the statutory meaning. 257 So. 2d. at 22. The Court held that the statute was void on its face as unconstitutional for vagueness and uncertainty in its language, violating constitutional due process requirements. This bill contains identical language to that declared unconstitutional in Franklin.

In 1957, in Roth v. U.S., 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, (1957) the U. S. Supreme Court held that obscenity is not within the area of constitutionally protected speech and press. Still later, in 1973, the Court established guidelines to determine what the term "obscenity" encompassed. Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L. Ed. 2d 419 (1973). In Miller, a majority of the Court agreed that "a state offense must be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value". 413 U.S. at 24, 93 S. Ct. at 2615.

Section 827.071 was created by the Legislature in 1983 as a comprehensive rewrite of other sections in the law relating to sexual performances by children. This section was promulgated after the U. S. Supreme Court handed down its seminal child pornography decision. New York v. Ferber, 458 U.S. 747 , 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982). In Ferber, the Court upheld the constitutionality of a New York criminal statute which prohibited persons from knowingly promoting sexual performances by children by distributing material which depicts such performances.

Recognizing that laws directed at the dissemination of child pornography, like the obscenity laws, run the risk of suppressing protected expression, the Court in Ferber opened the door for the states to impose more stringent regulations of pornographic depictions of children. The Court stated that the Miller standard, like all general definitions of what may be banned as obscene, does not reflect a state's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children.

In upholding the New York statute, the Court pointed out that the forbidden acts to be depicted were listed with sufficient precision

and represented the kind of conduct which, if it were the theme of a work, could render it legally obscene: "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals". s. 263.3, N.Y.S.A.

The definition of "sexual conduct" in HB 439 goes beyond that which was held constitutional under Ferber. One of the primary reasons that the Court upheld the New York statute and determined that it did not have to comport with the Miller standard was because of the specificity of the statutory language. The acts included in this new definition of "sexual conduct" in HB 439 are not as specific as the court required in Ferber.

Finally, "homosexuality" has not been defined by the Legislature. In State v. Rose, 382 P.2d 513 (Wash. 1963), this term conveyed a much broader meaning than just sexual acts by two persons of the same sex. The point here is that "homosexuality" is no more, or less, an act than is "heterosexuality".

V. AMENDMENTS:

VI. PREPARED BY: _____
Marie Mattox-Shelfer
Legislative Analyst

VII. STAFF DIRECTOR: _____
J. Thomas Wright

NOTICE of COMMITTEE MEETING
House of Representatives

CRIMINAL JUSTICE

Subcommittee on Crimes & Penalties

April 9 3:30-5:30 p.m. 314 HOB

HB 0171 by Ros-Lehtinen--Worthless checks

HB 0262 by Morse--Investigative costs

HB 0360 by Wetherell--Terrorism

HB 0439 by Morgan--Child pornography: definitions

HB 0456 by Gordon--Definition of domestic violence

HB 0465 by Hanson--Trespass, Larceny: utilities

HB 0498 by Kelly--Theft: monetary limits

HB 0570 by Figg--Security of Communications: electronic communications

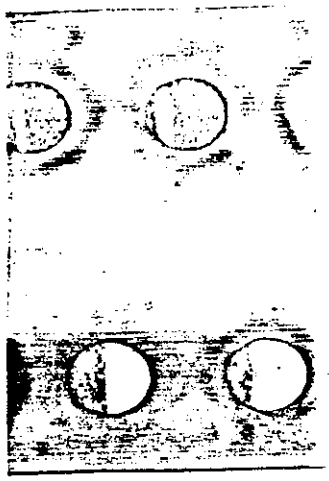
HB 0414 by Ward--Boating Regulations: noncriminal infractions

HB 0548 by Silver & Gordon--Boating Regulations: noncriminal infractions

HB 0731 by Watt & others--Computer pornography

HB 0809 by Metcalf--Arson: burglary or trespass





Elvin L. Martinez
Chairman

Received in the Office of the Sergeant at Arms on
April 4, 1986
at 11:15 a.m. (time).
Sergeant at Arms

Filed by me with the Sergeant at Arms and the Clerk on
April 4 1986
in compliance with Rule 6.
Committee Secretary

Distribution: Sergeant; Clerk (Calendar); Leg. Info. Services as required by Rule 6.

H-14(85C)

NOTICE of COMMITTEE MEETING
House of Representatives

CRIMINAL JUSTICE

Full Committee

April 14 1:15-3:15 p.m. 314 HOB

HB 0171 by Ros-Lehtinen--Worthless checks

HB 0262 by Morse--Investigative costs

HB 0429 by Casas--Acetone, ether registration

HB 0439 by Morgan--Child pornography: definitions

HB 0448 by Burnsed & Gordon--Child abuse investigations

HB 0456 by Gordon--Definition of domestic violence

HB 0465 by Hanson--Trespass, larceny: utilities

HB 0498 by Kelly--Theft: monetary limits

HB 0570 by Figg--Security of communications: electronic communications

HB 0414 by Ward--Boating regulations: noncriminal infractions

HB 0548 by Silver & Gordon--Boating regulations: noncriminal infractions

HB 0731 by Watt & others--Computer pornography

Elvira L. Martinez
Chairman

Received in the Office of the Sergeant at Arms on
April 10 1986
at 4:08 p.m. (time).
Sergeant at Arms

Filed by me with the Sergeant at Arms and the Clerk on
April 10 1986
in compliance with Rule 6.
Committee Secretary

Distribution: Sergeant; Clerk (Calendar); Leg. Info.; others as required by Rule 6.

H-14(85C)

Committee On Criminal Justice BILL NO. 499

Date of meeting April 14, 1986

Time 1:15 p.m.

Place 314 HOB

FINAL ACTION: ____ FAVORABLE
____ FAVORABLE WITH ____ AMENDMENTS
__X__ FAVORABLE WITH SUBSTITUTE
____ UNFAVORABLE

VOTE:

YEA	MEMBER	NAY
X	Brantley	
X	Burke	
X	Casas	
X	Clements	
	Deutsch	
	Grant	
	~~XXXXXX~~	
X	Locke	
X	Mackenzie	
X	McEwan	
X	Renke	
	Ros	
X	Sample	
X	Thomas, J.	
	Wetherell	

YEA	MEMBER	NAY
X	Martinez, Chm.	

Total Yeas 11

Total Nays 0

Ellen L. Martinez
Chairman

COMMITTEE APPEARANCE RECORD

The following persons (other than legislators) appeared before the committee during the consideration of this bill:

Name	Representing	Address
Buddy Jacobs	Fla. Prosecutor's Assoc.	Fernandina Beach

NOTE: Please indicate by an "X" any State employee appearing at the request of Committee Chairman.

(If additional persons, enter on reverse side and check here__)

File 2 copies with Clerk

H-22(19

House of Representatives

SUBCOMMITTEE REPORT — File with Parent Committee

To: Chairman, Committee on Criminal Justice

The Subcommittee on Crimes & Penalties

met at 3:30 p.m. o'clock on April 9, 19 86,

in Room 314 HOB, and considered HB 439.

On motion to report the bill [ ] FAVORABLE

[X] FAVORABLE WITH 2 (number) AMENDMENTS

the vote was:

YEA	MEMBER	NAY

YEA	MEMBER	NAY
X	Grant	
X	Martinez	
X	Mackenzie	
X	Burke, Chr.	
TOTAL 4		TOTAL 0

James C Burke
(Subcommittee Chairman)

SUBCOMMITTEE APPEARANCE RECORD

The following persons (other than legislators) appeared before the subcommittee during consideration of this bill:

NAME	REPRESENTING	ADDRESS

(If additional persons, enter on reverse side and check here __)

Received by Parent Committee:

Date _____

Received by _____