SB147

105571-1

By Senator Mitchem

RFD: Children, Youth Affairs, and Human Resources

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SYNOPSIS: Under existing law, a defendant is required to be age 19 or over to be charged with the crime of solicitation of a child by a computer and the child is required to be less than 16 years of age and three years younger than the defendant. The law also does not specify that a person being solicited may actually be an adult undercover officer.

This bill would delete the requirement that a defendant be age 19 or over to commit the crime and would specify that a defendant may be charged with the crime of solicitation of a child by a computer if the defendant believes that the person being solicited is a child who is less than 16 years of age and at least three years younger than the defendant which may include an adult undercover officer.

Under existing law, it is a crime to transmit obscene material to a child by computer. The age of the child is not specified.

This bill would provide that it is a crime to transmit obscene material by a cell phone or similar personal communication device data to a child under the age of 17, would further define the obscene materials covered, and would specify that the transmission may be to a person the defendant believes to be a child under the age of 17.

Under existing law, it is a crime to possess and possess with intent to disseminate obscene matter containing visual depiction of persons under 17 years of age involved in obscene acts.

This bill would provide that any person who knowingly possesses any obscene matter that contains a digital, computer generated, or animated visual depiction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, breast nudity, genital nudity, or other sexual conduct would be guilty of a Class C felony.

This bill would provide that any person knowingly possessing three or more visual depictions, material, matters, articles, or things coming within the provision of Section 13A-12-192 of the Code of Alabama 1975, is prima facie evidence of the violation of that section.

Under existing law, a parent or guardian who permits a child to engage in the production of obscene matter containing a visual depiction of the child commits a Class A felony.

This bill would expand the existing law to include any person who exercises control over a child and who transfers custody or control of the child to a third party for an obscene purpose including portraying the child in a visual depiction containing obscene matter. This bill would also make it a crime for any person to obtain custody or control of a child for an obscene purpose including portraying the child in a visual depiction containing obscene matter.

Under existing law, equipment, materials, vehicles, or other property used in the commercial production, transportation, or dissemination of obscene matter concerning a person under the age of 17 years is subject to forfeiture.

This bill would delete the reference to "commercial" property to provide further for the forfeiture of any article, equipment, machine, materials, matter, vehicle, or other thing whatsoever including computer equipment or supplies used in the possession or trafficking in obscene matter, or the solicitation of a child by computer or transmitting obscene material, intellectual

property, or acts to a person under the age of 17 years.

Existing law does not provide a distinction between a person who possesses more than 20 images of child pornography.

This bill would make it a separate crime of trafficking in obscene matter depicting children for a person to possess 20 or more images of child pornography or a motion picture or video of child pornography under certain conditions.

This bill would provide for graduated punishment. This bill would provide for a mandatory minimum term of imprisonment for a person convicted of trafficking in obscene matter.

Under existing law, electronic harassment or bullying is not a crime.

This bill would create the crime of electronic harassment or bullying and provide penalties.

This bill would specifically provide that in any criminal proceeding, any property or material that constitutes child pornography would remain in the care, custody, and control of either the state or the district or circuit court having jurisdiction of the case.

This bill would provide for immunity from civil liability with certain exceptions for any

person who reports to a law enforcement officer information concerning child pornography, information on on-line computer solicitation of minors, or any other information that would be harmful to a minor.

Amendment 621 of the Constitution of Alabama of 1901, now appearing as Section 111.05 of the Official Recompilation of the Constitution of Alabama of 1901, as amended, prohibits a general law whose purpose or effect would be to require a new or increased expenditure of local funds from becoming effective with regard to a local governmental entity without enactment by a 2/3 vote unless: it comes within one of a number of specified exceptions; it is approved by the affected entity; or the Legislature appropriates funds, or provides a local source of revenue, to the entity for the purpose. The purpose or effect of this bill would be to require a new or increased expenditure of local funds within the meaning of the amendment. However, the bill does not require approval of a local governmental entity or enactment by a 2/3 vote to become effective because it comes within one of the specified exceptions contained in the amendment.

A BILL

TO BE ENTITLED

AN ACT

To establish the Alabama Child Cyber Exploitation Act; to amend Section 13A-6-110 of the Code of Alabama 1975, to further provide for the offense of soliciting a child for sexual conduct by computer and to remove the age limit for a person who solicits a child by a computer; to provide that a person could be charged with solicitation or attempted solicitation of a child if the person utilizes a computer, computer on-line service, Internet service, or local bulletin board service to commit a sex act with a child; to further provide that the crime may be committed if the defendant believes the person being solicited is a child; to amend Section 13A-6-111 of the Code of Alabama 1975, relating to the transmitting of obscene material to a child by computer; to provide that it is a crime to transmit obscene material to a child by a cell phone or similar personal communication device; to amend Section 13A-12-192 of the Code of Alabama 1975, relating to the possession and possession with intent to disseminate any obscene matter containing a visual depiction of a person under 17 years of age involved in obscene acts; to provide that any person who knowingly possesses any obscene matter that contains a digital, computer generated, or animated visual depiction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, breast nudity,

genital nudity, or other sexual conduct shall be guilty of a Class C felony; to provide that a person knowingly possessing three or more visual depictions, materials, matters, articles, or things coming within the provisions of Section 13A-12-192 of the Code of Alabama 1975, is prima facie evidence of the violation of that section; to amend Section 13A-12-196 of the Code of Alabama 1975, to prohibit a person from transferring custody or control of a child to another person for an obscene purpose including portraying the child in the production of obscene matter containing a visual depiction of the child; to prohibit any person from obtaining custody or control of a child for an obscene purpose including portraying the child in the production of obscene matter containing a visual depiction of the child; to provide penalties for violation; to amend Section 13A-12-198 of the Code of Alabama 1975, relating to the forfeiture provisions under the Alabama Child Pornography Act; to delete the requirement that property forfeited be commercial property and to provide further for the forfeiture of any article, equipment, machine, materials, matter, vehicle, or other thing whatsoever, including computer equipment or supplies used in the possession and trafficking in obscene matter, or the solicitation of a child by computer, intellectual property or acts, or transmitting obscene materials to a person under the age of 17 years; to make it a crime for a person to traffic in obscene matter involving children; to provide for graduated punishment; to provide for a mandatory minimum term of imprisonment for a person

convicted of trafficking in obscene matter; to provide that possession by any person of 20 or more visual depictions, material, matters, articles, or things or a motion picture or video under certain conditions coming within the provision of Section 13A-12-192 of the Code of Alabama 1975, is prima facie evidence of the violation of that section; to create the crime of electronic harassment or bullying and to provide penalties; to provide for custody of the evidence pending trial; to provide for immunity for civil liability with certain exceptions for a person who reports to a law enforcement officer information concerning child pornography, information on on-line computer solicitation of minors, or any other information that would be harmful to a minor; and in connection therewith would have as its purpose or effect the requirement of a new or increased expenditure of local funds within the meaning of Amendment 621 of the Constitution of Alabama of 1901, now appearing as Section 111.05 of the Official Recompilation of the Constitution of Alabama of 1901, as amended.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. This act shall be known and cited as the Alabama Child Cyber Exploitation Act.

Section 2. Sections 13A-6-110, 13A-6-111, 13A-12-192, 13A-12-196, and 13A-12-198 of the Code of Alabama 1975, are amended to read as follows:

"§13A-6-110.

"(a) In addition to the provisions of Section 13A-6-69, a person is guilty of solicitation of a child by a computer if the person ~~is 19 years of age or older and the person~~ knowingly, with the intent to commit an unlawful sex act, entices, induces, persuades, seduces, prevails, advises, coerces, or orders, or attempts to entice, induce, persuade, seduce, prevail, advise, coerce, lure, or order, by means of a computer, on-line service, Internet service, local Internet bulletin board service, or any other electronic communication device, a child who is less than 16 years of age and at least three years younger than the defendant, or another person believed by the defendant to be a child who is less than 16 years of age and at least three years younger than the defendant, to meet with the defendant or any other person for the purpose of engaging in sexual intercourse, sodomy, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his or her benefit or for the benefit of another.

"(b) For purposes of determining jurisdiction, the offense is committed in this state if the transmission that constitutes the offense either originates in this state or is received in this state.

"~~(c) A person charged under this section shall be tried as an adult, and the record of the proceeding shall not be sealed nor subject to expungement.~~

"(c) The fact that an undercover operative or law enforcement officer was involved in the detection and

investigation of an offense under this section, or the fact that an adult undercover operative represented himself or herself to be a child less than 16 years of age, does not constitute a defense to a prosecution under this section.

"(d) Solicitation of a child by computer is a Class B felony.

"§13A-6-111.

"(a) A person is guilty of transmitting obscene material to a child if the person transmits, by means of any cell phone, computer communication system, or any similar communication device allowing the input, output, examination, or transfer of computer programs, data, or images from one cell phone, computer, or any similar personal communication device to another, material which, in whole or in part, describes or depicts actual or simulated nudity, digitally illustrated or animated nudity, sexual conduct, digitally illustrated or animated sexual conduct, or sadomasochistic abuse, to a person that is a child under the age of 17, or that a reasonable person given all the circumstances would believe to be a child under 17 years of age ~~for the purpose of initiating or engaging in sexual acts with the child~~.

"(b) For purposes of determining jurisdiction, the offense is committed in this state if the transmission that constitutes the offense either originates in this state or is received in this state.

"(c) A person charged under this section shall be tried as an adult and the record of the proceeding shall not be sealed nor subject to expungement.

"(d) The fact that an undercover operative or law enforcement officer was involved in the detection and investigation of an offense under this section, or the fact that an adult undercover operative represented himself or herself to be a child under 17 years of age, shall not constitute a defense to a prosecution under this section.

"~~(d)~~(e) Transmitting obscene material ~~of engaging in sexual intercourse, sodomy, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his or her benefit~~ to a child is a Class B felony.

"§13A-12-192.

"(a) Any person who knowingly possesses with intent to disseminate any obscene matter that contains a visual depiction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, breast nudity, genital nudity, or other sexual conduct shall be guilty of a Class B felony. Possession of three or more copies of the same visual depiction contained in obscene matter is prima facie evidence of possession with intent to disseminate the same.

"(b) Any person who knowingly possesses any obscene matter that contains a visual depiction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, genital

nudity, or other sexual conduct shall be guilty of a Class C felony.

"(c) Any person who knowingly possesses obscene matter that contains a digital, computer generated, or animated visual depiction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, breast nudity, genital nudity, or other sexual conduct shall be guilty of a Class C felony.

"(d) The possession by any person of three or more visual depictions, materials, matters, articles, or things coming within the provisions of this section is prima facie evidence of the violation of this section.

"§13A-12-196.

"(a) Any ~~parent or guardian~~ person who knowingly permits or allows ~~their~~ any child, ward, or dependent under the age of 17 years to engage in the production of any obscene matter containing a visual depiction of such child, ward, or dependent under the age of 17 years engaged in any act of sado-masochistic abuse, sexual excitement, masturbation, breast nudity, genital nudity, or other sexual conduct shall be guilty of a Class A felony.

"(b) Any person who obtains custody or control of a child for the purpose of furthering participation of the child in an act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, genital nudity, or other

sexual conduct defined in Section 13A-12-190, of the Code of Alabama 1975, is guilty of a Class A felony.

"§13A-12-198.

"Any article, equipment, machine, materials, matter, vehicle or other thing whatsoever used in the ~~commercial~~ possession, production, transportation, dissemination, display, or storage of any obscene matter displaying or depicting a person under the age of 17 years engaged in any of the obscene acts described in Sections 13A-12-191, 13A-12-192, 13A-12-196, and 13A-12-197 , trafficking in obscene matter, or the solicitation of a child by computer or transmitting obscene material to a child by computer described in Sections 13A-6-110 and 13A-6-111, shall be contraband and shall be forfeited to the State of Alabama. The manner, method, and procedure for the forfeiture and condemnation of such thing shall be the same as that provided by law for the confiscation or condemnation or forfeiture of automobiles, conveyances, or vehicles in which alcoholic beverages are illegally transported."

Section 3. (a)(1) A person is guilty of trafficking in obscene matter if he or she knowingly films, prints, records, photographs, sells, delivers, brings into this state, and who is knowingly in actual or constructive possession, or otherwise produces, in excess of 20 separate images, of any obscene matter that contains a visual reproduction of a person under the age of 17 years engaged in any act of

sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, genital nudity, or other sexual content.

(2) The images need not be of separate individual persons under the age of 17 years, but may be of the same individual or duplicates of the same image.

(3) A single moving picture, video image, digital moving picture, or motion picture of any obscene matter that contains a visual reproduction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, genital nudity, or other sexual content, for the purposes of this section, shall be the equivalent of 10 single individual images.

(4) The knowing possession by any person of 20 or more visual depictions, materials, matters, articles, or things coming within the provisions of this section is prima facie evidence of the violation of this section.

(b)(1) Trafficking in obscene matter is a Class A felony.

(2) A person who has one or more felony convictions and is convicted of violating subsection (a) shall be sentenced as provided under Section 13A-5-9, Code of Alabama 1975.

(c) Notwithstanding the provisions of Chapter 22, Title 15, Code of Alabama 1975, or any other provision of law, with respect to any person who is found to have violated subsection (a), adjudication of guilt or imposition of sentence shall not be suspended, split deferred, or withheld,

nor shall the person be eligible for any type of parole, probation, work release, supervised intensive restitution program, release because of deduction from sentence for good behavior under corrections incentive time act, or any other program, furlough, pass, leave, or any other type of early, conditional, or temporary release program, nor shall the person be permitted to leave the penitentiary for any reason whatsoever except for necessary court appearances and for necessary medical treatment, prior to serving the mandatory minimum term of imprisonment of not less than five years. Nothing contained in this subsection shall be construed in any way to render any inmate eligible for parole, probation, suspended sentence, furlough, pass, leave, or any type of early, conditional, or temporary release program of any type to which the inmate is not otherwise eligible under other provisions of law. Nor shall anything in this subsection be construed to render any person sentenced to life imprisonment without parole under this or any other act eligible for parole, probation, suspended sentence, furlough, pass, leave, or any type of early, conditional, or temporary release program at any time.

(d) Except where the sentence is life imprisonment without parole, the prosecuting attorney may move the sentencing court to reduce the mandatory minimum term of imprisonment for any defendant who provides substantial assistance in the arrest or the conviction of any of his or her accomplices, accessories, coconspirators, principals, or

other persons engaged in the production or dissemination of obscene matter as defined in this section. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce, but not suspend the sentence if he or she finds that the defendant rendered such substantial assistance. Under no circumstances may the judge reduce or suspend the sentence except upon motion of the prosecuting attorney.

Section 4. (a) For purposes of this section, the following words have the following meanings:

(1) ELECTRONIC. The word includes, but is not limited to, communication via electronic mail, such as Internet-based communication, pager services, cell phones, and electronic text messaging.

(2) TRAIT OR CHARACTERISTIC OF THAT PERSON. Includes, but is not limited to, age, color, creed, national origin, race, religion, marital status, sex, sexual orientation, gender identity, physical attributes, physical or mental ability or disability, ancestry, political party preferences, political belief, socio-economic status, family status, or education.

(b) A person commits the crime of electronic harassment or bullying if, with intent to harass, annoy, or alarm any person, he or she transmits, posts, displays, or disseminates, by or through an electronic communication

device, radio, computer, Internet, or other similar means, to any person, a communication, image, or information, which is based on the actual or perceived "traits or characteristics of that person", which creates any of the following conditions:

(1) Places that person in reasonable fear or harm to his or her person or property.

(2) Has a substantial and detrimental effect on that person's physical or mental health.

(3) Has the effect of substantially interfering with that person's academic performance, employment, or other community activities or responsibilities.

(4) Has the effect of substantially interfering with that person's ability to participate in or benefit from any academic, professional, or community based services, activities, or privileges.

(5) Has the effect of causing substantial embarrassment or humiliation within an academic or professional community.

(c) Electronic harassment is a Class A misdemeanor.

Section 5. (a) In any criminal proceeding, any property or material that is alleged to be obscene matter as defined by Section 13A-12-192, Code of Alabama 1975, shall remain in the care, custody, and control of either the state or the circuit or district court having jurisdiction of the case.

(b) (1) Notwithstanding Rule 16 of the Alabama Rules of Criminal Procedure, in any criminal proceeding, a court

shall deny any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that is alleged to be obscene matter as defined under Section 13A-12-192, Code of Alabama 1975, provided the state or the court makes the property or material reasonably available to the defendant.

(2) For the purposes of subdivision (1), property or material shall be deemed to be reasonably available to the defendant if the state or the court provides ample opportunity at a state facility or at the court for inspection, viewing, and examination of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to furnish expert testimony at trial.

Section 6. (a) Any person who reports to a law enforcement officer what the person reasonably believes to be child pornography, transmission of child pornography, or any image, information, or data that is harmful to a minor in this state, or the identity or information that would lead to the identity of an individual or individuals engaged in on-line computer solicitation of minors in this state, may not be held civilly liable for the reporting. For purposes of this section, the reporting may include furnishing the law enforcement officer with any image, information, or data that the person reasonably believes to be evidence of child pornography, transmission of child pornography, or any image, information, or data that is harmful to a minor in this state.

(b) This section does not apply to an action in which a party proves that a person who has reported information to a law enforcement officer subject to subsection (a) engaged in intentional misconduct with willful disregard to a substantial risk of causing injury to the party on whom the report was made.

Section 7. Although this bill would have as its purpose or effect the requirement of a new or increased expenditure of local funds, the bill is excluded from further requirements and application under Amendment 621, now appearing as Section 111.05 of the Official Recompilation of the Constitution of Alabama of 1901, as amended, because the bill defines a new crime or amends the definition of an existing crime.

Section 8. This act shall become effective on the first day of the third month following its passage and approval by the Governor, or its otherwise becoming law.