BREVARD County
BOARD OF COUNTY COMMISSIONERS

FLORIDA'S SPACE COAST

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Memo Discussing Issue Coming before BoCC on Tuesday, August 4, 2020

This memorandum does not solicit feedback from any Commissioner and Commissioners are specifically asked not to respond to it (or discuss it amongst one another outside of a duly noticed BoCC meeting) as doing so could and likely would constitute a violation of one or more provisions of Chapters 119 and/or 286, Fla. Stat. So that it may be made available to the public, a copy of this memo is being provided to the Clerk to the Board so that it may be included in the minutes for the Tuesday, August 4, 2020 BoCC meeting. Please see the attached County Attorney's Office Inter-Office Memo dated December 12, 2016 which indicates that communications of this variety are authorized under applicable law.

Please be advised that this is a memo pertaining to Commissioner Tobia's recent proposal to expand the restrictions placed upon sexual offenders and sexual predators within Brevard County.

While it would, unquestionably, be both politically convenient and safe to simply sign on the dotted line, I hesitate to do so. Herein, I hope to articulate some of the bases for my concerns.

As I understand it, Commissioner Tobia's proposal is intended to protect Brevard's precious children as well as those children visiting Brevard County. While this is a noble goal, it is important to ensure that any measures taken to accomplish it: (1) have some likelihood of being effective, (2) do not cause unintended consequences, and (3) do not unreasonably restrict anyone's freedoms.

In my experience practicing law, I have found that most crimes committed are committed at least partially due to poor impulse control. Impulsiveness (or impulsivity), in the context of criminal acts, often occurs due to substance abuse or mental illness. I have found that opportunity serves as a catalyst for many crimes irrespective of whether alcohol, drugs, or mental defect is also involved. Proximity certainly allows for increased opportunity and, for some, temptation. While many may resist temptation, there are also those with poor impulse control who are unable or unwilling to resist.

Just as when one develops skin cancer, he or she has an increased likelihood of developing additional skin cancers, it is logical that those who committed sexual crimes involving children have some greater propensity for subsequently committing similar or related crimes. While the degree of recidivism may be debatable, it is unquestionable that some offenders will reoffend.

If the goal is to protect children, the legislation should be tailored to meet that goal and not be overbroad.

As I mentioned at an earlier County Commission meeting, while I was (and remain) open to adding restricting applicable to sexual predators, I was hesitant to treat all sexual offenders in the same manner because there are certain crimes requiring registration as a sexual offender which do not necessarily entail any increased risk to children.

The example I discussed, at the last County Commission meeting was §847.0133, Fla. Stat., which penalizes giving obscene material to a minor. It provides a great example of the potential overbreadth of sexual offender classification.

All that must be proven, under §847.0133, is that the defendant knowingly sold, rented, loaned, gave away, distributed, transmitted, or showed obscene material to a person under the age of 18 years.

If an 18-year-old high school student shows a 17-year-old classmate a Playboy magazine, the 18-year-old defendant may find himself or herself convicted of a **felony** for violating §847.0133. To make matters worse, pursuant to §943.0435, Fla. Stat., the 18-year-old would then be classified as a **sexual offender**. Many, if not most, would find it troubling that these facts, alone, could result in one becoming both a convicted felon and a sexual offender as it is grossly inequitable and not remotely proportionate to what was done. Do we truly want to broad-brush such individuals along with child rapists and serial pedophiles?

If that is not bad enough, let us change the facts a bit. Let us assume both the defendant and the *victim* are 17 years of age. Instead of a Playboy magazine, let us assume that the minor defendant tries to pass an obscene drawing to a minor classmate (the "*victim*") but a teacher intercepts the drawing before the *victim* is even able to see it. Recap: The defendant is 17 years of age. So, too, is the *victim*. The drawing is simply that, a 17-year-old's pencil-drawn obscene rendition of the defendant's ex-boyfriend/girlfriend engaging in a profane act with a blobfish or a naked mole rat. The *victim* never even sees the drawing. That absolutely could count as the lesser included offense ("LIO") of attempt under §847.0133. Are you sitting down? §943.0435 would still classify the defendant, in this instance, as a sexual offender!

How can this be? For purposes of §847.0133, obscene material is defined very broadly and includes, "any obscene book, magazine, periodical, pamphlet, newspaper, **comic book**, story paper, written or printed story or article, writing paper, card, picture, **drawing**, photograph, motion picture film, figure, image, videotape, videocassette, phonograph record, or wire or tape or other recording, or any written, printed, or recorded…" (emphasis added).

Certainly law enforcement and prosecutors can exercise discretion in such instances, can't they? Yes, they most certainly can but they are not required to do so. But a judge would be able to dismiss the charge, right? Nope. Judges require a valid legal basis to dismiss charges. A judge's sensible belief that the ramifications would be too severe does not constitute a valid legal basis for dismissal of the charge.

If the obscene material was emailed, instead of provided physically, one could also be convicted of violating §847.0138, Fla. Stat., which prohibits the transmission of material harmful to minors to a minor by electronic device or equipment. The prosecution would only have to show that the

defendant knowingly sent an image, information or data that he or she knew or believed to be harmful to minors, that the defendant sent the image, information or data to a specific individual who was either actually known by him or her to be a minor or believed by him or her to be a minor, and the defendant sent the image, information or data via electronic mail.

The defendant and the victim could be the exact same age and a conviction could still result. The defendant's age is not an element the prosecution must prove. Moreover, the email need not even make it to the victim for there to be a conviction of at least one of the two lesser included offenses. The intended recipient's mother or father could intercept it and a crime still would have been committed.

What about so-called *sexting*? While it is true that §847.0141, Fla. Stat., which prohibits sexting, is not among the offenses which requires registration as either a sexual offender or a sexual predator, it is entirely possible that one would nonetheless be required to register for sexting. Why? Two reasons: (1) The statutory limitations on what constitutes sexting are so restrictive that they may not permit a prosecutor to file the charge in certain cases (e.g., where the minor recipient **solicited** the message or where the minor did not attempt to report the photo or video to his or her guardian or a school or law enforcement official) and (2) §827.071(5)(a), Fla. Stat., which prohibits possession, control, and/or intentional viewing of material including sexual conduct by a child does not require that the defendant be any particular age.

§827.071(5)(a) requires only that the prosecution prove the following there elements:

1. (Defendant) [knowingly possessed] [knowingly controlled] [intentionally viewed] a[n] [photograph] [motion picture] [exhibition] [show] [representation] [image] [data] [computer depiction] [presentation].
2. The [photograph] [motion picture] [exhibition] [show] [representation] [image] [data] [computer depiction] [presentation] included, in whole or in part, sexual conduct by a child less than 18 years of age.
3. (Defendant) knew that the [photograph] [motion picture] [exhibition] [show] [representation] [image] [data] [computer depiction] [presentation] included sexual conduct by a child less than 18 years of age.

Prosecutors typically have wide discretion with respect to the particular charge(s) they wish to file as there is no legal prohibition on a prosecutor filing the most severe charge(s) they believe they have a chance of proving at trial. In fact, this is often done as this tactic may scare many defendants into accepting a plea bargain for something more closely fitting the particular facts and circumstances of the incident forming the basis of the charge(s).

Looking at the elements of §827.071(5)(a), an act in which one 17-year-old minor sends another 17-year-old minor, perhaps one he or she is dating, a sexually explicit photo or video of himself or herself could result in his or her being charged with violating §827.071(5)(a), a felony which qualifies one as a sexual offender pursuant to §943.0435. In fact, both the sender and the recipient could be charged, as no element exempts either the sender or the recipient! While we rely on prosecutorial discretion in such cases, the fact remains that charges could be filed. It matters not that such instances were not necessarily the intended target of the statute. The elements are the

elements and unless there is a valid legal defense, which is often very different than a mere logical explanation, it may be *game over* for the defendant. Do we want to potentially ban a 17-year-old recipient of a sexual image sent by his or her 17-year-old boyfriend or girlfriend from being within 1000 feet of places where children congregate?

If the goal is to protect children, the legislation should be tailored to meet that goal and not be overbroad.

Irrespective of the severity of the offense(s), in adopting an ordinance restricting where sexual predators and sexual offenders are entitled to be, should we treat those who have committed sexual offenses with adults the same as those who committed sexual offenses with minors?

Let us assume we have someone who is understandably classified as a sexual offender: a serial flasher who has limited his or her victims to those over the age of 65. This flasher has twice snuck onto assisted living facility and nursing home properties and exposed himself or herself to those in that age group but has never shown any interest whatsoever in anyone under the age of 65. Assume this individual has never done anything unlawful in the presence of a child.

Based upon the advanced age of the victims, let us additionally assume, as a result of the aforementioned, this person was convicted of violating §825.1025, lewd or lascivious offenses committed upon or in the presence of an elderly person or disabled person.

Is this someone we should say cannot be within 1000 feet of a place where children congregate? Would 500 feet be more reasonable? Would there be any greater risk of harm by halving the distance?

Is it logical and reasonable to keep this person away from kids given that he or she is free to go to places where seniors – his true victim pool - congregate?

Does any distance requirement, from children, do anything to protect kids? Is there any real threat to kids? Is the threat anything more than hypothetical without an adequate and articulable basis in fact?

There are numerous additional offenses which have nothing whatsoever to do with children that can and do result in defendants becoming sexual offenders.

A "video voyeurism" conviction, under §810.145, Fla. Stat., need not have anything to do with a child. If one is convicted of having violated this statute as a result of having electronically watched the changing room in an adult-only nightclub – a club where kids are expressly prohibited - does it make sense to keep that person 1000 feet from locations where children congregate?

Let us consider more severe cases where the victim, nonetheless, is over 18 years of age.

A human trafficking conviction, while horrifying, may have nothing whatsoever to do with children. §787.06, Fla. Stat., which prohibits human trafficking not only of children but also of adults. Numerous subsections apply only to adults. Regardless of how horrible the crime was, does

it make sense to prohibit those whose victims were over the age of 18 from being within 1000 feet of locations where children congregate?

A sexual battery conviction, while also horrendous, does not necessarily involve juveniles. §794.011, Fla. Stat., which prohibits sexual battery, outlines differing levels of severity based upon the age of the victim with corresponding severity changes made at both ages 12 and 18. Regardless of how horrible the crime was, does it make sense to prohibit those whose victims were over the age of 18 from being within 1000 feet of locations where children congregate?

I have not yet had an opportunity to go through every single statute for which violation could or would result in classification as a sexual offender to determine whether exclusion from the proposal would be warranted. It takes considerable time to go through statutes, line by line, word by word.

I still believe that the proposed restriction should apply only to sexual predators and not to sexual offenders.

That said, if the Commission decides to support Commissioner Tobia's proposal, I have identified the following statutes which, at an absolute minimum, ought to be carved out from inclusion:

§810.145 - Video voyeurism

§825.1025 - Lewd or lascivious offenses committed upon or in the presence of an elderly person or disabled person.

§827.071(5)(a) - Possession, control, and/or intentional viewing of material including sexual conduct by a child.

§847.0133 - Protection of minors; prohibition of certain acts in connection with obscenity; penalty.

§847.0138 - Transmission of material harmful to minors to a minor by electronic device or equipment prohibited; penalties.

I would strongly discourage the Commission from going down the road of specifying victim age in any language intended for inclusion in the County Code. Doing so may result in inordinately difficult enforcement for law enforcement officers as victim age information may not be readily available to them depending, potentially among additional considerations, upon when and where the offense took place as well as the defendant's age at the time of commission of the offense. The relevant statutes themselves need to be carved out even if it means that certain folks we might otherwise wish to include would not be included.

Taking my Commissioner hat off, as an attorney, I would strongly caution an overbroad ordinance. The mostly anonymous keyboard warriors who have emailed all of us threatening lawsuits have nothing to do with this advice. In fact, many of their emails (including one in which

I was referred to as an "ignorant Bitch" by a guy who victimized a 14-year-old) have pushed me further in support of Commissioner Tobia's proposal. That said, we run the very real risk of unwarrantedly penalizing certain people who, as shown in several of the above examples, do not pose any elevated risk to children.

If the goal of the instant proposal is to protect children, let us keep our actions confined to that and do not, instead, add to the existing range of available punishments set out, by the legislature, to be imposed by the court system upon consideration of all lawful factors (e.g., prior criminal history, mitigating factors, aggravating factors, etc.) in each and every case.

If the Commission wishes to include sexual offenders along with sexual predators, I suggest reducing the distance requirement for sexual offenders to reflect the substantially lower risk they pose when compared to sexual offenders. A 1000-foot requirement for predators and a 250-foot requirement for offenders could be acceptable provided we carve out the specific statutes identified herein.

In addition to being far more equitable and proportionate, doing this also serves to reduce the likelihood the ordinance being successfully challenged as it will be less onerous and restrictive to many individuals.

It is critical that we extend the existing exception permitting those to whom our sexual offender / sexual predator ordinance applies to travel "on those public roads... through the buffer zone" within 1000 feet of a prohibited location "without undue delay" so as to apply to any further prohibition the BoCC may impose.

I would strongly advise we consider advertising an amendment to Sec. 74-102(b) of our County Code to add an exception to permit both sexual offenders and sexual predators to attend duly noticed Board of County Commissioner meetings so as to allow them to provide public comment without fear of arrest for simply existing within 1000 feet of a school.

This would not impact the existing residency prohibition within 1,000 feet of a school which, incidentally, has an exception permitting travel on the public roadways far nearer to the school than the County Commission Chambers. As written, in pertinent part, "... this section shall not be construed as prohibiting any person from traveling on those public roads located within the county when traveling through the buffer zone without intentional delay."