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**FLORIDA CASE LAW UPDATE 16-09**

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**Case:** Smith v. State, 41 Fla. L. Weekly S369a (Florida Supreme Court)

**Date:** September 8, 2016

**Subject:** Convictions for Transmission of Child Pornography via Online File-Sharing

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**FACTS:** Smith utilized an online file-sharing program to share child pornography with other users. The file-sharing program required Smith to send a “friend” request to another user, which then allowed the other user to access the computer files that Smith chose to share. Smith ended up sending a “friend” request to a Palm Beach County undercover detective, who then was able to download several images of child pornography without any further notice or permission from Smith. Smith was arrested and charged with twenty-one counts of transmitting child pornography, in violation of section 847.0137, Florida Statutes. Smith pled to a prison sentence followed by probation, but he filed a motion for postconviction relief after the Fifth District issued an opinion reversing a similar conviction in the *Biller v. State* case. In *Biller*, the Defendant was charged with one count of transmitting child pornography after an undercover officer obtained child pornography files from Biller’s file-sharing account. Biller used a peer-to-peer sharing network called Limewire, which allowed other Limewire subscribers to obtain the files Biller chose to share. Agents of the sheriff’s office, using the office’s own Limewire subscription, were able to retrieve images of child pornography from Biller’s accessible computer folder via the internet. Biller successfully argued to the Fifth District Court of Appeal that his conviction for transmitting child pornography was reversible because he did not “transmit” or purposefully deliver the files to another person merely by virtue of allowing access to files through a sharing network. The *Biller* court agreed and held that Biller did not “send” the files when he merely allowed access to the files. Accordingly, Smith argued to the Fourth District Court of Appeal that that based on the *Biller* opinion, he had been charged with a non-existent crime. The Fourth District disagreed with the Fifth District’s conclusion in *Biller*, holding that Smith sent and caused images to be delivered in violation of the transmission statute because he created the shared file folder and authorized others to download the contents of that folder. The Fourth District certified conflict between its opinion in *Smith* and the Fifth District’s opinion in *Biller*.

**RULING:** The Florida Supreme Court approved of the Fourth District Court of Appeal’s holding in *Smith* and disapproved of the Fifth District Court of Appeal’s holding in *Biller*. The Florida Supreme Court held that Smith’s convictions for transmitting child pornography were properly upheld, stating, “[W]e hold that the use of a file-sharing program, where the originator affirmatively grants the receiver access to the originator’s child pornography files, constitutes the transmission of child pornography under the plain meaning of section 847.0137.”

**DISCUSSION:** The Florida Supreme Court disagreed with Smith’s argument that he could not be convicted of transmission of child pornography by simply making images available to other users via a file-sharing program. The Court stated that Smith sent the images to an electronic “place” when he loaded them into a specific computer file and that then through his file-sharing program he made them accessible to authorized third parties. The Court went on to state that Smith sent a “friend” request to a third party that triggered access to his files through the program and concluded, “By these purposeful acts, Smith caused the delivery of the images to the third party to take place.” The Court compared Smith’s actions to the electronic equivalent of placing a locked box containing pornographic photos on his front porch and telling a “friend” that there is something on the front porch that he/she might want to see and then sending said friend a spare key to the locked box. The Court stated that such actions represented Smith causing the delivery of the photos which he had previously sent to his front porch. The Court specifically stated that the Fifth District Court of Appeal erred when it narrowly defined the definition of “transmit” in *Biller* opinion and called such an interpretation “unreasonably cramped.”

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**Officers should consult with their agency legal advisors to confirm the interpretation provided in this Update and to determine to what extent the case discussed will affect their activities.**