

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Children, Families, and Elder Affairs

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BILL: SB 1214

INTRODUCER: Senator Book

SUBJECT: Child Exploitation

DATE: January 26, 2018

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Delia	Hendon	CF	<b>Pre-meeting</b>
2.			CJ	
3.			AP	
4.			RC	

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**I. Summary:**

SB 1214 repeals s. 827.071, F.S., and moves the provisions relating to sexual performance by a child and child pornography into ch. 847, F.S.

The bill also:

- Creates s. 847.003, F.S., to include the criminal offenses from s. 827.071, F.S., relating to the sexual performance by a child;
- Creates s. 794.10, F.S., authorizing criminal justice agencies to issue subpoenas for investigations involving sexual offenses against children that require the recipient of the subpoena to keep the existence and contents of the subpoena confidential.
- Amends s. 847.0137, F.S. to include the criminal offenses from s. 827.071, F.S., relating to the possession and promotion of child pornography;
- Amends the definition of child pornography and the offense of child pornography to include morphed child pornography where pornographic images are altered; and
- Revises terminology in ss. 847.0315 and 847.0137, F.S., to provide the ability to charge each act of sending or delivering child pornography as a separate offense.

The bill will likely have a fiscal impact on the state by increasing the need for prison beds in Florida.

The bill has an effective date of October 1, 2018.

## II. Present Situation:

### Florida Child Pornography Laws

Child pornography is defined, as *any* image depicting a minor, any person under the age of 18, engaged in sexual conduct.<sup>1</sup> Florida law currently contains a variety of statutes that prohibit acts relating to child pornography. Currently, these statutes are found in two different chapters, ch. 827, F.S., and ch. 847, F.S.

“Morphing” refers to a process in which a computer user distorts or transforms one image picture into another.<sup>2</sup> In recent years, individuals have started using this technique to create “morphed” child pornography, e.g., images depicting sexually explicit conduct in which an actual child’s head has been superimposed onto an adult’s body.<sup>3</sup> Florida’s child pornography laws do not include morphed pornography.

#### *Section 827.071, F.S., Sexual Performance by a Child*

Section 827.071 specifies the criminal offenses for the production of child pornography and the possession and promotion of child pornography. The following terms apply to the offenses of s. 827.071, F.S.:

- “Intentionally view” means to deliberately, purposefully, and voluntarily view. Proof of intentional viewing requires establishing more than a single image, motion picture, exhibition, show, image, data, computer depiction, representation, or other presentation over any period of time;
- “Performance” means any play, motion picture, exhibition, show image, data, computer depiction, representation, or other presentation over any period of time;
- “Promote” means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer or agree to do the same;
- “Sexual conduct” means actual or 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, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed;<sup>4</sup>
- “Sexual performance” means any performance of part thereof which includes sexual conduct by a child of less than 18 years of age; and
- “Simulated” means the explicit depiction of sexual conduct which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.<sup>5</sup>

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<sup>1</sup> S. 847.001, F.S.,

<sup>2</sup> See Merriam-Webster, *Definition of “Morph,”* available at <https://www.merriam-webster.com/dictionary/morph> (last visited January 25, 2018).

<sup>3</sup> *Computer Generated Child Pornography: A Legal Alternative?* Seattle University Law Review, Vol. 22:643, 1998, available at <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1585&context=sulr> (last visited January 26, 2018).

<sup>4</sup> S. 847.001(16), F.S., also defines “sexual conduct” in this manner.

<sup>5</sup> S. 827.071(1), F.S.

Section 827.071, F.S., also defines the terms deviate sexual intercourse, sadomasochistic abuse, sexual battery, and sexual bestiality.<sup>6</sup>

Section 827.071(2), F.S., makes it a second degree felony<sup>7</sup> for a person, knowing the character and content, to employ, authorize, or induce a child to engage in a sexual performance. It is also a second degree felony for a parent, legal guardian or custodian to consent for a child to participate in a sexual performance.<sup>8</sup>

It is also a second degree felony for a person, knowing the character and content, to produce, direct, or promote any performance which includes sexual conduct by a child.

It is a third degree felony<sup>9</sup> for a person to knowingly possess, control, or intentionally view a photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation, which, in whole or in part, he or she knows to include any sexual conduct by a child.<sup>10</sup>

Section 827.071(4), F.S., makes it a second degree felony for a person to possess with the intent to promote any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, includes any sexual conduct by a child.<sup>11</sup>

### **Federal Child Pornography Laws**

Generally, the First Amendment does not protect child pornography. In *New York v. Ferber*,<sup>12</sup> the United States Supreme Court recognized that states have a compelling interest in safeguarding the physical and psychological well-being of minors and in preventing their sexual exploitation and abuse. The Court noted that it was “unlikely that visual depictions of children . . . lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work.”<sup>13</sup>

Under these principles, states have constitutionally been able to criminalize the possession, distribution, etc., of child pornography. However, the constitutionality of criminalizing such acts is less clear when the images at issue are morphed pornography.

### ***Child Pornography Prevention Action of 1996***

Prior to 1996, federal law criminalized a variety of acts relating to child pornography.<sup>14</sup> At that

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<sup>6</sup> See s. 827.071(1), F.S.

<sup>7</sup> A second degree felony is punishable by up to 15 years imprisonment and up to a \$10,000 fine. Sections 775.082 and 775.083, F.S.

<sup>8</sup> S. 827.071(2), F.S.

<sup>9</sup> A third degree felony is punishable by up to five years imprisonment and up to a \$5,000 fine. Sections 775.082 and 775.083, F.S.

<sup>10</sup> The statute also specifies that the possession, control, or intentional viewing of each such photograph, etc., is a separate offense. If such photograph, etc., includes sexual conduct by more than one child, then each child in each photograph, etc., that is knowingly possessed, controlled, or intentionally viewed is a separate offense.

<sup>11</sup> Possession of three or more copies of such photographs, etc., is prima facie evidence of intent to promote.

<sup>12</sup> 458 U.S. 747 (1982).

<sup>13</sup> *Id.* at 763.

<sup>14</sup> See, e.g., 18 U.S.C. s. 2252 (1994 ed.).

time, the statutes described such material as images created using an actual minor.<sup>15</sup> In 1996, Congress passed the Child Pornography Prevention Action of 1996 (CPPA),<sup>16</sup> which created a definition of “child pornography” which for the first time criminalized acts relating to morphed child pornography. Under the CPPA, “child pornography” was defined as:

- (8) Any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct,<sup>17</sup> where:
- (A) The production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
  - (B) Such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct (i.e., *virtual child pornography – created without using an actual child*);
  - (C) Such visual depiction has been created, adapted, or modified to appear that an identifiable minor<sup>18</sup> is engaging in sexually explicit conduct (i.e., *morphed child pornography*); or
  - (D) Such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.<sup>19</sup>

### ***Case Law Following the Passage of the CPPA***

In 2002, the United States Supreme Court decided *Ashcroft v. Free Speech Coalition*,<sup>20</sup> a case in which a California trade association for the adult-entertainment industry challenged section 2256(8)(B) of the CPPA as unconstitutionally overbroad. As noted above, section 2256(8)(B) made it a crime to possess or distribute images depicting a child or what appears to be a child, engaging in sexually explicit conduct (i.e., virtual child pornography).<sup>21</sup>

The Court held that the “speech” criminalized in the challenged provision of the CPPA violated the First Amendment because it extended the federal prohibition against child pornography to sexually explicit images that appeared to depict minors but were produced without using any real children.<sup>22</sup> The Court decided that by prohibiting child pornography that did not depict an actual child, section 2256(8)(B) of the CPPA “abridged the freedom to engage in a substantial amount of lawful speech” and was therefore overbroad and unconstitutional.<sup>23</sup>

<sup>15</sup> *U.S. v. Hotaling*, 599 F.Supp. 2d 306, 309 (N.D.N.Y. 2008); *see also* 18 U.S.C. ss. 2252 and 2256 (1994 ed.).

<sup>16</sup> Pub. L. No. 104-208, s. 121.

<sup>17</sup> The term “sexually explicit conduct” was defined as actual or simulated sexual intercourse (including genital-genital, oral-genital, anal-genital, or oral-anal) whether between persons of the same or opposite sex; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person. 18 U.S.C. s. 2256(2) (1996 ed.)

<sup>18</sup> The term “identifiable minor” was defined as a person who is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature, and: who was a minor at the time the visual depiction was created, adapted, or modified; or whose image as a minor was used in creating, adapting, or modifying the visual depiction. The term was not be construed to require proof of the actual identity of the identifiable minor. 18 U.S.C. s. 2256(9) (1996 ed.).

<sup>19</sup> 18 U.S.C. s. 2256(8) (1996 ed.).

<sup>20</sup> 535 U.S. 234 (2002).

<sup>21</sup> 18 U.S.C. s. 2256(8) (1996 ed.).

<sup>22</sup> *Ashcroft*, 535 U.S. at 256.

<sup>23</sup> *Id.*

The *Ashcroft* decision did not specifically address the constitutionality of 18 U.S.C. 2256(8)(C) (prohibiting *morphed* child pornography), it did note, in dictum, that “[a]lthough morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children. . .”<sup>24</sup> Courts have taken this dictum to suggest that the *Ashcroft* court would have deemed morphed child pornography as not protected by the First Amendment.<sup>25</sup>

### ***Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (Protect Act)***

Congress attempted to remedy the constitutional issues raised in *Ashcroft* by passing the “Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act” (Protect Act) in 2003.<sup>26</sup> The Protect Act, in part, narrowed the definition of “virtual” child pornography in section (8)(B) of the CPPA to include virtual or computer-generated images that are “indistinguishable from” images of actual minors engaging in sexually explicit conduct.<sup>27</sup>

Notably, the definition of “morphed” child pornography contained in section 2256(8)(C) remained unchanged between the CPPA and the Protect Act.

### ***Case Law since the Passage of the Protect Act***

To date, the federal statutes relating to morphed child pornography have been upheld.<sup>28</sup> In *United States v. Bach*,<sup>29</sup> the defendant was convicted of possessing morphed child pornography. The image at issue showed a young nude boy sitting in a tree, grinning, with his pelvis tilted upward, his legs opened wide, and a full erection.<sup>30</sup> The photograph of a well-known child entertainer’s head had been “skillfully inserted onto the photograph of the nude boy so that the resulting image appeared to be a nude picture of [the child entertainer] sitting in the tree.”<sup>31</sup>

The defendant appealed arguing that his conviction was invalid because the definition of morphed child pornography violated the First Amendment. The United States Court of Appeals for the Eighth Circuit disagreed, holding that morphed child pornography “implicate the interests of a real child,” and creates a lasting record of an identifiable minor child seemingly engaged in sexually explicit activity.<sup>32</sup> The court noted that there may be instances when the “application of s. 2256(8)(C) violates the First Amendment, this is not such a case. This image involves the type of harm which can constitutionally be prosecuted under [*Ashcroft*] and *Ferber*.”<sup>33</sup>

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<sup>24</sup> *Id.* at 242.

<sup>25</sup> *McFadden v. Alabama*, 67 So. 3d 169, 181-182 (Ala. Crim. App. 2010).

<sup>26</sup> Pub. L. No. 108-21.

<sup>27</sup> 18 U.S.C. s. 2256(8)(B).

<sup>28</sup> *See United States v. Ramos*, 685 F. 3d 120, 134 (2d Cir. 2012), *cert. denied*, 133 S.Ct. 567 (2012); *see also Doe v. Boland*, 630 F. 3d 491, 497 (6th Cir. 2011).

<sup>29</sup> 400 F. 3d 622 (8th Cir. 2005).

<sup>30</sup> *Id.* at 625.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 632.

<sup>33</sup> *Id.* *See also United States v. Hotaling*, 634 F. 3d 725 (2d Cir. 2008), *cert. denied*, 132 S.Ct. 843 (2011) (citing *Bach*, the Court held that “child pornography created by digitally altering sexually explicit photographs of adults to display the face of a child is not protected expressive speech under the First Amendment”).

In *United States v. Anderson*, the defendant was charged with distribution of morphed child pornography relating to an image in which the face of a minor female was superimposed over the face of an adult female engaging in sex with an adult male.<sup>34</sup> The defendant moved to dismiss the charge, arguing that the definition of morphed child pornography was unconstitutionally overbroad.<sup>35</sup> The court noted that the image at issue was different from the one in *Bach* in that “no minor was sexually abused.”<sup>36</sup> However, the court held that because such images falsely portray identifiable children engaging in sexual activity, such images implicate the government’s compelling interest in protecting minors. Using this reasoning, the court held that the definition of morphed child pornography was constitutional.<sup>37</sup>

### Florida Case Law – Child Pornography

In 2010, Florida’s Second DCA decided *Stelmack v. State*,<sup>38</sup> a case in which the defendant was charged with violating s. 827.071(5), F.S. (possession of child pornography). The images at issue showed the faces and heads of two girls, ages 11 and 12, which were cut and pasted onto images of a 19-year old woman lewdly exhibiting her genitals.<sup>39</sup> The court closely examined the definition of “sexual conduct,” and determined that it requires images to include actual lewd exhibition of the genitals *by a child*.<sup>40</sup> Because the only sexual conduct in the images at issue was performed by an adult, the court held that the images were not prohibited by s. 827.071(5), F.S.<sup>41</sup>

The court also noted that the images depicted *simulated* lewd exhibition of the genitals by a child. The state argued that s. 827.071(5), F.S., proscribed such images because they were photographs or representations “which ... *in part* ... include ... sexual conduct by a child.”<sup>42</sup> The court disagreed and found that the legislature specifically excluded *simulated* lewd exhibition from the definition of “sexual conduct.” Specifically the court stated, “[i]f the legislature had intended to proscribe the possession of composite images that simulate lewd and lascivious exhibition of the genitals, it could have included a provision doing so. In fact, child pornography has been defined in the federal statutes to specifically include composite images. . . .<sup>43</sup>

### Computer Pornography

#### ***Section 847.0135, F.S., – Computer Pornography; Prohibited Computer Usage; Traveling to Meet a Minor***

It is a third degree felony if:

- A person:
  - Knowingly compiles, enters into, or transmits by use of computer;
  - Makes, prints, publishes, or reproduces by other computerized means;

<sup>34</sup> 759 F. 3d 891 (8th Cir. 2014).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 895.

<sup>37</sup> *Id.* at 896.

<sup>38</sup> 58 So. 3d 874 (Fla. 2d DCA 2010).

<sup>39</sup> *Id.* at 875.

<sup>40</sup> *Id.* at 877

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (emphasis in original).

<sup>43</sup> *Id.* at 876.

- Knowingly causes or allows to be entered into or transmitted by use of computer; or
- Buys, sells, receives, exchanges, or disseminates;
- Any notice, statement, or advertisement of any minor’s name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information for purposes of facilitating, encouraging, offering, or soliciting sexual conduct of or with any minor, or the visual depiction of such conduct.<sup>44</sup>

### ***Florida Case Law – Number of Offenses Charged***

In 2015, the Fourth District Court of Appeal (DCA) in *State v. Losada*, considered the number of counts that may be charged for the offenses of computer pornography under s. 847.0135(2), F.S., and transmission of child pornography under s. 847.0137(2), F.S., where more than one image of child pornography is at issue.<sup>45</sup>

In this case, the defendant sent an undercover police officer a single image containing child pornography. On a subsequent day, the officer requested and received from the defendant access to files stored on the defendant’s computer, which contained 32 images of child pornography. Defendant was charged with and convicted of 33 counts of computer pornography in violation of s. 847.0135(2), F.S., and 33 counts of transmission of child pornography in violation of s. 847.0137(2), F.S. The defendant appealed his convictions, arguing that he could not be prosecuted for 33 counts of each offense because the Legislature did not intend for these offenses to be charged on an image-by-image basis.<sup>46</sup>

The court affirmed the trial court’s dismissal of 31 counts of computer pornography and 31 counts of transmission of child pornography. The dismissal was based on the Florida Supreme Court’s “a/any” test which holds that use of the word “a” before an item described in a statute evidences the intent of the Legislature to make each item subject to a separate prosecution; whereas, use of the word “any” before the item, is ambiguous and may evidence legislative intent that only one prosecution is intended for multiple items.<sup>47</sup>

Due to the use of the term “any” in ss. 847.0135 and 847.0137, the court concluded that the Legislature did not intend to make each individual image subject to separate prosecution.<sup>48</sup>

### ***Section 847.0137, F.S., Transmitting Child Pornography***

Section 847.0137, F.S., specifies that any person who knew or reasonably should have known that he or she was transmitting child pornography to another person it is a third degree felony.

The following definitions apply to the above-described offense:

- “Child pornography” means any image depicting a minor engaged in sexual conduct;
- “Minor” means any person under the age of 18 years;
- “Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the

<sup>44</sup> S. 847.0135(2), F.S.

<sup>45</sup> 175 So. 3d 911 (Fla. 4th DCA 2015).

<sup>46</sup> *Id.* at 912.

<sup>47</sup> *Id.* at 913-914.

<sup>48</sup> *Id.* at 914-915

genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed;

- “Simulated” means the explicit depiction of sexual conduct which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks; and
- “Transmit” means the act of sending and causing to be delivered any image, information, or data from one or more persons or places to one or more other persons or places over or through any medium, including the Internet, by use of any electronic equipment or device.<sup>49</sup>

### ***Florida Case law – Transmitting Child Pornography***

Recently, the Florida Supreme Court resolved a conflict between two District Courts of Appeal (DCAs) that considered whether the definition of “transmit” as used in s. 847.0137, F.S., to prohibit the transmission of child pornography includes transmission via a file-sharing program. According to the Fifth DCA in *Biller v. State*, the definition did not,<sup>50</sup> whereas, the Fourth DCA in *Smith v. State*,<sup>51</sup> found that a file-sharing program could be used to transmit child pornography in violation of s. 847.0137, F.S.

The Florida Supreme court affirmed the Fourth DCA’s decision in *Smith* and held “that the use of a file-sharing program, where the originator affirmatively grants the receiver access to child pornography placed by the originator in files accessible through the file-sharing program, constitutes the transmission of child pornography under the plain meaning of s. 847.0137, F.S.”<sup>52</sup>

### **Subpoenas in Investigations involving Sexual Offenses against Children**

A subpoena is an order directed to a person which requires his or her attendance at a particular time and place to testify as a witness. A subpoena may also require the witness to bring documents or other tangible evidence that may be introduced as evidence in a case.<sup>53</sup> The Sixth Amendment to the United States Constitution guarantees the defendant in a criminal case the right to have compulsory process for obtaining witnesses in his or her favor.<sup>54</sup> Subpoenas may be

<sup>49</sup> S. 847.001, F.S.

<sup>50</sup> 109 So. 3d 1240 (Fla. 5th DCA 2013).

<sup>51</sup> 190 So. 3d 94 (Fla. 4th DCA 2015).

<sup>52</sup> 204 So. 3d 18, 19 (Fla. 2016).

<sup>53</sup> BLACK’S LAW DICTIONARY, *What is Subpoena?*, <http://thelawdictionary.org/subpoena/> (last visited January 25, 2018).

<sup>54</sup> U.S. Const. am. 6

issued in a criminal investigation<sup>55</sup> or in a criminal prosecution during discovery<sup>56</sup> or for trial<sup>57</sup> by the defendant, his or her counsel, or the state attorney. Generally, a subpoena must state the name of the court, the title of action, and the time and the place at which the witness is commanded to give testimony or produce evidence.<sup>58</sup> Once a witness is subpoenaed by either party, he or she must remain available for attendance until the case is resolved or until he or she is excused by the court hearing the case.<sup>59</sup> A witness's failure to do so could result in contempt of court.<sup>60</sup>

In some cases, a subpoena may require the recipient of the subpoena to not disclose the existence or contents of the subpoena. For example, Florida statute authorizes an agency that is investigating<sup>61</sup> a violation of Florida's Racketeer Influenced and Corrupt Organizations (RICO) Act<sup>62</sup> to issue a civil investigative subpoena for testimony or documents.<sup>63</sup> This subpoena is confidential for 120 days, meaning the recipient of the subpoena may not disclose its contents or existence to any person or entity other than his or her attorney during that period.<sup>64</sup> The 120-day period may be extended by a circuit court upon showing of good cause by the investigative agency.<sup>65</sup> For good cause to exist, there must be a showing:

- Of sufficient factual grounds to reasonably indicate a violation of ss. 895.01 – 895.06, F.S.;
- That the documents or testimony requested appear reasonably calculated to lead to the discovery of admissible evidence; and
- Of facts that reasonably indicate that disclosure of the subpoena would hamper or impede the investigation, or would result in a flight from prosecution.<sup>66</sup>

Upon failure of the person or enterprise to comply with the subpoena, the investigative agency may apply to the circuit court to enforce the subpoena.<sup>67</sup>

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<sup>55</sup> Florida law authorizes certain entities to use subpoenas for the purpose of conducting criminal investigations, including, but not limited to, S. 409.920, F.S. (authorizing the Attorney General to subpoena witnesses or materials, including medical records, during an investigation for Medicaid fraud); S. 415.107, F.S. (authorizing a criminal justice agency investigating a report related to abuse, neglect, or exploitation of a vulnerable adult to subpoena related records); and S. 414.411, F.S. (authorizing Department of Financial Services to subpoena witnesses and records related to a public assistance fraud investigation).

<sup>56</sup> Fla. R. Crim. P. 3.220 (h), allows any party to conduct a deposition by oral examination of any person authorized by the rule, generally including listed witnesses, co-defendants, or unlisted witnesses who have information relevant to the offense charged. The rule provides that the issuance of the subpoena for deposition is the same as provided for in the Florida Rules of Civil Procedure.

<sup>57</sup> Fla. R. Crim. P. 3361(a), provides that subpoenas for testimony before the court and subpoenas for production of tangible evidence before the court may be issued by the clerk of the court or by any attorney of record in the case.

<sup>58</sup> *Id.*

<sup>59</sup> S. 914.03, F.S.

<sup>60</sup> *Id.*

<sup>61</sup> In order to issue a subpoena, the level of proof required is that there must be "something more than a fishing expedition, and something less than probable cause." *Check 'n Go of Florida, Inc. v. State* 790 So.2d 454, 458 (Fla. 5th DCA 2001).

<sup>62</sup> The Racketeer Influenced and Corrupt Organizations Act was passed by Congress in 1970 as part of the Organized Crime Control Act of 1970. Florida passed its own RICO Act in 1977.

<sup>63</sup> S. 895.06, F.S.

<sup>64</sup> S. 895.06(2), F.S.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> S. 895.06(4), F.S.

Similarly, federal law authorizes the Federal Bureau of Investigation (FBI) to issue a National Security Letter (NSL), which is an administrative subpoena that allows the FBI to obtain records from wire or electronic communication service providers if the records are relevant to investigations related to terrorism or clandestine intelligence activities.<sup>68</sup> For such subpoenas, the FBI may require nondisclosure if it certifies that disclosure may result in danger to the national security of the United States; interference with a criminal counterterrorism, or counterintelligence investigation; interference with diplomatic relations; or danger to the life or physical safety of any person.<sup>69</sup>

To avoid potential First Amendment concerns with such a restraint on speech, Congress passed the USA FREEDOM Act of 2015, which in relevant part authorizes a recipient of a NSL/subpoena to notify the federal government or file a petition for judicial review if the recipient wishes to have a court review a nondisclosure requirement in such subpoena.<sup>70</sup> Courts have upheld the FBI's authority to issue the subpoenas and the accompanying nondisclosure requirements because of the government interest in protecting national security and the provisions for judicial review included in the Act.<sup>71</sup>

### III. Effect of Proposed Changes:

#### Child Pornography

##### *Section 827.071, F.S., Sexual Performance by a Child*

**Section 29** repeals s. 827.071, F.S.

##### *Section 847.003, F.S., Sexual Performance by a Child*

**Section 31** creates s. 847.003, F.S.

The bill moves the criminal offenses from s. 827.071, F.S., relating to the sexual performance by a child, to the newly created s. 847.003, F.S. The bill changes the elements of these offenses.

The bill also moves the definitions of the terms “performance,” “promote,” and “sexual performance,” from s. 827.071, F.S., to s. 847.003, F.S. The bill does not change the definitions of these terms.

##### *Section 847.0137, F.S., Child Pornography*

**Section 34** moves the criminal offenses from s. 827.071, F.S., for the possession and promotion of child pornography to s. 847.0137, F.S., and makes the following changes:

The bill defines the terms child pornography, identifiable minor, and visual depiction to mirror the federal definitions in 18 U.S.C. s. 2256.

The bill defines child pornography to mean *a* visual depiction of sexual conduct, in which:

<sup>68</sup> 18 USC § 2709(b)(1).

<sup>69</sup> Id. at § 2709(c)(1)(B).

<sup>70</sup> 18 USC § 3511(b)(1)(A).

<sup>71</sup> *In re Nat'l Sec. Letters*, 2016 WL 7017215 (D.D.C. July 25, 2016); *In re Nat'l Sec. Letter*, 165 F.Supp.3d 352 (D. Md. 2015).

- The production of such visual depiction involves the use of a minor engaging in sexual conduct; or
- Such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct.

An identifiable minor is a person who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark, or other recognizable feature and:

- Who was a minor at the time the visual depiction was created, adapted, or modified; or
- Whose image as a minor was used in creating, adapting, or modifying the visual depiction.

As in 18 U.S.C. s. 2256(9), the bill does not require proof of the actual identity of the identifiable minor.

A visual depiction includes, but is not limited to, a photograph, picture, image, motion picture, film, video, representation, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means. The term also includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data that is capable of conversion into a visual image that has been transmitted by any means, whether stored in a permanent or nonpermanent format.

The bill also moves the definitions of the terms "intentionally view" and "promote" from s. 827.071, F.S., to s. 847.0137, F.S. The bill does not change the definitions of these terms.

The bill amends the definition of "transmit" to add that the act of sending and causing to be delivered *includes the act of providing access for receiving and causing to be delivered*. The bill also removes the reference to *any image* and replaces it with *visual depiction*. The bill also adds *an interconnected network* to the definition of transmit.

The definition of "transmit" now reads, "act of sending and causing to be delivered, including the act of providing access for receiving and causing to be delivered, a visual depiction, information, or data over or through any medium, including the Internet or an interconnected network, by use of electronic equipment or other device."

The bill amends the offenses of possession and promotion of child pornography to include newly defined term "visual depiction."

Cumulatively, the above-described changes make it a crime to possess, promote, and transmit morphed child pornography in Florida.

The bill amends s. 847.0137, F.S., to change the term "any" to "a" where it is used in the offense of the transmission of child pornography. These changes result in the ability to charge transmission of child pornography offenses separately based upon each visual depiction, data, or information and each recipient.

The bill also makes numerous conforming changes that reflect the repeal of s. 827.071, F.S., the creation of s. 847.003, F.S., and the expansion of s. 847.0137, F.S.

**Section 847.001, F.S., Definitions**

**Section 30** changes the definition of “child pornography” and “minor” to incorporate the court’s findings in *State v. Losada*, 175 So. 3d 911 (Fla. 4th DCA 2015).

The bill removes the current definition of child pornography, “any image depicting a minor engaged in sexual conduct,” and instead defines the term by a cross-reference to the definition of child pornography created by the bill in s. 847.0137, F.S.

The bill changes the term “minor” to “minor or child” and defines it to mean a person under the age of 18 years.

The bill expands the definition of “sexual conduct” applicable to all of ch. 847, F.S., to include “simulated” lewd exhibition of the genitals.

**Computer Pornography****Section 847.0135, F.S., Computer Pornography; Child Exploitation**

**Section 32** amends s. 847.0135, F.S., to change the term “any” to “a” where used in the provisions for the offense of computer pornography. These changes result in the ability to charge computer pornography offenses separately based upon each notice, statement, or advertisement and each minor affected.

**Subpoenas**

**Section 27** creates s. 794.10, F.S., authorizing a criminal justice agency to issue a subpoena for any investigation of an offense involving:

- The sexual exploitation or abuse of a child;
- A sexual offense alleged to have been committed by a sexual offender who has not properly registered; or
- An offense under ch. 847, F.S., involving a child who doesn’t qualify under the first two prongs.

The subpoena may require the production of any relevant record, object, or other information relevant to the investigation and may also require the custodian of the record to testify as to its authenticity. The subpoena must identify and describe any record, object, or other information that is required to be produced or testified to and provide a reasonable return date by which the record, object, or information must be submitted.

The bill defines:

- “Child” as a person who is less than 18 years of age.
- “Child sexual offender” as a person required to register as a sexual predator under s. 775.21, F.S., or as a sexual offender under s. 943.0435, F.S., if at least one of the offenses that qualified the person for registration involved a child.
- “Criminal justice agency” as a law enforcement agency, court, or prosecutor in this state.

- “Sexual exploitation or abuse of a child” as a criminal offense based on any conduct described in s. 39.01(71), F.S. This definition includes sexual abuse of a child, engaging in sexual acts in front of or with a child, and engaging in human trafficking of a child.

### ***Nondisclosure Requirement***

The bill allows a criminal justice agency to require that the recipient of the subpoena not disclose the existence or contents of the subpoena. In order for the subpoena to be subject to a nondisclosure requirement, it must be accompanied by a written certification that disclosure of the subpoena may result in one of the following circumstances:

- Endangering a person’s life or physical safety;
- Encouraging a person’s flight from prosecution;
- Destruction of or tampering with evidence;
- Intimidation of potential witnesses; or
- Otherwise seriously jeopardizing an investigation or unduly delaying a trial.

Upon such written certification, the recipient is prohibited from disclosing the contents or existence of the subpoena for 180 days, except that a recipient may disclose the subpoena and its contents to:

- A person to whom disclosure is necessary in order to comply with the subpoena;
- An attorney to obtain legal advice or assistance regarding the subpoena; or
- Any other person authorized by the criminal justice agency issuing the subpoena.

A person to whom such disclosure is made is bound by the same nondisclosure requirements as the original recipient. A criminal justice agency may require the person disclosing the subpoena to provide the identity of the person to whom he or she is disclosing. If a person refuses to comply with the subpoena, the criminal justice agency may request that the circuit court issue an order to comply. The circuit court may then issue an order, a violation of which may be punishable as contempt of court.

### ***Petition Process and Judicial Review***

The bill allows the subpoena recipient to challenge its requirements at any time before the return date by petitioning the circuit court of the county in which he or she lives. The bill also allows the subpoena recipient to challenge a nondisclosure requirement by filing a petition for judicial review in the circuit court or notifying the criminal justice agency that issued the subpoena. The petition may be for an order to modify or set aside the subpoena, or to modify or set aside the prohibition of disclosure of information.

### ***Other Effects***

Witnesses subpoenaed to testify are reimbursed for fees and mileage at the same rate at which witnesses appearing before Florida courts are reimbursed.<sup>72</sup> A subpoena issued under the bill

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<sup>72</sup> Section 92.142, F.S. establishes the amount that witnesses in a court in Florida will be reimbursed for their time. Consideration is given to the length of testimony, the distance traveled, and the reason testifying.

must not require the production of anything that is protected from production with a subpoena duces tecum issued by a Florida court.<sup>73</sup>

The bill allows criminal justice agencies to require the production of documents as soon as possible, but the recipient of the subpoena must be given at least 24 hours after he or she is served to comply. The criminal justice agency must return any original documents or objects upon request, within a reasonable time, if prosecution does not occur.

The bill provides that the service of a subpoena under this section may be served as provided in ch. 48, F.S.

The bill provides immunity from civil liability for persons disclosing information requested in the subpoena. This allows persons with information needed by the criminal justice agency to disclose it without fear that the person being investigated may sue them for disclosing the information.

### **Other**

**Section 61** directs the Division of Law Revision and Information to rename the chapter as “Obscenity; Child Exploitation” in order to better clarify the contents of ch. 847, F.S.

**Sections 1 – 26, 28, 33, and 35 – 60**, amend ss. 16.56, 39.01, 39.0132, 39.0139, 39.301, 39.509, 90.404, 92.56, 92.561, 92.565, 435.04, 435.07, 456.074, 480.041, 480.043, 743.067, 772.102, 775.082, 775.0847, 775.0877, 775.21, 775.215, 784.046, 794.0115, 794.024, 794.056, 796.001, 847.01357, 856.022, 895.02, 905.34, 934.07, 938.085, 938.10, 943.0435, 943.04354, 943.0585, 943.059, 944.606, 944.607, 947.1405, 948.013, 948.03, 948.04, 948.06, 948.062, 948.101, 948.30, 948.32, 960.03, 960.197, 985.04, 985.475, 1012.315 and 921.0022, F.S., to conform provisions to changes made by the bill and correct cross references.

**Sections 62 – 132** amend ss. 39.402, 39.506, 39.509, 39.521, 39.524, 39.806, 63.089, 63.092, 68.07, 92.55, 92.605, 322.141, 381.004, 384.29, 390.01114, 393.067, 394.495, 394.9125, 397.4872, 409.1678, 435.07, 655.50, 741.313, 775.084, 775.0862, 775.13, 775.21, 775.24, 775.25, 775.261, 784.049, 794.011, 794.03, 794.075, 847.002, 847.012, 847.01357, 847.0138, 896.101, 903.0351, 903.046, 905.34, 921.0022, 921.141, 921.187, 943.0435, 943.0436, 943.325, 944.11, 944.607, 944.608, 944.609, 944.70, 947.13, 947.1405, 947.141, 948.06, 948.063, 948.064, 948.08, 948.12, 948.30, 948.31, 951.27, 960.003, 960.065, 984.03, 985.0301, 985.04, 985.441, 985.4815, and 1012.467, F.S., to reenact provisions to incorporate changes made by the bill.

**Section 133** provides an effective date of October 1, 2018.

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<sup>73</sup> A subpoena may request evidence that is relevant and admissible or is reasonably calculated to lead to admissible evidence. *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995). Certain documents, such as materials prepared for trial or work products, are not discoverable under the Florida Rules of Civil Procedure. Fla. R. Civ. P. 1.280.

**IV. Constitutional Issues:**

## A. Municipality/County Mandates Restrictions:

None.

## B. Public Records/Open Meetings Issues:

None.

## C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

None.

## C. Government Sector Impact:

The Criminal Justice Impact Conference (CJIC) met on January 8, 2018, and determined the bill would significantly increase the prison population by an indeterminate amount.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 16.56, 39.01, 39.0132, 39.0139, 39.301, 39.509, 90.404, 92.56, 92.561, 92.565, 435.04, 435.07, 456.074, 480.041, 480.043, 743.067, 772.102, 775.082, 775.0847, 775.0877, 775.21, 775.215, 784.046, 794.0115, 794.024, 794.056, 796.001, 847.001, 847.0135, 847.01357, 847.0137, 856.022, 895.02, 905.34, 934.07, 938.085, 938.10, 943.0435, 943.04354, 943.0585, 943.059, 944.606, 944.607, 947.1405, 948.013, 948.03, 948.04, 948.06, 948.062, 948.101, 948.30, 948.32, 960.03, 960.197, 985.04, 985.475, 1012.315 and 921.0022.

This bill creates section 847.003 of the Florida Statutes.

This bill creates section 794.10 of the Florida Statutes.

This bill repeals section 827.071 of the Florida Statutes.

This bill reenacts the following sections of the Florida Statutes: 39.402, 39.506, 39.509, 39.521, 39.524, 39.806, 63.089, 63.092, 68.07, 92.55, 92.605, 322.141, 381.004, 384.29, 390.01114, 393.067, 394.495, 394.9125, 397.4872, 409.1678, 435.07, 655.50, 741.313, 775.084, 775.0862, 775.13, 775.21, 775.24, 775.25, 775.261, 784.049, 794.011, 794.03, 794.075, 847.002, 847.012, 847.01357, 847.0138, 896.101, 903.0351, 903.046, 905.34, 921.0022, 921.141, 921.187, 943.0435, 943.0436, 943.325, 944.11, 944.607, 944.608, 944.609, 944.70, 947.13, 947.1405, 947.141, 948.06, 948.063, 948.064, 948.08, 948.12, 948.30, 948.31, 951.27, 960.003, 960.065, 984.03, 985.0301, 985.04, 985.441, 985.4815, and 1012.467.

**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.