

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1453 Sexually Explicit Material

**SPONSOR(S):** Justice Appropriations Subcommittee, Criminal Justice & Public Safety Subcommittee, Harding and others

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 1798

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice & Public Safety Subcommittee	17 Y, 0 N, As CS	Frost	Hall
2) Justice Appropriations Subcommittee	14 Y, 0 N	Smith	Keith
3) Judiciary Committee			

### SUMMARY ANALYSIS

With rapid advancements in audio-visual technology in recent years, both the federal government and many states have created laws addressing the growing issues related to the misuse of such technology. In particular, many laws are aimed at preventing the creation and dissemination of sexually explicit material including morphed child pornography, sexually explicit “deepfake” images and videos of adults, and other unauthorized use of sexually explicit images.

CS/HB 1453 amends chapters 775, 784, 827, and 847, F.S., and creates new sections of law in ch. 836, F.S., to address issues that have emerged as a result of rapidly advancing audiovisual technology. Specifically, the bill makes the following changes:

- **Altered Sexual Depictions:** The bill prohibits a person from willfully and maliciously promoting an altered sexual depiction of an identifiable person, without the consent of the identifiable person, when the person promoting such altered sexual depiction knows or reasonably should have known that such depiction was an altered sexual depiction. A person who unlawfully promotes an altered sexual depiction commits a third degree felony, ranked as a level 3 offense on the Criminal Punishment Code offense severity ranking chart (OSRC).
- **Sexually Explicit Images:** Under the bill, a person commits a third degree felony, ranked as a level 4 offense on the OSRC, when he or she: willfully obtains with intent to promote a sexually explicit image (SEI) of an identifiable person (IP) without the IP’s authorization; or possesses a SEI of an IP with the intent to promote such image for pecuniary or other financial gain, without the IP’s authorization. Additionally, a person who actually promotes a SEI of an IP for pecuniary or other financial gain without the IP’s authorization commits a second degree felony, ranked as a level 5 offense on the OSRC.
- **Child Pornography and Obscenity:** The bill ensures that morphed child pornography is prohibited in Florida by: expanding the meaning of the term “child pornography” to include any image that has been created, altered, adapted, or modified by electronic, mechanical, or other means, to portray an identifiable minor engaged in sexual conduct; and defining or redefining multiple terms relating to child pornography and obscenity.
- **Transmission of Child Pornography:** The bill amends the definition of “transmit” to clarify that using file servers or file sharing to transmit child pornography is prohibited.
- **Sexual Cyberharassment:** The bill increases the minimum monetary damages that a victim may receive as a result of a civil action from \$5,000 to \$10,000.
- **Child-like Sex Dolls:** The bill increases the penalty for possessing an obscene child-like sex doll from a first degree misdemeanor to a third degree felony.

The bill may have a positive indeterminate impact on prison beds by expanding the material considered child pornography and creating new felony offenses for: promoting an altered sexual depiction; obtaining, possessing, or promoting a SEI; and possessing an obscene child-like sex doll.

The bill provides an effective date of October 1, 2022.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

With rapid advancements in audio-visual technology in recent years, both the federal government and many states have created laws addressing the growing issues related to the misuse of such technology. In particular, many laws are aimed at preventing the creation and dissemination of sexually explicit material including morphed child pornography, sexually explicit “deepfake” images and videos of adults, and other unauthorized use of sexually explicit images.

#### Morphed Child Pornography

“Morphing,” which refers to a process in which a computer user distorts or transforms one picture into another, is a relatively simple technique using inexpensive and readily available software. Individuals use this technique to create “morphed” child pornography, consisting of images depicting sexually explicit conduct in which an actual child’s head has been superimposed onto an adult’s body or onto computer generated nude body parts.

#### Federal Law

Generally, the First Amendment does not protect child pornography. In *New York v. Ferber*,<sup>1</sup> the United States Supreme Court (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 Supreme 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>2</sup> Under these principles, states have criminalized possessing, distributing, and other acts involving 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>3</sup> At that time, federal statutes described images of a minor actually engaging in sexually explicit conduct.<sup>4</sup> In 1996, Congress passed the Child Pornography Prevention Action of 1996 (CPPA),<sup>5</sup> creating a definition of “child pornography” that 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>6</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);

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<sup>1</sup> 458 U.S. 747 (1982).

<sup>2</sup> *Id.* at 762-63.

<sup>3</sup> See, e.g., 18 USC §2252 (1994 ed.).

<sup>4</sup> *U.S. v. Hotaling*, 599 F.Supp.2d 306, 309 (N.D.N.Y. 2008); see also 18 USC §§ 2252 and 2256 (1994 ed.).

<sup>5</sup> Pub. L. No. 104-208.

<sup>6</sup> 18 USC §2256(2) (1996 ed.) defined the term “sexually explicit conduct” 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.

- (C) Such visual depiction has been created, adapted, or modified to appear that an identifiable minor<sup>7</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>8</sup>

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

In 2002, the Supreme Court decided *Ashcroft v. Free Speech Coalition*,<sup>9</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. Section 2256(8)(B) made it a crime to possess or distribute images depicting sexually explicit conduct which could be created by using advanced computer imaging techniques to “create realistic images of children who do not exist” (i.e., virtual child pornography).<sup>10</sup>

The Supreme Court held that the speech criminalized in the challenged provision of the CPPA violated the First Amendment since 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>11</sup> The Supreme 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>12</sup>

While 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>13</sup> This suggests that morphed child pornography is not protected by the First Amendment.<sup>14</sup>

#### *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today 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>15</sup> The Protect Act, in part, narrowed the definition of virtual child pornography in section (8)(B) of the CPPA to include only virtual or computer-generated images that are “indistinguishable from” images of actual minors engaging in sexually explicit conduct.<sup>16</sup>

The definition of morphed child pornography contained in section 2256(8)(C) remained unchanged by the Protect Act.

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<sup>7</sup> 18 USC § 2556(9) (1996 ed.) defined the term “identifiable minor” 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 construed to require proof of the actual identity of the identifiable minor.

<sup>8</sup> 18 USC § 2556(8) (1996 ed.).

<sup>9</sup> 535 U.S. 234 (2002).

<sup>10</sup> *Supra*, FN 8.

<sup>11</sup> *Supra*, FN 9, at 256.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 242.

<sup>14</sup> *McFadden v. Alabama*, 67 So.3d 169, 181-82 (Ala. Crim. App. 2010).

<sup>15</sup> Pub. L. No. 108-21.

<sup>16</sup> 18 USC §2256(8)(B).

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

To date, the federal statutes relating to morphed child pornography have been upheld.<sup>17</sup> In *United States v. Bach*,<sup>18</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>19</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>20</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[s] the interests of real children" and creates a lasting record of an identifiable minor child seemingly engaged in sexually explicit activity.<sup>21</sup> However, the court noted that:

Although there may well be instances in which the application of §2256(8)(C) violates the First Amendment, this is not such a case. The interests of real children are implicated in the image received by Bach showing a boy with the identifiable face of AC in a lascivious pose. This image involves the type of harm which can constitutionally be prosecuted under *Free Speech Coalition and Ferber*.<sup>22, 23</sup>

More recently, in *United States v. Anderson*,<sup>24</sup> 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>25</sup> The defendant moved to dismiss the charge, arguing that the definition of morphed child pornography was unconstitutionally overbroad.<sup>26</sup> The court noted that the image at issue was different than the one in *Bach* in that "no minor was sexually abused."<sup>27</sup> However, the court held that because such images falsely portray identifiable children engaging in sexual activity, such images implicate the compelling governmental interest in protecting minors.<sup>28</sup> Using this reasoning, the court applied a strict scrutiny balancing test and held that the definition of morphed child pornography was constitutional as applied to the facts of *Anderson*.

### Florida Law

Under Florida law, "child pornography" means any image depicting a minor<sup>29</sup> engaged in sexual conduct.<sup>30</sup> Florida law contains a variety of provisions prohibiting acts relating to child pornography, including under ch. 827, F.S., relating to "Abuse of Children," and ch. 847, F.S., entitled "Obscenity."

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<sup>17</sup> *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>18</sup> 400 F.3d 622 (8th Cir. 2005).

<sup>19</sup> *Id.* at 625.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 632.

<sup>22</sup> *Id.*

<sup>23</sup> *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.)

<sup>24</sup> 759 F.3d 891 (8th Cir. 2014).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 895.

<sup>28</sup> *Id.* at 896.

<sup>29</sup> S. 847.001(8), F.S., provides that "minor" means any person under the age of 18 years.

<sup>30</sup> "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. A mother's breastfeeding of her baby does not under any circumstance constitute "sexual conduct." S. 847.001(16), F.S.

*Sexual Performance by a Child (S. 827.071, F.S.)*

Section 827.071(4), F.S., makes it a second degree felony<sup>31</sup> 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. Possession of three or more copies of such photographs, etc., is prima facie evidence of a person's intent to promote.<sup>32</sup>

Section 827.071(5), F.S., makes it a third degree felony<sup>33</sup> for any person to knowingly possess, control, or intentionally view<sup>34</sup> a photograph, motion picture, or other image that, in whole or in part, he or she knows includes any sexual conduct by a child.<sup>35</sup>

The following definitions apply to the above-described offenses:

- "Child" means any person under the age of 18 years.
- "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.
- "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>36</sup>

*Transmitting Child Pornography (S. 847.0137, F.S.)*

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 commits 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 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.<sup>37</sup>

Because Florida laws addressing child pornography do not currently include a specific prohibition against morphed child pornography, several courts have held that such images do not violate any Florida law.

*Florida Case Law*

<sup>31</sup> A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

<sup>32</sup> S. 827.071(4), F.S.

<sup>33</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Ss. 775.082 and 775.083, F.S.

<sup>34</sup> Section 827.071(1)(b), F.S., defines "intentionally view" as 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 was viewed over any period of time.

<sup>35</sup> The statute also specifies that the possession, control, or intentional viewing of each such photograph, or other image, is a separate offense. If such photograph or other image includes sexual conduct by more than one child, then each child in each photograph or image that is knowingly possessed, controlled, or intentionally was viewed is a separate offense.

<sup>36</sup> Ss. 827.01(2) and 827.071(1), F.S.

<sup>37</sup> S. 847.001, F.S.

In 2010, Florida's Second District Court of Appeal (DCA) decided *Stelmack v. State*,<sup>38</sup> a case in which the defendant was charged with possession of child pornography.<sup>39</sup> The images at issue showed the faces and heads of two girls, ages 11 and 12, cut and pasted onto images of a 19-year old woman lewdly exhibiting her genitals.<sup>40</sup> After closely examining the definition of sexual conduct, the court determined that it requires images to include actual lewd exhibition of the genitals *by a child*.<sup>41</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>42</sup>

The court also noted that the images depicted *simulated* lewd exhibition of the genitals by a child. The state, citing the *Bach* decision, 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>43</sup> The court disagreed and noted that the legislature specifically excluded *simulated* lewd exhibition from the definition of sexual conduct. In discussing this point, the court stated:

We do not mean to suggest that the possession of composite images of real children that simulate lewd and lascivious exhibition of the children's genitals should not be criminalized. However, there is no indication in either the plain language of s. 827.071(5), F.S., or its legislative history that the legislature intended to do so. If 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.<sup>44</sup> In fact, child pornography has been defined in the federal statutes to specifically include composite images...<sup>45</sup>

Shortly after the *Stelmack* decision, the Second DCA reviewed another case in which the defendant was convicted of possessing child pornography.<sup>46</sup> In this case, the images at issue were morphed images in which photographs of children's heads were pasted onto photographs of nude women engaged in sexual intercourse, deviate sexual intercourse, or masturbation. After extensively reviewing the definition of sexual conduct and the elements of the offense, the court reversed the lower court's decision holding that "no child engaged in the sexual conduct" and that "no matter how one parses the words, s. 827.071, F.S., requires that the depicted sexual conduct be that of a child."<sup>47</sup>

In reversing the trial court's decision, the Second DCA also reviewed the legislative history of the relevant federal statutes. The court noted that Congress had enacted child pornography legislation three times (in 1994, 1996, and 2003), each time broadening the definition of child pornography.<sup>48</sup> The latest iteration, the Protect Act, defines child pornography to include not only images of actual children engaged in sexually explicit conduct, but also images created by a computer that are indistinguishable from images of actual minors engaging in such conduct and images that are created or modified to appear as though an identifiable minor was involved in the production of the depiction.<sup>49</sup> After noting that Congress specifically removed the defense that no actual minor was involved in the production of the depiction, the court stated "if our legislature wants to follow Congress's example and prohibit the possession of the types of photographs involved here, we are confident that it can, and perhaps should, craft an appropriate statute."<sup>50</sup>

### **Altered Depictions ("Deepfakes")**

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

<sup>39</sup> S. 827.071(5), F.S.

<sup>40</sup> *Id.* at 875.

<sup>41</sup> *Id.* at 877.

<sup>42</sup> *Id.*

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

<sup>44</sup> In a footnote, the court noted that it would "leave for another day a discussion of the constitutionality of such a provision." *Id.* at 876.

<sup>45</sup> *Id.*

<sup>46</sup> *Parker v. State*, 81 So.3d 451 (Fla. 2d DCA 2011).

<sup>47</sup> *Id.* at 453.

<sup>48</sup> *Id.* at 455-57.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 457.

Similar to morphing, the term “deepfakes” refers to artificial intelligence-generated synthetic media. Deepfakes are essentially false but highly realistic computer-generated depictions, such as a video or image showing a person saying things they never said or doing things they never did.<sup>51</sup> While there may be some beneficial uses, deepfake technology may also pose a harm to individuals, as the technology may be used to spread false information, or used to embarrass, humiliate, exploit, or sabotage others.<sup>52</sup> For example, early deepfakes involved pornography created by face-swapping a celebrity into a pornographic video and algorithms that created a realistic fake nude photo from a clothed image of a real person. However, in recent years, the use of deepfake technology has expanded to include targeting non-celebrities and political figures.<sup>53</sup> According to a 2019 report by Sensity, a company that detects and monitors synthetic media, non-consensual deepfake pornography accounted for 96 percent of a sample study of more than 14,000 deepfake videos posted online. The study also indicated that the number of deepfake videos online was roughly doubling every six months.<sup>54</sup>

### Deepfake Legislation in other States

Currently, several states provide criminal or civil liability for creating or distributing deepfake images, including: Virginia,<sup>55</sup> Hawaii,<sup>56</sup> California,<sup>57</sup> and Texas.<sup>58</sup> However, no state completely bans the creation or distribution of all deepfake content. A complete ban of such images would likely violate constitutional protections under the First Amendment. However, certain categories of speech, including defamation, fraud, true threats, and the imminent-and likely incitement of violence, are not entitled to protections under the First Amendment,<sup>59</sup> and some deepfake content is likely to fall into one of these categories and therefore may be regulated.<sup>60</sup>

While deepfake content may be created for a number of reasons, the harm stemming from deepfake content is, more often than not, related to the creation of nonconsensual deepfake pornography. “The core issue of nonconsensual pornography is consent, and [deepfake] pornography adds an additional layer because the individual depicted did not actually engage in the sexual behavior [he or she] is depicted as doing.”<sup>61</sup>

Florida does not currently prohibit any conduct related to deepfakes.

### “Revenge Porn”

Many states, including Florida, ban nonconsensual pornography, otherwise known as “revenge porn.” Such bans have been consistently upheld by the courts.<sup>62</sup> Courts have found a compelling state interest in protecting individuals from the nonconsensual dissemination of private sexual images. “Those who

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<sup>51</sup> Reuters, *Manipulating Media, Chapter 2 – Identifying Deepfakes*, <https://www.reuters.com/manipulatedmedia/en/chapter-2-identifying-deepfake> (last visited Feb. 3, 2022).

<sup>52</sup> Bobby Chesney and Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, California Law Review, 2019 Vol. 107:1753, p. 1771-74, <https://deliverypdf.ssrn.com/delivery.php?ID=277088114073097112067115091069109102029075010065021082108068004081087085118000073093123061037002058104115003088111127126102116047042021051029118114000114029004077023035062073105105064020001126095078064087069009076124019118089024110089019098082100083&EXT=pdf&INDEX=TRUE> (last visited Feb. 3, 2022).

<sup>53</sup> Betül Çolak, *Legal Issues of Deepfakes*, Institute for Internet & the Just Society (Jan. 19, 2021), <https://www.internetjustsociety.org/legal-issues-of-deepfakes> (last visited Feb. 3, 2022).

<sup>54</sup> Shane Raymond, *INSIGHT-Deepfake anyone? AI synthetic media tech enters perilous phase*, Nasdaq (Dec. 13, 2021), <https://www.nasdaq.com/articles/insight-deepfake-anyone-ai-synthetic-media-tech-enters-perilous-phase> (last visited Feb. 3, 2022)

<sup>55</sup> S. 18.2-386.2., V.A.C.

<sup>56</sup> S. 711-1110.9., H.R.S.

<sup>57</sup> S. 1708.86., C.C.C.

<sup>58</sup> S. 255.004, V.T.C.A.

<sup>59</sup> *United States v. Alvarez*, 567 U.S. 709 (2012).

<sup>60</sup> *Supra* Note 52, p. 1791.

<sup>61</sup> Mathew B. Kugler and Carly Pace, *Deepfake Privacy: Attitudes and Regulation*, Northwestern University Law Review, 2021 Vol 116:611, p. 624-25, <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1476&context=nulr> (last visited Feb. 3, 2022).

<sup>62</sup> See *Minnesota v. Casillas*, 952 N.W. 2d 629, 642 (Minnesota 2020); *Vermont v. VanBuren*, 210 Vt. 293 (Vermont 2019); and *Illinois v. Austin*, 2019 IL 123910, (Illinois 2019).

are unwillingly exposed to their friends, family, bosses, co-workers, teachers, fellow students, or random strangers on the Internet are often deeply and permanently scarred by the experience.”<sup>63</sup>

Under Florida law, “sexual cyberharassment” means to publish to an Internet website or disseminate through electronic means to another person a sexually explicit image of a person that contains or conveys the personal identification information of the depicted person without the depicted person’s consent, contrary to the depicted person’s reasonable expectation that the image would remain private, for no legitimate purpose, with the intent of causing substantial emotional distress to the depicted person.<sup>64</sup>

A person who willfully and maliciously sexually cyberharrasses another person commits a first degree misdemeanor,<sup>65</sup> and a second or subsequent offense of sexual cyberharrassment is a third degree felony.<sup>66</sup> In addition to criminal penalties, an aggrieved person may initiate a civil action to obtain injunctive relief, a minimum of \$5,000 in monetary damages, and reasonable attorney fees and costs.<sup>67</sup>

While Florida specifically criminalizes sexual cyberharrassment, which involves a photo taken and provided to another person consensually but later disseminated without consent, there is currently no Florida law which prohibits a person from: obtaining a sexually explicit image with the depicted person’s consent; or possessing or disseminating a sexually explicit image for the purpose of financial or other gain without the consent of the person depicted. Currently, such crimes may only be charged as a theft,<sup>68</sup> if applicable.

### Transmission of Child Pornography via File-Sharing Programs

In 2016, the Florida Supreme Court (FSC) resolved a conflict between two 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>69</sup> whereas the Fourth DCA in *Smith v. State*,<sup>70</sup> found that a file-sharing program could be used to transmit child pornography in violation of s. 847.0137, F.S.

In *Biller*, the defendant used a peer-to-peer sharing network called Limewire to download pornographic images of children to his home computer. The defendant downloaded the images in question from other Limewire subscribers who shared access to their files. Using Limewire, sheriff’s agents retrieved the images from an accessible folder in the defendant’s computer. Based on the retrieval of these images, the defendant was, in relevant part, charged with and convicted of one count of transmitting child pornography using an electronic device in violation of s. 847.0137(2), F.S.<sup>71</sup>

The Fifth DCA reversed the defendant’s conviction, determining that the child pornography had not been transmitted in violation of the statute because the definition of “transmit” requires a violator to “send” the files to another person. According to the court, “send” could mean that the defendant purposefully acted to deliver the files or that the defendant effectively sent them by maintaining a shared folder and knowingly allowing other Limewire users to access them. As the statute was susceptible to more than one construction, the court held that it was required under s. 775.021, F.S.,<sup>72</sup> to construe the statute most favorable to the defendant.<sup>73</sup>

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<sup>63</sup> *Minnesota v. Casillas*, 952 N.W. 2d 629, 642 (Minnesota 2020).

<sup>64</sup> S. 784.049(2)(c), F.S.

<sup>65</sup> A first degree misdemeanor is punishable by up to one year in county jail and a fine of up to \$1,000. Ss. 775.082 and 775.083, F.S.

<sup>66</sup> S. 784.049(3), F.S. A third degree felony is punishable by up to five years imprisonment and a fine of up to a \$5,000. Ss. 775.082 and 775.083, F.S.

<sup>67</sup> S. 784.049(5), F.S.

<sup>68</sup> See ch. 812, F.S.

<sup>69</sup> 109 So.3d 1240 (Fla. 5th DCA 2013).

<sup>70</sup> 190 So.3d 94 (Fla. 4th DCA 2015).

<sup>71</sup> *Id.* at 1241.

<sup>72</sup> Section 775.021(1), F.S., states, “The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.”

<sup>73</sup> *Id.*

Conversely, the Fourth DCA in *Smith v. State*,<sup>74</sup> found that a file-sharing program could be used to transmit child pornography in violation of s. 847.0137, F.S. In this case, the defendant used a file-sharing program that was designed to allow one-on-one access to stored data. The defendant loaded pornographic images into a specific computer file. Authorization was required to gain access to it. The defendant then sent a “friend request” to a Palm Beach County undercover detective which authorized the detective to access certain files the defendant had chosen to share with other users. The detective downloaded various images of child pornography from these files. Apart from the “friend request,” the defendant did not know that the files were actually downloaded. Ultimately, the defendant was convicted of 20 counts of transmitting child pornography.<sup>75</sup>

After the defendant’s conviction, the Fifth District decided *Biller*. Based on *Biller*, the defendant filed a motion for post-conviction relief, claiming in part that he had been convicted of a non-existent crime because he had not “sent” the images to the undercover detective. The Fourth DCA rejected this argument and affirmed the trial court’s order denying defendant’s motion. According to the court, “when the originator creates the shared file folder and specifically authorizes others to download the contents of that folder, he is ‘sending’ information in the form of the ‘friend’ request and is ‘causing’ the pornographic images to be delivered to another.”<sup>76</sup> Further, the court certified conflict with *Biller*.<sup>77</sup>

The FSC resolved the conflict in *Smith*, rejecting the Fifth DCA’s decision in *Biller* and affirming the Fourth DCA’s decision in *Smith*. The FSC 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>78</sup> The court reasoned that by sending the “friend request” to the third party, the defendant purposefully “caused the delivery of the images to the third party to take place.”<sup>79</sup>

## Child-like Sex Dolls

In 2019, the Legislature enacted laws relating to the possession and distribution of obscene child-like sex dolls (CLSD).<sup>80</sup> Section 847.011(5)(a), F.S., prohibits a person from knowingly possessing, selling, lending, giving away, distributing, transmitting, showing, or transmuting an obscene CLSD. Simple possession of an obscene CLSD is a first degree misdemeanor for a first offense, and a third degree felony for a second or subsequent offense.

Selling, lending, giving away, distributing, transmitting, showing, transmuting, or possessing with intent to do any of these is a third degree felony for a first offense, and a second degree felony for a second or subsequent offense.

## Criminal Punishment Code Offense Severity Ranking Chart

Felony offenses which are subject to the Criminal Punishment Code<sup>81</sup> are listed in a single offense severity ranking chart (OSRC),<sup>82</sup> which uses 10 offense levels to rank felonies from least severe to most severe. Each felony offense listed in the OSRC is assigned a level according to the severity of the offense.<sup>83, 84</sup> A person’s primary offense, any other current offenses, and prior convictions are scored

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<sup>74</sup> 190 So.3d 94 (Fla. 4th DCA 2015).

<sup>75</sup> *Id.* at 95-96.

<sup>76</sup> *Id.* at 96-97.

<sup>77</sup> *Id.*

<sup>78</sup> 204 So.3d 18, 19 (Fla. 2016).

<sup>79</sup> *Id.* at 22.

<sup>80</sup> Ch. 2019-45, Laws of Fla.

<sup>81</sup> All felony offenses, with the exception of capital felonies, committed on or after October 1, 1998, are subject to the Criminal Punishment Code.

<sup>82</sup> S. 921.0022, F.S.

<sup>83</sup> S. 921.0022(2) and (3)(e), F.S.

<sup>84</sup> Felony offenses that are not listed in the OSRC default to statutorily assigned levels, as follows: an unlisted third degree felony defaults to a level 1; an unlisted second degree felony defaults to a level 4; an unlisted first degree felony defaults to a level 7; an unlisted first degree felony punishable by life defaults to a level 9; and an unlisted life felony defaults to a level 10. S. 921.0023, F.S.

using the points designated for the offense severity level of each offense.<sup>85, 86</sup> The final score calculation, following the scoresheet formula, determines the lowest permissible sentence that a trial court may impose, absent a valid reason for departure.<sup>87</sup>

## Effect of Proposed Changes

CS/HB 1453 amends chapters 775, 784, 827, and 847, F.S., and creates new sections of law in ch. 836, F.S., to address issues that have emerged as a result of rapidly advancing audiovisual technology. Specifically, the bill:

- Amends chapters 775, 827, and 847, F.S., relating to child pornography and obscenity to ensure that morphed child pornography and transmission of child pornography via file sharing are prohibited;
- Creates new crimes in ch. 836, F.S., prohibiting the promotion of altered sexual depictions and criminalizing the taking without authorization, of certain images which are sexually explicit; and
- Increases the criminal penalty in ch. 784, F.S., for possessing an obscene child-like sex doll.

### Unlawful Promotion of Specified Sexually Explicit Material

This bill creates two new criminal laws addressing the promotion of altered sexual depictions and the obtaining, possession, and promotion of certain sexually explicit material.

#### *Altered Sexual Depictions*

The bill defines the following terms relating to these new crimes:

- “Altered sexual depiction” means any visual depiction that, as a result of any type of digital, electronic, mechanical, or other modification, alteration, or adaptation, depicts a realistic version of an identifiable person:
  - With the nude body parts of another person as the nude body parts of the identifiable person;
  - With computer-generated nude body parts as the nude body parts of the identifiable person; or
  - Engaging in sexual conduct in which the identifiable person did not engage.
- “Identifiable person” means 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.
- “Nude body parts” means human male or female genitals, pubic area, or buttocks with less than fully opaque covering; or the female breast with less than fully opaque covering any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. The term does not under any circumstances include a mother breastfeeding her baby.<sup>88</sup>
- “Promote” means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, transmute, publish, distribute, circulate, disseminate, present, exhibit, send, post, share, or advertise or to offer or agree to do the same.

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<sup>85</sup> Ss. 921.0022 and 921.0024, F.S.

<sup>86</sup> A person may also accumulate points for factors such as victim injury points, community sanction violation points, and certain sentencing multipliers. S. 921.0024(2), F.S.

<sup>87</sup> If a person scores more than 44 points, the lowest permissible sentence is a specified term of months in state prison, determined by a formula. If a person scores 44 points or fewer, the court may impose a nonprison sanction, such as a county jail sentence, probation, or community control. *Id.*

<sup>88</sup> This definition mirrors the definition of nudity found in S. 847.001(9), F.S.

- “Sexually explicit image” means any image<sup>89</sup> depicting nudity<sup>90</sup> or depicting a person engaging in sexual conduct.<sup>91</sup>
- “Visual depiction” includes, but is not limited to, a photograph, picture, image, motion picture, film, video, or representation.

The bill prohibits a person from willfully and maliciously promoting an altered sexual depiction of an identifiable person, without the consent of the identifiable person, when the person promoting such altered sexual depiction knows or reasonably should have known that such depiction was an altered sexual depiction. A person who promotes an altered sexual depiction commits a third degree felony, ranked as a level 3 offense on the OSRC.

The bill specifies that the presence of a disclaimer within an altered sexual depiction which notifies a viewer that the person or persons depicted did not consent to or participate in the creation or promotion of the material, or that the person or persons depicted did not actually perform the actions portrayed, is not a defense and does not relieve a person of criminal liability.

### *Unlawfully Obtaining, Possessing, or Promoting Sexually Explicit Images*

The bill prohibits a person from unlawfully obtaining, possessing, or promoting certain sexually explicit images. A person commits a third degree felony, ranked as a level 4 offense on the OSRC, when he or she:

- Willfully obtains with intent to promote a sexually explicit image of an identifiable person without the identifiable person’s authorization; or
- Possesses a sexually explicit image of an identifiable person with the intent to promote such image for pecuniary or other financial gain, without the identifiable person’s authorization.

A person commits a second degree felony, ranked as a level 5 offense on the OSRC, when he or she promotes a sexually explicit image of an identifiable person for pecuniary or other financial gain, without the identifiable person’s authorization.

An exception is provided for promoting a sexually explicit image that resulted from the voluntary exposure of the person depicted in a public or commercial setting.

For both promoting an altered sexual depiction and obtaining, possessing, or promoting a sexually explicit image:

- Every act, thing or transaction prohibited which an offender commits constitutes a separate offense, and a violation is considered to be committed within this state if any conduct that is an element of the offense, or any harm to the depicted individual resulting from the offense, occurs in this state.
- There is a civil cause of action allowing an aggrieved person to receive injunctive relief; monetary damages of up to \$10,000 or actual damages, whichever is greater; and reasonable attorney fees and costs.
- The criminal and civil penalties do not apply to:
  - A provider of an interactive computer service, of an information service, or of a communications service which provides the transmission, storage, or caching of: electronic communications or messages of others; another related telecommunications or commercial mobile radio service; or content provided by another person;

<sup>89</sup> “Image” includes, but is not limited to, any photograph, picture, motion picture, film, video, or representation.

<sup>90</sup> “Nudity” means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. A mother’s breastfeeding of her baby does not under any circumstance constitute “nudity,” irrespective of whether or not the nipple is covered during or incidental to feeding. S. 847.001(9), F.S.

<sup>91</sup> “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. A mother’s breastfeeding of her baby does not under any circumstance constitute “sexual conduct.” S. 847.001(16), F.S.

- A law enforcement officer, or any local, state, federal, or military law enforcement agency that disseminates an altered sexual depiction or sexually explicit image in connection with the performances of his or her duties;
- A person reporting unlawful activity; or
- A person participating in a hearing, trial, or other legal proceeding.

### Child Pornography and Obscenity

The bill ensures the morphed child pornography is prohibited in Florida by expanding the meaning of the term “child pornography” throughout Florida law to include any image that has been created, altered, adapted, or modified by electronic, mechanical, or other means, to portray an identifiable minor engaged in sexual conduct.

Under the bill, “identifiable minor” means a person:

- Who was a minor at the time an image was created, adapted, or modified, or whose image as a minor was used in the creation, adaptation, or modification of the image; and
- 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.

The bill provides that the term identifiable minor may not be construed to require proof of the actual identity of the identifiable minor.

The bill also amends s. 827.071, F.S., to replace the phrase “any sexual conduct by a child,” with the term “child pornography,” as this term includes images depicting any sexual conduct by a child.

The bill amends s. 775.0847, F.S., to replace the term “movie” with “motion picture, film, video, or computer-generated motion picture, film, or video,” for purposes of enhancing specified offenses relating to child pornography or obscenity.

Additionally, the bill expands or adds multiple terms relating to child pornography or obscenity throughout Florida law. Specifically, the bill:

- Amends the terms “minor” and “child” in ss. 775.0847 and 847.001, F.S., to provide that “minor” or “child” means any person, whose identity is known or unknown, younger than 18 years of age. The bill also adds this definition of “minor” or “child” to s. 827.071, F.S.
- Amends s. 827.071, F.S., to expand the definition of “promote” by adding the new actions included in the definition of “promote” under s. 847.001, F.S.; “promote” means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, *transmit*, transmute, publish, distribute, circulate, disseminate, present, exhibit, *send, post, share*, or advertise or to offer or agree to do the same.
- Expands the definition of “sexual conduct,” in ss. 775.0847, 827.071, and 847.001, F.S., to include *simulated* lewd exhibition of the genitals.

### Sexual Cyberharassment

The bill amends s. 784.049, F.S., relating to sexual cyberharassment, to increase the minimum monetary damages from \$5,000 to \$10,000 that a victim may receive as a result of a civil action.

### Child-like Sex Dolls

The bill amends s. 847.011(5), F.S., to increase the penalty for possessing an obscene child-like sex doll from a first degree misdemeanor to a third degree felony.

The bill provides an effective date of October 1, 2022.

## B. SECTION DIRECTORY:

**Section 1:** Amends s. 775.0847, F.S., relating to possession or promotion of certain images of child pornography; reclassification.

- Section 2:** Amends s. 784.049, F.S., relating to sexual cyberharrassment.
- Section 3:** Amends s. 827.071, F.S., relating to sexual performance by a child; penalties.
- Section 4:** Creates s. 836.13, F.S., relating to promotion of an altered sexual depiction; prohibited acts; penalties; applicability.
- Section 5:** Creates s. 836.14, F.S., relating to unlawfully obtaining, possessing, or promoting a sexually explicit image.
- Section 6:** Amends s. 847.001, F.S., relating to definitions.
- Section 7:** Amends s. 847.011, F.S., relating to prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty.
- Section 8:** Amends s. 847.0137, F.S., relating to transmission of pornography by electronic device or equipment prohibited; penalties.
- Section 9:** Amends s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity ranking chart.
- Section 10:** Amends s. 288.1254, F.S., relating to entertainment industry financial incentive program.
- Section 11:** Amends s. 847.0141, F.S., relating to sexting; prohibited acts; penalties.
- Section 12:** Provides an effective date of October 1, 2022.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have a positive indeterminate impact on prison beds by expanding the material considered child pornography and creating new felony offenses for: promoting an altered sexual depiction; obtaining, possessing, or promoting a sexually explicit image; and possessing an obscene CLSD.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may allow a victim of sexual cyberharrassment, promotion of an altered sexual depiction, or unlawful promotion of a sexually explicit image to recover damages up to \$10,000.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

On February 3, 2022, the Criminal Justice & Public Safety Subcommittee adopted a proposed committee substitute (PCS) and reported the bill favorably as a committee substitute. The PCS differed from the original bill as it:

- Revised the definition of “child pornography.”
- Prohibited a person from willfully obtaining or possessing with intent to promote a sexually explicit image of an identifiable person without the identifiable person’s authorization;
- Prohibited a person from promoting a sexually explicit image of an identifiable person without the identifiable person’s authorization;
- Increased the minimum monetary damages that a victim of sexual cyberharrassment may receive as a result of a civil action from \$5,000 to \$10,000;
- Increased the penalty for a person who possesses an obscene child-like sex doll from a first degree misdemeanor to a third degree felony; and
- Made other technical, clarifying, and conforming changes.

This analysis is drafted to the committee substitute as passed by the Criminal Justice & Public Safety Subcommittee.