

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.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: SB 1798

INTRODUCER: Senator Book

SUBJECT: Sexually Explicit Material

DATE: January 24, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stokes	Jones	CJ	Pre-meeting
2.			CF	
3.			AP	

I. Summary:

SB 1798 creates s. 784.0491, F.S., to create criminal and civil penalties for persons who disseminate sexually explicit images of another person that have been digitally or otherwise altered, without that person’s consent. Colloquially known as “deep fakes,” these images often depict individuals engaging in sexual behavior that they did not engage in.

Specifically, this bill provides that a person commits a first degree misdemeanor for a first offense, and a third degree felony for a second or subsequent offense, when he or she willfully and maliciously:

- Creates and disseminates or sells any sexually explicit image of a depicted individual, without the consent of the depicted individual.
- Disseminates or sells any sexually explicit image of a depicted individual, without the consent of the depicted individual, and who knows or reasonably should have known that such image was the result of digitization.

The bill creates s. 784.0492, F.S., to create criminal and civil penalties relating to the unlawful obtaining, possessing, or disseminating of sexually explicit images. A person commits a third degree felony when he or she:

- Knowingly and unlawfully obtains a sexually explicit image of a person which contains or conveys the personal identification information of the depicted person with the intent of causing substantial emotional distress.
- Willfully possesses with the intent to disseminate for the purpose of pecuniary or any type of financial gain a sexually explicit image of a person which contains or conveys the personal identification information of the depicted person without first obtaining that person’s consent.

A person commits a second degree felony when he or she willfully disseminates for the purpose of pecuniary or any type of financial gain a sexually explicit image of a person which contains or

conveys the personal identification information of the depicted person without first obtaining that person's consent.

Additionally, the felony offenses created in this bill are ranked in the offense severity ranking chart of the Criminal Punishment Code.

The bill amends ss. 775.0847, 827.071, and 847.001, F.S., to expand the definition of "child pornography," to include any image depicting an actual and identifiable minor who appears, as a result of digitization, to be engaged in sexual conduct.

The bill further amends s. 827.071, F.S., to replace the phrase "any sexual conduct by a child," with the term "child pornography." The term "child pornography," includes images depicting any sexual conduct by a child.

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.

Additionally, the bill provides conforming cross-references.

The bill may have a positive indeterminate fiscal impact (unquantifiable increase in prison beds and jail beds) on the Department of Corrections and local jails. See Section V. Fiscal Impact Statement.

The bill is effective October 1, 2022.

II. Present Situation:

With technology advancing at a rapid rate, states and the federal government are attempting to craft laws to address issues arising as a result of such technology. Many of these issues relate to the creation or dissemination of sexually explicit material including, nonconsensual pornography of adults, sexually explicit deep fake images of adults, and morphed child pornography.

Deep Fakes

Deep fakes are realistic images or videos that are created using artificial intelligence (AI) and often depict a real person saying something they did not say, or engaging in a behavior they did not engage in. The use of AI to generate a deep fake image is causing concern because the results are increasingly realistic, rapidly created, and inexpensively made. Software to create such images is often free and publicly available.¹

While there may be beneficial uses, deep fake technology may also pose a harm to individuals. Deep fakes may be used to spread false information, or used to embarrass, humiliate, exploit, or sabotage others.²

¹ In Focus, Congressional Research Service, *Deep Fakes and National Security*, June 8, 2021, available at <https://crsreports.congress.gov/product/pdf/IF/IF11333> (last visited January 17, 2022).

² California Law Review, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, Bobby Chesney and Danielle Citron, 2019 Vol. 107:1753, p. 1771-74, (on file with Senate Criminal Justice Committee).

Legislation in Other States

Several states provide criminal or civil liability for creating or distributing deep fake images. The states that have enacted laws relating to deep fake images include: Virginia,³ Hawaii,⁴ California,⁵ and Texas.⁶

Currently, no states completely ban the creation or distribution of all deep fakes. A complete ban of such images would likely run afoul of constitutional protections under the First Amendment. However, certain categories of speech, including defamation, fraud, true threats, and the imminent-and likely incitement of violence, do not receive protections under the First amendment.⁷ Some deep fakes will likely fall into one of those categories and therefore may be regulated.⁸

The potential for harm stemming from deep fake images is often explored in the context of nonconsensual deep fake pornography. “The core issue of nonconsensual pornography is consent, and deep fake pornography adds an additional layer because the individual depicted did not actually engage in the sexual behavior [he or she] is depicted as doing.”⁹

Nonconsensual Pornography

Many states, including Florida, ban nonconsensual pornography, otherwise known as “revenge porn.” Such bans have been consistently upheld by the courts.¹⁰ The courts have found a compelling state interest in protecting individuals from the nonconsensual dissemination of private sexual images. “Those who 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.”¹¹

Section 784.049, F.S., provides that 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.

³ Section 18.2-386.2., V.A.C.

⁴ Section 711-1110.9., H.R.S.

⁵ Section 1708.86., C.C.C.

⁶ Section 255.004, V.T.C.A.

⁷ *United States v. Alvarez*, 567 U.S. 709 (2012).

⁸ California Law Review, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, Bobby Chesney and Danielle Citron, 2019 Vol. 107:1753, p. 1791, (on file with Senate Criminal Justice Committee).

⁹ Northwestern University Law Review, *Deepfake Privacy: Attitudes and Regulation*, Mathew B. Kugler and Carly Pace, 2021 Vol 116:611, p. 624-25, (on file with Senate Criminal Justice Committee).

¹⁰ See *Minnesota v. Casillas*, 952 N.W. 2d 629, 642 (Minnesota 2020); *Vermont v. VanBuren*, 210 Vt. 293 (Vermont 2019); *Illinois v. Austin*, 2019 IL 123910, (Illinois 2019).

¹¹ *Minnesota v. Casillas*, 952 N.W. 2d 629, 642 (Minnesota 2020).

It is a first degree misdemeanor¹² to willfully and maliciously sexually cyberharass another person. A second or subsequent violation is a third degree felony.¹³ 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.¹⁴

There is currently no state law prohibiting the unlawful procuring, or possession of a sexually explicit image with the intent of selling or disseminating such image. Such crimes in Florida may only be charged under current theft¹⁵ laws if applicable.

Child Pornography

Generally, the First Amendment does not protect child pornography. In *New York v. Ferber*,¹⁶ the Supreme Court of the United States 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.”¹⁷

The use of AI has also been used to create child pornography, sometimes referred to as “morphing.” The Federal Government prohibits such images, however, the Supreme Court of the United States has found that the child or minor depicted in the image must be a real minor for such bans to pass constitutional muster.¹⁸ 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

In 1996, Congress passed the Child Pornography Prevention Action of 1996 (CPPA),¹⁹ which created a definition of “child pornography.” This criminalized, for the first time, 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,²⁰ where:
- (A) The production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

¹² A first degree misdemeanor is punishable by up to a year in county jail and a fine not exceeding \$1,000. Sections 775.082 and 775.083, F.S.

¹³ Section 784.049(3), F.S. 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.

¹⁴ Section 784.049(5), F.S.

¹⁵ See ch. 812, F.S.

¹⁶ *New York v. Ferber*, 458 U.S. 747 (1982).

¹⁷ *Id.* at 763.

¹⁸ See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

¹⁹ Pub. L. No. 104-208, s. 121.

²⁰ 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.).

- (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 minor²¹ 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.²²

In 2002, the United States Supreme Court decided *Ashcroft v. Free Speech Coalition*,²³ 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).²⁴

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.²⁵ 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.²⁶

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. . . .”²⁷ Courts have taken this dictum to suggest that the *Ashcroft* court would have deemed morphed child pornography as not protected by the First Amendment.²⁸

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 2003.²⁹ 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.³⁰

²¹ 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. 2556(9) (1996 ed.).

²² 18 U.S.C. s. 2556(8) (1996 ed.).

²³ 535 U.S. 234 (2002).

²⁴ 18 U.S.C. s. 2556(8) (1996 ed.).

²⁵ *Ashcroft*, 535 U.S. at 256.

²⁶ *Id.*

²⁷ *Id.* at 242.

²⁸ *McFadden v. Alabama*, 67 So. 3d 169, 181-182 (Ala. Crim. App. 2010).

²⁹ Pub. L. No. 108-21.

³⁰ 18 U.S.C. s. 2256(8)(B).

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.³¹ In *United States v. Bach*,³² 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.³³ 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.”³⁴

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.³⁵ 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*.”³⁶

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.³⁷ The defendant moved to dismiss the charge, arguing that the definition of morphed child pornography was unconstitutionally overbroad.³⁸ The court noted that the image at issue was different from the one in *Bach* in that “no minor was sexually abused.”³⁹ 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.⁴⁰

³¹ 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).

³² *United States v. Bach*, 400 F. 3d 622 (8th Cir. 2005).

³³ *Id.* at 625.

³⁴ *Id.*

³⁵ *Id.* at 632.

³⁶ *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”).

³⁷ 759 F. 3d 891 (8th Cir. 2014).

³⁸ *Id.*

³⁹ *Id.* at 895.

⁴⁰ *Id.* at 896.

Florida Child Pornography Laws

Child pornography is defined, as *any* image depicting a minor⁴¹ engaged in sexual conduct.⁴²

⁴³Florida 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., relating to the abuse of children, and ch. 847, F.S., relating to obscenity.

In recent years, individuals have started using AI to create child pornography, e.g., images depicting sexually explicit conduct in which an actual child’s head has been superimposed onto an adult’s body.⁴⁴ Florida’s child pornography laws do not include morphed pornography.

In 2010, Florida’s Second DCA held that images that depicted the heads and faces of two children, ages 11 and 12, which were cut and pasted onto images of a 19 year old woman lewdly exhibiting her genitals did not constitute child pornography.⁴⁵ 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*.⁴⁶

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.”⁴⁷ 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. . . .”⁴⁸

Section 827.071, F.S., specifies the criminal offenses for the production of child pornography and the possession and promotion of child pornography. It is a second degree felony⁴⁹ for a person:

- Knowing the character and content thereof, to employ, authorize, or induce a child to engage in a sexual performance.⁵⁰

⁴¹ Section 847.001(8), F.S., provides that “minor” means any person under the age of 18 years.

⁴² “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.” Section 847.001(16), F.S.

⁴³ Section 847.001(3), F.S.

⁴⁴ *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 19, 2022).

⁴⁵ *Stelmack v. State*, 58 So. 3d 874 (Fla. 2d DCA 2010).

⁴⁶ *Id.* at 877

⁴⁷ *Id.* (emphasis in original).

⁴⁸ *Id.* at 876.

⁴⁹ 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.

⁵⁰ Section 827.071(1)(c), F.S., provides “performance” means any play, motion picture, photograph, or dance or any other visual representation exhibited before an audience.

- Who is a parent, legal guardian or custodian to consent for a child to participate in a sexual performance.⁵¹
- Knowing the character and content, to produce, direct, or promote⁵² any performance which includes sexual conduct by a child.⁵³
- 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.⁵⁴

It is a third degree felony 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.⁵⁵

Section 847.0137, F.S., specifies that any person who knew or reasonably should have known that he or she was transmitting^{56, 57} child pornography to another person commits a third degree felony.

Criminal Punishment Code and Offense Severity Ranking

The Criminal Punishment Code⁵⁸ is Florida's primary sentencing policy. Noncapital felonies sentenced under the Code receive an offense severity level ranking (levels 1-10). Points are assigned and accrue based upon the severity level ranking assigned to the primary offense, additional offenses, and prior offenses. Sentence points escalate as the severity level escalates.

Offenses are either ranked in the offense severity level ranking chart in s. 921.0022, F.S., or are ranked by default based on a ranking assigned to the felony degree of the offense as provided in s. 921.0023, F.S. Currently, a felony of the third degree is ranked as a level 1 offense, and a second degree felony is ranked as a level 4 offense.⁵⁹

⁵¹ Section 827.071(2), F.S.

⁵² Section 827.071(1)(d), F.S., provides "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 to agree to do the same.

⁵³ Section 827.071(3), F.S.

⁵⁴ Possession of three or more copies of such photographs, etc., is prima facie evidence of intent to promote.

⁵⁵ 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.

⁵⁶ Section 847.0137(1)(b), F.S., provides "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.

⁵⁷ *Smith v. Florida*, 204 So. 3d 18, 19 (Fla. 2016), 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."

⁵⁸ Sections 921.002-921.0027, F.S. See chs. 97-194 and 98-204, L.O.F. The Code is effective for offenses committed on or after October 1, 1998.

⁵⁹ Section 921.0023(1) and (2), F.S.

III. Effect of Proposed Changes:

This bill addresses issues that have emerged as a result of rapidly advancing technology. Specifically, it creates new crimes relating to the creation, dissemination, and taking of certain images which are sexually explicit. Additionally, the bill amends current laws dealing with sexually explicit material, including expanding the definition of child pornography.

Unlawful Dissemination of Sexually Explicit Material

This bill creates two new crimes addressing the dissemination, taking, and criminal use of sexually explicit material. The bill defines the following terms relating to these new crimes:

- “Depicted individual” means an actual and identifiable person who appears, as a result of digitization, to be engaged in a performance he or she did not actually perform or to be performing in an altered depiction.
- “Digitization” means to realistically depict any of the following:
 - The nude body parts of another human being as the nude body parts of a depicted individual.
 - A depicted individual engaging in sexual conduct in which the depicted individual did not engage.
- “Disseminate” includes, but is not limited to, the publishing of an image to an Internet website or the transfer of an image through electronic means to another person.
- “Obtains” means any manner of taking or exercising control over an image or obtaining an image by fraud, willful misrepresentation, or false promise.
- “Personal identification information” means any information that identifies an individual, and includes, but is not limited to, any name, postal or electronic mail address, telephone number, social security number, date of birth, or unique physical representation.
- “Sexually explicit image” means any image⁶⁰ depicting nudity⁶¹ or depicting a person engaging in sexual conduct.

The bill addresses deep fake images by providing a person commits a first degree misdemeanor for a first offense, and a third degree felony for a second or subsequent offense, when he or she willfully and maliciously:

- Creates and disseminates or sells any sexually explicit image of a depicted individual, without the consent of the depicted individual.
- Disseminates or sells any sexually explicit image of a depicted individual, without the consent of the depicted individual, and who knows or reasonably should have known that such image was the result of digitization.

The bill provides an exception to the misdemeanor warrant requirement. This exception allows a law enforcement officer to arrest, without a warrant, any person who he or she has probable cause to believe committed the above misdemeanor offense.

⁶⁰ “Image” includes, but is not limited to, any photograph, picture, motion picture, film, video, or representation.

⁶¹ “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. Section 847.001(9), F.S.

The bill criminalizes the taking or criminal use of sexually explicit images by making it a third degree felony when he or she:

- Knowingly and unlawfully obtains a sexually explicit image of a person which contains or conveys the personal identification information of the depicted person with the intent of causing substantial emotional distress; or
- Willfully possesses with the intent to disseminate for the purpose of pecuniary or any type of financial gain a sexually explicit image of a person which contains or conveys the personal identification information of the depicted person without first obtaining that person's consent.

The bill provides a higher penalty, a second degree felony, when a person willfully disseminates for the purpose of pecuniary or any type of financial gain a sexually explicit image of a person which contains or conveys the personal identification information of the depicted person without first obtaining that person's consent. An exception is provided for sexually explicit images involving voluntary exposure in a public or commercial setting. Additionally, every act, thing or transaction prohibited in the offense of the taking or criminal use of sexually explicit images constitutes a separate offense.

The bill also specifies that a violation is 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.

Additionally, a civil cause of action is created so that an aggrieved person may receive injunctive relief; monetary damages or actual damages, whichever is greater; and reasonable attorney fees and costs.

The criminal and civil penalties created for these crimes 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; or
- A law enforcement officer, or any local, state, federal, or military law enforcement agency that disseminates a sexually explicit image in connection with the performances of his or her duties.

Additionally, the felony offenses created in this bill are ranked in the offense severity ranking chart of the Criminal Punishment Code.

The third degree felony offenses of unlawful taking, and criminal use, of a sexually explicit image created in s. 784.0492, F.S., are ranked as level 4 offenses.

The second degree felony offense of criminal use of a sexually explicit image created in s. 784.0492, F.S., is ranked as a level 5 offense.

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 Pornography

The bill amends ss. 775.0847, 827.071, and 847.001, F.S., to expand the definition of “child pornography,” to include any image depicting an actual and identifiable minor who appears, as a result of digitization, to be engaged in sexual conduct.

The bill provides that, when relating to child pornography, “digitization” means to realistically depict any of the following:

- The nude body parts of another human being as the nude body parts of a minor.
- Computer-generated nude body parts as the nude body parts of a minor.
- A minor engaging in sexual conduct.

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

Additionally, the bill provides conforming cross-references.

The bill is effective October 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

This bill likely has a positive indeterminate fiscal impact (unquantifiable increase in prison beds and jail beds) on the Department of Corrections and local jails due to the increased number of prison and jail beds needed for persons convicted of the crimes created in the bill.

The bill creates s. 784.0491, F.S., to create two new crimes, both of which are first degree misdemeanors for a first offense and third degree felonies for a second or subsequent offense. The bill also creates s. 784.0492, F.S., to create two third degree felony offenses and one second degree felony offense.

Additionally, the bill expands the definition of child pornography. Due to this expansion, more people may be arrested and convicted under existing crimes for behavior that is not prohibited under current law, but is prohibited under the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 775.0847, 784.049, 827.071, 847.001, 921.0022, 288.1254, and 847.0141.

This bill creates the following sections of the Florida Statutes: 784.0491 and 784.0492.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

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

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
