

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 7055 PCB CRJS 16-01 Child Pornography

**SPONSOR(S):** Criminal Justice Subcommittee, Spano

**TIED BILLS:** HB 7057 **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Criminal Justice Subcommittee	12 Y, 0 N	White	White
1) Justice Appropriations Subcommittee	11 Y, 0 N	McAuliffe	Lloyd
2) Judiciary Committee			

### SUMMARY ANALYSIS

“Morphing” refers to a process in which a computer user distorts or transforms one picture into another. It is a relatively simple technique using inexpensive and readily available software. In recent years, individuals have used 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).

While the possession, distribution, transmission, etc., of traditional child pornography has long been illegal, criminalizing such acts that involve morphed child pornography has been more problematic. Congress first attempted to do so in 1996, when they passed the Child Pornography Prevention Action (CPPA). In the years that followed, portions of the CPPA were deemed an unconstitutional violation of First Amendment rights. Congress’s latest attempt to criminalize morphed child pornography came in 2003, with the passage of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (Protect Act). While this legislation has been challenged, it has thus far been upheld by the courts.

In upholding the federal legislation, courts cite the exceptionally detailed definitions and prohibitions contained in the Protect Act. These provisions specifically refer to computer-generated images and images that have been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

Unlike the federal statutes, Florida’s child pornography laws are not as specific in addressing morphed child pornography. As a result, Florida courts have determined that persons who possess, distribute, transmit, etc. such images may not be held criminally liable.

The bill amends the definitions of the terms “sexual conduct” and “child pornography” in ch. 847, F.S., to include morphed images of child pornography. As a result, persons who possess, promote, transmit, etc., morphed child pornography can be held criminally liable.

The bill reorganizes Florida’s laws relating to “sexual performance by a child” and Florida’s child pornography laws so that they are all located in ch. 847, F.S. The bill also provides that each act of transmitting child pornography is a separate offense.

The Criminal Justice Impact Conference met January 5, 2016, and determined this bill will have an indeterminate impact on state prison beds. This means this bill may increase the number of offenders sentenced to state prison beds, but the extent of the increase is unquantifiable. The bill may also increase the number of offenders sentenced to local jail beds because the bill expands the definition of “sexual conduct,” and expands the application of numerous misdemeanor offenses.

The bill is effective October 1, 2016.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **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. 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.

##### **Federal Statutes and Case Law**

Generally, the First Amendment does not protect child pornography. In *New York v. Ferber*,<sup>1</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>2</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>3</sup> At that time, the statutes described such material as images created using an actual minor.<sup>4</sup> In 1996, Congress passed the Child Pornography Prevention Action of 1996 (CPPA),<sup>5</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>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);
  - (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>

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

<sup>2</sup> *Id.* at 762-763.

<sup>3</sup> *See, e.g.*, 18 U.S.C. §2252 (1994 ed.).

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

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

<sup>6</sup> 18 U.S.C. §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.

<sup>7</sup> 18 U.S.C. §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 be construed to require proof of the actual identity of the identifiable minor.

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**DATE:** 1/13/2016

**PAGE:** 2

(8) “[C]hild pornography” means 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, where-

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;<sup>9</sup>

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct [e.g., virtual child pornography created without use of an actual child]; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor<sup>10</sup> is engaging in sexually explicit conduct [e.g., morphed child pornography].<sup>11</sup>

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

In 2002, the United States Supreme Court decided *Ashcroft v. Free Speech Coalition*,<sup>12</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 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>13</sup> The 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>14</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>15</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>16</sup> This suggests that the *Ashcroft* court would have deemed morphed child pornography as not protected by the First Amendment.<sup>17</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>18</sup> The Protect Act, in part, narrowed the definition of “virtual” child pornography in section (8)(B)

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<sup>8</sup> 18 U.S.C. §2556(8) (1996 ed.).

<sup>9</sup> The term “sexually explicit conduct” is defined to mean graphic or simulated sexual intercourse (including genital-genital, oral-genital, anal-genital, or oral-anal) whether between persons of the same or opposite sex; graphic or simulated bestiality, masturbation, or sadistic or masochistic abuse; or graphic or simulated lascivious exhibition of the genitals or pubic area of any person. 18 U.S.C. §2556(2) (2015).

<sup>10</sup> The term “identifiable minor” is 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. §2556(9) (2015).

<sup>11</sup> 18 U.S.C. §2556(8) (2015).

<sup>12</sup> 535 U.S. 234 (2002).

<sup>13</sup> 18 U.S.C. §2556(8) (1996 ed.).

<sup>14</sup> *Ashcroft*, 535 U.S. at 256.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 242.

<sup>17</sup> *McFadden v. Alabama*, 67 So. 3d 169, 181-182 (Ala. Crim. App. 2010).

<sup>18</sup> Pub. L. No. 108-21.

of the CPPA to include virtual or computer-generated images that are “indistinguishable from” images of actual minors engaging in sexually explicit conduct.<sup>19</sup>

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

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

To date, the federal statutes relating to morphed child pornography have been upheld.<sup>20</sup> In *United States v. Bach*,<sup>21</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>22</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>23</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 real children,” and creates a lasting record of an identifiable minor child seemingly engaged in sexually explicit activity.<sup>24</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>25</sup>

Subsequent to the *Bach* decision, the United States Court of Appeals for the Second Circuit heard a case with a similar fact pattern. In *United States v. Hotaling*,<sup>26</sup> the defendant was charged with possession of morphed child pornography relating to images in which the heads of minor females had been cut from their original, non-pornographic photographs and superimposed over the heads of images of nude and partially nude adult females engaged in sexually explicit conduct.<sup>27</sup> The defendant argued that the definition of morphed child pornography was unconstitutionally vague and overbroad, and that because no actual minor was harmed by the creation of the images, they were protected speech under the First Amendment.<sup>28</sup> The court, citing the decision in *Bach*, disagreed and 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>29</sup>

Most recently, the United States Court of Appeals for the Eighth Circuit decided *United States v. Anderson*.<sup>30</sup> In *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>31</sup> The defendant moved to dismiss the charge, arguing that the definition of morphed child pornography was unconstitutionally overbroad.<sup>32</sup> The court noted that the image at issue was different than the one in *Bach* in that “no minor was sexually abused.”<sup>33</sup> However, the court held that because such images falsely portray identifiable children engaging in

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<sup>19</sup> 18 U.S.C. §2256(8)(B).

<sup>20</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>21</sup> 400 F.3d 622 (8th Cir. 2005).

<sup>22</sup> *Id.* at 625.

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

<sup>24</sup> *Id.* at 632.

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

<sup>26</sup> 634 F.3d 725 (2d Cir. 2008), cert. denied, 132 S.Ct. 843 (2011).

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

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

<sup>29</sup> *Id.* at 726.

<sup>30</sup> 759 F.3d 891 (8th Cir. 2014).

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

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

<sup>33</sup> *Id.* at 895.

sexual activity, such images implicate the government's compelling interest in protecting minors.<sup>34</sup> Using this reasoning, the court held that the definition of morphed child pornography was constitutional.

## Florida Statutes

Florida law currently contains a variety of statutes that prohibit acts relating to child pornography. Currently, these statutes are found in two different chapters. A summary of these laws follows.

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

Section 827.071(4), F.S., makes it a second degree felony<sup>35</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.<sup>36</sup>

Section 827.071(5), F.S., makes it a third degree felony<sup>37</sup> for any person to knowingly possess, control, or intentionally view<sup>38</sup> a photograph, motion picture, etc., which, in whole or in part, he or she knows to include any sexual conduct by a child.<sup>39</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; 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>40</sup>

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

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; 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>41</sup>

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<sup>34</sup> *Id.* at 896.

<sup>35</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>36</sup> Possession of three or more copies of such photographs, etc., is prima facie evidence of intent to promote.

<sup>37</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>38</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 over any period of time.

<sup>39</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>40</sup> ss. 827.01(2) and 827.071(1), F.S.

<sup>41</sup> s. 847.001, F.S.

Notably, the terms used in the above-described statutes do not specifically include morphed pornography.

### Florida Case Law

In 2010, Florida's Second District Court of Appeal (DCA) decided *Stelmack v. State*,<sup>42</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>43</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>44</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>45</sup>

The court also noted that the images depicted *simulated* lewd exhibition of the genitals by a child. The state, citing the *Bach* decision, discussed *supra*, 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>46</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 section 827.071(5) 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>47</sup> In fact, child pornography has been defined in the federal statutes to specifically include composite images...<sup>48</sup>

Shortly after the *Stelmack* decision, the Second DCA reviewed another case in which the defendant was convicted of possessing child pornography in violation of s. 827.071(5), F.S.<sup>49</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, section 827.071 requires that the depicted sexual conduct be that of a child."<sup>50</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>51</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 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>52</sup> After noting

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<sup>42</sup> 58 So. 3d 874 (Fla. 2d DCA 2010).

<sup>43</sup> *Id.* at 875.

<sup>44</sup> *Id.* at 877

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

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

<sup>47</sup> In a footnote, the court noted that they would "leave for another day a discussion of the constitutionality of such a provision." *Id.* at 876.

<sup>48</sup> *Id.*

<sup>49</sup> *Parker v. State*, 81 So. 3d 451 (Fla. 2d DCA 2011).

<sup>50</sup> *Id.* at 453.

<sup>51</sup> *Id.* at 455-57.

<sup>52</sup> *Id.*

that Congress specifically removed the defense that no actual minor was involved in the production of the depiction, the court stated that “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>53</sup>

### **Effect of the Bill**

As noted above, s. 827.071, F.S., currently contains provisions relating to sexual performance by a child, as well as provisions relating to child pornography. The bill repeals this section of statute and moves all of its provisions to statutes in ch. 847, F.S., relating to obscenity and child pornography.

The bill moves the provisions of s. 827.071(2) and (3), F.S., relating to sexual performance by a child, to s. 847.003, F.S. The bill does not change the elements of these offenses.

The bill moves the provisions of s. 827.071(4) and (5), F.S., which criminalize the possession and promotion of child pornography, into s. 847.0137, F.S., and defines a variety of terms in accordance with federal law to include morphed images. For example:

- "Child pornography" is defined as a visual depiction of sexual conduct, where:
  - 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.
- "Identifiable minor" is 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.
- "Visual depiction" is defined to include any photograph, picture, 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 which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

The bill expands the definition of "sexual conduct" applicable to all of ch. 847, F.S., to include "simulated" lewd exhibition of the genitals. The bill also provides that each act of transmitting child pornography is a separate offense.

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

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.

### **B. SECTION DIRECTORY:**

Section 1. Amends s. 16.56, F.S., relating to the Office of Statewide Prosecution.

Section 2. Amends s. 39.01, F.S., relating to definitions.

Section 3. Amends s. 39.0132, F.S., relating to oaths, records, and confidential information.

Section 4. Amends s. 39.0139, F.S., relating to visitation or other contact; restrictions.

Section 5. Amends s. 39.301, F.S., relating to initiation of protective investigations.

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<sup>53</sup> *Id.* at 457.

- Section 6. Amends s. 39.509, F.S., relating to grandparents rights.
- Section 7. Amends s. 90.404, F.S., relating to character evidence; when admissible.
- Section 8. Amends s. 92.56, F.S., relating to judicial proceedings and court records involving sexual offenses and human trafficking.
- Section 9. Amends s. 92.561, F.S., relating to prohibition on reproduction of child pornography.
- Section 10. Amends s. 92.565, F.S., relating to admissibility of confession in sexual abuse cases.
- Section 11. Amends s. 435.04, F.S., relating to level 2 screening standards.
- Section 12. Amends s. 456.074, F.S., relating to certain health care practitioners; immediate suspension of license.
- Section 13. Amends s. 480.041, F.S., relating to massage therapists; qualifications; licensure; endorsement.
- Section 14. Amends s. 480.043, F.S., relating to massage establishments; requisites; licensure; inspection.
- Section 15. Amends s. 743.067, F.S., relating to unaccompanied homeless youths.
- Section 16. Amends s. 772.102, F.S., relating to definitions.
- Section 17. Amends s. 775.082, F.S., relating to penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison.
- Section 18. Amends s. 775.0847, F.S., relating to possession or promotion of certain images of child pornography; reclassification.
- Section 19. Amends s. 775.0877, F.S., relating to criminal transmission of HIV; procedures; penalties.
- Section 20. Amends s. 775.21, F.S., relating to the Florida Sexual Predators Act.
- Section 21. Amends s. 775.215, F.S., relating to residency restrictions for persons convicted of certain sex offenses.
- Section 22. Amends s. 784.046, F.S., relating to action by victim of repeat violence, sexual violence, or dating violence for protective injunction; dating violence investigations, notice to victims, and reporting; pretrial release violations; public records exemption.
- Section 23. Amends s. 794.0115, F.S., relating to dangerous sexual felony offender; mandatory sentencing.
- Section 24. Amends s. 794.024, F.S., relating to unlawful to disclose identifying information.
- Section 25. Amends s. 794.056, F.S., relating to Rape Crisis Program Trust Fund.
- Section 26. Amends s. 796.001, F.S., relating to offenses by adults involving minors; intent.
- Section 27. Repeals s. 827.071, F.S., relating to sexual performance by a child; penalties.
- Section 28. Amends s. 847.001, F.S., relating to definitions.
- Section 29. Creates s. 847.003, F.S., relating to sexual performance by a child; penalties.



- Section 30. Amends s. 847.0135, F.S., relating to computer pornography; prohibited computer usage; traveling to meet minor; penalties.
- Section 31. Amends s. 847.01357, F.S., relating to exploited children's civil remedy.
- Section 32. Amends s. 847.0137, F.S., relating to transmission of pornography by electronic device or equipment prohibited; penalties.
- Section 33. Amends s. 856.022, F.S., relating to loitering or prowling by certain offenders in close proximity to children; penalty.
- Section 34. Amends s. 895.02, F.S., relating to definitions.
- Section 35. Amends s. 905.34, F.S., relating to powers and duties; law applicable.
- Section 36. Amends s. 934.07, F.S., relating to authorization for interception of wire, oral, or electronic communications.
- Section 37. Amends s. 938.085, F.S., relating to additional cost to fund rape crisis centers.
- Section 38. Amends s. 938.10, F.S., relating to additional court cost imposed in cases of certain crimes.
- Section 39. Amends s. 943.0435, F.S., relating to sexual offenders required to register with the department; penalty.
- Section 40. Amends s. 943.04354, F.S., relating to removal of the requirement to register as a sexual offender or sexual predator in special circumstances.
- Section 41. Amends s. 943.0585, F.S., relating to court-ordered expunction of criminal history records.
- Section 42. Amends s. 943.059, F.S., relating to court-ordered sealing of criminal history records.
- Section 43. Amends s. 944.606, F.S., relating to sexual offenders; notification upon release.
- Section 44. Amends s. 944.607, F.S., relating to notification to Department of Law Enforcement of information on sexual offenders.
- Section 45. Amends s. 947.1405, F.S., relating to conditional release program.
- Section 46. Amends s. 948.013, F.S., relating to administrative probation.
- Section 47. Amends s. 948.03, F.S., relating to terms and conditions of probation.
- Section 48. Amends s. 948.04, F.S., relating to period of probation; duty of probationer; early termination.
- Section 49. Amends s. 948.06, F.S., relating to violation of probation or community control; revocation; modification; continuance; failure to pay restitution or cost of supervision.
- Section 50. Amends s. 948.062, F.S., relating to reviewing and reporting serious offenses committed by offenders placed on probation or community control.
- Section 51. Amends s. 948.101, F.S., relating to terms and conditions of community control.

Section 52. Amends s. 948.30, F.S., relating to additional terms and conditions of probation or community control for certain sex offenses.

Section 53. Amends s. 948.32, F.S., relating to requirements of law enforcement agency upon arrest of persons for certain sex offenses.

Section 54. Amends s. 960.03, F.S., relating to definitions; ss 960.01-960.28.

Section 55. Amends s. 960.197, F.S., relating to assistance to victims of online sexual exploitation and child pornography.

Section 56. Amends s. 985.04, F.S., relating to oaths; records; confidential information.

Section 57. Amends s. 985.475, F.S., relating to juvenile sexual offenders.

Section 58. Amends s. 1012.315, F.S., relating to disqualification from employment.

Section 59. Amends s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity ranking chart.

Sections 60-114. Reenact sections of law to incorporate the bill's amendments to statutes that are cross-referenced in the reenacted sections.

Section 115. Directs the Division of Law Revision and Information to rename chapter 847, F.S., as "Obscenity; Child Pornography".

Section 116. Provides an effective date of October 1, 2016.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to have any impact on state revenues.

#### 2. Expenditures:

The Criminal Justice Impact Conference met January 5, 2016, and determined this bill will have an indeterminate impact on state prison beds. This means this bill may increase the number of offenders sentenced to state prison beds, but the extent of the increase is unquantifiable.

This bill 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. This bill also defines a variety of terms to include "morphing," conforming to those in federal law. This expands the definition of both "sexual conduct," through "simulated" lewd expression of the genitals, and child pornography, through a visual depiction that has been "created, adapted, or modified." By including this type of conduct and these types of images for violations such as producing, directing, possession, transmission, there is potential for additional offenders to be prosecuted for the felonies currently in place.

According to the Department of Corrections, in Fiscal Year 2014-15, there were 289 offenders sentenced under both s. 827.071, F.S., and s. 847.0137, F.S. Of these offenders, 183 were sentenced to prison (mean sentence length is 90.8 months, incarceration rate is 63.3 percent).

It is unknown how many more offenders will be included with the addition of "morphing." Additionally, it is unknown how incarceration rate and sentence length would be affected by creating the possibility for each offender to be charged with multiple offenses, though some could see further penalty increases since the possession of ten or more visual depictions or images (s. 775.0847, F.S.) would reclassify their felonies to the next higher degree.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

#### 2. Expenditures:

The bill may increase the number of sentenced to local jail beds because the bill expands the definition of "sexual conduct," and expands the application of numerous misdemeanor offenses.

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

None.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.