

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 1180

INTRODUCER: Senator Gaetz

SUBJECT: Sexual Images

DATE: March 24, 2025

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Parker</u>	<u>Stokes</u>	<u>CJ</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>ACJ</u>	_____
3.	_____	_____	<u>FP</u>	_____

I. Summary:

SB 1180 changes the definition of child pornography, provides guidance on proving actual or lewd exhibition, and prohibits generation or possession of certain images.

Child Pornography

The bill amends s. 827.071, F.S., to revise the definition of “Child pornography” to include any image depicting a minor with actual or simulated exhibition of the genitals.

The bill provides that the term “actual or lewd exhibition of the genitals” may be evidenced by the overall content of the visual depiction, taking into account the age of the minor and, including, but not limited to, whether:

- The focal point of the visual depiction is on the child’s genitalia or pubic area;
- The setting of the visual depiction is sexually suggestive or in a place or pose generally associated with sexual activity;
- The child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
- The visual depiction suggest sexual coyness or a willingness to engage in sexual activity; or
- The visual depiction is intended or designed to elicit a sexual response in the viewer.

Altered sexual depiction

The bill amends s. 836.13, F.S., to define the term “Generate” to mean to create, alter, adapt, or modify any image by electronic, mechanical, or other computer-generated means to portray an identifiable person or to offer or agree to do the same.

A person who willfully generates or possesses any altered sexual depiction of an identifiable person, without the consent of the identifiable person, and who knows or reasonably should have known that such visual depiction was an altered sexual depiction commits a third degree felony.

The bill authorizes a person who is portrayed in an altered sexual depiction without his or her consent to initiate a civil cause of action against a person who willfully generates such an altered sexual depiction to obtain appropriate relief to prevent or remedy the generation of such a depiction, including:

- Injunctive relief.
- Monetary damages to include \$10,000 or actual damages incurred.
- Reasonable attorney fees and costs.

The bill amends s. 921.0022, F.S., ranking the offense of person who generates or possesses an altered sexual depiction of an identifiable person without consent as a Level 3 on the Offense Severity Ranking Chart (OSRC).

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

The bill takes effect October 1, 2025.

II. Present Situation:

Altered Sexual Depictions

Nonconsensual altered sexual depictions are distinguishable from consensual pornography as the person being depicted has not given his or her consent and did not actually engage in the sexual behavior he or she is depicted as doing. Such depictions may exploit the depicted person for other's gratification and may cause emotional and reputational harm stemming from subsequent uses of the depiction and society's response to the person depicted.¹

Section 836.13, F.S., defines "Altered sexual depiction" to mean 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:²

- 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

¹ 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 March 19, 2025).

² Section 836.13(1)(b), F.S., defines "Identifiable person" to mean 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.

- Engaging in sexual conduct as defined in s. 847.001, F.S.,³ in which the identifiable person did not engage.

A person who willfully and maliciously promotes any altered sexual depiction of an identifiable person, without the consent of the identifiable person, and who knows or reasonably should have known that such visual depiction was an altered sexual depiction, commits a third degree felony.⁴

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 under this section.⁵

A person who is portrayed in such an altered sexual depiction without his or her consent may initiate a civil cause of action against a person who willfully and maliciously promoted such depiction and may obtain appropriate relief to prevent or remedy the promotion, including:

- Injunctive relief.
- Monetary damages to include \$10,000 or actual damages incurred.
- Reasonable attorney fees and costs.⁶

Child Pornography

The law prohibits any person to knowingly produce, distribute, receive, or possess with intent to transfer or distribute material that appears to depict minors engaged in sexually explicit conduct and is deemed obscene.⁷

Miller v. California established the test for determining obscenity, now known as the *Miller*⁸ test, which outlines three criteria for material to be considered obscene. The three-prong test requires the trier of fact to consider the following factors to determine if something is obscene:

- Whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest;
- Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁹

³ Section 847.001(19), F.S., defines “Sexual conduct” to mean actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated 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.”

⁴ A third degree felony is punishable by a term of imprisonment up to 5 years and a \$5,000 fine as provided in ss. 775.082, 775.083, and 775.084, F.S.

⁵ Section 836.13(4), F.S.

⁶ Section 836.13(5), F.S.

⁷ 18 U.S.C.A. s. 1466A. (2003).

⁸ *Miller v. California*, 413 U.S. 15, 24 (1973).

⁹ *Id.*

The test for determining whether matter involving minors is obscene is a slightly lower threshold than the Miller test. Material involving minors can be considered obscene if:

- It depicts an image that is, or appears to be a minor engaged in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse; and
- The image lacks serious literary, artistic, political, or scientific value.¹⁰

The Court tends to grant greater protections to minors, routinely upholding state statutes that penalize those who possess or disseminate obscene material relating to minors. In *New York v. Ferber*, the defendant was convicted for distributing material that depicted a sexual performance by a minor under the age of 16 in violation of a state law that prohibited persons from knowingly promoting material that depicted such a performance.¹¹ In *Ferber*, the Court held that the statute at issue did not violate the First Amendment, explaining that the states have a compelling interest, and thus are granted more leeway, in regulating pornographic depictions of children.¹² The Court reasoned that such material bears so heavily on the welfare of children engaged in its production that a balance of compelling interests are struck and, therefore, these materials are not afforded the protections of the First Amendment.¹³

Present law defines child pornography to mean:

- Any image depicting a minor engaged in sexual conduct; or
- 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.¹⁴

Sexual performance means, a person is guilty of the use of a child in a sexual performance if, knowing the character and content thereof, he or she employs, authorizes, or induces a child to engage in a sexual performance or, being a parent, legal guardian, or custodian of such child, consents to the participation by such child in a sexual performance. A person who violates this offense commits a second degree felony.^{15,16}

A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a child.¹⁷ A person who violates this offense commits a second degree felony.

It is unlawful for any person to possess with the intent to promote¹⁸ any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, includes child pornography. The possession of three or more copies of such photograph, motion

¹⁰ *Id.*

¹¹ *New York v. Ferber*, 458 U.S. 747 (1982).

¹² *Ferber*, 458 U.S. at 756.

¹³ *Id.* at 747-48.

¹⁴ Section 827.071(1)(b), F.S.

¹⁵ Section 827.071(2), F.S.

¹⁶ A second degree felony is punishable by a term of imprisonment not exceeding 15 years and a fine up to \$10,000, as provided in ss. 775.082, 775.083, and 775.084, F.S.

¹⁷ Section 827.071(3), F.S.

¹⁸ Section 836.13(4), F.S., defines “Promote” to mean to 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.

picture, representation, or presentation is prima facie evidence of an intent to promote. A person who violates this offense commits a second degree felony.

This provision does not apply to any material possessed, controlled, or intentionally viewed as part of a law enforcement investigation.

Courts have determined what criteria may be used in determining what is lewd exhibition of the genitals. In *State v. Hubbs*,¹⁹ the critical issue for the court to determine was whether the state proved the defendant knew photographs taken of a 14 year old girl included “actual lewd exhibition of the genitals” by a child and were “lewd” in nature. To prove an “actual lewd exhibition of the genitals” by a child, the State will be required to prove the defendant knew the photographs of the child were “lewd” in nature.²⁰ The Second District has specifically held that “the lewdness requirement may be satisfied by the intent of the person promoting the performance which included sexual conduct by the child.”²¹ The *Brabson* court also noted that lewdness may be evaluated based on the test in *United States v. Dost*. The court held that a trier of fact should consider the *Dost* factors in making a determination whether he exhibition of the child's genitals in the photographs was lewd in nature.²²

In *U.S. v. Dost*,²³ the court opined that a determination of whether there was lascivious exhibition should be made on a case-by-case basis using general principles as a guide for analysis.

The court held that a trier of fact should look at the following factors, among any others that may be relevant in a particular case, when determining whether a visual depiction of a minor constitutes lascivious exhibition of the genitals or pubic area:

- Whether the focal point of the visual depiction is on the child’s genitalia or pubic area;
- Whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
- Whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
- Whether the child is fully or partially clothed or nude;
- Whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
- Whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

The court asserted that a visual depiction need not involve all of the above-listed factors to constitute lascivious exhibition of the genitals or pubic area, but rather that, a determination should be made based on the overall content of the visual depiction, taking into account the age of the minor.²⁴

¹⁹ *State v. Hubbs*, 377 So.3d 1162 (Fla. 4th DCA 2023).

²⁰ Section § 827.071(1)(h), (5)(a), Fla. Stat. (2019).

²¹ *State v. Brabson*, 7 So.3d 1119, 1122 (Fla. 2^d DCA 2008).

²² *Hubbs*, at 1168.

²³ *U.S. v. Dost*, 636 F. Supp. 828 (S.D. California 1986).

²⁴ *Dost*, 636 F. Supp. At 832.

Offense Severity Ranking Chart

Felony offenses which are subject to the Criminal Punishment Code²⁵ are listed in a single OSRC, 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.^{26,27}

A person's primary offense, any other current offenses, and prior convictions are scored using the points designated for the offense severity level of each offense. 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.²⁸

III. Effect of Proposed Changes:

Child Pornography

The bill amends s. 827.071, F.S., to revise the definition of "Child pornography" to mean:

- Any image depicting a minor engaged in sexual conduct;
- 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; or
- *Any image depicting a minor with actual or simulated exhibition of the genitals.*

The bill provides that the term "actual or lewd exhibition of the genitals" may be evidenced by the overall content of the visual depiction, taking into account the age of the minor and, including, but not limited to, whether:

- The focal point of the visual depiction is on the child's genitalia or pubic area;
- The setting of the visual depiction is sexually suggestive or in a place or pose generally associated with sexual activity;
- The child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
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²⁵ All felony offenses, with the exception of capital felonies, committed on or after October 1, 1998, are subject to the Criminal Punishment Code.

²⁶ Section 921.0022, F.S.

²⁷ Section 921.0022(2), F.S.

²⁸ Section 921.0024(2), F.S., provides that 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.

A person who willfully generates or possesses any altered sexual depiction of an identifiable person, without the consent of the identifiable person, and who knows or reasonably should have known that such visual depiction was an altered sexual depiction commits a third degree felony.

The bill authorizes a person who is portrayed in an altered sexual depiction without his or her consent to initiate a civil cause of action against a person who willfully generates such an altered sexual depiction to obtain appropriate relief to prevent or remedy the generation of such a depiction, including:

- Injunctive relief.
- Monetary damages to include \$10,000 or actual damages incurred.
- Reasonable attorney fees and costs.

The bill amends s. 921.0022, F.S., ranking the offense of person who generates or possesses an altered sexual depiction of an identifiable person without consent as a Level 3 on the OSRC.

The bill takes effect October 1, 2025.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by Article VII, s. 18, of the State Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None. The First Amendment of the U.S. Constitution states that, "Congress shall make no law ... abridging the freedom of speech..." This language prohibits the government from having the ability to constrain the speech of citizens. However, materials that constitute child pornography, obscenity, or material harmful to minors may be restricted. Child pornography, obscenity, and material harmful to minors have been defined in ch. 847, F.S., and are consistent with federal law and the United States Supreme Court holdings regarding such laws. The bill makes the simple creation or possession of an altered sexual depiction a crime. This may be subject to challenges under the First Amendment.

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

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of legislation, has not yet reviewed the bill. The bill expands materials that constitute child pornography, obscenity, and materials harmful to minors. The bill may have a positive indeterminate prison bed impact (unquantifiable increase prison bed impact) on the Department of Corrections.

VI. Technical Deficiencies:

None.

VII. Related Issues:

This bill could potentially criminalize a parent for possessing a nude photo of their child taken without a prurient intent or prurient curiosity.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 827.071, 836.13, 921.0022.

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.