

STORAGE NAME: h0327s2.go

DATE: April 7, 1998

**HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE COMMITTEE ON
GOVERNMENTAL OPERATIONS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: CS/CS/HB 327

RELATING TO: Criminal Mischief

SPONSOR(S): Committees on Governmental Operations and Crime & Punishment,
Representative Rojas and others

COMPANION BILL(S): SB 444 1st Engrossed(s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME AND PUNISHMENT YEAS 8 NAYS 0
- (2) COMMUNITY AFFAIRS YEAS 6 NAYS 0
- (3) GOVERNMENTAL OPERATIONS YEAS 5 NAYS 0
- (4)
- (5)

I. SUMMARY:

This bill makes the following changes to the Criminal Mischief section of the Arson and Criminal Mischief Act:

- Allows for the reclassification of a criminal mischief offense to a third degree felony if the offender has had one or more previous convictions involving property damage of less than \$1,000.
- Provides that a county or municipality is not preempted by state law from establishing an ordinance which prohibits graffiti or other graffiti-related offenses.
- Provides that a county or municipality is not preempted by state law from establishing higher penalties for graffiti or graffiti-related offenses than those provided by general law.
- Provides that a county or municipality may establish mandatory penalties for graffiti or graffiti-related offenses when state law provides discretionary penalties.
- Provides that a county or municipality may establish penalties including fines that do not exceed the amount specified in ss. 125.69 and 162.21, Florida Statutes; community service; restitution; and forfeiture.
- Provides that upon finding that a juvenile has violated a graffiti or graffiti-related ordinance, a court acting under Chapter 985, Florida Statutes (Delinquency; Interstate Compact on Juveniles), can not impose a penalty on the juvenile which is less severe than any of the mandatory penalties prescribed by municipal or county ordinance for such violation.

This bill will increase revenue by an indeterminate amount for those local governments which choose to establish mandatory penalties for graffiti or graffiti-related offenses.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Section 125.69(1), Florida Statutes, provides, that upon conviction of a violation of a county ordinance, the violator shall be punished by a fine not to exceed \$500 or by imprisonment in the county jail not to exceed 60 days or by both such fine and imprisonment. However, a county may specify, by ordinance, a violation of a county ordinance, which is punishable by a fine in an amount exceeding \$500, but not exceeding \$2,000 a day, if the county must have authority to punish a violation of that ordinance by a fine in an amount greater than \$500 in order for the county to carry out a federally mandated program.

Section 162.21(5), Florida Statutes, provides, in part, that a county or a municipality is authorized to enforce codes and ordinances under the provisions of this section if a county or municipality so chooses. Each code or ordinance, or ordinance enacted to establish implementation procedures, must provide a maximum civil penalty not to exceed \$500.

The general prohibition regarding criminal mischief is found in section 806.13, Florida Statutes. Under this section the willful and malicious placement of graffiti is illegal. The seriousness of the offense is generally dependent upon the dollar value of the damage done to the property. The classifications of the offense are as follows:

- 1) It is a second degree misdemeanor when the damage to the property is less than \$200;
- 2) It is a first degree misdemeanor when the damage to the property is more than \$200 but less than \$1,000;
- 3) It is a third degree felony when any of the following occur:
 - a) The damage to the property is \$1,000 or greater; or
 - b) It takes more than \$1,000 in costs, labor, or supplies to restore the damage done to the operation of a business, public communication, transportation, supply of water, the supply of gas, the supply of power, or other public service.

Section 806.13, Florida Statutes, gives a court discretion to impose any sentence allowed by the state guidelines. Local government ordinances are not permitted to impose penalties that exceed state penalties for similar or identical offenses. As the Florida Supreme Court explained in *Thomas v. State*, 614 So. 2d 468, 470 (Fla. 1993):

Municipal ordinances are inferior to laws of the state and must not conflict with any controlling provision of a statute. As this court stated in *Rinzler v. Carson*, 262 So.2d 661, 668 (Fla. 1972), '[a] municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden.' Although municipalities and the state may legislate concurrently in areas that are not expressly preempted by the state, a

municipality's concurrent legislation must not conflict with state law. While a municipality may provide a penalty less severe than that imposed by a state statute, an ordinance penalty may not exceed the penalty imposed by the state. [citations omitted.]

Preemption occurs when the Legislature passes laws that create regulations for certain actions. When the state law is adopted, any local ordinances that also regulate those actions are no longer valid. The local ordinances are no longer valid because, in general, local ordinances may not impose minimum mandatory penalties that are higher than state minimum penalties. However, the Legislature may pass a law expressly stating that a specific general law does not preempt local ordinances.

B. EFFECT OF PROPOSED CHANGES:

This bill allows counties or municipalities to impose higher and mandatory penalties for a violation of a graffiti-related ordinance. Such penalties include fines that do not exceed the amount specified in ss. 125.69 and 162.21, Florida Statutes; community service; restitution; and forfeiture. Local graffiti-related ordinances are presently preempted by State law, and, judges usually have discretion as to whether any jail, probation, or community service will be ordered. Under this bill, a charging authority (the officer and prosecutor) would have the choice of charging a person with a violation of a state statute or a local ordinance. Judges will be required to impose mandatory sentences as required by local ordinances if the offender is charged with violating the ordinance.

If a person is convicted of a second criminal mischief offense (if property damage is less than \$1,000) the charge will be reclassified as a felony of the third degree. Graffiti is currently included within the section that makes criminal mischief illegal, section 806.13, Florida Statutes. However, a second criminal mischief offense (which includes graffiti), does not become a felony unless both the prior and the new offense were charged under the state statute. The law is not settled as to whether a local government may attach felony level penalties to an ordinance.

Effect of bill on Criminal Mischief Statute

It is not clear from the bill whether a local ordinance could provide for a mandatory penalty if an offender is charged under the state statute. The provision of the bill which could allow an ordinance to attach a penalty to a state statute reads as follows:

[C]ities and counties shall not be preempted by state law from establishing higher penalties than those state law provides and mandatory penalties when state law provides discretionary penalties.

This provision is likely to be interpreted to allow higher penalties only if a person is charged by the local ordinance and not by the criminal mischief statute. The courts could also prohibit a local government from attaching any arbitrary penalty to a state statute even if expressly authorized by state statute. If an offender is charged under the criminal mischief statute for a graffiti-related offense, then judges will, most likely, have complete discretion to impose any sentence up to 60 days in jail for a second degree misdemeanor and up to 1 year in jail for a first degree misdemeanor.

This bill also allows an officer to arrest a person without a warrant, if there is probable cause to believe that the criminal mischief statute was violated. The general rule for misdemeanors is that an officer must issue a "notice to appear" instead of making an arrest if the offense did not occur in an officer's presence. Other misdemeanors such as battery and retail petit theft are exempted from this general rule as well.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

This bill gives local governments more authority to punish people who place graffiti on property.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

An agency or program is not eliminated or reduced.

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

No.

- b. Does the bill require or authorize an increase in any fees?

No.

- c. Does the bill reduce total taxes, both rates and revenues?

No.

- d. Does the bill reduce total fees, both rates and revenues?

No.

- e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

This bill does not purport to provide services to families or children.

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

This bill does not create or change a program providing services to families or children.

- (1) parents and guardians?

N/A

- (2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

ss. 806.13 and 901.15

E. SECTION-BY-SECTION RESEARCH:

Section 1: Amends section 806.13, Florida Statutes, to:

- Add a requirement for increasing the penalty for a criminal mischief charge. This new requirement provides that when a person has been previously convicted for criminal mischief under this section resulting in property damage of less than \$1,000, the current offense shall be reclassified as a third degree felony.
- Add a statement of intent by the Legislature which specifically provides that the local governments are not preempted by state law from passing ordinances which prohibit graffiti or graffiti-related activities.
- Provide that local government ordinances establishing higher penalties than those provided by state law or mandatory penalties where state law provides for discretionary penalties are also not preempted. Permissible higher fines or mandatory penalties include: fines that do not exceed the amount specified in ss. 125.69 and 162.21, Florida Statutes; community service; restitution; and forfeiture.

Included in the intent section is also the requirement that courts acting under Chapter 985 (Delinquency; Interstate Compact on Juveniles), Florida Statutes, upon finding that a juvenile has violated a graffiti or graffiti-related ordinance will not impose a penalty which is less severe than the penalties required by the ordinance.

Section 2: Amends section 901.15 (When Arrest By Officer Without A Warrant Is Lawful), Florida Statutes, to include an act of criminal mischief or graffiti-related offense as defined in section 806.13, Florida Statutes.

Section 3: Establishes an effective date of October 1, 1997.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See Fiscal Comments.

2. Recurring Effects:

See Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments.

4. Total Revenues and Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See Fiscal Comments.

2. Recurring Effects:

See Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

See Fiscal Comments.

2. Direct Private Sector Benefits:

See Fiscal Comments.

3. Effects on Competition, Private Enterprise and Employment Markets:

See Fiscal Comments

D. FISCAL COMMENTS:

This bill would allow people to be prosecuted under local graffiti-related ordinances. Violations of ordinances are not currently treated as felony offenses. A person may only be sentenced to prison for a felony offense, therefore, this bill would not have an impact on the Department of Corrections. Local governments will be affected depending on the type of mandatory penalties that are imposed on people who violate graffiti-related

ordinances. If the penalties are left to the court's discretion, then there would be no impact because that is the state of the current law. However, local ordinances which do not include malice as an element for a graffiti-related offense, would be easier to prove, and could affect local supervising agencies and jails.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

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

B. REDUCTION OF REVENUE RAISING AUTHORITY:

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

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

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

V. COMMENTS:

The element of malice necessary to prove any type of criminal mischief, including the placement of graffiti, can be very difficult if not impossible to prove beyond a reasonable doubt. Graffiti may just as easily be a form of boasting or advertizing rather than malicious which requires willful destruction of property from actual ill will or resentment.

This bill requires that a charge for criminal mischief be reclassified as a felony if a person has a prior **conviction** for criminal mischief. The automatic reclassification of an offense could be an improper intrusion upon a prosecutor's discretion to determine the appropriate charge. The Florida Supreme Court has held that the offense must be charged as a felony in order for the defendant to be convicted of a felony. *Young v. State*, 641 So. 2d 401 (Fla. 1994).

The requirement of a **conviction** usually means that a person was adjudicated guilty of an adult offense. A prior "withhold of adjudication" or a juvenile adjudication may keep a prosecutor from charging a person with a felony for a second offense. For most criminal offenses, judges have complete discretion whether to impose an adjudication of guilt, or withhold adjudication of guilt. (A person who is adjudicated guilty can not seal or expunge his/her record, and also must lawfully say that he/she has been convicted of a crime when requested on employment application forms.)

It is not clear whether this bill would allow an offender to be charged under the state statute, section 806.13, Florida Statutes, and then require a judge to impose a mandatory county penalty. Absent an express provision allowing local ordinances to impose additional or mandatory penalties on top of a sentence for a violation of a State statute, it is unlikely that the appellate courts would permit local governments to enhance the penalty for a state law.

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Reyes v. State, 655 So. 2d 111 (Fla. 2d DCA 1995) (there is no statutory basis for a county to establish an additional local fine for violation of a state statute). Even if a statute does allow a county or municipality to enhance the penalty for a State statute, it is not clear whether the courts would allow local governments to have very different penalties for a violation of the same state law. The safest approach would be to charge offenders with the local ordinance which would not be preempted pursuant to this bill.

In 1997, HB 1165, passed the Legislature and was vetoed by the Governor. This bill, CS/CS/HB 327, is similar to HB 1165. The Governor's veto message provided in part:

House Bill 1165 would allow cities and counties to pass ordinances that provide for local criminal penalties stricter than provided by state law, for graffiti-related offenses within the boundaries of the city or county. I am concerned that allowing local governments to preempt state law will provide disparate treatment of offenders when the problem of graffiti-related crime should be handled by a statewide statute that assures equivalent penalties for all who violate these laws. House Bill 1165 additionally lacks a limitation on the range of locally enhanced penalties.

CS/CS/HB 327, however, does have a limitation on the range of locally enhanced penalties.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On April 15, 1997, one amendment was adopted by the House Committee on Community Affairs and is traveling with the bill. The amendment changed the following:

- Lowered the dollar threshold amount for a first degree misdemeanor for criminal mischief (for the value of the property damage), from a maximum of \$1,000 to a maximum of \$300;
- Lowered the dollar threshold for a third degree felony for criminal mischief (for the value of the property damage or for the labor and supply costs due to the interruption or impairment of a business operation; public communication; transportation; supply of water, gas, or power; or other public service), from a minimum of \$1,000 to a minimum of \$300.

On April 7, 1998, two amendments were adopted by the House Committee on Governmental Operations. The first was technical (providing gender neutral language); and, the second provided that the higher and mandatory penalties that cities and counties could adopt could include fines "not to exceed the amount specified in ss. 125.69 and 162.21, Florida Statutes.

CS/HB 327, as amended, was made a committee substitute. Accordingly, the amendment traveling with the bill is no longer viable.

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VII. SIGNATURES:

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