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HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
CRIME PREVENTION, CORRECTIONS & SAFETY
ANALYSIS

BILL #: HB 349

RELATING TO: Child Support

SPONSOR(S): Representative Gannon

TIED BILL(S): None

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

(1) JUDICIAL OVERSIGHT YEAS 10 NAYS 0
(2) CRIME PREVENTION, CORRECTIONS & SAFETY YEAS 5 NAYS 0
(3) FISCAL POLICY & RESOURCES
(4) COUNCIL FOR SMARTER GOVERNMENT
(5)

I. SUMMARY:

The bill substantially amends s. 827.06, Florida Statutes, to remove the notice and jurisdictional requirements for persistent nonsupport. The provision that a person cannot be prosecuted for the crime of persistent nonsupport as a first degree misdemeanor if there is a court with jurisdiction over any proceedings for child support or dissolution of marriage is removed. A felony offense of the third degree is created for the failure to pay support to a child or spouse, if the person who is legally obligated and able to provide the support, owes support in an amount equal to or greater than $5,000 and that support remains unpaid for a period of more than 1 year.

The bill has an effective date of October 1, 2001.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No [X]	N/A []
2.	Lower Taxes	Yes []	No []	N/A [X]
3.	Individual Freedom	Yes [X]	No []	N/A []
4.	Personal Responsibility	Yes [X]	No []	N/A []
5.	Family Empowerment	Yes [X]	No []	N/A []

For any principle that received a "no" above, please explain: The bill creates a new felony for persistent nonsupport which adds a criminal enforcement remedy for collecting child and spousal support.

B. PRESENT SITUATION:

Obligation to Support

In 1765, Sir William Blackstone in his Commentaries on the Laws of England, stated:

> The duty of parents to provide for the maintenance of their children, is a principle of natural law…By begetting them, therefore, they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect right of receiving maintenance from their parents.
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> And the manner, in which this obligation shall be performed, is thus pointed out. The father, and mother, grandfather, and grandmother of poor impotent persons shall maintain them at their own charges, if of sufficient ability…and if a parent runs away, and leaves his children, the churchwardens and overseers of the parish shall seize his rents, goods, and chattels, and dispose of them toward their relief.

Likewise, s. 409.2551, Florida Statutes, provides legislative intent that "it is declared to be the public policy of this state that this act be construed and administered to the end that children shall be maintained from the resources of their parents, thereby relieving, at least in part, the burden presently borne by the general citizenry through public assistance programs". The same section contains legislative recognition that, "Common-law and statutory procedures governing the remedies for enforcement of support for financially dependent children by persons responsible for their support have not proven sufficiently effective or efficient to cope with the increasing incidence of financial dependency…The state, therefore, exercising its police and sovereign powers, declares that the common-law and statutory remedies pertaining to family desertion and nonsupport of dependent children shall be augmented by additional remedies directed to the resources of the responsible parents". These sentiments were echoed with the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), or federal welfare reform, in 1996. Under the Temporary Assistance for Needy Families (TANF) provisions, mothers are expected to work and to support their children from their own resources whenever possible. This expectation that mothers will develop their capacity for self-support is backed by time-limits for cash assistance and other services. The expectation that fathers will share the responsibility for

supporting their children is reflected in the stronger paternity establishment and child support enforcement procedures enacted under PRWORA.

Child support can be ordered by a court under a number of circumstances. Section 61.13, Florida Statutes, provides that in a proceeding for dissolution of marriage, the court may at any time order either or both parents who owe a duty of support to a child to pay support in accordance with the guidelines in s. 61.30, Florida Statutes. Section 742.031, Florida Statutes, related to the determination of parentage, provides that unmarried parents of a child may also be ordered to pay support for that child pursuant to s. 61.30, Florida Statutes. Additionally, s. 741.30, Florida Statutes, provides that during a proceeding for an injunction for protection against domestic violence, the court may grant relief that includes the establishment of support for a child or children of the petitioner.

Ability to Pay

Florida law also addresses the ability of a parent to pay ordered support. Section 61.30, Florida Statutes, provides that the court may order payment of child support which varies, plus or minus 5 percent, from the guideline amount, after considering all relevant factors, including the needs of the child, age, station in life, standard of living, and the financial status and ability of each parent. Additionally, s. 409.2564, Florida Statutes, provides that in each case in which payment is not being made, the Department of Revenue may institute actions to secure payment after determination of the obligor's reasonable ability to pay. The section further provides that when the "department has undertaken an action for enforcement of a support obligation, the department may enter into an agreement with the obligor for the entry of a judgment determining paternity and for periodic child support payments based on the obligor's ability to pay …In making a determination of the obligor's reasonable ability to pay and until guidelines are established for determining child support award amounts, the following criteria shall be considered: all earnings, income, and resources of the obligor; the ability of the obligor to earn; the reasonable necessities of the obligor; and the needs of the dependent child for whom support is sought". The term, "ability to pay" is not specifically defined in Florida statute.

Noncustodial parents who are delinquent in their child support payments and therefore subject to contempt citations often respond that they do not have the financial ability to pay their court ordered support obligations. State supreme courts in California, Oregon and Texas have all ruled that it is the obligor's responsibility to raise an inability to pay as a defense, and to prove that inability by a preponderance of the evidence [Moss v. Superior Court, 17 Cal.4th 396, 950 P.2d 59 (Cal. 1998); State ex rel. Mikkelsen v. Hill, 315 Or. 452, 847 P.2d 402 (Or. 1993); Ex parte Roosth, 881 S.W.2d 300 (Tex. 1994)]. According to those courts, it is not the responsibility of the custodial parent or the state to prove that the noncustodial parent has the financial resources to meet his or her child support obligation. The U.S. Supreme Court also found that allocating the burden of proof in this manner was constitutional and reasonable in child support contempt proceedings [Hicks v. Fieock, 485 U.S. 624 (1988)].

The determination of whether or not a parent has the financial ability to comply with an ordered child support obligation is particularly important in prosecutions under federal law, which requires that the parent's failure to pay support must be "willful" in order to warrant a conviction. In order to obtain a conviction under existing federal law, the government must prove that the parent has the resources to comply and has simply chosen not to do so. See U.S. v. Mathes, 151 F.3d 251 (5th Cir. 1998); U.S. v. Brand, 163 F.3d 1268 (11th Cir. 1998). The Ballek court examined the provisions of the Child Support Recovery Act and the Congressional legislative history in order to clarify the willfullness requirement and determined that "a noncustodial parent who does not have the funds to satisfy the child support award, and who does not obtain a reduction or remission of the award because of inability to pay, will almost certainly be engaged in willful defiance of the state court's

child support order" [U.S. v. Ballek, 1999 WL 125955, 1999 Daily Journal D.A.R. 2325 (9th Cir. (Alaska), Mar. 11, 1999)(NO. 97-30326)].

Noncustodial parents who truly lack the ability to pay their child support obligations have the right in all states to seek a downward modification of their child support order based on a change in circumstances (Section 61.14, Florida Statutes). In addition, an increasing number of states are beginning to offer parents who cannot meet their support obligations and have accrued arrearages the opportunity to negotiate a payment plan and thus avoid some sanctions. As a result of such alternatives being available, many states are adopting an increasingly stronger stance against parents who ignore their child support obligations.

Notice of Delinquent Support Obligation and Enforcement Action

Section 61.14(6), Florida Statutes, provides that when a child support obligor is 15 days delinquent making a payment or a payment installment, notice shall be served on the obligor informing him or her of the delinquency and its amount, the impending judgment by operation of law against him or her in the amount of the delinquency, and the obligor's right to contest the impending judgment. Such notice shall be served by first class mail at the last address of record, or, if there is no address of record, through publication. Additionally, notice must be provided before any enforcement action is undertaken by the Department of Revenue as provided by the following examples:

M Section 61.13015, Florida Statutes, relating to the suspension or denial of professional licenses and certificates, provides that, "The obligee shall give notice to any obligor when a delinquency exists in the support obligation. The notice shall specify…notice shall be served under this section by…".

M Section 61.13016, Florida Statutes, relating to the suspension of driver's licenses and motor vehicle registrations, provides that, "When an obligor is 15 days delinquent making a payment in child support …the Title IV-D agency may provide notice to the obligor…".

M Section 409.25656, Florida Statutes, relating to garnishment, provides that, "not less than 30 days before the day of the levy, the notice of intent to levy …must be given in person or sent by certified mail or registered mail to the person's last known address".

Enforcement Remedy

Laws related to most aspects of child support guidelines and child support enforcement are civil, but the failure to pay obligated child support may result in criminal sanctions for a parent in three situations:

M a finding of contempt of court for failure to obey a court ordered child support obligation;
M prosecution under the federal Deadbeat Parents Punishment Act of 1998; or
M prosecution under a state criminal statute.

Contempt

Child support orders are court orders and as such, a parent disobeying the terms of the child support order risks a finding of contempt of court. For this reason, a contempt of court order is probably the most common vehicle for a delinquent child support obligor to find himself or herself facing incarceration. The primary factor in determining whether a contempt is civil or criminal is the purpose for which the contempt power is exercised, which includes both the nature of the relief and the purpose to be served by the sentence that is imposed.

M The purpose of civil contempt is to compel the defendant to do the thing required by a court order for the benefit of the complainant. Civil contempt is coercive and is avoidable through obedience. Punishment for civil contempt is considered to be remedial and may include restitution, fines, and/or jail time - sanctions conditioned on the compliance with the order of the court. The conditional status of the punishment renders the relief civil in nature because the defendant can end the sentence at any moment by complying with the provisions of the court order. If the relief provided is incarceration, it is remedial because the defendant is imprisoned unless and until he or she performs the affirmative act required by the order of the court. An individual found guilty under a civil contempt order, in essence "holds the jailhouse keys" in that he or she can cure the contempt and gain release from jail by obeying the order. By virtue of this fact, a contemnor may not be incarcerated for civil contempt unless the court finds that he or she has the present ability to purge the contempt. In a civil contempt of court proceeding, the violation of the order must be proven by clear and convincing evidence and the burden of proof may be shifted to the defendant in some circumstances. While having the potential to carry a criminal penalty of incarceration, civil contempt of court orders are not considered to be criminal actions.

M The purpose of criminal contempt is to preserve the authority of the court and to punish for disobedience of its orders. Punishment for criminal contempt is punitive in order to vindicate the authority of the court, and like civil contempt, sanctions may include restitution, fines, and/or jail time. Unlike in a civil contempt situation, these unconditional penalties are solely and exclusively punitive in nature. Under a criminal contempt order, the contemnor does not "hold the keys to the jailhouse door" - he or she cannot shorten the imprisonment period simply by paying the fine or otherwise complying with the order. Criminal contempt, rather, is a form of punishment: a penalty imposed and required to be served to its completion. Because of the punitive nature of these orders, they generally are accompanied by many of the same due process requirements as a criminal trial (e.g. right to notice, right to counsel, right to a jury trial, etc.), and criminal contempt powers typically must be statutorily authorized by the legislature. Section 38.22, Florida Statutes, provides that “every court may punish contempts against it …”. Finally, in criminal contempt hearings, guilt must be proven beyond a reasonable doubt.

Courts have differed in their characterization of contempt orders for failure to pay child support and the lines between civil and criminal contempt are often blurred in failure to pay child support cases. A U.S. Supreme Court case examining the issue of contempt for failure to pay child support focused on this very question of whether the contempt was criminal or civil in nature [Hicks v. Fieock, 485 U.S. 624 (1988)]. The Court held that the California statute in question, which had a legal presumption that the obligated parent was able to pay the required child support, was an unconstitutional violation of the Due Process Clause of the U.S. Constitution if the proceeding was a criminal contempt proceeding. The statute's legal presumption reduced the burden of proof on the government and transferred that burden to the delinquent parent, which is not permissible in a criminal trial. On the other hand, the Court reasoned, if the statute were being applied in a civil proceeding, the transfer of the burden of proof would be constitutionally valid. Therefore, the Court remanded the case back to the lower court to determine whether the contempt proceedings were civil or criminal in nature. The Supreme Court also offered guidance to the lower court by more clearly delineating some of the characteristics distinguishing civil and criminal contempt orders and outlining examples of both.

Florida law provides for an obligor to be held in contempt for failure to pay court ordered support and also provides that the original order of the court for support creates a presumption that the obligor has the present ability to pay the support and purge himself or herself from the contempt:

M Section 61.14(5)(a), Florida Statutes, provides that when a court of competent jurisdiction enters an order for the payment of alimony or child support or both, the court shall make a finding of the obligor's imputed or actual present ability to comply with the order. If the obligor subsequently fails to pay alimony or support and a contempt hearing is held, the

> original order of the court creates a presumption that the obligor has the present ability to pay the alimony or support and to purge himself or herself from the contempt. At the contempt hearing, the obligor shall have the burden of proof to show that he or she lacks the ability to purge himself or herself from the contempt. This presumption is adopted as a presumption under s. 90.302(2) to implement the public policy of this state that children shall be maintained from the resources of their parents. The court shall state in its order the reasons for granting or denying the contempt.
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> **M** Section 409.2561(1), Florida Statutes, provides that the extraordinary remedy of contempt is applicable in child support enforcement cases because of the public necessity for ensuring that dependent children be maintained from the resources of their parents rather than relying on public assistance programs.

In 1998, the Florida Supreme Court adopted Florida Family Law Rule 12.615, relating to civil contempt proceedings in family law actions. In its opinion adopting the rule, the Court noted that while the law relating to contempt had not recently changed, cases were reflective of the confusion as to the process to be followed. In 1985, the Florida Supreme Court held that to incarcerate a contemnor for civil contempt, the court must find that he or she has the present ability to purge the contempt [Bowen v. Bowen 471 So. 2d 1274 (Fla. 1885)]. Subsequently, in Johnson v. Bednar [573 So. 2d 822 Fla. 1991)], the Court ruled that a trial court only need include a purge provision in its contempt order if it is ordering incarceration of the contemnor.

In 1994, the U.S. Supreme Court effectively overruled the Johnson v. Bednar decision, by not limiting the need for a purge provision in a civil contempt proceeding to cases in which incarceration is ordered. Rather the Court required purge provisions in civil contempt proceedings if any coercive sanctions ordered [International Union, United Mine Workers v. Bagwell 512 U.S. 821. 829 (1994)]. The Court concluded that if a court orders any coercive sanction and does not find that the contemnor has the ability to purge, then the contempt is criminal in nature and the contemnor is entitled to all the constitutional due process protections found in criminal cases.

Florida case law has established procedures to be used in civil contempt proceedings involving support in family law cases and the Court incorporated those into Rule 12.615. In Bowen, the Court found that an initial order must be entered that directs payment by the obligor of child support or alimony. Due to the fact that such an order is based on a finding that the obligor has the ability to pay, it creates a presumption in subsequent proceedings that there is indeed an ability to pay. In any subsequent proceeding, the party requesting the contempt sanction must show that the prior order was entered and that the alleged contemnor failed to pay all or a portion of the support due. The burden is then shifted to the obligor, who must show that he or she no longer has the ability to pay the ordered support. The court must then evaluate the evidence presented and determine whether the obligor has the present ability to pay and has willfully refused to do so. A finding in the affirmative requires the court to decide what sanctions to impose to obtain compliance.

Federal Law

The Child Support Recovery Act of 1992 (PL 102-521) created a federal class B misdemeanor for a first offense if a child support obligor willfully fails to pay a past due support obligation for a child living in another state. The term “past due support obligation” was defined to mean any amount determined under a court order or an administrative order pursuant to state law to be due from a person for the support and maintenance of a child or of a child and the parent with whom the child is living and that has remained unpaid for more than one year or is greater than $5000. In order to establish willfulness, the U.S. Attorney’s Office had to prove that the noncustodial parent was aware of the support obligation, was financially able to meet it at the time it was due, and either intentionally did not pay it or acted to create an insufficiency of funds available to pay the obligation. If convicted of a first offense, the obligor was subject to mandatory restitution of an amount equal to

the past due support obligation as it existed at the time of sentencing and to a fine and/or up to six months imprisonment. Subsequent convictions result in fine and/or imprisonment for not more than two years. In screening cases for the possibility of federal prosecution, a major consideration is whether all reasonably available civil and state criminal remedies have been exhausted. Generally, cases accepted for possible prosecution at the federal level are those that have proven to be unenforceable using the state child support enforcement process.

The Deadbeat Parents Punishment Act of 1998 (PL 105-187) expanded the provisions of the 1992 law. Under the 1998 law, the presumption of "willful failure" implicit under the 1992 statute is made explicit and tightened. The very existence of a support obligation in effect for the period of time charged in the indictment creates a rebuttable presumption that the obligor had the means to pay the support obligation for that period. Additionally, three categories of offense are prescribed in the bill. The first is the same as created in 1992 and remains a misdemeanor. The second is travel in interstate or foreign commerce with the intent to evade payment of child support if the obligation remains unpaid for longer than one year or is greater than $5,000 and is a felony. The third is the willful failure to pay support for a child residing in another state when the past due amount is greater than $10,000 or remains unpaid for longer than two years and is a felony. For the misdemeanor offense the penalty remains mandatory restitution and a fine and/or imprisonment for up to six months. For the felony offenses or, for a subsequent misdemeanor offense, the penalty is mandatory restitution and a fine and/or imprisonment up to two years.

Although the "Deadbeat Parents" act was designed to extend and facilitate prosecution of interstate child support cases, it was never anticipated that it would be widely used. As with the 1992 act, all available state civil and criminal remedies must be exhausted by a state child support enforcement agency before a case is turned over to a U.S. Attorney. Before 1995, federal law was used in approximately three dozen cases; since 1995, it has been used in 423 cases, resulting in 183 convictions. Even with the 1998 expansion, the law's primary value with remain with its use in high profile cases and from publicity generated by prosecutions in these cases.

Florida Law

State statutes contain a large number and extensive range of civil enforcement tools to collect support that is ordered and owed. Existing enforcement laws were strengthened and new remedies were added with the implementation of federal welfare reform in 1996. The use of income deduction orders, driver's license and motor vehicle registration suspensions, IRS intercepts, professional license and certificate suspensions, and bank account levies are provided for in current law. In addition, s. 61.14, Florida Statutes, provides for contempt:

> (5)(a) When a court of competent jurisdiction enters an order for the payment of alimony or child support or both, the court shall make a finding of the obligor's imputed or actual present ability to comply with the order. If the obligor subsequently fails to pay alimony or support and a contempt hearing is held, the original order of the court creates a presumption that the obligor has the present ability to pay the alimony or support and to purge himself or herself from the contempt. At the contempt hearing, the obligor shall have the burden of proof to show that he or she lacks the ability to purge himself or herself from the contempt. This presumption is adopted as a presumption under s 90.302(2) to implement the public policy of this state that children shall be maintained from the resources of their parents and as provided for in s. 409.2551, and that spouses be maintained as provided for in s. 61.08. The court shall state in its order the reasons for granting or denying the contempt.

State laws designed to criminally penalize parents for failure to pay child support are becoming more popular and more prevalent. States are beginning to recognize a fundamental difference between parents who are delinquent in child support – there are those who "cannot pay" and those who "will not" pay. Millions of dollars are being spent to help those low income cannot pay parents,

while enforcement mechanisms are becoming increasingly aggressive to pursue the will not pay parents who refuse to acknowledge child support obligations, despite having the ability to pay those obligations. The increasing use of criminal statutes to target parents who hide assets, avoid employment, or otherwise maneuver to avoid paying child support is reflective of a growing frustration with parents who will not pay obligated child support.

All states, including Florida, have criminal statutes creating misdemeanor or felony penalties for failure to support a child or family. The majority of these laws were not created specific to child support, but were originally intended for parents who abandoned or neglected their children. Provisions of these statutes range from "desertion and nonsupport" in Michigan to "nonsupport of a child or spouse" in Kansas to "failure to meet an obligation to provide support to a minor" in West Virginia. Penalties associated with these laws also vary considerably, from 14 years in prison for a felony conviction in Idaho to six months in prison for a misdemeanor in Rhode Island.

Florida law contains two criminal provisions related to nonpayment of child support. Section 827.06, Florida Statutes, provides that any person who knows he or she is legally obligated to pay support and is able to pay support and who fails to pay that support is guilty of a misdemeanor of the first degree if no court has jurisdiction in any proceeding for child support or dissolution of marriage. The state attorney is required to notify the person responsible for the support by certified mail that prosecution will be initiated if payments are not made or a satisfactory explanation for failure to pay is not provided. Because s. 61.13, Florida Statutes, provides that the court in which the child support order was initially entered shall have continuing jurisdiction for any modification deemed necessary to the child support order, the number of cases to which the current criminal charge of persistent non-support under s. 827.06, Florida Statutes, could be applied is quite limited. The Department of Revenue substantiates this and reports that over a three year period, this criminal penalty was used only once. Section 856.04, Florida Statutes, provides that any man who deserts his wife, his wife and children, or his wife when there are no children, or any mother who deserts her children and willfully withholds the means of support, shall be guilty of a felony of the third degree.

The federal Child Support Enforcement Amendments of 1984 required the governor of each state to appoint a State Commission on Child Support, on or before December 1, 1984. The Commission was to be composed of members representing all aspects of the child support system, including custodial and non-custodial parents, the agency or organizational unit administering the Title IV-D program, the state judiciary, the executive and legislative branches of the state government, child welfare and social service agencies, and others. The function of the Commission was to examine, investigate, and study the operation of the state's child support system for the primary purpose of determining the extent to which such system had been successful in securing support and parental involvement.

Each Commission was required to submit to the Governor of the State and make available to the public a full and complete report of its findings and recommendations resulting from the study no later than October 1, 1985, and the Governor was required to transmit such report and the Governor's comments to the Secretary of Health and Human Services. Then Governor Bob Graham established the Florida State Commission on Child Support by Executive Order Number 84-226 on November 30, 1984. One of the Commission's recommendations was related to ss. 827.06 and 856.04, Florida Statutes, and stated in part:

> Section 827.06 of Florida Statutes, headed "Persistent Nonsupport" should be repealed. It expressly exempts from prosecution any person who is the subject of a court order to furnish support to a child …It is no wonder that one can search the law books in vain for any prosecutions under this section.

> There is another section of the Florida Statutes dealing with "Willfully Withholding Support from…Children", F.S. 856.04. That section was completely emasculated by the case of Byrne v. State (First DCA – 1.2.79). There, a unanimous court held: a) a showing must be made that the minor children were "in need" in order to convict a parent of willfully withholding support under this section; and b) criminal prosecution should not be used where there is adequate civil remedy to force a parent to support his children….
>
> The Commission recommends that existing criminal laws dealing with neglect and willful or persistent failure to support should be strengthened. The outdated statutes should be eliminated. The public policy of the state should be expressed in clear and unmistakable terms that a parent's willful failure to support a child is child neglect and is to be punished under our criminal laws, whether or not the offender is theoretically subject to punishment for contempt of court, and whether or not such willful failure to support has resulted or threatens to result in physical harm to the child, malnutrition, or lack of clothing or shelter.

Sections 827.06 and 856.04, Florida Statutes, have not been amended since 1975.

Sections 775.082 and 775.083, Florida Statutes, provide that persons convicted of a misdemeanor of the first degree can be sentenced to a term of imprisonment not to exceed one year or a fine not to exceed $1000. A conviction for a third degree felony can result in imprisonment up to five years or a fine of $5000. A felony conviction also results in the loss of an individual's civil rights.

Section 921.001(9)(b), Florida Statutes, provides that on or after January 1, 1994, any legislation which enhances a misdemeanor offense to a felony offense must provide that such a change result in a net zero sum impact in the overall prison population, as determined by the Criminal Justice Estimating Conference, unless the legislation contains a funding source sufficient in its base or rate to accommodate such change or provision which specifically abrogates the application of this paragraph.

Section 921.0023, Florida Statutes, provides that until the Legislature specifically assigns an offense to a severity level in the offense severity ranking chart, the severity level for a felony of the third degree is within offense level 1. Section 921.0024, Florida Statutes, relating to worksheet computations and scoresheets, provides 4 sentence points for a primary offense at level 1 in the offense severity ranking chart. The section also provides that the lowest permissible sentence is the minimum sentence that may be imposed by the trial court, without a valid reason for departure. The lowest permissible sentence is any nonstate prison sanction in which the total sentence points equals or is less than 44 points, unless the court determines otherwise.

Florida law contains a number of provisions related to convicted felons, including:

> **M** Section 97.041(2), Florida Statutes, provides that persons who might otherwise be qualified, but may not register or vote, include persons convicted of any felony and who has not had his or her rights to vote restored pursuant to law;
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> **M** Section 112.011, Florida Statutes, provides that, except for certain drug related offenses, a person shall not be disqualified from employment by the state, any of its agencies or political subdivisions, or any municipality solely because of a prior conviction for a crime. However, a person may be denied employment by the state, any of its agencies or political subdivisions, or any municipality by reason of the prior conviction for a crime if the crime was a felony or first degree misdemeanor and directly related to the position of employment sought. Also, except for certain drug related offenses, a person whose civil rights have been restored shall not be disqualified to practice, pursue, or engage in any occupation, trade, vocation, profession, or business for which a license, permit, or certificate is required to be issued by the state, any of its agencies or political subdivisions, or any municipality solely because of a prior conviction for a crime. However, a person whose civil rights have been

restored may be denied a license, permit, or certification to pursue, practice, or engage in an occupation, trade, vocation, profession, or business by reason of the prior conviction for a crime if the crime was a felony or first degree misdemeanor and directly related to the specific occupation, trade, vocation, profession, or business for which the license, permit, or certificate is sought.

M Section 775.13, Florida Statutes, provides that any person who has been convicted of a felony in any court of this state shall, within 48 hours after entering any county in this state, register with the sheriff of said county, be fingerprinted and photographed, and list the crime for which convicted, place of conviction, sentence imposed, if any, name, aliases, if any, address, and occupation. This requirement does not apply to an offender who has had his or her civil rights restored, has received a full pardon for the offense for which convicted, or has been lawfully released from incarceration or other sentence or supervision for a felony conviction for more than 5 years prior to such time for registration, unless the offender is a fugitive from justice on a felony charge or has been convicted of any offense since release from such incarceration or other sentence or supervision.

M Section 944.292, Florida Statutes, provides that upon conviction of a felony as defined in s. 10, Art. X of the State Constitution, the civil rights of the person convicted shall be suspended in Florida until such rights are restored by a full pardon, conditional pardon, or restoration of civil rights granted pursuant to s. 8, Art. IV of the State Constitution.

M Section 940.05, Florida Statutes, provides that any person who has been convicted of a felony may be entitled to the restoration of all the rights of citizenship enjoyed by him or her prior to conviction if the person has received a full pardon from the board of pardons, has served the maximum term of the sentence imposed upon him or her, or has been granted his or her final release by the Parole Commission.

C. EFFECT OF PROPOSED CHANGES:

HB 349 eliminates the jurisdictional and notice provisions of s. 827.06, Florida Statutes, and creates a felony level of offense for persistent nonsupport under certain circumstances.

The bill has removed the primary barrier to the existing inability to criminally prosecute cases for persistent nonsupport at the first degree misdemeanor level by eliminating the prohibition to criminal prosecution if there is a court with jurisdiction. The added felony level of offense may provide increased disincentive for willfully choosing not to pay support. The proposed threshold for triggering a felony prosecution under state statute would be less stringent than under federal law because it requires both a 1 year delinquency and that the amount owed is equal to or greater than $5,000. The federal law requires only one or the other.

While the federal law requires that all state civil and criminal remedies be exhausted before federal prosecution is appropriate, the bill does not contain a similar requirement that all state civil remedies be exhausted before moving to criminal prosecution.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 827.06, Florida Statutes, to provide that any individual who fails to provide support commits a felony of the third degree **if:** the individual is able to provide support; the individual knows he or she is legally obligated to provide support; the unpaid support is an amount equal to or greater than $5000; and the support has remained unpaid for more than 1 year. The section also removes the limiting applicability of current law related to no court having jurisdiction in any proceedings for child support or dissolution of marriage and removes the notice requirement.

Section 2. Provides for an effective date of October 1, 2001.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

An anticipated increase in support collections would benefit custodial parents and their children and have the potential to prevent them from having to access the public assistance arena.

D. FISCAL COMMENTS:

The Office of the State Courts Administrator (OSCA) reports that the bill could have the potential for a significant, but indeterminate increase in court workload, with an attendant increase in judicial costs. Because the possibility of incarceration exists, the defendant would be entitled to court appointed counsel. There would be an increase in prosecutorial time and other costs associated with other courtroom personnel. Potential incarcerations would result in increased costs for correctional facilities.

OSCA also states that the new criminal offense may result in unanticipated complications in civil actions to establish and enforce support obligations. Parents may be less willing to provide information on a financial affidavit and child support guidelines worksheet if that information would be available in a criminal case.

According to the Department of Corrections, the bill has a potential impact on the supervised population provided that individuals found guilty of the offense are placed on supervision which appears likely based on the anticipated Criminal Punishment Code scoresheet calculation and the need for continued payment of the support delinquency through a restitution order. The exact impact in numbers of cases is indeterminate at this time and the final impact will be determined by the Criminal Justice Estimating Conference.

Both the Florida Prosecutors Association and the Florida Public Defenders Association have reported that the bill has a potential for increased workloads.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill will not reduce the authority of municipalities and counties to raise revenues.

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

The bill will not reduce the state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

There are a number of constitutional issues that have been raised related to the criminal enforcement of court ordered support obligations.

Parents with delinquent child support obligations have argued that requiring an obligor to meet a court-ordered child support obligation, without consideration of his or her current employment status, is unconstitutional because it violates the U.S. Constitution's prohibition on slavery and involuntary servitude or because it creates a criminal penalty for a civil debt. In 1998, the California state supreme court examined this argument in considerable detail and ruled that enforcement of a child support order was not in violation of the Thirteenth Amendment's slavery and involuntary servitude prohibition [Moss v. Superior Court, 17 Cal. 4th 396, 950 P.2d 59 (Cal. 1998)]. In this case, the court found that "there is no constitutional impediment to imposition of contempt sanctions on a parent for violation of a judicial child support order when the parent's financial inability to comply with the order is the result of the parent's willful failure to seek and accept available employment that is commensurate with his or her skills and ability." California's highest court also reviewed U.S. Supreme Court and U.S. Circuit Court of Appeals cases, Congressional legislative history, the state constitution, and analogous areas of common law in order to reach its holding. Based on this review, the court determined that the crucial element in slavery or involuntary servitude is the requirement that the oppressed person be bound to one employer or one form of employment. Because child support orders do not require the obligor to work for a specific person or in a particular line of work, the court held that enforcement of such orders does not rise to the level or slavery or involuntary servitude. The court also noted that the U.S. Supreme Court has previously outlined exceptions for the performance of other civil duties, such as jury service, military service, road work, and enforced labor as punishment for a crime, such as work camps.

At least one federal circuit court of appeals has also ruled that enforcement of a child support order cannot be likened to slavery [U.S. v. Ballek, 1999 WL 125955, 1999 Daily Journal D.A.R. 2325 (9th Cir. (Alaska), Mar. 11, 1999)(NO. 97-30326)]. The U.S. Ninth Circuit Court of Appeals cited three reasons for distinguishing child support enforcement from involuntary servitude and slavery: 1.) "the relationship between parent and child is much more than the ordinary relationship between debtor and creditor"; 2.) "the state's strong concern for the welfare of minor children is...manifested by the fact that parental obligations at the dissolution of marriage are not left to private agreement"; and 3.) "the state has an interest in protecting the public [funds] by ensuring that the children not become wards of the state." Additionally, the court declined to "interpret the Thirteenth Amendment in a way that would so drastically interfere with one of the most important and sensitive exercises of the

police power - ensuring that persons too young to take care of themselves can count on both their parents for material support."

Also in March 1999, the Supreme Court for the State of Colorado ruled against a father's claim that a criminal contempt sanction for failure to pay child support violated the state constitution's prohibition against imprisonment for debt [In re Marriage of Nussbeck, 1999 WL 112188 (Colo., Mar 01, 1999) (NO. 97SC540)]. Specifically, the father argued that because his child support arrearage was converted automatically to a judgment against him under Colorado child support law, he was being imprisoned for a standing debt. The court rejected this argument, holding that the father may be imprisoned for failure to pay child support because the contempt order was predicated on his failure to comply with the order, not on the existence of a judgment against him. The fact that the arrearage converted to a judgment against him, the court stated, was immaterial to the contempt order for noncompliance. Article I, Section 11, of Florida's Constitution also provides that no person shall be imprisoned for debt, except in cases of fraud.

Noncustodial parents with delinquent child support obligations have also challenged Congressional authority to enact the 1992 Child Support Recovery Act (CSRA), but none have been successful. At least ten of the 11 federal circuit courts of appeal have heard cases of this kind. The most common claim is that Congress exceeded its Constitutional authority when it enacted the CSRA, violating the Tenth Amendment of the U.S. Constitution in the process. All ten U.S. Circuit Courts of Appeal rejected this argument and further found that passage of the CSRA was a proper exercise of Congress' broad authority under the Commerce Clause [U.S. v. Bongiorno, 106 F.3d 1027 (1st Cir. 1997); U.S. v. Sage, 92 F.3d 101 (2nd Cir. 1996); U.S. v. Parker, 108 F.3d 28 (3rd Cir. 1997); U.S. v. Johnson, 114 F.3d 476 (4th Cir. 1997); U.S. v. Bailey, 115 F.3d 1222 (5th Cir. 1997); U.S. v. Black, 125 F.3d 454 (7th Cir. 1997); U.S. v. Crawford, 115 F.3d 1397 (8th Cir. 1997); U.S. v. Mussari, 95 F.3d 787 (9th Cir. 1996); U.S. v. Hampshire, 95 F.3d 999 (10th Cir. 1996); U.S. v. Williams, 121 F.3d 615 (11th Cir. 1997)].

There have been a few arguments that prosecutions under the CSRA for child support arrearages that accrued prior to enactment of the federal law violate the U.S. Constitution's protection that a person not be found criminally liable for an action that was not criminal when it was committed. These challenges to an ex post facto application of the CSRA have resulted in limited success in the courts. In at least five of the cases at the federal court of appeals level, the courts ruled that the prosecutions did not violate the ex post facto clause of the U.S. Constitution [U.S. v. Rose, 153 F.3d 208 (5th Cir. 1998); U.S. v. Black, 125 F.3d 454 (7th Cir. 1997); U.S. v. Crawford, 115 F.3d 1397 (8th Cir. 1997); U.S. v. Hampshire, 95 F.3d 999 (10th Cir. 1996); U.S. v. Muench, 153 F.3d 1298 (11th Cir. 1998)] Only the U.S. Ninth Circuit Court of Appeals agreed with the defendant that the retroactive application of the CSRA, which subjected the defendant to federal criminal penalties for failure to pay support without differentiating between delinquencies alleged to have occurred before and after the CSRA's date of enactment, was an unconstitutional ex post facto enforcement of the CSRA [U.S. v. Mussari, 152 F.3d 1156 (9th Cir. 1998). Article I, Section 10, of Florida's Constitution provides that no ex post facto law shall be passed.

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

None

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On March 29, 2001, the **Committee on Judicial Oversight** adopted a strike everything amendment that does the following:

- Removes the provision in current law that an individual cannot be prosecuted for persistent nonsupport IF a court has jurisdiction in any proceeding for child support or dissolution of marriage. This would effectively free up the ability to prosecute under this section.

- Provides that an individual must have been previously adjudged in contempt for failure to comply with a support order and willfully failed to provide support that he or she is legally obligated to provide in order to be eligible for prosecution.

- Provides for mandatory restitution in an amount equal to the total unpaid support obligation that exists that the time of sentencing. This mirrors federal law.

- Provides for the imposition of a mandatory fine and mandatory term of incarceration for a first, second and third conviction at the first degree misdemeanor level. The fine is to be paid after restitution.

- Provides that for a fourth or subsequent conviction at the misdemeanor level or if the support owed is equal to or greater than $5000 and remains unpaid for a period of more than 1 year – the crime is a felony of the 3rd degree.

- Provides that evidence that the defendant willfully failed to make sufficient efforts to legally acquire the resources to pay court ordered support may be sufficient to prove that he or she had the ability to provide support but willfully failed to do so.

- Provides that the element of notice may be satisfied if a support order has been entered by a court or tribunal.

On April 12, 2001, the **Committee on Crime Prevention, Corrections and Safety** adopted a substitute amendment to the strike-everything amendment. This substitute amendment has the following provisions:

- Removes the provision in current law that an individual cannot be prosecuted for persistent nonsupport IF a court has jurisdiction in any proceeding for child support or dissolution of marriage. This would effectively free up the ability to prosecute under this section.

- Provides that prior to commencing prosecution, the state attorney must provide notification via regular mail to the person's last known address, that a prosecution will commence against the person unless the total unpaid support obligation is paid.

- Provides that, in order to be eligible for prosecution, an individual must be notified by the state attorney of the intent to commence prosecution, have been previously adjudged in contempt for failure to comply with a support order, and willfully failed to provide the legally obligated support.

- Provides for the imposition of a mandatory fine and mandatory term of incarceration for a first, second and third conviction at the first degree misdemeanor level. The fine is to be paid after restitution.

- Provides that for a fourth or subsequent conviction at the misdemeanor level, or for a violation of s. 827.06(1), F.S., in which the support owed is equal to or greater than $5000 and remains unpaid for a period of more than 1 year, the crime is a felony of the 3rd degree.

- Provides for mandatory restitution in an amount equal to the total unpaid support obligation that exists at the time of sentencing. This provision mirrors federal law.

- Provides that evidence that the defendant willfully failed to make sufficient good faith efforts to legally acquire the resources to pay court ordered support may be sufficient to prove that he or she had the ability to provide support but willfully failed to do so.

- Provides that the element of knowledge may be proven by evidence that a support order has been entered by a court or tribunal.

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:	Staff Director:
Carol Preston	Lynne Overton

AS REVISED BY THE COMMITTEE ON CRIME PREVENTION, CORRECTIONS & SAFETY:

Prepared by:	Staff Director:
Lynn Dodson	David De La Paz