

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Criminal Justice Committee

BILL: SB 316

SPONSOR: Senator Fasano

SUBJECT: Sexual Conduct by Minors

DATE: March 10, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable</u>
2.	_____	_____	<u>JA</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Senate Bill 316 changes the ranking of several offenses within the offense severity ranking chart of the Criminal Punishment Code. The bill increases the ranking of the following offenses: possession of child pornography; using a computer to transmit child pornography; using a computer to transmit material harmful to minors; and using a computer to facilitate sexual conduct with a minor. The result of these changes is that an offender convicted of any of these offenses is more likely (than under current law) to receive a prison sentence.

This bill substantially amends section 921.0022, Florida Statutes.

II. Present Situation:

The Criminal Punishment Code

Under the Criminal Punishment Code¹, Florida's sentencing code for felony offenses, except capital offenses, committed on or after October 1, 1998, there are 10 ranking levels. All felony offenses, excluding capital offenses, are either specifically ranked in a ranking level of a ranking chart² or, if not specifically ranked in the chart, are ranked by a "default" provision³ based on the felony degree of the offense. Sentencing points accrue based on the level ranking of a felony offense. The higher the level ranking of the offense, the greater the number of sentencing points for the offense. These points, along with points accrued for other factors, are used in a mathematical formula that determines a lowest permissible sentence.⁴ This formula not only

¹ ss. 921.002 – 921.0027, F.S.

² s. 921.0022, F.S.

³ s. 921.0023, F.S.

⁴ s. 921.0024, F.S.

determines if the lowest permissible sentence scored will be a prison sentence or may be a non-prison sanction, but also determines the length of a lowest permissible sentence of imprisonment.

If the lowest permissible sentence scored is a prison sentence⁵, the sentencing court must impose at least the lowest permissible sentence, unless there are mitigating grounds (most of which are specified in statute⁶) for imposing a lesser sentence. However, the court is free to impose a greater sentence within a range⁷ consisting of the lowest permissible sentence scored up to and including the maximum penalty imposed for the felony degree of the offense before the court for sentencing.

If the lowest permissible sentence scored is a non-prison sanction, the sentencing court is free to impose a non-prison sanction for the offense before the court for sentencing. However, the court may impose a prison sentence up to and including the maximum penalty for the offense before the court for sentencing.⁸

Sexual performance by a child

Section 827.071(5), F.S., provides that it is unlawful for any person to knowingly possess a photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, he or she knows to include any sexual conduct⁹ by a child. The offense is a third degree felony. The possession of each article depicting sexual conduct by a child is a separate criminal offense. This offense is not currently ranked in the offense severity ranking chart of the Criminal Punishment Code. Because it is a third degree felony, it defaults to a level 1 ranking.

Transmission of pornography by electronic device or equipment

Section 847.0137, F.S., provides penalties for several offenses related to the transmission of child pornography. Subsection (2) provides that any person in this state who knew or should have known that he or she was transmitting¹⁰ child pornography to another person commits a third degree felony. Subsection (3) provides the same penalties for a person who commits the

⁵ Any sentence to state prison must exceed one year. s. 921.0024(2), F.S.

⁶ s. 921.0026, F.S.

⁷ A sentence may be appealed on the basis that it departs from the Code only if the sentence is below the lowest permissible sentence (i.e., a mitigated sentence) or it is one of the grounds for an appeal by a defendant that are specified in s. 924.06(1), F.S., such as an appeal from an illegal sentence or a sentence that exceeds the maximum penalty in s. 775.082, F.S., for the offense, unless otherwise provided by law. s. 921.002(1)(h), F.S.

⁸ In a very limited number of cases, the lowest permissible sentence scored actually exceeds the maximum penalty provided in s. 775.082, F.S., for the felony degree of the offense before the court for sentencing. This typically happens when the offender has an extensive number of prior serious felonies, which score sentencing points, and/or the offense resulted in a death for which sentencing points accrue. Florida law addresses these cases by making the lowest permissible sentence scored both the minimum penalty (absent mitigation) and the maximum penalty. s. 921.0024(2), F.S.

⁹ Section 827.071(1)(g), F.S., defines the term "sexual conduct" to mean "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. A mother's breastfeeding of her baby does not under any circumstance constitute 'sexual conduct.'"

¹⁰ The term "transmit" is defined as the "act of sending and causing to be delivered any image, information, or data from one or more persons or places to one or more other persons or places over or through any medium, including the Internet, by use of any electronic equipment or device." s. 847.0137(1)(b), F.S.

offense and is in a jurisdiction other than this state. These offenses are not currently in the offense severity ranking chart and therefore default to a level 1 ranking.

Transmission of material harmful to minors to a minor by electronic device or equipment

Section 847.0138(2), F.S., provides that any person in this state who knew or believed that he or she was transmitting an image, information, or data that is harmful to minors¹¹ to a specific individual known by the defendant to be a minor, commits a third degree felony. Subsection (3) of that section provides the same penalties for a person who commits the offense and is in a jurisdiction other than this state. These offenses are not currently ranked in the offense severity ranking chart and therefore default to a level 1 ranking.

Facilitating sexual conduct of or with a minor

Section 847.0135(2), F.S., provides that a person who transmits by computer any statement of any minor's name or other identifying information for purposes of facilitating or soliciting sexual conduct of or with any minor or the visual depiction of such conduct commits a third degree felony. This offense is not currently ranked in the ranking chart and therefore defaults to a level 1 ranking.

Section 847.0135, F.S., provides that a person who knowingly uses a computer on-line service to solicit a child to commit any illegal act described in the sexual battery, lewd or lascivious, or child abuse statutes commits a third degree felony. This offense is currently ranked in level 6 of the ranking chart.

III. Effect of Proposed Changes:

Senate Bill 316 amends s. 921.0022, F.S., the offense severity level ranking chart of the Criminal Punishment Code, to do the following:

- *Increase from a level 1 ranking to a level 5 ranking the offense of sexual performance by a child.* While this increase will not result in a mandatory prison sentence, it increases the probability of one being imposed. For a first-time offender, the court may be more inclined to impose a prison sentence for a level 5 offense than a level 1 offense. If the offender has a criminal history, sentencing points accrued for the primary offense, prior offenses, and other factors (such as additional offenses) may result in a lowest permissible sentence of state prison.
- *Increase from a level 1 ranking to a level 5 ranking offenses involving the electronic transmission of pornography.* (See previous comments regarding ranking of sexual performance by a child.)

¹¹ The term "harmful to minors" is defined as any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it: (a) Predominantly appeals to the prurient, shameful, or morbid interest of minors; (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and (c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors. s. 847.001(6), F.S.

- *Increase from a level 1 ranking to a level 5 ranking offenses involving the electronic transmission of material harmful to minors. (See previous comments regarding ranking of sexual performance by a child.)*
- *Increase from a level 1 ranking to a level 5 ranking the offense of transmitting by computer any statement of any minor's name or other identifying information for purposes of facilitating or soliciting sexual conduct of or with any minor or the visual depiction of such conduct. (See previous comments regarding ranking of sexual performance by a child.)*
- *Increase from a level 6 ranking to a level 7 the offense of knowingly using a computer on-line service to solicit a child to commit any illegal act described in the sexual battery, lewd or lascivious, or child abuse statutes. A level 7 offense accrues enough sentencing points to score a lowest permissible sentence of state prison, even if the offender is a first-time offender. Therefore, absent mitigation, a first-time offender scores a lowest permissible sentence of 21 months in state prison.*

The bill takes effect July 1, 2005.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference estimates that the bill has an indeterminate prison bed impact with minimal expected impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
