

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility: This bill increases the severity of the sanction for potentially injurious behavior.

Provide limited government: The bill does not create any new criminal offenses but may result in increased penalties for offenders who commit certain criminal offenses.

B. EFFECT OF PROPOSED CHANGES:

Criminal Punishment Code: The Criminal Punishment Code applies to sentencing for felony offenses committed on or after October 1, 1998. Criminal offenses are ranked in the "offense severity ranking chart"¹ from level one (least severe) to level ten (most severe) and are assigned points based on the severity of the offense as determined by the legislature. If an offense is not listed in the ranking chart, it defaults to a ranking based on the degree of the felony. A third degree felony defaults to level one, a second degree felony faults to level four and a first degree felony defaults to level 7.² A defendant's sentence is calculated based on points assigned for factors including: the offense for which the defendant is being sentenced; the injury to the victim; additional offenses that the defendant committed at the time of the primary offense; the defendant's prior record and other aggravating factors. The points are added in order to determine the "lowest permissible sentence" for the offense. This is the minimum sentence that a judge may impose. The permissible sentence for an offense ranges from the calculated lowest permissible sentence to the statutory maximum for the primary offense. The statutory maximum sentence for a first degree felony is thirty years, for a second degree felony is fifteen years and for a third degree felony is five years. s. 775.082, F.S.

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 conduct³ 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 one ranking. HB 411 ranks the offense in level 5 of the ranking chart.

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 transmitting⁴ child pornography to another person commits a third degree felony. Subsection (3) provides the same penalties for a person who commits the offense and is in a jurisdiction other than this state. These offenses are currently not ranked in the offense severity ranking chart and therefore default to a level one ranking. HB 411 ranks the offenses in level 5 of the ranking chart.

¹ s. 921.0022, F.S.

² s. 921.0023, F.S.

³ s. 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.'"

⁴ 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.

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 minors 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. 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.

These offenses are currently not ranked in the offense severity ranking chart and therefore default to a level one ranking. HB 411 ranks the offenses in level 5 of the ranking chart.

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 currently unranked in the ranking chart and therefore defaults to a level 1 ranking. HB 411 ranks the offense in level 6 of the ranking chart. Subsection (3) of 847.0135 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 & lascivious, or child abuse statutes commits a third degree felony. This offense is currently ranked in level 6 of the ranking chart. HB 411 ranks the offense within level 7 of the ranking chart.

C. SECTION DIRECTORY:

Section 1. Amends s. 921.0022, F.S. to modify ranking of several criminal offenses within offense severity ranking chart of the Criminal Punishment Code.

Section 2. Provides effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

On February 22, 2005, the Criminal Justice Impact Conference decided that the prison bed impact of this bill on the Department of Corrections is indeterminate with minimal expected impact.

The bill increases the ranking of several offenses in the offense severity ranking chart of the Criminal Punishment Code. This may result in offenders being sent to prison where they would

have otherwise received a sentence such as probation or county jail. The offense contained in s. 847.0135(3) is removed from level 6 of the offense severity ranking chart and ranked in level 7. This will have the effect of increasing the lowest permissible sentence for the offense to 21 months in prison.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES