

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1169

Criminal Conduct

SPONSOR(S): Harrell

TIED BILLS:

IDEN./SIM. BILLS: SB 2736

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Homeland Security & Public Safety</u>	<u>8 Y, 0 N</u>	<u>Cunningham</u>	<u>Kramer</u>
2) <u>Safety & Security Council</u>	<u>14 Y, 0 N, As CS</u>	<u>Cunningham</u>	<u>Havlicak</u>
3) <u>Policy & Budget Council</u>	<u></u>	<u></u>	<u></u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

The 1st and 4th District Courts of Appeal have recently issued conflicting opinions as to whether the criminal child abuse statute applies to speech (i.e. whether mere words could ever amount to child abuse). The 4th DCA ruled that the statute would be unconstitutionally overbroad if it did apply to speech, and thus held that speech was not encompassed by the statute. The 1st DCA ruled that the statute does apply to speech, and that because the statute can be narrowly construed to only apply to unprotected speech, the statute is not overbroad.

This bill attempts to address the above issue by providing an exception to the criminal child abuse statute. Specifically, the bill states that an act does not violate the child abuse statute if it is protected by the First Amendment. In relation to the 1st and 4th DCA opinions, this language may be interpreted to mean that the child abuse statute does apply to speech so long as it is not constitutionally protected.

This bill also amends the definition of "crime" contained in Chapter 960, F.S. (the victim assistance chapter) to include felonies or misdemeanors committed by an adult or a juvenile which result in psychiatric or psychological injury to a person less than 18 years of age who was not physically injured by the criminal act.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard Individual Liberty – This bill amends the criminal child abuse statute in a manner that may be interpreted to mean that the child abuse statute does apply to speech so long as it is not constitutionally protected speech.

Provide Limited Government – This bill redefines the term “crime,” for victim assistance purposes, to include felonies or misdemeanors committed by an adult or a juvenile which result in psychiatric or psychological injury to a person less than 18 years of age who was not physically injured by the criminal act.

B. EFFECT OF PROPOSED CHANGES:

Section 827.03, F.S. – Criminal Child Abuse

Florida’s criminal child abuse statute¹ currently provides the following:

(1) “Child abuse” means:

- (a) Intentional infliction of physical or mental injury upon a child;
- (b) An intentional act that could reasonably be expected to result in physical or mental injury to a child; or
- (c) Active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or mental injury to a child.

A person who knowingly or willfully abuses a child without causing great bodily harm, permanent disability, or permanent disfigurement to the child commits a third degree felony.²

(2) “Aggravated child abuse” occurs when a person:

- (a) Commits aggravated battery on a child;
- (b) Willfully tortures, maliciously punishes, or willfully and unlawfully cages a child; or
- (c) Knowingly and willfully abuses a child and in doing so causes great bodily harm, permanent disability, or permanent disfigurement to a child.

A person who commits aggravated child abuse commits a first degree felony³.

Mental Injury

In recent years, the criminal child abuse statute has been challenged as being unconstitutionally vague based on the fact that the statute does not define the term “mental injury.”⁴ In 2002, the Florida Supreme Court held that the statute was not unconstitutionally vague because “mental injury” was defined in Chapter 39, F.S., a related child-protection statute.⁵ However, the court stated in their opinion that “While it may obviously be preferable for the Legislature to place the appropriate definition

¹ s. 827.03, F.S.

² A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. ss. 775.082 and 775.083, F.S.

³ A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. ss. 775.082 and 775.083, F.S.

⁴ See *State v. DuFresne*, 782 So.2d 888 (Fla. 4th DCA 2001).

⁵ See *DuFresne v. State*, 826 So.2d 272 (Fla. 2002).

in the same statute, citizens should be on notice that controlling definitions may be contained in other related statutes.”⁶

Effect of the Bill

Section 39.01(41), F.S., currently defines “mental injury” as “an injury to the intellectual or psychological capacity of a child as evidenced by a discernible and substantial impairment in the ability to function within the normal range of performance and behavior.” HB 1169 adds this definition of “mental injury” to the criminal child abuse statute.

Whether Speech Can Amount to Child Abuse

The criminal child abuse statute has also been challenged as being unconstitutionally overbroad. The Florida Supreme Court explained the overbreadth doctrine in *Wyche v. State*⁷:

When legislation is drafted so that it may be applied to conduct that is protected by the First Amendment, it is said to be unconstitutionally overbroad. See *Southeastern Fisheries Ass'n, Inc. v. Department of Natural Resources*, 453 So.2d 1351, 1353 (Fla.1984). This overbreadth doctrine permits an individual whose own speech or conduct may be prohibited to challenge an enactment facially “because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.” *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503, (1985).

In *State v. DuFresne*⁸, the state alleged that a teacher who screamed at an autistic student caused the student “mental injury” and charged the teacher with criminal child abuse. The defendant argued that the statute was overbroad because it applied to speech that is protected by the First Amendment. The 4th District Court of Appeal (DCA) held that in order for the criminal child abuse statute to withstand an overbreadth challenge, it could not apply to speech. The 4th DCA reiterated this decision in 2006 in *Munao v. State*⁹. In *Munao*, the court held that the defendant, who repeatedly told his six year-old child to get a knife and stab his mother, could not be charged with child abuse because, under *DuFresne*, the child abuse statute did not apply to speech.

Shortly after the *Munao* decision was issued, the 1st DCA decided *State v. Coleman*¹⁰ disagreeing with the 4th DCA. In *Coleman*, the state charged the defendant with child abuse arguing that he caused mental injury by driving by young girls and asking them vulgar and offensive questions. In disagreeing with the 4th DCA, the court stated:

We do not agree with *DuFresne* and *Munao*, however, that, to withstand an overbreadth challenge to section 827.03(1), we must construe the statute to avoid its application to *all* speech. If section 827.03(1), can be construed to be applicable *only* to specifically described unprotected speech, it can withstand an overbreadth challenge.¹¹

The court then explained that, “If in applying section 827.03(1) to speech, courts define the proscribed speech by construing the statute *in pari materia* with the definitions in chapter 39, constitutional speech will not be implicated.”¹² Recognizing that their opinion was in direct conflict with the *DuFresne* and *Munao* opinions, the 1st DCA certified the conflict to the Florida Supreme Court. To date, the Florida Supreme Court has not issued an opinion resolving this conflict.

⁶ *Id.* at 279.

⁷ 619 So.2d 231, 235 (Fla.1993).

⁸ 782 So.2d 888 (Fla. 4th DCA 2001).

⁹ 939 So.2d 125 (Fla. 4th DCA 2006).

¹⁰ 937 So.2d 1226 (Fla. 1st DCA 2006).

¹¹ *Id.* at 1230.

¹² *Id.*

Effect of the Bill

HB 1169 provides an exception to the criminal child abuse statute. Specifically, the bill states that an act does not violate the child abuse statute if it is protected by the First Amendment. In relation to the cases discussed above, this language may be interpreted to mean that the child abuse statute does apply to speech so long as it is not constitutionally protected speech.

Victim Assistance

Florida law authorizes the Florida Attorney General's Division of Victim Services to serve as an advocate for crime victims and victims' rights and to administer a compensation program to ensure financial assistance for innocent victims of crime.¹³ Currently, injured crime victims may be eligible for financial assistance for medical care, lost income, funeral expenses and other out-of-pocket expenses directly related to the injury.¹⁴ Payment is made from the Crime Compensation Trust Fund.¹⁵

While the Crime Compensation Trust Fund is primarily used to compensate victims who have suffered *physical* injuries, certain victims who suffer *mental* injuries are also compensated. Children under 16 who are present at the scene of a crime, saw or heard the crime, and suffered a psychiatric or psychological injury because of the crime but who are not physically injured are considered "victims" for compensation purposes, as are people who suffer a psychiatric or psychological injury as a direct result of a forcible felony¹⁶ being committed upon them.¹⁷ The Department of Legal Affairs may adopt rules establishing compensation award limits, however, compensation awards may not exceed \$10,000 for treatment, or \$10,000 for continuing or periodic mental health care of a minor victim whose normal emotional development is adversely affected by being the victim of a crime.¹⁸

Section 960.03(3), F.S., defines the term "crime" for victim assistance purposes. Subsection (a) of that definition provides that "crime" means "a felony or misdemeanor offense committed by either an adult or a juvenile which results in physical injury or death. The term also includes any such criminal act which is committed within this state but which falls exclusively within federal jurisdiction."

HB 1169 amends the definition of the term "crime" to include felonies or misdemeanors committed by an adult or a juvenile which result in psychiatric or psychological injury to a person less than 18 years of age who was not physically injured by the criminal act.

C. SECTION DIRECTORY:

Section 1. Amends s. 827.03, F.S., relating to abuse, aggravated abuse, and neglect of a child; penalties.

Section 2. Amends s. 775.084, F.S., relating to violent career criminals; habitual felony offenders and habitual violent felony offenders; three-time violent felony offenders; definitions; procedure; enhanced penalties or mandatory minimum prison terms.

Section 3. Amends s. 775.0877, F.S., relating to criminal transmission of HIV; procedures; penalties.

¹³ <http://myfloridalegal.com/victims>

¹⁴ *Id.*

¹⁵ s. 960.21, F.S.

¹⁶ The term "forcible felony" means "treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual." s. 776.08, F.S.

¹⁷ s. 960.03, F.S.

¹⁸ s. 960.13, F.S.

Section 4. Amends s. 782.07, F.S., relating to manslaughter; aggravated manslaughter of an elderly person or disabled adult; aggravated manslaughter of a child; aggravated manslaughter of an officer, a firefighter, an emergency medical technician, or a paramedic.

Section 5. Amends s. 921.0022, F.S., relating to the Criminal Punishment Code; offense severity ranking chart.

Section 6. Amends s. 943.325, F.S., relating to blood or other biological specimen testing for DNA analysis.

Section 7. Amends s. 948.062, F.S., relating to reviewing and reporting serious offenses committed by offenders placed on probation or community control.

Section 8. Amends s. 960.03, F.S., relating to definitions; ss. 960.01-960.28.

Section 9. This bill takes effect July 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Officer of Attorney General provided the following fiscal analysis:

The fiscal impact that House Bill 1169 as amended will have on the Crime Victims Compensation Trust Fund is indeterminate at this time. However, taking into account the bill as amended, the Department of Legal Affairs believes that this bill will have a minimal fiscal impact on the Crime Victims Compensation Trust Fund.

The Crime Victims Compensation Trust Fund's statutory benefits currently provide that for a minor child who is physically injured, or a minor child who is the survivor of a deceased victim may receive outpatient mental health care up to \$10,000. By Rule 2A-2.002 Claims, Florida Administrative Code, the fund can pay awards for mental health care including both inpatient and outpatient, when the treatment is directly related to the crime and when such services are rendered by a person licensed to provide mental health counseling services pursuant to Chapter 458, 490 or 491, F.S.

Inpatient mental health care for adults and minors is limited to acute, crisis stabilization up to a maximum of 7 days, not to exceed \$10,000.

When the victim is 18 years of age or older, payment for outpatient mental health care is limited to \$2,500.

Minors under age 16 who saw or heard the crime incident, and who suffered a psychological or psychiatric injury as a result of the crime, but were not physically injured, may receive mental health care up to \$2,500, if the law enforcement report reflects that the minor was present at the crime scene.

Persons who suffer a psychiatric or psychological injury as a result of a forcible felony committed against their person may receive mental health care up to \$2,500, if the law enforcement report reflects that person as a victim of the crime. This is the only benefit available to victims who do not suffer a physical injury or death.

A surviving minor child of a deceased victim, or a minor victim who was physically injured, may receive outpatient mental health care up to \$10,000. When the child or victim reaches the age of 18, payment for outpatient services will be limited to an additional \$2,500 or 3 years, whichever comes first, provided total benefits do not exceed \$10,000 per claim.

A surviving spouse, parent, adult child or sibling of a deceased victim may receive mental health care up to \$2,500, provided total benefits do not exceed \$10,000 per claim.

See "Fiscal Comments."

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill amends the definition of the term "crime" to include felonies or misdemeanors committed by an adult or a juvenile which result in psychiatric or psychological injury to a person less than 18 years of age who was not physically injured by the criminal act. As noted above, children under 16 who are present at the scene of a crime, saw or heard the crime, and suffered a psychiatric or psychological injury because of the crime but who are not physically injured, and children who suffer a psychiatric or psychological injury as a direct result of a forcible felony being committed upon them are currently eligible to receive compensation awards. Such award may not exceed \$10,000.

To the extent that this bill increases the number children eligible to receive a compensation award for psychiatric or psychological injury, there could be a fiscal impact. However, many of the children eligible under the "psychiatric or psychological injury" criterion contained in this bill may be eligible under existing law. To the extent that children who suffer "psychiatric or psychological injury" would be eligible under current law, the additional impact to the Crimes Compensation Trust Fund resulting from passage of this bill would be mitigated.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This 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:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

The bill sponsor submitted the following statement:

This bill will close a loophole in our child abuse statutes that has caused a conflict in our court system and has allowed parents or caregivers to walk away unpunished after abusing their children. The 4th DCA asked the Legislature to resolve the overbreadth and ambiguity issues in the statutes and that is exactly what this bill does. This legislation is important because it will hold those who abuse their children mentally to account, without infringing on the free speech rights of parents or caregivers.

The chair of the Safety & Security Council chose not to submit any further comments regarding the council substitute.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On April 11, 2007, the Safety & Security Council adopted one amendment and reported the bill favorably as a council substitute. The amendment revises the definition of the term "crime" for victims compensation purposes to include felonies or misdemeanors committed by an adult or a juvenile which result in psychiatric or psychological injury to a person less than 18 years of age who was not physically injured by the criminal act.

This analysis is drafted to the council substitute.