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:	SPB 7048
INTRODUCER:	For consideration by Criminal Justice Committee
SUBJECT:	Crimes/Use of Minor to Facilitate
DATE:	February 7, 2007 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon		**Pre-meeting**
2.				
3.				
4.				
5.				
6.				

I. Summary:

The bill, which was recommended by the Violent Crime and Drug Control Council, provides for the reclassification of the felony or misdemeanor degree of any criminal offense to the next higher degree if, during the commission or attempted commission of the offense, the offender was an adult and the offender:

- Used or hired a minor as an agent or employee of the offender or others to facilitate the commission or attempted commission of the offense;
- Conspired with a minor to commit the offense;
- Solicited or otherwise caused a minor to commit or attempt to commit the offense;
- Used a minor to aid or abet in the commission or attempt to commit the offense; or
- Used a minor to assist or attempt to assist in avoiding detection or apprehension for the offense.

The bill also provides for enhanced penalties for the reclassified offense.

This bill creates section 775.0849 of the Florida Statutes.[1]

[1] The section number for this newly created section is already an existing section of the Florida Statutes. See "Technical Deficiencies" section of this analysis.

II. Present Situation:

Section 777.04(1), F.S., provides:

(1) A person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt, ranked for purposes of sentencing as provided in subsection (4). *Criminal attempt includes the act of an adult who, with intent to commit an offense prohibited by law, allures, seduces, coaxes, or induces a child under the age of 12 to engage in an offense prohibited by law.* (Italics provided.)

Subsection (4) of the statute provides that most felony criminal attempts are ranked for purposes of sentencing under ch. 921, F.S., one level below the ranking under s. 921.0022, F.S., or s. 921.0023, F.S., of the offense attempted. (If the criminal attempt is of an offense ranked in Level 1 or Level 2, such offense is a first degree misdemeanor.)

In general, the misdemeanor or felony degree of criminal attempt is as follows:

- First degree felony, if the offense attempted is a capital felony;
- Second degree felony, if the offense attempted is a life felony or a first degree felony;
- Third degree felony if the offense attempted is a second degree felony, third degree felony burglary, or a third degree felony ranked in Levels 3-10;
- First degree misdemeanor, if the offense attempted is a third degree felony (not previously described); and
- Second degree misdemeanor, if the offense attempted is a first or second degree misdemeanor.

Section 827.04, F.S., provides, in part, that it is a first degree misdemeanor to induce or endeavor to induce, by act, threat, command, or persuasion, a child to commit or perform any act, follow any course of conduct, or live in a manner that causes or tends to cause such child to become or to remain a delinquent child.

Section 847.0135(3), F.S., provides that it is a third degree felony to knowingly utilize a computer on-line service, Internet service, or local bulletin board service to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child or another person believed by the person to be a child, to commit any illegal act described in ch. 794, F.S., relating to sexual battery; ch. 800, F.S., relating to lewdness and indecent exposure; or ch. 827, F.S., relating to child abuse.

Section 893.13(4), F.S., provides that, except as authorized by ch. 893, F.S., it is unlawful for any person 18 years of age or older to deliver any controlled substance to a person under the age of 18 years, or to use or hire a person under the age of 18 years as an agent or employee in the sale or delivery of such a substance, or to use such person to assist in avoiding detection or apprehension for a violation of this chapter. This offense is a first degree felony or second degree felony depending on the controlled substance.

III. Effect of Proposed Changes:

The bill, which was recommended by the Violent Crime and Drug Control Council, creates s. 775.0849, F.S., to provide for reclassification of the felony or misdemeanor degree of any criminal offense to the next higher degree if, during the commission or attempted commission of the offense, the offender was 18 years of age or older and if the offender:

- Used or hired a person younger than 18 years of age as an agent or employee of the offender or others to facilitate the commission or attempted commission of the offense;
- Conspired with a person younger than 18 years of age to commit the offense;
- Solicited or otherwise caused a person younger than 18 years of age to commit or attempt to commit the offense;
- Used a person younger than 18 years of age to aid or abet in the commission or attempt to commit the offense; or
- Used a person younger than 18 years of age to assist or attempt to assist in avoiding detection or apprehension for the offense.

For purposes of sentencing under ch. 921, F.S., and determining incentive gain-time eligibility under ch. 944, F.S., if a first degree misdemeanor is reclassified to a third degree felony, this felony is ranked in level 2 of the offense severity ranking chart. For purposes of sentencing under ch. 921, F.S., a felony offense that is reclassified is ranked one level above the ranking under s. 921.0012, F.S., s. 921.0013, F.S., s. 921.0022, F.S., or s. 921.0023, F.S., of the offense committed.

Notwithstanding any other provision of law, the court may sentence the offender as follows:

- In the case of an offense reclassified to a life felony or a first degree felony, for life.
- In the case of an offense to a second degree felony, for a term of years not exceeding 30.
- In the case of an offense reclassified to a third degree felony, for a term of years not exceeding 10.

The provisions of this bill appear to conflict with s. 777.04(1), F.S., to the extent that both may apply when the minor is under 12 years of age. It is unclear how a court would construe the operation of the statutes in this case.[2] "Where statutes in pari materia are fairly susceptible of two constructions, one of which will give effect to both, and the other of which will defeat one or both, the former construction is preferred, it being the function of the courts under the maxim 'ut res magis valeat quam pereat' to find means within the terms of the statutes by which to sustain rather than to strike down or defeat the legislative purpose…. Where possible, that construction should be adopted which harmonizes and reconciles statutory provisions, and courts should endeavor to find a reasonable field of operation that will preserve the force and effect of each…. As a general rule, the last expression of legislative will is the law, and in the absence of irreconcilable provisions or manifest overriding considerations the last in point of time or order

[2] For example, would a court reviewing the penalty statute created by the bill determine that its provisions effectively nullify the language in s. 777.04(1), F.S., relevant to use of minors under 12 years of age, or would the court determine that the field of operation of the penalty statute is limited to offenses involving use of a minor 12 or older, so as to allow the language in s. 777.04(1), F.S., to continue to have force and effect?

of arrangement prevails." *State ex rel. Ashby v. Haddock*, 140 So.2d 631, 635 (Fla. 1st DCA 1962) (citations omitted).

The bill takes effect on July 1, 2007.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Fifth Amendment
The bill reclassifies offenses based on a finding of the use of a minor factor and additionally imposes penalties greater than would be imposed absent the enhancement. While a defendant may not be subject to multiple punishments for the same offense in violation of the Fifth Amendment to the U.S. Constitution,[3] case law may suggest that the reclassification and penalty provisions of the bill are not impermissible multiple punishments. For example, in *State v. Whitehead*, 472 So.2d 730, 732 (Fla.1985), the Florida Supreme Court determined that a reclassification and enhanced penalty did not constitute impermissible multiple punishments.

> [T]he defendant was convicted of second degree murder with a firearm. Section 775.087(1) provided that when a person commits a felony with a firearm the sentence is to be reclassified one category higher. Section 775.087(2) provided that people who commit specified crimes with a firearm are required to serve three years before becoming eligible for parole. In holding that applying both of these statutes was not an improper double enhancement, the court explained:
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> Determination of punishment for crimes is a legislative matter. Because the legislature has provided both these subsections, both are to be followed. Absent an indication from the legislature that these subsections are an either/or proposition, both subsections will be followed.

Spann v. State, 772 So.2d 38, 39 (Fla. 4th DCA 2000), summarizing the holding *Whitehead*.

[3] Protection against multiple punishments for the same offense emanates from the Double Jeopardy Clauses of the U.S. Constitution and the Florida Constitution. *See Hunsicker v. State*, 881 So.2d 1166, 1169 (Fla. 5th DCA 2004), *review denied*, 894 So.2d 970 (Fla.2005).

Sixth Amendment

Because the bill authorizes a penalty above the maximum statutory penalties provided in s. 775.082, F.S., it appears that a jury would have to determine the use of a minor factor beyond a reasonable doubt to avoid conflict with the U.S. Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the Court held that, under the Sixth Amendment of the U.S. Constitution, any fact (other than a prior conviction) that exposes a defendant to a sentence in excess of the relevant statutory maximum must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of evidence. In *Blakely v. Washington*, 542 U.S. 296, 306 (2004), the Court clarified that the statutory maximum is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant"* (emphasis in original). *See Monnar v. State*, 939 So.2d 251, 253 (Fla.1st DCA 2006) ("under *Apprendi* and *Blakely*, appellant is entitled to a jury determination of severe victim injury when the inclusion of the points increases his sentence beyond the guidelines maximum").[4]

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, which provides the final, official estimate of the prison bed impact, if any, of legislation, had not met to consider the bill at the time this analysis was completed. A preliminary impact estimate by the Legislature's Office of Economic and Demographic Research (EDR) is that EDR cannot determine if the bill has a prison bed impact because EDR does not have a way to determine how often minors are used in the commission or attempted commission of a crime.

VI. Technical Deficiencies:

There are three technical deficiencies in the bill that need to be corrected. First, the new section of the Florida Statutes created by the bill contains the number of an existing statute (s. 775.0849, F.S.). Second, the bill contains language regarding incentive gain-time eligibility that the

[4] Recently, Justice Pariente stated: "Interrogatories have been used successfully for many years under previous versions of section 775.087, Florida Statutes, which now includes the '10-20-life' mandatory penalties. We have noted that a 'specific question or special verdict form is the clearest way by which the jury can make the finding necessary to support [a firearm] enhancement.' *State v. Hargrove*, 694 So.2d 729, 731 (Fla.1997). Further, these interrogatories setting forth specific jury findings have increased importance under the Sixth Amendment to support a sentence that exceeds the maximum sentence authorized by the jury verdict on the substantive offense alone." *Sanders v. State*, 944 So.2d 203, 207-208 (concurring opinion of Justice Pariente) (footnote omitted), citing *Apprendi*.

Department of Corrections (DOC) states is inapplicable to sentencing under the Criminal Punishment Code.[5] Third, the bill contains references to statutes pertaining to the former sentencing guidelines. This language is inapplicable because the bill is prospective; therefore, it applies to offenses subject to the current sentencing system: the Criminal Punishment Code.

VII. Related Issues:

None.

[5] The DOC states: "Effective October 1, 1995, inmates may earn up to a max of 10 days per month incentive gain-time. Since incentive gain-time has not been tied to sentencing guideline levels since September 30, 1995, it is recommended that the reference to incentive gain-time eligibility as noted above be deleted from the proposed bill."

VIII. Summary of Amendments:

None.