

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 103 Criminal Conduct  
**SPONSOR(S):** Safety & Security Council; Harrell  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1280

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Courts</u>	<u>6 Y, 0 N</u>	<u>Webb</u>	<u>Bond</u>
2) <u>Safety &amp; Security Council</u>	<u>15 Y, 0 N, As CS</u>	<u>Webb/Davis</u>	<u>Havlicak</u>
3) <u>Policy &amp; Budget Council</u>	<u></u>	<u></u>	<u></u>
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### SUMMARY ANALYSIS

The 1<sup>st</sup> and 4<sup>th</sup> District Courts of Appeal (DCA) issued conflicting opinions as to whether the criminal child abuse statute applies to speech. The 4<sup>th</sup> DCA ruled that the statute is unconstitutionally overbroad as applied to child abuse that is only speech. The 1<sup>st</sup> DCA, however, ruled that the statute is not overbroad because it can be narrowly construed to only apply to unprotected speech. This bill addresses the conflict by providing an affirmative defense to the criminal child abuse statute when the conduct giving rise to the offense is based solely on speech protected by the First Amendment.

This bill adds a definition of "mental injury" to the criminal child abuse statute. This bill also amends the definition of "crime" applicable to provisions on victim assistance 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 bill does not appear to have a fiscal impact on state or local government expenditures. It appears to have an unknown minimal negative fiscal impact on the Crime Compensation Trust Fund.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Promote Personal Responsibility -- This bill redefines criminal child abuse.

Provide Limited Government -- This bill expands the number of persons and types of injuries for which compensation under the Crimes Compensation Trust Fund are paid.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Whether Speech Can Amount to Child Abuse**

Florida's criminal child abuse statute, s. 827.03, F.S., provides that child abuse is an intentional physical or mental injury to a child, an intentional act that could be expected to result in a physical or mental injury to a child, or encouragement of any person to act that results or could be expected to result in physical or mental injury to a child. It further provides that it is a third-degree felony for a person to knowingly or willfully abuse a child without causing great bodily harm, disability, or disfigurement. Aggravated child abuse, which is a first degree felony, occurs when a person commits aggravated battery on a child, willfully tortures, punishes or cages a child, or knowingly and willfully abuses a child and causes great bodily harm, permanent disability or permanent disfigurement to the child.

In *State v. DuFresne*, 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.<sup>1</sup> The defendant asserted that the statute is overbroad because it applies to speech that is protected by the First Amendment.<sup>2</sup> The 4<sup>th</sup> 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 overbreadth doctrine relates to the First Amendment freedom of speech and "prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."<sup>3</sup> A statute can be considered overbroad if it is written so broadly that it deters free expression.<sup>4</sup>

The 4<sup>th</sup> DCA reiterated this decision in 2006 in *Munao v. State*. 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 does not apply to speech.<sup>5</sup>

Shortly after the *Munao* decision was issued, the 1<sup>st</sup> DCA decided *State v. Coleman*. In *Coleman*, the state charged the defendant with child abuse and prosecuted him for causing mental injury when he drove by young girls and asked them vulgar and offensive questions.<sup>6</sup> In disagreeing with the 4<sup>th</sup> DCA opinion, the 1<sup>st</sup> DCA 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

<sup>1</sup> 782 So.2d 888, 889 (Fla. 4<sup>th</sup> DCA 2001).

<sup>2</sup> The First Amendment of the United States Constitution grants the freedoms of speech, religion, press, assembly, and petition. The First Amendment applies to the states through the Fourteenth Amendment, which prohibits states from depriving any person of life, liberty, or property without due process.

<sup>3</sup> *State v. Coleman*, 937 So.2d 1226, 1229 (Fla. 1<sup>st</sup> DCA 2006)

<sup>4</sup> Bryan A. Garner, *Black's Law Dictionary*, Second Pocket Edition 507 (West Publishing Co. 2001).

<sup>5</sup> 939 So.2d 125, 128 (Fla. 4<sup>th</sup> DCA 2006).

<sup>6</sup> 937 So.2d 1226, 1227 (Fla. 1<sup>st</sup> DCA 2006).

withstand an overbreadth challenge...<sup>7</sup> 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.<sup>8</sup>

This bill addresses the conflict by providing an affirmative defense that where the offense is based solely on oral statements of the defendant, it is an affirmative defense to prosecution that the conduct giving rise to such offense was solely speech protected by the First Amendment to the United States Constitution. However, this affirmative defense does not apply to speech that was directed to incite or produce imminent lawless action that was likely to incite or produce such action. 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.

## **Mental Injury**

In recent years, the criminal child abuse statute has been challenged as unconstitutionally vague because it does not define the term "mental injury."<sup>9</sup> In 2002, the Florida Supreme Court held that the statute was not unconstitutionally vague because "mental injury" was defined in ch. 39, F.S., a related child-protection statute.<sup>10</sup> Section 39.01, F.S., 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." The Supreme Court opinion recommended that the criminal child abuse statute be amended to include a definition of mental injury.

This bill amends s. 827.03, F.S., to add the definition "mental injury." This bill provides that "mental injury" is multiple instances of injury caused by the same abuser to the intellect or psychological capacity of a child as seen by a discernible and substantial impairment of the child to function within a normal range of performance and behavior. This impairment must be supported by expert testimony of a person:

- Who is a licensed physician under ch. 458 or ch. 459,
- Who is board certified in psychiatry, and
- Who has devoted professional time during the past 3 years immediately preceding the date of the occurrence to the active clinical practice of, or consulting with respect to, a specialty that includes the evaluation, diagnosis, or treatment of the condition which is the subject of the offense.

## **Victims of Domestic Violence**

This bill provides an affirmative defense to prosecution when the offense is based solely on a claim of mental injury because of a caregiver's failure to make a reasonable effort to protect a child from an abuser other than the defendant. This bill provides that it is an affirmative defense if:

- The defendant was a victim of an act of domestic violence or had reasonable cause to believe that he or she was about to become a victim of an act of domestic violence, and
- The defendant has reasonable cause to believe that the action or failure to act was necessary to escape or protect himself or herself from the domestic violence or to preserve the minor or incompetent person from exposure to domestic violence.

This affirmative defense is only available if the defense has not been previously asserted with respect to the same abuser.

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<sup>7</sup> *Id.* at 1230.

<sup>8</sup> *Id.*

<sup>9</sup> See *State v. DuFresne*, 782 So.2d 888 (Fla. 4<sup>th</sup> DCA 2001).

<sup>10</sup> See *DuFresne v. State*, 826 So.2d 272, 274 (Fla. 2002).

## Victim Assistance Program

Injured crime victims may be eligible for financial assistance through the Florida Attorney General's Division of Victim Services for medical care, lost income, funeral expenses and other out-of-pocket expenses directly related to the injury.<sup>11</sup> Payment is made from the Crime Compensation Trust Fund to compensate victims who have suffered *physical* injuries and certain victims who suffer *mental* injuries.<sup>12</sup>

Section 960.03(3), F.S., defines the term "crime", which definition controls who is eligible for payment from the Division of Victim Services. 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."

This bill redefines the term "crime" for the purposes of payment from the Crime Compensation Trust Fund to include an additional form of injury to a victim or intervenor.<sup>13</sup> As a result, a felony or misdemeanor offense committed by an adult or juvenile that results in physical injury, mental injury, or death of the victim or intervenor is considered a crime for purposes of victim assistance.

## Clarification of Criminal Child Abuse Statute

This bill changes the structure of s. 827.03, F.S., creating a definition section, followed by an "offenses" section that describes the conduct proscribed by the statute and the applicable penalties. The bill adds the definition of "mental injury" to s. 827.03, F.S. The bill also makes conforming changes to various sections of the Florida Statutes.

### C. SECTION DIRECTORY:

Section 1 amends s. 827.03, F.S., relating to criminal penalties for child abuse and neglect.

Section 2 amends s. 775.084, F.S., relating to imprisonment for crime.

Section 3 amends s. 775.0877, F.S., relating to criminal transmission of HIV.

Section 4 amends s. 782.07, F.S., relating to manslaughter.

Section 5 amends s. 921.0022, F.S., relating to the Criminal Punishment Code and the 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 applicable to portions of chapter 960, F.S.

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<sup>11</sup> *Id.*

<sup>12</sup> Section 960.21, F.S.

<sup>13</sup> The Crimes Compensation Trust Fund receives offender generated federal and state dollars to provide services to crime victims. The trust fund is funded primarily by court-ordered assessments from offenders, including a mandatory court cost, a surcharge on fines, and restitution. Florida's share of federal Victims of Crime Act (VOCA) dollars during 2005-2006 totaled \$27,437,000. VOCA funds awarded to Florida consisted of \$20,439,000 for victim assistance programs throughout the state and \$6,998,000 for financial compensation to victims for losses incurred as a result of their victimization. See the Division of Victim Services and Criminal Justice Programs Annual Report, 2005-2006 at <http://myfloridalegal.com/victims>.

Section 9 provides an effective date of July 1, 2008.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

The portion of this bill amending the definition of crime applicable to the crime compensation fund appears to have an unknown minimal negative fiscal impact on the Crime Compensation Trust Fund because the bill expands the definition of crime to include *all* offenses that result only in psychiatric or psychological injury. *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 adds the term "mental injury" to the definition of "crime". Children are currently eligible to receive compensation awards if they are under 16, present at the scene of a crime, saw or heard the crime, and suffered a psychiatric or psychological injury because of the crime as long as they were not physically injured. Children under 16 are also eligible to receive compensation if they suffer a psychiatric or psychological injury as a direct result of a forcible felony being committed upon them.

To the extent that this bill increases the number of children eligible to receive a compensation award for mental injury, there could be a fiscal impact. However, many of the children eligible under the "mental injury" criterion contained in this bill may be eligible under existing law.

## 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

No statement submitted.

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

On February 20, 2008, the Committee on Courts adopted one amendment to this bill. The amendment made the following revisions to the bill:

- Added to the definition of child abuse in chapter 39 that there must be multiple instances of injury by the same abuser.
- Added the requirement that mental abuse must be supported by the expert testimony of a licensed health care provider licensed under ch. 458 or ch.459, F.S.<sup>14</sup>
- Provided an affirmative defense to prosecution, instead of an exception to prosecution, that the speech which is the sole basis of prosecution is protected by the first amendment.
- Provided an affirmative defense to prosecution for mental injury where the defendant is a victim of domestic violence as long as the defense was not used previously with respect to the same abuser.

The bill was then reported favorably with an amendment.

On March 19, 2008, the Safety & Security Council adopted one substitute amendment. The amendment provides that a person who gives expert testimony regarding mental injury under this bill must be board certified in psychiatry. The amendment also clarifies that a "victim" is a person less than 18 years of age who suffered a felony or misdemeanor offense which results in psychiatric or psychological injury and was not physically injured by the criminal act.

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<sup>14</sup> Chapter 458, F.S., regulates physicians, and ch. 459, F.S. regulates osteopathic physicians.