

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1545 Child Exploitation Offenses

SPONSOR(S): Criminal Justice Subcommittee, Baker

TIED BILLS: **IDEN./SIM. BILLS:** SB 1656

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|--|------------------|---------|--|
| 1) Criminal Justice Subcommittee | 17 Y, 0 N, As CS | Butcher | Hall |
| 2) Justice Appropriations Subcommittee | 14 Y, 0 N | Saag | Keith |
| 3) Judiciary Committee | | | |

SUMMARY ANALYSIS

Felony offenses which are subject to the Criminal Punishment Code are listed in a single offense severity ranking chart (OSRC) in s. 921.0022, F.S., which uses 10 offense levels to rank felonies from least severe to most severe. Each felony offense listed in the OSRC is assigned a level according to the severity of the offense. A person's primary offense, any other current offenses, and prior convictions are scored using the points designated for the offense severity level of each offense. The final score calculation, following the scoresheet formula, determines the lowest permissible sentence that a trial court may impose, absent a valid reason for departure.

Section 827.071, F.S., prohibits specified child exploitation offenses, including:

- Section 827.071(2), F.S., prohibiting a person from using a child in a sexual performance as a second degree felony and a Level 6 offense.
- Section 827.071(3), F.S., prohibiting a person from promoting a sexual performance by a child as a second degree felony and a Level 6 offense.
- Section 827.071(4), F.S., prohibiting a person from possessing child pornography with the intent to promote as a second degree felony and a Level 5 offense.
- Section 827.071(5), F.S., prohibiting a person from possessing or intentionally viewing child pornography as a third degree felony and a Level 5 offense.

CS/HB 1545 amends s. 921.0022, F.S., to increase the OSRC rankings for specified child exploitation offenses:

| Violation | Current OSRC Ranking | New OSRC Ranking |
|---|----------------------|------------------|
| Using a child in or promoting a child sexual performance under s. 827.071(2) or (3), F.S. | Level 6 | Level 7 |
| Possessing child pornography with intent to promote under s. 827.071(4), F.S. | Level 5 | Level 7 |
| Possessing or intentionally viewing child pornography under s. 827.071(5), F.S. | Level 5 | Level 6 |

The bill may have a positive indeterminate impact on jail and prison beds by increasing the OSRC ranking for specified child exploitation offenses, which may result in increased admissions or longer terms of incarceration for persons convicted of such offenses.

The bill provides an effective date of October 1, 2024.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Criminal Punishment Code

Felony offenses which are subject to the Criminal Punishment Code¹ are listed in a single offense severity ranking chart (OSRC),² which uses 10 offense levels to rank felonies from least severe to most severe. Each felony offense listed in the OSRC is assigned a level according to the severity of the offense.^{3,4} A person's primary offense, any other current offenses, and prior convictions are scored using the points designated for the offense severity level of each offense.^{5,6} The final score calculation, following the scoresheet formula, determines the lowest permissible sentence that a trial court may impose, absent a valid reason for departure.⁷

Child Exploitation Offenses

Using a Child in a Sexual Performance

Section 827.071(2), F.S., prohibits a person from, knowing the character and content thereof, employing, authorizing, or inducing a child to engage in a sexual performance; or being a parent, legal guardian, or custodian of such child, consenting to the participation by such child in a sexual performance. A violation for using a child in a sexual performance is a second degree felony⁸ and the offense is ranked as a Level 6 offense on the OSRC.

Promoting a Sexual Performance by a Child

Under s. 827.071(3), F.S., a person commits a second degree felony if, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a child. The offense is ranked as a Level 6 offense on the OSRC.

Possessing Child Pornography with Intent to Promote

Under s. 827.071(4), F.S., a person commits a second degree felony if he or she possesses with the intent to promote any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, includes child pornography. The possession of three or more copies of such photograph, motion picture, representation, or presentation is prima facie evidence of an intent to promote. The offense is ranked as a Level 5 offense on the OSRC.

Possessing or Intentionally Viewing Child Pornography

¹ All felony offenses, with the exception of capital felonies, committed on or after October 1, 1998, are subject to the Criminal Punishment Code. S. 921.002, F.S.

² S. 921.0022, F.S.

³ S. 921.0022(2), F.S.

⁴ Felony offenses that are not listed in the OSRC default to statutorily assigned levels, as follows: an unlisted third-degree felony defaults to a level 1; an unlisted second-degree felony defaults to a level 4; an unlisted first-degree felony defaults to a level 7; an unlisted first-degree felony punishable by life defaults to a level 9; and an unlisted life felony defaults to a level 10. S. 921.0023, F.S.

⁵ Ss. 921.0022 and 921.0024, F.S.

⁶ A person may also accumulate points for factors such as victim injury points, community sanction violation points, and certain sentencing multipliers. S. 921.0024(1), F.S.

⁷ If a person scores more than 44 points, the lowest permissible sentence is a specified term of months in state prison, determined by a formula. If a person scores 44 points or fewer, the court may impose a nonprison sanction, such as a county jail sentence, probation, or community control. S. 921.0024(2), F.S.

⁸ A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Ss. 775.082, 775.083, or 775.084, F.S.

Section 827.071(5), F.S., prohibits a person from knowingly possessing, controlling, or intentionally viewing a photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation which, in whole or in part, he or she knows to include child pornography. A violation of the prohibition is a third degree felony⁹ and the offense is ranked as a Level 5 offense on the OSRC.

Additionally, s. 827.071(5), F.S., specifies that the possession, control, or intentional viewing of each such photograph, motion picture, exhibition, show, image, data, computer depiction, representation, or presentation is a separate offense, and if such photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation includes child pornography depicting more than one child, then each such child in each such photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation that is knowingly possessed, controlled, or intentionally viewed is a separate offense.¹⁰

Section 827.071, F.S., defines the following relevant terms:

- “Child pornography” means any image depicting a minor engaged in sexual conduct, or any image that has been created, altered, adapted, or modified by electronic, mechanical, or other means, to portray an identifiable minor engaged in sexual conduct.¹¹
- “Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated 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.¹²
- “Sexual performance” means any performance or part thereof which includes sexual conduct by a child.¹³

Reclassification of Specified Child Exploitation Offenses

Under s. 775.0847, F.S., a violation of s. 827.071, F.S., must be reclassified to the next higher degree if the offender possesses 10 or more images of any form of child pornography regardless of content, and the content of at least one image contains one or more of the following:

- A child who is younger than the age of five;
- Sadomasochistic abuse¹⁴ involving a child;
- Sexual battery¹⁵ involving a child;
- Sexual bestiality¹⁶ involving a child; or
- Any motion picture, film, video, or computer-generated motion picture, film, or video involving a child, regardless of length and regardless of whether the motion picture, film, video, or computer-generated motion picture, film, or video contains sound.

⁹ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Ss. 775.082, 775.083, or 775.084, F.S.

¹⁰ This does not apply to any material possessed, controlled, or intentionally viewed as part of a law enforcement investigation. S. 827.071(5)(b), F.S.

¹¹ S. 827.071(1)(b), F.S.

¹² A mother’s breastfeeding of her baby does not under any circumstance constitute “sexual conduct.” S. 827.071(1)(l), F.S.

¹³ “Performance” means any play, motion picture, photograph, or dance or any other visual representation exhibited before an audience. S. 827.071(1)(m) and (g), F.S.

¹⁴ “Sadomasochistic abuse” means flagellation or torture by or upon a person, or the condition of being fettered, bound, or otherwise physically restrained, for the purpose of deriving sexual satisfaction from inflicting harm on another or receiving such harm oneself. S. 827.071(1)(i), F.S.

¹⁵ “Sexual battery” means oral, anal, or female genital penetration by, or union with, the sexual organ of another or the anal or female genital penetration of another by any other object; however, “sexual battery” does not include an act done for a bona fide medical purpose. S. 827.071(1)(j), F.S.

¹⁶ “Sexual bestiality” means any sexual act between a person and an animal involving the sex organ of the one and the mouth, anus, or female genitals of the other. S. 827.071(1)(k), F.S.

This section reclassifies both the felony and OSRC level for a qualifying offense. For example, a third degree felony that is ranked as a Level 5 offense on the OSRC would be reclassified as a second degree felony that is ranked as a Level 6 offense on the OSRC, if the offense meets the requirements under s. 775.0847, F.S.

Effect of Proposed Changes

CS/HB 1545 amends s. 921.0022, F.S., to increase the OSRC rankings for specified child exploitation offenses as follows:¹⁷

| Violation | Current OSRC Ranking | New OSRC Ranking |
|--|----------------------|------------------|
| Using a child in or promoting a child sexual performance under 827.071(2) or (3), F.S. | Level 6 | Level 7 |
| Possessing child pornography with intent to promote under s. 827.071(4), F.S. | Level 5 | Level 7 |
| Possessing or intentionally viewing child pornography under s. 827.071(5), F.S. | Level 5 | Level 6 |

By increasing the offense severity ranking of specified child exploitation offenses, the bill may increase the minimum sentence to which a person convicted of such an offense may be sentenced and may increase a term of incarceration required to be imposed as part of that sentence.

Under s. 921.0024(2), F.S., if a person scores *more than 44 points*, the lowest permissible sentence to which he or she may be sentenced is a specified term of months in state prison, determined by a formula, and if a person scores *44 points or fewer*, the court may impose a nonprison sanction, such as a county jail sentence, probation, or community control.

Under s. 921.0024(1), F.S., which specifies the method for calculating an offender's scoresheet total, a Level 6 offense scores 36 points and a Level 7 offense scores 54 points. Thus, by increasing the OSRC ranking for specified child exploitation offenses, persons convicted of such offenses may be eligible for a minimum prison sentence as a result of that conviction.

The bill provides an effective date of October 1, 2024.

B. SECTION DIRECTORY:

Section 1: Amends s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity ranking chart.

Section 2: Provides an effective date of October 1, 2024.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

¹⁷ The bill retains the current felony levels for ss. 827.071(2), (3), (4), and (5), F.S.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill may have a positive indeterminate impact on jail and prison beds by increasing the OSRC ranking for specified child exploitation offenses, which may result in increased prison admissions or longer terms of incarceration for persons convicted of such offenses.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On January 25, 2024, the Criminal Justice Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment removed the ranking of an offense under s. 827.071(5), F.S., that is already subject to reclassification on the OSRC under s. 775.0847, F.S., and made another technical change.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.