

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/HB 1545 Child Exploitation Offenses
SPONSOR(S): Criminal Justice Subcommittee, Baker and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 1656

FINAL HOUSE FLOOR ACTION: 100 Y's 11 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/HB 1545 passed the House on March 1, 2024. The bill was amended in the Senate on March 5, 2024, and returned to the House. The House concurred in the Senate amendment and subsequently passed the bill as amended on March 7, 2024.

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.

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

- Section 827.071(2) or (3), F.S., prohibiting a person from using a child in or promoting a child sexual performance, as second degree felonies and Level 6 offenses.
- 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.

The bill 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 also creates s. 847.01385, F.S., to prohibit harmful communication to a minor as a third degree felony, ranked as a Level 3 offense. Under the bill, an adult is prohibited from engaging in a pattern of verbal or written communication to a minor that includes explicit and detailed verbal descriptions or narrative accounts of sexual activity, sexual conduct, or sexual excitement and that is harmful to minors. The bill prohibits an offender from raising specified defenses to such a violation.

The bill may have a positive indeterminate impact on jail and prison beds by increasing the OSRC ranking for specified child exploitation offenses and creating a new felony offense. See Fiscal Comments.

The bill was approved by the Governor on April 10, 2024, ch. 2024-74, L.O.F., and will become effective on October 1, 2024.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF 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

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.

- 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.

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.

Offenses Related to Material Harmful to Minors

Florida law prohibits specified conduct in connection with material that is harmful to minors. Under s. 847.001(7), F.S., “harmful to minors” means any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

- Predominantly appeals to a prurient, shameful, or morbid interest;
- Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and
- Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.¹⁷

Section 847.012, F.S., prohibits a person from knowingly:

- Selling, renting, or loaning for monetary consideration to a minor:
 - Any picture, photograph, drawing, sculpture, motion picture film, videocassette, or similar visual representation or image of a person or portion of the human body which depicts nudity or sexual conduct, sexual excitement, sexual battery, bestiality, or sadomasochistic abuse and which is harmful to minors; or
 - Any book, pamphlet, magazine, printed matter however reproduced, or sound recording that contains any matter defined in s. 847.001, F.S., explicit and detailed verbal descriptions or narrative accounts of sexual excitement, or sexual conduct and that is harmful to minors.
- Using a minor in the production of any of the above specified material, regardless of whether the material is intended for distribution to minors or is actually distributed to minors.
- Distributing to a minor on school property, or post on school property,¹⁸ any of the above specified material.¹⁹

A person’s ignorance of a minor’s age, a minor’s misrepresentation of his or her age, a bona fide belief of a minor’s age, or a minor’s consent may not be raised as a defense in a prosecution for a violation of s. 847.012, F.S.

Section 847.0138, F.S., prohibits a person from knowingly transmitting an image, information, or data that is harmful to minors as defined in s. 847.001, F.S., to a specific individual known by the defendant to be a minor. A violation of the prohibition is punishable as a third degree felony. Under s. 847.0138, F.S., “transmit” means to send to a specific individual, known by the defendant to be a minor, via electronic mail. As such, the current offense does not prohibit oral or other specified written communications to a minor that are harmful to minors.

¹⁷ A mother’s breastfeeding of her baby is not under any circumstance harmful to minors.

¹⁸ Under s. 847.012(5), F.S., the term “school property” means the grounds or facility of any kindergarten, elementary school, middle school, junior high school, or secondary school, whether public or nonpublic. This subsection does not apply to the distribution or posting of school-approved instructional materials that by design serve as a major tool for assisting in the instruction of a subject or course by school officers, instructional personnel, administrative personnel, school volunteers, educational support employees, or managers as those terms are defined in s. 1012.01, F.S.

¹⁹ Additional offenses involving material harmful to minors include, but are not limited to, ss. 847.011 (conduct related to obscene or lewd material), 847.0125 (retail display of materials harmful to minors), 847.013 (exposing minors to specified harmful material), 847.0134 (prohibition of adult entertainment establishments that display, sell, or distribute materials harmful to minors within a specified distance of a school), and 847.0141 (sexting), F.S.

Effect of the Bill

The bill amends s. 921.0022, F.S., to increase the OSRC rankings for specified child exploitation offenses as follows:²⁰

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.

Additionally, the bill creates s. 847.01385, F.S., to prohibit harmful communication to a minor as a third degree felony and ranks the new offense as a Level 3 offense on the OSRC. Under the bill, an adult is prohibited from engaging in a pattern of verbal or written communication to a minor that includes explicit and detailed verbal descriptions or narrative accounts of sexual activity, sexual conduct, or sexual excitement and that is harmful to minors. The bill specifies that a person's ignorance of a minor's age, a minor's misrepresentation of his or her age, a bona fide belief of a minor's age, or a minor's consent may not be raised as a defense in a prosecution for a violation of the offense.

The effective date of the bill is October 1, 2024.

²⁰ The bill retains the current felony levels for s. 827.071(2), (3), (4), and (5), F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

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, and by creating a new third degree felony offense for harmful communication to a minor.