

The Florida Senate
PROFESSIONAL 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: Children, Families, and Elder Affairs Committee

BILL: SB 2736

INTRODUCER: Senator Aronberg

SUBJECT: Criminal Child Abuse

DATE: April 17, 2007

REVISED: 04/19/07

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Toman	Jameson	CF	Fav/1 amendment
2.			CJ	
3.			JU	
4.			JA	
5.				
6.				

Please see last section for Summary of Amendments

- Technical amendments were recommended
- Amendments were recommended
- Significant amendments were recommended

I. Summary:

Senate Bill 2736 amends the criminal child abuse statute, s. 827.03, F.S., providing that the term “mental injury” as used in the section has the same meaning as in s. 39.01, F.S., and providing that an act does not violate the section if it is protected by the First Amendment.

The bill amends s. 960.03, F.S., changing the definition of “crime” as used in the Florida Crimes Compensation Act (Compensation Act). Specifically, the bill expands the definition to include offenses that result in death or in personal, psychiatric or psychological (as opposed to physical) injury to a victim or an intervenor. The bill thus provides that a felony or misdemeanor offense committed by an adult or juvenile that results in personal (i.e., physical) injury, mental injury, or death of the victim or intervenor is a crime for purposes of victim assistance.

This bill substantially amends the following sections of the Florida Statutes: 827.03, 775.084, 775.0877, 782.07, 921.0022, 943.325, 948.062, and 960.03.

II. Present Situation:

Criminal Child Abuse

Pursuant to s. 827.03, F.S., criminal child abuse is defined as:

- Intentional infliction of physical or mental injury upon a child;
- An intentional act that could reasonably be expected to result in physical or mental injury to a child; or
- 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.

Mental Injury

In recent years, the criminal child abuse statute has been challenged as unconstitutionally vague for its failure to define the term “mental injury.” In 2002, in *DuFresne v. State*, the Florida Supreme Court considered this issue.

In *DuFresne*, the Court acknowledged that “in order to withstand a vagueness challenge, a statute must provide persons of common intelligence and understanding adequate notice of the proscribed conduct.”¹ The Court noted, however, that

‘the legislature’s failure to define a statutory term does not in and of itself render a penal provision unconstitutionally vague. In the absence of a statutory definition, resort may be had to case law or related statutory provisions which define the term . . .’ [internal citations omitted]²

The Court found that the child protective provisions of ch. 39, F.S., were “plainly interrelated” with the provisions of the criminal child abuse statute and that, as such, the criminal child abuse statute was not unconstitutionally vague because the term “mental injury” was adequately defined in ch. 39, F.S.³ The Court held, “While it may obviously be preferable for the Legislature to place the appropriate definition in the same statute, citizens should be on notice that controlling definitions may be contained in other related statutes.”⁴

Section 39.01(41), F.S., defines the term “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.”

Verbal Conduct

The criminal child abuse statute has also been challenged as being unconstitutionally overbroad. The overbreadth doctrine has been explained by the Florida Supreme Court as follows:

[S]tatutes cannot be so broad that they prohibit constitutionally protected conduct as well as unprotected conduct . . . 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 . . . The [overbreadth] doctrine contemplates the pragmatic judicial assumption that an overbroad statute will have a chilling effect on protected expression . . .’ [internal citations omitted]⁵

¹ *DuFresne v. State*, 826 So.2d 272, 275 (Fla. 2002).

² *Id.* at 275.

³ *Id.* at 278.

⁴ *Id.* at 279.

⁵ *Wyche v. State*, 619 So.2d 231, 235 (Fla. 1993).

Thus, although the regulation of unprotected speech (e.g., fighting words and obscenity) is permissible, if a particular regulation proscribing unprotected speech also proscribes protected speech, it is unconstitutionally overbroad.

In *State v. DuFresne*,⁶ the state charged a teacher with several counts of child abuse under s. 827.03, F.S. Some of the counts were based solely on oral statements made by the teacher. The teacher argued that the criminal child abuse statute was overbroad because it was being used to prosecute conduct protected by the First Amendment. The 4th District Court of Appeals (DCA) held that the criminal child abuse statute “is not substantially overbroad and can be upheld against an overbreadth argument by narrowly construing it as not applicable to speech.”⁷

In *Munao v. State*, the 4th DCA, relying on the *DuFresne* holding, 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 criminal child abuse because the child abuse statute is not applicable to speech.⁸ The *Munao* court admitted that it was troubled by the facts of the case before it, and “invite[d] the legislature to reconstruct the statutory language in a way that balances the strong interest in protecting children with the fundamental preservation of individual constitutional freedoms.”⁹

Shortly after *Munao*, the 1st DCA decided *State v. Coleman*.¹⁰ In *Coleman*, the state charged the defendant with felony child abuse, alleging that he caused mental injury by driving past young girls and asking them vulgar and offensive questions. The *Coleman* court held,

We do not agree with *DuFresne I* 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 . . . 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 . . . Thus, speech will constitute ‘child abuse’ under section 827.03(1)(a) only if it meets the definitions of abuse and mental injury in section 39.01, Florida Statutes (2004). [internal citations omitted]¹¹

The United States Supreme Court has long recognized that a few categories of speech are so harmful and so lacking in value that they are unworthy of First Amendment protection.¹² Under this line of cases, state legislatures may regulate, and even ban, unprotected speech that falls into

⁶ 782 So.2d 888 (Fla. 4th DCA 2001). The Florida Supreme Court reviewed this case to answer the certified question of whether the term “mental injury” in the criminal child abuse statute was unconstitutionally vague (see discussion *supra* at p. 2). The Supreme Court did not address the issue of overbreadth, so the District Court’s holding as to that issue remains relevant. The District Court case is sometimes referred to as *DuFresne I*, while the Supreme Court case is referred to as *DuFresne II*.

⁷ *Id.* at 890.

⁸ 939 So.2d 125 (Fla. 4th DCA 2006).

⁹ *Id.* at 128.

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

¹¹ *Id.* at 1229.

¹² H. Kitrosser, *Containing Unprotected Speech*, Florida Law Review (2005).

the following categories: threats, fighting words, obscenity, child pornography, and speech that imminently incites illegal activity.¹³

Victim Assistance

The Compensation Act is established in ss. 960.01-960.28, F.S. For purposes of the Compensation Act, the term “victim” is defined to include:

- A person who suffers personal physical injury or death as a direct result of a crime;
- A person less than 16 years of age who was 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 was not physically injured; or
- A person against whom a forcible felony was committed and who suffers a psychiatric or psychological injury as a direct result of that crime but who does not otherwise sustain a personal physical injury or death.¹⁴

Also for purposes of the Compensation Act, the term “crime” is defined to include “a felony or misdemeanor offense committed by either an adult or a juvenile which results in physical injury or death . . .”¹⁵

The Compensation Act provides that the following persons are eligible for awards:

- Victim;
- Intervenor;
- Surviving spouse, parent or guardian, sibling, or child of a deceased victim or intervenor; and
- Any other person who is dependent for his or her principal support upon a deceased victim or intervenor.¹⁶

The Florida Attorney General's Division of Victim Services¹⁷ serves as an advocate for crime victims and victims' rights and administers a compensation program to ensure financial assistance for innocent victims of crime.¹⁸ 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.¹⁹ Payment is made from the Crimes Compensation Trust Fund (Trust Fund),²⁰ and awards to eligible victims are limited as follows:

- No more than \$10,000 for treatment;
- No more than \$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;
- A total of \$25,000 for all compensable costs; or

¹³ *Id.*

¹⁴ Section 960.03(13), F.S.

¹⁵ Section 960.03(3), F.S.

¹⁶ Section 960.065(1), F.S.

¹⁷ The Division of Victim Services is housed within the Office of Attorney General/Department of Legal Affairs.

¹⁸ <http://myfloridalegal.com/victims> (last visited April 15, 2007).

¹⁹ *Id.*

²⁰ Section 960.21, F.S.

- \$50,000 when there is a finding that a victim has suffered catastrophic injury.²¹

The Department of Legal Affairs has rulemaking authority to establish limits on awards within the statutory guidelines.

Pursuant to Rule 2A-2.002, F.A.C., application and benefit payment criteria, limitations and procedures for victim assistance are provided in a publication entitled "Victim Compensation Assistance," which is incorporated into the rules by reference.²² This publication provides that the following mental health benefits are available to eligible individuals, up to the statutory limits, 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:

- Inpatient mental health care for adults and minors but only for acute, crisis stabilization up to a maximum of seven days, and not to exceed \$10,000;
- Outpatient mental health care for adults (18 years of age or older), up to \$2,500;
- Mental health care for minors under the age of 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, up to \$2,500;
- Mental health care for persons who suffer a psychiatric or psychological injury as a result of a forcible felony against the person, up to \$2,500;²³
- Mental health care (outpatient) for a surviving minor child of a deceased victim, or a minor victim who was physically injured, up to \$10,000;²⁴
- Mental health care for a surviving spouse, parent, adult child or sibling of a deceased victim up to \$2,500, provided total benefits do not exceed \$10,000 per claim.²⁵

When the Department of Legal Affairs determines that the monies available in the Trust Fund are insufficient to pay the program's anticipated expenditures, the department may limit the payment of benefits to a percentage of allowable benefits.²⁶

III. Effect of Proposed Changes:

The 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.

Substantively, the bill adds a definition of "mental injury" to s. 827.03, F.S., providing that the term has the same meaning as in s. 39.01, F.S. The bill further amends s. 827.03, F.S., by providing an exception to the criminal child abuse statute. Specifically, the bill states that an act

²¹ Section 960.13, F.S.

²² The publication is in fact entitled *Victim Compensation* (BVC P-001), Office of the Attorney General, Division of Victim Services and Criminal Justice Programs (effective January 1, 2000).

²³ This is the only benefit available to victims who do not suffer physical injury or death.

²⁴ When the child or victim reaches the age of 18, payment for outpatient services are limited to an additional \$2,500 or three years, whichever comes first, provided total benefits do not exceed \$10,000 per claim.

²⁵ *Victim Compensation* (BVC P-001), Office of the Attorney General, Division of Victim Services and Criminal Justice Programs (effective January 1, 2000).

²⁶ *Id.*

does not violate the section if it is protected by the First Amendment. In relation to the cases discussed above, this language means that the criminal child abuse statute does not apply to constitutionally protected speech, but it may apply to unprotected speech.

The bill makes conforming changes to the following sections of the Florida Statutes:

- Section 775.084, F.S., relating to the definition of violent career criminals;
- Section 921.0022, F.S., relating to the “Offense Severity Ranking Chart;”
- Section 943.325, F.S., relating to DNA analysis in certain cases; and
- Section 948.062, F.S., relating to the review of certain cases involving offenders on probation.

The bill amends s. 960.03, F.S., changing the definition of “crime” as used in the Compensation Act. Specifically, the bill expands the definition to include offenses that result in death or in personal, psychiatric or psychological (as opposed to physical) injury to a victim or an intervenor. The bill thus provides that a felony or misdemeanor offense committed by an adult or juvenile that results in personal (i.e., physical) injury, mental injury, or death of the victim or intervenor is a crime for purposes of victim assistance.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill, by expanding the definition of crime to include all offenses (not just forcible felonies) that result only in psychiatric or psychological injury, would expand the number of persons potentially eligible for compensation awards.

C. Government Sector Impact:

The Office of Attorney General (OAG) anticipates that the bill may have significant but indeterminate fiscal impact on the Trust Fund, because it expands the number of persons eligible to receive compensation awards to include those who suffer only psychiatric or psychological injury as the result of an offense. According to OAG, the potential fiscal impact would be up to \$25,000 times the number of victims who would become eligible to receive funds.²⁷

The definition of crime for purposes of the Compensation Act provides that compensation awards are limited to persons who suffer physical injury or death as a result of an offense. However, the definition of victim includes a person against whom a forcible felony is committed and who suffers a psychiatric or psychological injury, but no physical injury. Under the OAG's current rules, consistent with the definition of victim, mental health care is available to persons who suffer psychiatric or psychological injury (without physical injury) *only if* the psychiatric or psychological injury is the result of a forcible felony.

The bill, by expanding the definition of crime to include all offenses (not just forcible felonies) that result only in psychiatric or psychological injury, would significantly expand the number of persons potentially eligible for compensation awards.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

²⁷Compensable costs include disability payments, funeral expenses, loss of support payments, wage loss payments, and treatment (including mental health care) expenses. Treatment expenses are limited to \$10,000, but the total for all compensable costs is limited to \$25,000. See *Victim Compensation* (BVC P-001), Office of the Attorney General, Division of Victim Services and Criminal Justice Programs (effective January 1, 2000). See also, s. 960.13, F.S.

VIII. Summary of Amendments:

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The bill expands the definition of crime for purposes of the Florida Crimes Compensation Act to include all offenses (not just forcible felonies) that result only in psychiatric or psychological injury. The amendment limits the application of the expanded definition to minors and makes a conforming amendment to the definition of victim. Because the compensable costs for a minor will typically include only treatment expenses (which are statutorily limited to \$10,000), the amendment limits the fiscal impact on the Trust Fund to \$10,000 times the number of minor victims who would become eligible (WITH TITLE AMENDMENT).

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