

STORAGE NAME: h0025a.jo.doc
DATE: March 20, 2001

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
JUDICIAL OVERSIGHT
ANALYSIS**

BILL #: HB 25
RELATING TO: Offenses Against Children
SPONSOR(S): Representative Crow & Others

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME PREVENTION, CORRECTIONS & SAFETY YEAS 9 NAYS 0
- (2) JUDICIAL OVERSIGHT YEAS 10 NAYS 0
- (3) COUNCIL FOR HEALTHY COMMUNITIES
- (4)
- (5)

I. SUMMARY:

Section 787.025, Florida Statutes, makes it a third degree felony for a person who has been convicted of a sexual offense to lure or entice a child under the age of 12 into a structure, dwelling, or conveyance for other than a lawful purpose. The bill raises the age of the children being protected under this statute from those under the age of 12 to those under the age of 15.

In Brake v. State, 746 So. 2d 527 (Fla. 2nd DCA 1999), the Second District Court of Appeal ruled that s. 787.025, F.S., is unconstitutionally vague because the term "for other than a lawful purpose" fails to give "persons of common intelligence adequate warning of the proscribed conduct". HB 25 attempts to fix this apparent constitutional infirmity by prohibiting a sexual offender from luring a child into a structure, dwelling, or conveyance without the permission of the child's parent rather than for other than a lawful purpose.

The Committee on Judicial Oversight amended the bill to add a definition of "presence", which is currently not defined in statute, to section 800.04, F.S. The second amendment added language to clarify that a person convicted of certain sexual offenses that lures or entices a child away from the child's parents without the consent of the parents is guilty of the crime of luring or enticing a child. The amendments are traveling with the bill.

The bill takes effect on July 1, 2001.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Section 787.025, F.S., provides that a person over the age of 18 who, having been previously convicted of a sexual offense under Chapter 794 or s. 800.04, F.S., or of a similar offense in another jurisdiction, intentionally lures or entices a child under the age of 12 into a structure¹, dwelling², or conveyance³ for other than a lawful purpose commits a third degree felony.

The section further provides that the luring or enticing of a child under the age of 12 into a structure, dwelling or conveyance without the consent of the child's parent or legal guardian shall be prima facie evidence of other than a lawful purpose. The section also provides that it is an affirmative defense to a prosecution for this offense that:

1. the person reasonably believed that his or her action was necessary to prevent the child from being seriously injured;
2. the person lured or enticed, or attempted to lure or entice, the child under the age of 12 into a structure, dwelling or conveyance for a lawful purpose or
3. the person's actions were reasonable under the circumstances and the defendant did not have any intent to harm the health, safety, or welfare of the child.

"An 'affirmative defense' is any defense that assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question." State v. Cohen, 568 So.2d 49, 51 (Fla.1990). A defendant has the

¹ The term "structure" is defined as "a building of any kind, either temporary or permanent, which has a roof over it, together with the curtilage thereof." s. 787.025(1)(a), F.S.

² The term "dwelling" is defined as a "building or conveyance of any kind, either temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging together therein at night, together with the curtilage thereof." s. 787.025(1)(b), F.S.

³ The term "conveyance" is defined as any motor vehicle, ship, vessel, railroad car, trailer, aircraft, or sleeping car". s. 787.025(1)(c), F.S.

burden of initially offering evidence to establish an affirmative defense, after which the burden shifts to the state to disprove the defense beyond a reasonable doubt. See Hansman v. State, 679 So.2d 1216, 1217 (Fla. 4th DCA 1996).

In Brake v. State, 746 So. 2d 527 (Fla. 2nd DCA 1999), the Second District Court of Appeal found s. 787.025, F.S., to be unconstitutionally vague. The Court found that the term "other than for a lawful purpose" failed to give "persons of common intelligence adequate warning of the proscribed conduct". Brake, 746 So. 2d at 529. The court noted that one way that the legislature could cure this problem is by "leaving out the offending language and making it illegal for a convicted sex offender over the age of eighteen....to lure or entice a child under twelve into a structure, dwelling, or conveyance without the permission of a parent or guardian." Id. at 529-530. The Florida Supreme Court accepted review and heard oral argument on February 7, 2001. The court has not issued a ruling.

C. EFFECT OF PROPOSED CHANGES:

The bill amends s. 787.025, F.S., to provide that a person over the age of 18 who, having been convicted of a sexual offense under Chapter 794 or s. 800.04, F.S., intentionally lures or entices a child under the age of 15, into a structure, dwelling, or conveyance without the consent of the child's parent or legal guardian, commits a third degree felony. The bill changes the age of the children being protected under this statute from those under the age of 12 to those under the age of 15. The bill removes the phrase "for other than a lawful purpose" which the Second District Court of Appeal found to be unconstitutionally vague and instead makes the proscribed behavior the luring of a child into a dwelling, structure, or conveyance by a sexual offender without the permission of the child's parent. The court suggested the language in this bill in the Brake opinion.

The bill retains the affirmative defenses to a prosecution under this section that: 1) the person reasonably believed that his or her action was necessary to prevent the child from being seriously injured or 2) the person's actions were reasonable under the circumstances and the defendant did not have any intent to harm the health, safety, or welfare of the child.

D. SECTION-BY-SECTION ANALYSIS:

Section 1: Amends s. 787.025, F.S., relating to luring or enticing a child.

Section 2: Provides effective date of July 1, 2001.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See fiscal comments.

2. Expenditures:

See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See fiscal comments.

2. Expenditures:

See fiscal comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See fiscal comments.

D. FISCAL COMMENTS:

The Criminal Justice Estimating Conference has not met to consider the prison bed impact that this bill will have on the Department of Corrections. The bill both raises the age of the children which are protected and attempts to fix the constitutional infirmity which is presumably preventing this crime from being prosecuted and therefore could result in more convictions for this third degree felony offense. However, in prior years, the Criminal Justice Estimating Conference has determined that the creation of any third degree felony offense which is not ranked in the Offense Severity Ranking Chart of the Criminal Punishment Code would have an insignificant prison bed impact on the Department of Corrections.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

The bill amends s. 787.025, F.S., in order to attempt to fix the constitutional infirmity that the Second District Court of Appeal found in Brake. Instead of prohibiting a sexual offender from luring a child into their house for "other than a lawful purpose", the bill will prohibit a sexual offender from luring a child into their house for any purpose without first obtaining the permission of the parent. As mentioned above, the defendant will be able to present evidence as an affirmative defense that he or she believed that the action was necessary to prevent the child from being seriously injured or that the defendant's actions were reasonable under the circumstances and the defendant did not have any intent to harm the health, safety, or welfare of the child.

The bill changes the age of the children who are being protected by the statute from those under the age of 12 to those under the age of 15. In light of the expansion of the potential number of victims, the fact that this bill only applies to defendants who have previously been convicted of a sexual offense is an important limitation for constitutional purposes. If the bill was not limited to persons who had previously been convicted of a crime, it would be subject to attack as a violation of substantive due process because it could be construed by a court as punishing entirely innocent activities. See State v. O.C., 748 So.2d 945 (Fla. 1999) (holding that statute providing for enhancement of sentence based on membership in a criminal street gang violated a defendant's substantive due process rights, as statute punished gang membership without requiring any nexus between criminal activity and gang membership and thus lacked rational relationship to legislative goal of reducing gang violence or activity). For example, if the bill applied to any person over the age of 18, a mother who invited a 14 year old girl into her house to play with her daughter without first obtaining the permission of the girl's parent would commit a third degree felony.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee on Judicial Oversight considered the bill on March 20, 2001. The Committee amended the bill to add a definition of "presence" to section 800.04, F.S. Under the amendment, "presence" means "that the victim of an act in violation of this section is physically present where and when the act occurs. The term does not mean that the victim must actually see or have sensory awareness of the act." The final amendment added language to clarify that a person convicted of certain sexual offenses that lures or entices a child away from the child's parents without the consent of the parents is guilty of the crime of luring or enticing a child.

The amendments are traveling with the bill.

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Trina Kramer

Staff Director:

David De La Paz

AS REVISED BY THE COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

L. Michael Billmeier

Staff Director:

Lynne Overton