

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|---|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. Empower families? | 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. EFFECT OF PROPOSED CHANGES:

Kidnapping

Section 787.01 prohibits the offense of kidnapping, a first degree felony, which is defined as follows:

The term kidnapping means forcibly, secretly or by threat confining, abducting or imprisoning another person against her or his will and without lawful authority, with intent to:

1. Hold for ransom or reward or as a shield or hostage.
2. Commit or facilitate the commission of a felony.
3. Inflict bodily harm upon or terrorize the victim or another person [or]
4. Interfere with the performance of any governmental or political function.

Confinement of a child under the age of 13 is against her or his will within the meaning of this subsection if such confinement is without the consent of her or his parent or legal guardian.

The section also provides that the offense of kidnapping is a life felony when the victim is under the age of 13 and when in the course of committing the kidnapping, the offender commits one or more of the following offenses:

1. Aggravated child abuse, as defined in s. 827.03.
2. Sexual battery, as defined in chapter 794, against the child.
3. Lewd or lascivious battery, lewd or lascivious molestation, lewd or lascivious conduct, or lewd or lascivious exhibition, in violation of s. 800.04.
4. A violation of s. 796.03 or 796.04, relating to prostitution.
5. Exploitation of the child or allowing the child to be exploited in violation of s. 450.151.

False Imprisonment

False imprisonment is defined in section 787.02, F.S., as "forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority and against her or his will."

This section provides that the confinement of a child under the age of 13 is considered against her or his will if the confinement is without the consent of the victim's parent or legal guardian. The offense is a third degree felony. The offense is a first degree felony if it is committed on a child under the age of 13 and in the course of offense, the offender commits one of the following offenses:

1. Aggravated child abuse, as defined in s. 827.03.
2. Sexual battery, as defined in chapter 794, against the child.
3. Lewd or lascivious battery, lewd or lascivious molestation, lewd or lascivious conduct, or lewd or lascivious exhibition, in violation of s. 800.04.
4. A violation of s. 796.03 or 796.04, relating to prostitution.
5. Exploitation of the child or allowing the child to be exploited in violation of s. 450.151.

Changes to Kidnapping and False Imprisonment Statutes

The kidnapping and false imprisonment statutes currently provide for enhanced penalties in certain circumstances when the victim is under the age of 13. The bill raises the age of victims who are afforded increased protection by amending the kidnapping and false imprisonment statutes to provide for these enhanced penalties when the victim is under the age of 16. The bill also amends the presumption which provides that confinement of a child under the age of 13 is against his or her will if the confinement is without the consent of the child's parent or guardian, to apply the presumption to children under the age of 16.

Luring or Enticing a Child

Section 787.025, F.S., makes it unlawful for a person over the age of 18, who has been previously convicted of a sexual offense under Chapter 794 or s. 800.04, F.S., to intentionally lure or entice a child under the age of 12 into a structure¹, dwelling², or conveyance³ for other than a lawful purpose. The offense is 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.

¹The 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." Sec. 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." Sec. 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". Sec. 787.025(1)(c), F.S.

"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 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. 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 section 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". 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 overturned the lower court and ruled that the statute is not unconstitutional. The court ruled that the requirement that the offender lured or enticed a child "for other than a lawful purpose" can be construed to require that the state prove "that the defendant lured or enticed a child into the structure, dwelling or conveyance for an 'illegal' purpose, i.e. with intent to violate Florida law by committing a crime." State v. Brake, 796 So.2d 522 (Fla. 2001). However, the court ruled that the part of the statute which provides that luring a child "without the consent of the child's parent or legal guardian shall be prima facie evidence of other than a lawful purpose" created a unconstitutional statutory presumption. The court explained its holding as follows:

[T]he statute permits the State to prove the mens rea element of the offense ("for other than a lawful purpose") by proving lack of parental consent for the child to enter the structure, dwelling or conveyance with the defendant. We cannot say with substantial assurance that a defendant's unlawful intent can be so presumed. For example, a neighbor who invited a child into their house for a perfectly innocent reason is not likely to seek parental permission. Thus, section 787.025(2)(b) must be deleted as an unconstitutional statutory presumption.

Id. at 529. The presumption that was struck down in Brake has not been removed from the statute.

Changes to Luring or Enticing a Child Statute

The bill raises the age of the children protected under section 787.025, F.S. from children under the age of 12 to children under the age of 16. It also increases the severity of the offense from a third degree felony to a second degree felony. This has the effect of raising the maximum sentence for the offense from five years in prison to fifteen years in prison.⁴

Because the Florida Supreme Court ruled in Brake that the provision constituted an unconstitutional presumption, the bill modifies the language in section 787.025, F.S. which provides that proof that an offender lured or enticed a victim without the permission of the child's parent or legal guardian shall be prima facie evidence that the victim acted for an unlawful purpose. The bill provides that if the defendant lured or enticed, or attempted to lure or entice, a child under the age of 16 into a structure, dwelling or conveyance without the consent of the child's parent or guardian, that fact does not give rise to a presumption that the defendant committed the luring or enticing for other than a lawful purpose but may be considered with other competent evidence in determining whether the defendant acted for other than a lawful purpose.

C. SECTION DIRECTORY:

Section 1: Amends s. 787.01, F.S.; revising the elements of the offense of kidnapping a minor child to apply enhanced penalties when victim under the age of 16.

⁴ Section 775.082(3), F.S.

Section 2: Amends s. 787.02, F.S.; revising the elements of the offense of false imprisonment of a minor child to apply enhanced penalties when victim under the age of 16.

Section 3: Amends s. 787.025, F.S.; revising the elements of the offense of luring or enticing a child to apply offense to victims under the age of 16; amending presumption; increasing severity of offense from third degree felony to second degree felony.

Sections 4-16: Reenacting sections of statute for the purpose of incorporating by reference the amendments made by the bill to sections 787.01 and 787.02, F.S.

Section 17: Provides effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

According to the Criminal Justice Impact Conference, HB 1713 will have an indeterminate but likely minimal prison bed impact on the Department of Corrections.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

See above.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The 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:

As a result of the Florida Supreme Court's opinion in Brake, as part of a prosecution for the offense of luring or enticing a child into a dwelling, structure or conveyance, the state will have to prove that the defendant lured or enticed the child for an illegal purpose – with the intent to commit a crime. Because the court ruled that it was unconstitutional, the state will have to do this without the benefit of the presumption that lack of consent of the child's parent is evidence that the defendant acted for other than a lawful purpose. [The jury will be able to consider this fact with other competent evidence in determining whether the defendant acted for other than a lawful purpose]. It may be difficult for the state to prove the specified illegal purpose for which a defendant acted. It would be possible to amend the elements of the offense in the manner suggested by the lower court in Brake so that the prohibited conduct would be luring or enticing a child without the permission of the parent by a person who had previously been convicted of a sexual offense. [The defendant would still be able to attempt to show by way of affirmative defense that he reasonably believed his action was necessary to prevent the child from being seriously injured.] The state would not be required to show that the offender acted with the intent to commit a crime and may enhance the utility of the statute.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

None.