



- 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.”<sup>1</sup> 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]<sup>2</sup>

The Court found that the child protection 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.<sup>3</sup> 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.”<sup>4</sup>

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]<sup>5</sup>

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

<sup>2</sup> *Id.* at 275.

<sup>3</sup> *Id.* at 278.

<sup>4</sup> *Id.* at 279.

<sup>5</sup> *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*,<sup>6</sup> 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.”<sup>7</sup>

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.<sup>8</sup> 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.”<sup>9</sup>

Shortly after *Munao*, the 1st DCA decided *State v. Coleman*.<sup>10</sup> 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]<sup>11</sup>

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.<sup>12</sup> Under this line of cases, state legislatures may regulate, and even ban, unprotected speech that falls into

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<sup>6</sup> 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*.

<sup>7</sup> *Id.* at 890.

<sup>8</sup> 939 So.2d 125 (Fla. 4<sup>th</sup> DCA 2006), *rev. denied*, 954 So.2d 28 (Fla. 2007)

<sup>9</sup> *Id.* at 128.

<sup>10</sup> 937 So.2d 1226 (Fla. 1<sup>st</sup> DCA 2006).

<sup>11</sup> *Id.* at 1229.

<sup>12</sup> Heidi Kitrosser, *Containing Unprotected Speech*, 57 Fla. L. Rev. 843, 844 (September 2005).

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

### **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.<sup>14</sup>

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 . . .”<sup>15</sup>

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

- Victim;
- Intervener;
- Surviving spouse, parent or guardian, sibling, or child of a deceased victim or intervener; and
- Any other person who is dependent for his or her principal support upon a deceased victim or intervener.<sup>16</sup>

The Florida Attorney General’s Division of Victim Services<sup>17</sup> serves as an advocate for crime victims and victims’ rights and administers a compensation program to ensure financial assistance for innocent victims of crime.<sup>18</sup> 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.<sup>19</sup> Payment is made from the Crimes Compensation Trust Fund (Trust Fund),<sup>20</sup> 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

<sup>13</sup> *Id.* at 845.

<sup>14</sup> Section 960.03(13), F.S.

<sup>15</sup> Section 960.03(3), F.S.

<sup>16</sup> Section 960.065(1), F.S.

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

<sup>18</sup> See <http://myfloridalegal.com/victims> (last visited February 28, 2008).

<sup>19</sup> *Id.*

<sup>20</sup> Section 960.21, F.S.

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

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.<sup>22</sup> 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;<sup>23</sup>
- 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;<sup>24</sup> and
- 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.<sup>25</sup>

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.<sup>26</sup>

### 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

<sup>21</sup> Section 960.13(9)(a), F.S.

<sup>22</sup> 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).

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

<sup>24</sup> 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.

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

<sup>26</sup> *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 775.0877, F.S., relating to the criminal transmission of HIV;
- Section 782.07, F.S., relating to manslaughter;
- 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 any offense that results in psychiatric or psychological injury to a minor who was not physically injured by the criminal act.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

#### **V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill, by expanding the definition of crime to include offenses that result in psychiatric or psychological injury to a minor, would expand the number of persons potentially eligible for compensation awards.

C. Government Sector Impact:

The bill will have an indeterminate fiscal impact on the Trust Fund, according to the Attorney General’s Office, because it expands the number of persons eligible to receive

compensation awards to include minors who suffer only psychiatric or psychological injury as the result of an offense. Because the compensable costs for a minor in these circumstances will typically include only treatment expenses, the fiscal impact on the Trust Fund will likely be limited to \$10,000<sup>27</sup> times the number of minor victims who might become eligible.

According to the Criminal Justice Impact Conference, there will be an insignificant impact upon prison beds as a result of this bill.

## VI. Technical Deficiencies:

The bill amends the definition of “crime” for purposes of the Compensation Act to include any offense that results in psychiatric or psychological injury to an individual less than 18 years old who is not physically injured by the criminal act. The definition of “victim” under the act includes an individual less than 16 years old who suffers a psychiatric or psychological injury but is not physically injured. This inconsistency makes it unclear at what age a child can recover for psychiatric or psychological injury.

## VII. Related Issues:

A criminal conviction can only be sustained if each element of the crime is established beyond a reasonable doubt.<sup>28</sup> It is possible that this bill could be interpreted to require a prosecutor in a child abuse case to prove, beyond a reasonable doubt, that an act does *not* violate the First Amendment, making it more difficult for the state to prosecute child abuse offenses.

The Florida Coalition Against Domestic Violence (FCADV) suggests that this bill may result in victims of domestic violence being charged with criminal child abuse when their children witness domestic violence and suffer psychiatric or psychological injury as a result.<sup>29</sup>

The bill as amended by barcode 330518 by Children, Families, and Elder Affairs, defines “mental injury” as requiring “multiple instances of injury caused by the same abuser to the intellectual or psychological capacity of a child...” Currently, there is no such statutory requirement for multiple instances. In fact, the statute specifically states that child abuse can be an intentional act reasonably expected to result in mental injury to a child. s. 827.03(1)(b), F.S. It also states that neglect may be based on a single incident resulting in serious mental injury. s. 827.03(a), F.S. The amendment appears to preclude being able to charge a person who inflicts mental injury on a child during one incident with a third degree felony offense of either child abuse or neglect.

## VIII. Additional Information:

### A. Committee Substitute – Statement of Substantial Changes: (Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

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<sup>27</sup>Section 960.13, F.S.

<sup>28</sup> *State v. Sigler*, 967 So.2d 835, 843 (Fla. 2007).

<sup>29</sup> Correspondence from Tiffany Carr, President/CEO, FCADV to Nicole Webb, J.D. (December 10, 2007).

**B. Amendments:****Barcode 525032 by Criminal Justice on April 16, 2008:**

Amends the Children, Families and Elder Affairs amendment, barcode 330518, in the following ways. Deletes the requirement of “multiple instances of injury by the same abuser” from the definition of “mental injury.” Allows a psychologist licensed under ch. 490, F.S., to give expert testimony regarding mental injury. Clarifies that the expert testimony requirements apply only to criminal court cases, not to family court or dependency court cases.

**Barcode 330518 by Children, Families and Elder Affairs on March 12, 2008:**

Provides that in a criminal child abuse case, “mental injury” means multiple instances of injury by the same abuser to the intellectual or psychological capacity of a child, as evidenced by discernible and substantial impairment and supported by the testimony of an expert licensed pursuant to ch. 458, F.S., governing medical practice, or ch. 459, F.S., governing osteopathic medicine. Provides that if an offense of child abuse is based solely on oral statements by a defendant, it is an affirmative defense that the conduct giving rise to the offense was protected by the First Amendment. Provides that it is an affirmative defense to a prosecution for mental injury if the defendant is a victim of domestic violence who acted or failed to act in order to protect herself or her child, and provides that this affirmative defense can only be raised once. (WITH TITLE AMENDMENT)

**Barcode 930020 by Children, Families and Elder Affairs on March 12, 2008:**

The bill amends the definition of “crime” for purposes of the Compensation Act to include any offense that results in psychiatric or psychological injury to an individual less than 18 years old who is not physically injured by the criminal act. The definition of “victim” under the act includes an individual less than 16 years old who suffers a psychiatric or psychological injury but is not physically injured. The amendment clarifies that an individual less than 18 years old may make a claim under the Act pursuant to the new definition of crime. (WITH TITLE AMENDMENT)