

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 431 Solicitation of Minors to Commit Lewd or Lascivious Act

SPONSOR(S): Criminal Justice Subcommittee, Baker and others

TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 486

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	18 Y, 0 N, As CS	Leshko	Hall
2) Judiciary Committee	21 Y, 0 N	Leshko	Kramer

SUMMARY ANALYSIS

The Florida Supreme Court has held that the terms "lewd" and "lascivious" mean a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act. Under s. 800.04(6), F.S., a person commits lewd or lascivious conduct by intentionally touching a person under 16 in a lewd or lascivious manner; or soliciting a person under 16 to commit a lewd or lascivious act. A person who is 18 years or age or older who commits lewd or lascivious conduct commits a second degree felony.

Under s. 847.0135(3), F.S., a person commits a third-degree felony if he or she knowingly uses a computer online service, internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a person under 18 or a person believed by the offender to be under 18, to commit any illegal act described in chapter 794 (sexual battery), chapter 800 (lewdness/indecent exposure), or chapter 827 (abuse of children) or to otherwise engage in any unlawful sexual conduct with a person under 18 or with a person believed by the offender to be under 18. While current law prohibits the solicitation of a person under 16 to commit a lewd or lascivious act when it occurs by any means, the solicitation of a 16 or 17-year-old is only prohibited if it occurs electronically.

Section 794.05, F.S., prohibits a person who is 24 years of age or older from engaging in sexual activity with a victim who is 16 or 17 years old, as a second-degree felony. Sexual activity means the 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, but does not include an act done for a bona fide medical purpose.

Similarly, s. 794.051, F.S., prohibits a person who is 24 years of age or older from intentionally touching in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person 16 or 17 years of age, or forcing or enticing a person 16 or 17 years of age to so touch the perpetrator, as a third-degree felony. While a person 24 years of age or older is prohibited from engaging in sexual activity or other lewd or lascivious conduct with a 16 or 17-year-old, current law does not similarly specifically criminalize the written solicitation of such minors to commit lewd or lascivious acts by a person who is 24 years of age or older.

CS/HB 431 creates s. 794.053, F.S., to prohibit a person 24 years of age or older from soliciting a person who is 16 or 17 years of age in writing to commit a lewd or lascivious act as a third-degree felony. The newly-created offense will capture written solicitation regardless of the medium used. The bill ranks the new third-degree felony as a level 3 offense on the Criminal Punishment Code offense severity ranking chart.

The bill may have an indeterminate positive impact on jail and prison beds by creating a new felony offense for certain offenders who solicit certain minors in writing, which may result in more jail and prison admissions.

The bill provides an effective date of October 1, 2023.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Solicitation of a Minor

Lewd or Lascivious Conduct

The Florida Supreme Court has held that the terms "lewd" and "lascivious" mean a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.^{1, 2}

Section 800.04, F.S., criminalizes the following lewd or lascivious offenses committed on or in the presence of a person less than 16 years of age:

- Lewd or lascivious battery;
- Lewd or lascivious molestation;
- Lewd or lascivious conduct; and
- Lewd or lascivious exhibition.

Neither the victim's lack of chastity nor the victim's consent is a defense to lewd or lascivious offenses. Additionally, the perpetrator's ignorance of the victim's age, the victim's misrepresentation of his or her age, or the perpetrator's bona fide belief of the victim's age cannot be raised as a defense.³

A person commits lewd or lascivious conduct by:

- Intentionally touching a person under 16 in a lewd or lascivious manner; or
- Soliciting a person under 16 to commit a lewd or lascivious act.⁴

Lewd or lascivious conduct is a second-degree felony⁵ if the offender is 18 years of age or older⁶ and a third-degree felony⁷ if the offender is younger than 18 years of age.^{8, 9}

Prohibited Computer Usage

Under s. 847.0135(3), F.S., a person commits a third-degree felony if he or she knowingly uses a computer online service, internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:

- Seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a person under 18 or a person believed by the offender to be under 18, to commit any illegal act described in chapter 794 (sexual battery), chapter 800 (lewdness/indecent exposure), or chapter 827 (abuse of children) or to otherwise engage in any unlawful sexual conduct¹⁰ with a person under 18 or with a person believed by the offender to be under 18; or

¹ *Chesebrough v. State*, 255 So.2d 675, 677 (Fla. 1971).

² Whether an act or conduct is lewd or lascivious is a factual issue to be decided on a case-by-case basis. *Andrews v. State*, 130 So. 3d 788, 790 (Fla. 1st DCA 2014).

³ S. 800.04(2-3), F.S.

⁴ S. 800.04(6)(a), F.S.

⁵ 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.

⁶ Ranked as a level 6 offense on the OSRC.

⁷ A third-degree felony is punishable by up to five years' imprisonment and a \$5,000 fine. Ss. 775.082, 775.083, and 775.084, F.S.

⁸ S. 800.04(6)(b)-(c), F.S.

⁹ Ranked as a level 5 offense on the OSRC.

¹⁰ "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. A mother's breastfeeding of her baby does not under any circumstance constitute "sexual conduct." S. 847.001(19), F.S.

- Solicit, lure, or entice, or attempt to solicit, lure, or entice a parent, legal guardian, or custodian of a person under 18 or a person believed by the offender to be the same, to consent to such person's participation in any act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any sexual conduct.¹¹

While current law prohibits the solicitation of a person under 16 to commit a lewd or lascivious act when it occurs by any means, the solicitation of a 16 or 17-year-old is only prohibited if it occurs electronically.

Unlawful Acts by a Person 24 Years of Age or Older Against a Person 16 or 17 Years of Age

Unlawful Sexual Activity with a Minor

Section 794.05, F.S., prohibits a person who is 24 years of age or older from engaging in sexual activity with a victim who is 16 or 17 years old, as a second-degree felony.¹² Sexual activity means the 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, but does not include an act done for a bona fide medical purpose.¹³ Evidence of a victim's prior sexual conduct is not relevant in a prosecution for unlawful sexual activity with a minor.^{14, 15}

Indecent, Lewd, or Lascivious Touching of Certain Minors

Section 794.051, F.S., prohibits a person who is 24 years of age or older from intentionally touching in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person 16 or 17 years of age, or forcing or enticing a person 16 or 17 years of age to so touch the perpetrator, as a third-degree felony.^{16, 17}

While a person 24 years of age or older is prohibited from engaging in sexual activity or other lewd or lascivious conduct with a 16 or 17-year-old, current law does not similarly specifically criminalize the written solicitation of such minors to commit lewd or lascivious acts by a person 24 years of age or older.

Criminal Punishment Code

Felony offenses which are subject to the Criminal Punishment Code¹⁸ are listed in a single offense severity ranking chart (OSRC),¹⁹ 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.^{20, 21} 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.^{22, 23} The final score

¹¹ Ranked as a level 7 offense on the OSRC.

¹² However, a person 16 or 17 years of age who has been emancipated under ch. 743, F.S., is not considered a victim of an offense under s. 794.05, F.S.

¹³ S. 794.05(2)(b), F.S.

¹⁴ S. 794.05(4), F.S.

¹⁵ Ranked as a level 6 offense on the OSRC.

¹⁶ However, a person 16 or 17 years of age who has been emancipated under ch. 743, F.S., is not considered a victim of an offense under s. 794.051, F.S.

¹⁷ Ranked as a level 4 offense on the OSRC.

¹⁸ 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.

¹⁹ S. 921.0022, F.S.

²⁰ S. 921.0022(2), F.S.

²¹ 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.

²² Ss. 921.0022 and 921.0024, F.S.

²³ 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.

calculation, following the scoresheet formula, determines the lowest permissible sentence that a trial court may impose, absent a valid reason for departure.²⁴

Effect of Proposed Changes

CS/HB 431 creates s. 794.053, F.S., to prohibit a person 24 years of age or older from soliciting a person who is 16 or 17 years of age in writing to commit a lewd or lascivious act as a third-degree felony. The newly-created offense will capture written solicitation regardless of the medium used.

The bill ranks the new third-degree felony as a level 3 offense on the OSRC.

The bill provides an effective date of October 1, 2023.

B. SECTION DIRECTORY:

Section 1: Creates s. 794.053, F.S., relating to lewd or lascivious written solicitation of certain minors.

Section 2: Amends s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity ranking chart.

Section 3: Provides an effective date of October 1, 2023.

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 an indeterminate positive impact on jail and prison beds by creating a new felony offense for certain offenders who solicit certain minors in writing, which may result in more jail and prison admissions.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

²⁴ 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.

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 29, 2023, the Criminal Justice Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment:

- Moved the new offense from ch. 800 (lewd and lascivious) to ch. 794 (sexual battery), F.S., where other similar offenses are located;
- Lowered the offense level of the new offense from a level 7 to a level 3 on the OSRC; and
- Removed the requirement for a person convicted of the new offense to register as a sexual offender.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.