



Judiciary Committee

**Thursday, February 18, 2016
9:00 a.m. – 12:00 p.m.
Sumner Hall (404 HOB)**

MEETING PACKET

**Steve Crisafulli
Speaker**

**Charles McBurney
Chair**

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Judiciary Committee

Start Date and Time: Thursday, February 18, 2016 09:00 am
End Date and Time: Thursday, February 18, 2016 12:00 pm
Location: Sumner Hall (404 HOB)
Duration: 3.00 hrs

Consideration of the following bill(s):

CS/HB 47 Offenses Against Brokers, Broker Associates, or Sales Associates by Criminal Justice Subcommittee, Passidomo
CS/HB 151 Installation of Tracking Devices or Tracking Applications by Criminal Justice Subcommittee, Cortes, B.
CS/CS/HB 179 Evidence Collected in Sexual Offense Investigations by Justice Appropriations Subcommittee, Criminal Justice Subcommittee, Adkins
CS/CS/HB 203 Residential Properties by Business & Professions Subcommittee, Civil Justice Subcommittee, Wood
CS/HB 555 Driving Under the Influence by Highway & Waterway Safety Subcommittee, Plakon, Cortes, B.
CS/HB 739 Secondhand Dealers by Criminal Justice Subcommittee, Passidomo
CS/HB 761 Fraudulent Activities Associated with Payment Systems by Criminal Justice Subcommittee, Young, Cruz
CS/HB 769 Mental Health Treatment by Children, Families & Seniors Subcommittee, Peters
CS/HB 969 Orders of No Contact by Criminal Justice Subcommittee, Stevenson
HB 1089 Criminal History Information by Rooney
CS/HB 1149 Alternative Sanctioning by Criminal Justice Subcommittee, Spano
CS/HB 1181 Bad Faith Assertions of Patent Infringement by Civil Justice Subcommittee, Grant
CS/HB 1231 Process and Service of Process by Civil Justice Subcommittee, Cortes, B.
HB 4003 Repeal of a Prohibition on Cohabitation by Rehwinkel Vasilinda, Stark



Pursuant to rule 7.12, the deadline for amendments to bills on the agenda by non-appointed members shall be 6:00 p.m., Wednesday, February 17, 2016.

By request of the chair, all committee members are asked to have amendments to bills on the agenda submitted to staff by 6:00 p.m., Wednesday, February 17, 2016.

NOTICE FINALIZED on 02/16/2016 4:06PM by Ingram.Michele

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 47 Offenses Against Brokers, Broker Associates, or Sales Associates
SPONSOR(S): Criminal Justice Subcommittee; Passidomo and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 214

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N, As CS	Keegan	White
2) Justice Appropriations Subcommittee	9 Y, 0 N	Smith	Lloyd
3) Judiciary Committee		Keegan 	Havlicak 

SUMMARY ANALYSIS

Over the past several years, news outlets have reported on a number of violent crimes allegedly committed against brokers, broker associates, and sales associates (hereafter "real estate professionals"), while they were showing real property to prospective buyers. Florida law currently provides for criminal charges to be increased in severity when assault or battery is committed against various protected groups of people. Law enforcement officers, firefighters, sports officials, code inspectors, and people 65 years of age and older are some examples of protected groups. Florida law does not currently include real estate professionals as a protected group.

The bill reclassifies specific offenses committed against a real estate professional while he or she is engaged in showing real property or holding an open house of real property. The reclassified offenses include felony or misdemeanor violations of:

- Section 784.011, relating to assault;
- Section 784.021, relating to aggravated assault;
- Section 784.03, relating to battery and felony battery;
- Section 784.041(1), relating to felony battery;
- Section 784.045, relating to aggravated battery; or
- Section 794.011, relating to sexual battery.

The offenses listed above are reclassified by an increase of one degree, as follows:

- A misdemeanor of the second degree is reclassified as a misdemeanor of the first degree;
- A misdemeanor of the first degree is reclassified as a felony of the third degree;
- A felony of the third degree is reclassified as a felony of the second degree;
- A felony of the second degree is reclassified as a felony of the first degree; and
- A felony of the first degree is reclassified as a life felony.

The Criminal Justice Impact Conference met on October 28, 2015, and determined that this bill will have an insignificant prison bed impact on the Department of Corrections (i.e., an increase of 10 or fewer beds).

This bill reclassifies certain misdemeanors to felonies. Therefore this bill may decrease commitments to local jails.

The bill is effective October 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Violent Crimes against Real Estate Professionals

Over the past several years, news outlets have reported on a number of violent crimes allegedly committed against real estate brokers, broker associates, and sales associates (hereafter “real estate professionals”), while they were showing real property to prospective buyers.¹ The process for showing real estate often causes a real estate professional to be alone at a property with a prospective buyer, yet background checks cannot be completed on each prospective buyer before showing a property. A number of reported violent crimes have occurred against Florida real estate professionals while alone with prospective buyers in Manatee² and Pinellas³ counties.

Criminal Penalties

Assault

Assault is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.⁴ Assault is typically a second degree misdemeanor.⁵ However, if a perpetrator commits assault using a deadly weapon without intent to kill or commits assault with the intent to commit a felony, the crime constitutes aggravated assault⁶ and is punishable as a third degree felony.

Battery

Battery is to actually and intentionally touch or strike another person against the will of that person or intentionally causing bodily harm to another person.⁷ Battery is typically a first degree misdemeanor.⁸ However, battery can be enhanced to felony battery when a perpetrator commits a battery and causes great bodily harm, permanent disability, or permanent disfigurement to the victim,⁹ or when the perpetrator has one or more prior convictions for battery, aggravated battery, or felony battery, and commits a subsequent battery.¹⁰ Both forms of felony battery are third degree felonies.

¹ WFTS Webteam & Michael Paluska, *Search on for Man Who Attacked Real Estate Agent*, ABC ACTION NEWS, WFTS TAMPA BAY (Aug. 11, 2015), <http://www.abcactionnews.com/news/region-sarasota-manatee/search-on-for-man-who-attacked-manatee-realtor> (last visited Oct. 21, 2015); Garrison, Trey, *After One Week, Missing Realtor's Trail Goes Cold*, HOUSING WIRE (June 24, 2015), <http://www.housingwire.com/articles/34293-after-one-week-missing-realtors-trail-goes-cold> (last visited Oct. 21, 2015); Ford, Dana, *Risky Business: Real Estate Agent's Killing Hits Home for Realtors*, CNN (Oct. 1, 2014), <http://www.cnn.com/2014/10/01/us/real-estate-risks/> (last visited Oct. 21, 2015).

² Conlon, Kendra, *Realtor Attacked during Showing in Bradenton*, 10 NEWS TAMPA BAY SARASOTA (Aug. 11, 2015), <http://www.wtsp.com/story/news/local/2015/08/10/realtor-attacked-during-showing-bradenton/31444577/> (last visited Oct. 21, 2015).

³ ABC News, *Florida Cops Fear Repeat of Attacks on Real Estate Agents*, ABC NEWS (June 5, 2015), <http://abcnews.go.com/US/florida-cops-fear-repeat-attacks-real-estate-agents/story?id=31547919> (last visited Oct. 21, 2015); Krueger, Curtis, *Man Who Attacked Realtor in St. Petersburg Home Gets Life Sentence*, TAMPA BAY TIMES (Jan. 13, 2012), <http://www.tampabay.com/news/courts/criminal/man-who-attacked-realtor-in-st-petersburg-home-gets-life-sentence/1210628> (last visited Oct. 21, 2015).

⁴ s. 784.011, F.S.

⁵ A second degree misdemeanor is punishable by up to 60 days in jail and a \$500 fine. ss. 775.082 and 775.083, F.S.

⁶ s. 784.021, F.S.

⁷ s. 784.03, F.S.

⁸ s. 784.03(1)(b), F.S. A first degree misdemeanor is punishable by up to one year in county jail and \$1000 fine. ss. 775.082 and 775.083, F.S.

⁹ s. 784.041(1), F.S.

¹⁰ s. 784.03(2), F.S.

Sexual Battery

Section 794.011, F.S., contains a variety of offenses relating to sexual battery. Depending on various factors, such as whether a deadly weapon is used or the victim is physically incapacitated, these offenses can be punishable as a third degree felony, a second degree felony, a first degree felony, a life felony, or a capital felony.

Criminal Offense Ranking Chart

Sections 775.082 and 775.083, F.S., establish the following penalties applicable to felony offenses:

- A capital felony must be punished by death if a sentencing proceeding results in findings by the court that the person must be punished by death, otherwise the person must be punished by life imprisonment and is ineligible for parole;
- A life felony committed on or after July 1, 1995, is punishable by a term of imprisonment for life or by imprisonment for a term of years not exceeding life imprisonment and a \$15,000 fine;
- A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine;
- A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine; and
- A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine.

The Criminal Punishment Code applies to sentencing for felony offenses committed on or after October 1, 1998.¹¹ Criminal offenses are ranked in the Offense Severity Ranking Chart from Level 1 (least severe) to Level 10 (most severe), and are assigned points based on the severity of the offense.¹² If an offense is not listed in the ranking chart, it defaults to a ranking based on the degree of the felony.¹³

A defendant's sentence is calculated based on points assigned for factors including the offense for which the defendant is being sentenced, injury to the victim, additional offenses that the defendant committed at the time of the primary offense, the defendant's prior record, and other aggravating factors.¹⁴ A defendant's total sentence points are then entered into a mathematical computation that determines the defendant's lowest permissible sentence.¹⁵ The permissible sentence for an offense ranges from the calculated lowest permissible sentence to the statutory maximum for the primary offense (the statutory maximum sentences for felonies are described above).¹⁶

Reclassification of Offenses in Florida

Florida law currently provides for criminal charges to be increased in severity when assault or battery is committed against various protected groups of people. Law enforcement officers,¹⁷ firefighters,¹⁸ sports officials,¹⁹ code inspectors,²⁰ and people 65 years of age and older²¹ are examples of such protected groups. However, Florida law does not currently include real estate professionals as a protected group.

Effect of the Bill

The bill reclassifies specific offenses committed against a broker, broker associate, or sales associate while he or she is engaged in showing real property or holding an open house of real property. The reclassified offenses include felony or misdemeanor violations of:

- Section 784.011, relating to assault;
- Section 784.021, relating to aggravated assault;
- Section 784.03, relating to battery and felony battery;

¹¹ s. 921.002, F.S.

¹² s. 921.0022, F.S.

¹³ s. 921.0023, F.S.

¹⁴ s. 921.0024, F.S.

¹⁵ *Id.* Section 921.0026, F.S., prohibits a judge from imposing a sentence below the lowest permissible sentence unless the judge makes written findings that there are "circumstances or factors that reasonably justify the downward departure."

¹⁶ s. 921.0024(2), F.S.

¹⁷ s. 784.07, F.S.

¹⁸ *Id.*

¹⁹ s. 784.081, F.S.

²⁰ s. 784.083, F.S.

²¹ s. 784.08, F.S.

- Section 784.041(1), relating to felony battery;
- Section 784.045, relating to aggravated battery; or
- Section 794.011, relating to sexual battery.

The offenses listed above are reclassified by an increase of one degree, as follows:

- A misdemeanor of the second degree is reclassified as a misdemeanor of the first degree;
- A misdemeanor of the first degree is reclassified as a felony of the third degree;
- A felony of the third degree is reclassified as a felony of the second degree;
- A felony of the second degree is reclassified as a felony of the first degree; and
- A felony of the first degree is reclassified as a life felony.

The bill defines “broker,” “broker associate,” and “sales associate” in accordance with the definitions provided s. 475.01, F.S.

The bill provides that for the purposes of sentencing and calculation of gain-time, any felony offense that is reclassified under the bill must be ranked one level above the ranking under ss. 921.0022 or 921.0023, F.S., of the offense committed.

B. SECTION DIRECTORY:

Section 1. Creates s. 775.0863, F.S., relating to offenses against brokers, broker associates, or sales associates; reclassification of offenses.

Section 2. Provides an effective date of October 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The Criminal Justice Impact Conference met on October 28, 2015, and determined that this bill will have an insignificant prison bed impact on the Department of Corrections (i.e., an increase of 10 or fewer beds).

In total, 10,153 were sentenced in fiscal year 2014-2015 with 3,709 sentenced to prison for assault and battery. (Incarceration rate: 36.5%).

The number of violent offenders to real estate professionals in the State of Florida is not currently known.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

This bill reclassifies certain misdemeanors to felonies. Therefore this bill may decrease commitments to local jails.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This 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:

The bill does not appear to create the need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On November 4, 2015, the Criminal Justice Subcommittee adopted a proposed committee substitute and reported the bill favorable as a committee substitute. The committee substitute:

- Specifies the criminal offenses subject to increased penalties under the bill, and provides cross-references to the sections of statute relating to the specified offenses; and
- Clarifies language in the bill.

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

1 A bill to be entitled
 2 An act relating to offenses against brokers, broker
 3 associates, or sales associates; creating s. 775.0863,
 4 F.S.; providing definitions; providing applicability;
 5 providing for reclassification of specified offenses
 6 committed against brokers, broker associates, or sales
 7 associates; providing an effective date.

8
 9 Be It Enacted by the Legislature of the State of Florida:

10
 11 Section 1. Section 775.0863, Florida Statutes, is created
 12 to read:

13 775.0863 Offenses against brokers, broker associates, or
 14 sales associates; reclassification of offenses.-

15 (1) For purposes of this section, the terms "broker,"
 16 "broker associate," and "sales associate" have the same meanings
 17 as provided in s. 475.01.

18 (2) The degree of an offense shall be reclassified as
 19 provided in subsection (3) if the offense is committed against a
 20 broker, broker associate, or sales associate while he or she is
 21 engaged in the act of showing real property or holding an open
 22 house of real property and the offense is a felony or
 23 misdemeanor violation of:

- 24 (a) Section 784.011, relating to assault;
 25 (b) Section 784.021, relating to aggravated assault;
 26 (c) Section 784.03, relating to battery and felony

27 | battery;

28 | (d) Section 784.041(1), relating to felony battery;

29 | (e) Section 784.045, relating to aggravated battery; or

30 | (f) Section 794.011, relating to sexual battery.

31 | (3)(a) A misdemeanor of the second degree shall be
 32 | reclassified as a misdemeanor of the first degree.

33 | (b) A misdemeanor of the first degree shall be
 34 | reclassified as a felony of the third degree.

35 | (c) A felony of the third degree shall be reclassified as
 36 | a felony of the second degree.

37 | (d) A felony of the second degree shall be reclassified as
 38 | a felony of the first degree.

39 | (e) A felony of the first degree shall be reclassified as
 40 | a life felony.

41 | (4) For purposes of sentencing under chapter 921 and
 42 | determining incentive gain-time eligibility under chapter 944, a
 43 | felony offense that is reclassified under this section is ranked
 44 | one level above the ranking under s. 921.0022 or s. 921.0023 of
 45 | the offense committed.

46 | Section 2. This act shall take effect October 1, 2016.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 151 Installation of Tracking Devices or Tracking Applications

SPONSOR(S): Criminal Justice Subcommittee; Cortes, B.

TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 298

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N, As CS	Keegan	White
2) Economic Affairs Committee	16 Y, 0 N	Johnson	Pitts
3) Judiciary Committee		Keegan <i>JK</i>	Havlicak <i>RH</i>

SUMMARY ANALYSIS

Tracking devices and tracking applications can utilize cell phone signal technology, the Global Positioning System (hereinafter "GPS"), and tracking software downloaded onto electronic devices to secretly track the location of a person.

During the 2015 Legislative Session, CS/CS/HB 197 passed the House and Senate and was signed into law. That bill created s. 934.425, F.S., making it a second degree misdemeanor for a person to install a tracking device or tracking application on another person's property without the other person's consent. The prohibition applies to a person engaged in private investigation, who installs a tracking device or tracking application on behalf of another person unless the activities would otherwise be exempt under an exception under s. 934.425, F.S.

This bill provides that a person engaged in private investigation, as defined in s. 493.6101, may install a tracking device in the following two circumstances:

- A person or business entity that is exempt under paragraphs (b), (c), and (e) may hire a private investigator to install a tracking device or tracking application consistent with the applicable exemption.
- A private investigator may install a tracking device or tracking application pursuant to a lawful court order.

The bill expands the exemption for persons and business entities that may install a tracking device or tracking application without being exposed to the second degree misdemeanor penalty for doing so. This may reduce the jail bed impact on local government expenditures.

The bill is effective October 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Cellular Phone Tracking

Any time a cellular phone is on, it will periodically send a signal to the local “base station”¹ to verify the strength of the phone’s connection to the provider network.² Cellular phones also communicate back and forth with base stations during phone calls.³ Providers divide their service area up among base stations in the area, and the cellular phone communicates with different nearby base stations as the user moves around the service area.⁴ Providers keep close track of which base stations a phone communicates with so the provider knows which base stations to send phone calls to.⁵ The electronic record created by a cellular phone communicating with a base station is often referred to as “cell site location information” (hereinafter “CSLI”).⁶

CSLI is also used by cellular providers to transmit location data for cellular phones that dial 911.⁷ The Federal Communications Commission (hereinafter “FCC”) developed the Enhanced 911 program (hereinafter “E911”) to ensure that wireless carriers provide location information to 911 dispatchers when a 911 call is placed from a cellular phone.⁸ Over time the FCC has created more stringent requirements for cellular providers that currently require specific location data such as latitude and longitude of the 911 caller.⁹ In similar form to the FCC requirements, Florida law requires the establishment of a statewide E911 program requiring providers to route 911 calls to the correct public safety answering points.¹⁰ This is accomplished by “selective routing based on the geographical location from which the call originated,” and requiring providers to create automatic number identification and automatic location-identification features.¹¹

GPS Tracking

The Global Positioning System (hereinafter “GPS”) is a system of twenty-four operating satellites that orbit the earth and transmit radio signals.¹² The GPS system is operated by the United States Air Force,¹³ and is used for civilian applications as well as national security and military operations.¹⁴ GPS can be used for tracking and locating cellular phones that are equipped with hardware that can receive radio signals from GPS satellites.¹⁵ GPS technology can usually identify the location of a cellular

¹ The “base station” is the device or communications tower that transmits cellular radio signals so a telephone call can be made wirelessly. These towers are also referred to as “cellular towers.” TECHOPEDIA, *Base Station*, <https://www.techopedia.com/definition/5268/base-station-bs> (last visited Jan. 28, 2016).

² *ECPA Reform and the Revolution in Location Based Techs. & Servs. before the Subcomm. on the Constitution, Civil Rights & Civil Liberties*, 111th Cong. 13-14 (testimony of Matt Blaze, Assoc. Prof., Univ. Pa.).

³ *ECPA Reform*, *supra* note 2, at 13.

⁴ *ECPA Reform*, *supra* note 2, at 13.

⁵ *ECPA Reform*, *supra* note 2, at 14.

⁶ *In re Application of U.S. for an Order Directing a Provider of Elec. Commc’n Serv. to Disclose Records to the Gov’t*, 620 F.3d 304 (3d Cir. 2010).

⁷ FEDERAL COMM’NS COMM’N, *Enhanced 9-1-1 Wireless Services*, <https://www.fcc.gov/general/enhanced-9-1-1-wireless-services> (last visited Jan. 28, 2016).

⁸ FEDERAL COMM’NS COMM’N, *Guide: 911 Wireless Services*, <https://www.fcc.gov/consumers/guides/911-wireless-services> (last visited Jan. 28, 2016).

⁹ *Enhanced 9-1-1 Wireless Services*, *supra* note 7.

¹⁰ s. 365.172(3)(h), F.S.

¹¹ *Id.*

¹² GPS.GOV, *Space Segment*, <http://www.gps.gov/systems/gps/space/> (last visited Jan. 28, 2016).

¹³ SCHRIEVER AIR FORCE BASE, *GPS*, <http://www.schriever.af.mil/GPS/> (last visited Jan. 28, 2016).

¹⁴ GPS.GOV, *GPS Applications*, <http://www.gps.gov/applications/> (last visited Jan. 28, 2016).

¹⁵ *ECPA Reform*, *supra* note 2, at 13-14.

phone within a distance of ten meters;¹⁶ however, more recent cellular phone models are the only models equipped with the proper hardware to utilize this technology.¹⁷

Tracking Software

Tracking software can be downloaded onto phones and other electronic devices and used to track the location of the device for mapping applications or other purposes.¹⁸ Some types of tracking software can monitor messages, emails, websites that are visited, and contacts that are saved, in addition to tracking a device's location.¹⁹

Florida Law

Chapter 934, F.S., governs the security of electronic and telephonic communications and the procedural requirements for searching and monitoring such communications. The law covers a number of different investigative and monitoring procedures, including wiretapping, obtaining service provider records, and mobile tracking devices. However, many of the chapter's provisions only apply to law enforcement entities (e.g., s. 934.42, F.S., authorizes a law enforcement officer to apply to a judge of competent jurisdiction for an order authorizing or approving the installation and use of a mobile tracking device).²⁰

During the 2015 Legislative Session, CS/CS/HB 197 passed House and Senate and was signed into law. That bill created s. 934.425, F.S., making it a second degree misdemeanor²¹ for a person to install a tracking device or tracking application on another person's property without the other person's consent. This prohibition does not apply to:

- A law enforcement officer or law enforcement agency that lawfully installs a tracking device or tracking application on another person's property as part of a criminal investigation;
- A parent or legal guardian of a minor child that installs a tracking device or tracking application on the minor child's property if:
 - The parents or legal guardians are lawfully married to each other and are not separated or otherwise living apart, and either parent or legal guardian consents to the installation of the tracking device or tracking application;
 - The parent or legal guardian is the sole surviving parent or legal guardian of the minor child;
 - The parent or legal guardian has sole custody of the minor child; or
 - The parents or legal guardians are divorced, separated, or otherwise living apart and both consent to the installation of the tracking device or tracking application;
- A caregiver of an elderly person or disabled adult, if the elderly person or disabled adult's treating physician certifies that such installation is necessary to ensure the safety of the elderly person or disabled adult;
- A person who is not engaged in private investigation, and is acting in good faith on behalf of a business entity for a legitimate business purpose; or
- An owner or lessee of a motor vehicle, in specified circumstances.

¹⁶ *ECPA Reform*, *supra* note 2, at 13-14.

¹⁷ *ECPA Reform*, *supra* note 2, at 22.

¹⁸ *ECPA Reform*, *supra* note 2, at 13-14.

¹⁹ CBS DFW, *Stalkers Using Cell Phones to Track Victims*, CBS LOCAL (Jan. 14, 2015), <http://dfw.cbslocal.com/2015/01/14/stalkers-using-cell-phones-to-track-victims/>; Crystal Price, *Oklahoma Attorney Raises Awareness about Stalking*, KOCO.COM OKLAHOMA CITY (Jan. 25, 2016), <http://www.koco.com/news/Oklahoma-attorney-raises-awareness-about-stalking/37616944>.

²⁰ Section 934.42, F.S., defines "tracking device" as an electronic or mechanical device which permits the tracking of the movement of a person or object.

²¹ A second degree misdemeanor is punishable by up to 60 days in jail and a \$500 fine. ss. 775.082 and 775.083, F.S.

Effect of the Bill

The bill provides that a person engaged in private investigation, as defined in s. 493.6101, may install a tracking device in the following two circumstances:

- A person or business entity that is exempt under paragraphs (b), (c), and (e) may hire a private investigator to install a tracking device or tracking application consistent with the applicable exemption.
- A private investigator may install a tracking device or tracking application pursuant to a lawful court order.

The bill reenacts s. 493.6118, F.S., (relating to grounds for disciplinary action against specified parties), to incorporate the amendments made by the bill to s. 934.425(4), F.S.

B. SECTION DIRECTORY:

Section 1. Amends s. 934.425, F.S., relating to installation of tracking devices or tracking applications; exceptions; penalties.

Section 2. Reenacts s. 493.6118, F.S., relating to grounds for disciplinary action.

Section 3. Provides an effective date of October 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have an impact on state revenues.

2. Expenditures:

The bill does not appear to have an impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have an impact on local government revenues.

2. Expenditures:

The bill expands the exemption for persons and business entities that may install a tracking device or tracking application without being exposed to the second degree misdemeanor penalty for doing so. This may reduce the jail bed impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

This bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 3, 2016, the Criminal Justice Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute:

- Authorizes certain persons or business entities to hire a private investigator to install tracking devices or tracking applications when the person or business entity is lawfully permitted to do so.
- Permits a private investigator to install a tracking device or tracking application pursuant to a lawful court order.

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

1 A bill to be entitled

2 An act relating to installation of tracking devices or
 3 tracking applications; amending s. 934.425, F.S.;
 4 authorizing certain persons, business entities, and
 5 private investigators to install tracking devices or
 6 tracking applications under certain circumstances;
 7 deleting a provision concerning persons engaging
 8 private investigators; reenacting s. 493.6118(1)(y),
 9 F.S., relating to grounds for disciplinary action, to
 10 incorporate the amendment made to s. 934.425, F.S., in
 11 a reference thereto; providing an effective date.
 12

13 Be It Enacted by the Legislature of the State of Florida:
 14

15 Section 1. Paragraph (d) of subsection (4) of section
 16 934.425, Florida Statutes, is amended to read:

17 934.425 Installation of tracking devices or tracking
 18 applications; exceptions; penalties.—

19 (4) This section does not apply to:

20 (d) A person acting in good faith on behalf of a business
 21 entity for a legitimate business purpose. This paragraph does
 22 not apply to a person engaged in private investigation, as
 23 defined in s. 493.6101, on behalf of another person, except
 24 that:

25 1. A person or business entity that is exempt under
 26 paragraph (b), paragraph (c), or paragraph (e) may hire a

27 private investigator to install a tracking device or tracking
 28 application consistent with the applicable exemption.

29 2. A private investigator may install a tracking device or
 30 tracking application pursuant to a lawful court order unless
 31 ~~such activities would otherwise be exempt under this subsection~~
 32 ~~if performed by the person engaging the private investigator.~~

33 Section 2. For the purpose of incorporating the amendment
 34 made by this act to section 934.425, Florida Statutes, in a
 35 reference thereto, paragraph (y) of subsection (1) of section
 36 493.6118, Florida Statutes, is reenacted to read:

37 493.6118 Grounds for disciplinary action.—

38 (1) The following constitute grounds for which
 39 disciplinary action specified in subsection (2) may be taken by
 40 the department against any licensee, agency, or applicant
 41 regulated by this chapter, or any unlicensed person engaged in
 42 activities regulated under this chapter.

43 (y) Installation of a tracking device or tracking
 44 application in violation of s. 934.425.

45 Section 3. This act shall take effect October 1, 2016.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 179 Evidence Collected in Sexual Offense Investigations

SPONSOR(S): Justice Appropriations Subcommittee; Criminal Justice Subcommittee; Adkins and others

TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 636

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 0 N, As CS	White	White
2) Justice Appropriations Subcommittee	11 Y, 0 N, As CS	McAuliffe	Lloyd
3) Judiciary Committee		White TW	Havlicak RN

SUMMARY ANALYSIS

Sexual offense evidence kits (SOEKs), also referred to as "rape kits," are medical kits used to collect evidence from the body and clothing of a victim of rape or other sexual offense during a forensic physical examination. Such kits are submitted by law enforcement agencies to crime laboratories for DNA analysis and resulting DNA profiles are uploaded to local, state, and federal DNA databases to determine whether a match identifying the perpetrator can be made.

During the past decade, the federal government has indicated that hundreds of thousands of SOEKs have been retained untested in law enforcement evidence storage facilities across the nation. Concerns about this issue have prompted the federal funding of studies in Houston, Texas and Detroit, Michigan to determine the number of untested SOEKs retained in those jurisdictions, federal grant funding to assist jurisdictions in analyzing untested kits, and legislation being adopted in some states which mandates periodic audits of untested SOEKs or which specifies requirements for the use, submission, and analysis of SOEKs.

Currently, Florida Law does not specify requirements regarding the testing of SOEKs. Proviso adopted as part of the 2015-2016 General Appropriations Act directed the Florida Department of Law Enforcement (FDLE) to conduct a statewide assessment of untested SOEKs, including both kits that have been submitted to a laboratory for analysis and those that have not been submitted. The FDLE reported its findings January 1, 2016.

The bill creates s. 943.326, F.S., to require a SOEK, or other DNA evidence if such kit is not collected, to be submitted to a member of the statewide criminal analysis laboratory system for forensic testing within the earlier of 30 days after:

- Receipt of the evidence by a law enforcement agency if a report of the sexual offense is made to the agency; or
- A request to have the evidence tested is made by the alleged victim or a specified representative of the victim.

The bill further requires that an alleged victim or certain representatives of the victim be informed of the purpose for and right to demand testing of such evidence. It also requires testing of SOEKs be completed within 120 days, and requires FDLE and others to adopt guidelines for the collection, submission, and testing of DNA evidence and specifies that the section does not create certain causes of action or rights.

The bill will not have a significant fiscal impact on state or local governments.

The bill takes effect July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Sexual Offense Evidence Kits; Forensic Physical Examinations; DNA Analysis

A sexual offense evidence kit (SOEK), also referred to as a “rape kit,” is a medical kit used to collect evidence from the body and clothing of a victim of rape or other sexual offense during a forensic physical examination. The kit contains tools such as swabs, tubes, glass slides, containers, and plastic bags. These items are used to collect and preserve fibers from clothing, hair, and bodily fluids, which can help identify DNA and other forensic evidence left by a perpetrator.¹

In Florida, a victim of certain sexual offenses may have a forensic physical examination conducted by a healthcare provider for free regardless of whether the victim reports the offense to law enforcement authorities. Pursuant to s. 960.28(2), F.S., up to \$500 for expenses for a forensic physical examination must be paid for by the Crime Victims’ Services Office within the Department of Legal Affairs (DLA) for a victim of sexual battery as defined in chapter 794 or a lewd or lascivious offense as defined in chapter 800. Such payment is made regardless of whether the victim is covered by health or disability insurance and whether the victim participates in the criminal justice system or cooperates with law enforcement.² Information received or maintained by the DLA which identifies an alleged victim who seeks payment of such medical expenses is confidential and exempt from the provisions of s. 119.07(1), F.S.³

According to protocols developed by the DLA, healthcare providers conducting the forensic physical examination should complete the document entitled “Sexual Assault Kit Form for Healthcare Providers.”⁴ This document includes a consent form that requires the victim or his or her legal guardian to indicate that he or she consents to a forensic physical examination for the preservation of evidence of a sexual offense.⁵ Additionally, the victim or legal guardian must select one of the following two options:

- For Reporting Victims [i.e., victims who choose to report the sexual offense to law enforcement]: I do authorize this medical facility and the examiner to perform all necessary tests, examinations, photography, and treatment, and to supply copies of all pertinent medical laboratory reports, immediately upon completion to the law enforcement agency and the State Attorney’s Office having jurisdiction.
- For Non-Reporting Victims [i.e., victims who choose to not report the sexual offense to law enforcement]: I do authorize this medical facility and the examiner to perform all necessary tests, examinations, photography, and treatment at this time.⁶

The DLA protocols provide instructions for sealing the SOEK upon completion of the exam and indicate that the SOEK must stay with the medical examiner or secured in a locked area with limited access and proper chain of custody procedures until transferred to law enforcement. For a SOEK of a non-reporting

¹ The White House, Office of Communications, *FACT SHEET: INVESTMENTS TO REDUCE THE NATIONAL RAPE KIT BACKLOG AND COMBAT VIOLENCE AGAINST WOMEN*, March 16, 2015, at 1.

² s. 960.28(2), F.S.

³ s. 960.28(4), F.S.

⁴ Florida Department of Legal Affairs, Division of Victim Services and Criminal Justice Programs, *Adult and Child Sexual Assault Protocols: Initial Forensic Physical Examination*, April 2015, at 13.

⁵ Florida Department of Law Enforcement, *Sexual Assault Kit Form for Healthcare Providers*, available at

<http://www.fdle.state.fl.us/Content/getdoc/036671bc-4148-4749-a891-7e3932e0a483/Publications.aspx> (last visited Nov. 28, 2015).

⁶ *Id.*

victim, the protocol states that the medical examiner should check the local area for storage procedures and that a law enforcement agency is recommended for long-term storage.^{7, 8}

Generally, law enforcement agencies in Florida submit SOEKs for DNA analysis to the statewide criminal analysis laboratory system, which consists of six laboratories operated by the Florida Department of Law Enforcement (FDLE) in Ft. Myers, Jacksonville, Pensacola, Orlando, Tallahassee, and Tampa and five local laboratories in Broward, Indian River, Miami-Dade, Palm Beach, and Pinellas Counties.⁹ According to information provided by the FDLE, DNA analysis of a SOEK requires on average approximately 26.25 hours of crime analyst and supervisor time.¹⁰

DNA profiles resulting from such analyses are uploaded by the laboratory to its local DNA Index System (DIS), which then uploads the profiles to the state DNA database. From there, DNA profiles are uploaded to the Federal Bureau of Investigation's Combined DIS, referred to as CODIS, which consists of DNA profiles contributed by federal, state, and local participating forensic laboratories. DNA profiles within these local, state, and federal databases are continuously searched against one another to determine whether a match exists.¹¹

In some cases, a law enforcement agency may not submit a SOEK for DNA analysis and may instead retain the SOEK in evidence storage. Reasons for not analyzing a SOEK include: (a) the victim did not want to file a police report regarding the assault; (b) the victim no longer wants the investigation to proceed; (c) the case is not being pursued by the state attorney; and (d) the suspect has pled guilty or nolo contendere.¹² According to FDLE, DNA profiles may not be uploaded into CODIS if there is no crime such as in the case of a non-reporting victim

SOEK Analysis Backlogs

National Backlog

In March 2015, the federal government estimated that a backlog of hundreds of thousands of untested SOEKs exists in crime labs throughout the United States (U.S.). As used by the federal government, the term "backlog" refers to SOEKs that were submitted to a crime laboratory for testing more than 90 days ago.¹³ Additionally, there are an unknown number of SOEKs in police evidence storage facilities throughout the nation which have not been submitted to a crime laboratory for analysis.¹⁴

To better understand the issue of SOEKs that have not been submitted for analysis, the National Institute of Justice (NIJ) awarded grants in 2011 to the Houston, Texas Police Department and Wayne County, Michigan Prosecutor's Office.¹⁵ Both entities conducted a census of untested SOEKs:¹⁶

⁷ Florida Department of Legal Affairs, *supra* note 4, at 21; *see also* Florida Department of Law Enforcement, *Instruction List for Forensic Exam Kit*, available at <http://www.fdle.state.fl.us/Content/getdoc/036671bc-4148-4749-a891-7e3932e0a483/Publications.aspx> (last visited Nov. 28, 2015).

⁸ Chief Frank Fabrizio, who represents the Florida Police Chiefs Association, testified at a Florida Senate hearing that in Orange and Volusia Counties, SOEKs for non-reporting victims are stored by a law enforcement agency, but are not submitted to a crime laboratory for analysis. Hearing of the Florida Senate Appropriations Subcommittee on Criminal and Civil Justice, Nov. 3, 2015, available at http://www.flsenate.gov/media/videoplayer?EventID=2443575804_2015111024.

⁹ s. 943.32, F.S.; *see also* Florida Department of Law Enforcement, *Biology Screening of Sexual Assault Evidence Kits* (on file with the House Criminal Justice Subcommittee).

¹⁰ Florida Department of Law Enforcement, *supra* note 9, at 7.

¹¹ *Id.* at 7-8; *see also* Federal Bureau of Investigation, *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System*, <https://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet> (last visited Nov. 28, 2015).

¹² These reasons were provided during testimony by Jennifer Pritt, Assistant Commissioner of the Florida Department of Law Enforcement, and Chief Frank Fabrizio, representing the Florida Police Chiefs Association. Hearing of the Florida Senate Appropriations Subcommittee on Criminal and Civil Justice, Nov. 3, 2015, available at http://www.flsenate.gov/media/videoplayer?EventID=2443575804_2015111024.

¹³ The White House, *supra* note 1, at 1-2.

¹⁴ *Id.*

¹⁵ The White House, *supra* note 1, at 2.

- 6,663 untested SOEKs were found in storage at the Houston Police Department.¹⁷ Each of these SOEKs were submitted for analysis. As of February 2015, such analyses had resulted in 850 matches identifying the perpetrator and in the prosecutions of 29 offenders.¹⁸
- 8,707 untested SOEKs were found in Detroit.¹⁹ Of these SOEKs, approximately 2,000 were analyzed. The analyses resulted in 760 matches identifying the perpetrator, the identification of 188 serial offenders, and 15 convictions.²⁰

More recently this year, Congress approved the National Sexual Assault Kit Initiative, a \$41 million competitive grant program administered by the Bureau of Justice Assistance within the U.S. Department of Justice to support the comprehensive reform of jurisdictions' approaches to sexual offense cases resulting from evidence found in SOEKs that have never been submitted to a crime laboratory. Grant recipients announced on September 10, 2015, included: (a) the Florida Department of Law Enforcement which received \$1,268,540; (b) the Miami-Dade Police Department Forensic Services Bureau which received \$1,968,246; and (c) the Tallahassee Police Department which received \$163,939.²¹

Florida's Backlog Assessment

Proviso adopted as part of the 2015-2016 General Appropriations Act, appropriated \$300,000 in nonrecurring general revenue funds to FDLE to conduct statewide assessment of SOEKs that have not been analyzed. The proviso required FDLE to submit a report of its findings, including reasons for delays or deferment of analysis, to the Governor, President of the Senate, and Speaker of the House of Representatives by January 1, 2016.²²

In August 2015, FDLE, in cooperation with the Florida Sheriff's Association and the Florida Police Chiefs Association, developed and conducted a survey of all of this state's law enforcement agencies. This survey asked the agencies to identify the number of SOEKs that have not been submitted for analysis, the number of SOEKs that should be submitted for analysis, and the number of SOEKs that are from victims who chose to not report their sexual offenses to law enforcement.

The submitted report indicated that 212 local law enforcement agencies (69 percent) and all of the state's sheriff's offices responded to the survey, which represents 89 percent of this state's population. These survey responses indicate that 13,435 SOEKs have not been submitted for analysis.²³ Of this total, 6,774 kits are housed in jurisdictions served by county forensic laboratories and 6,661 are housed in jurisdictions served by FDLE crime laboratories.

The survey also required law enforcement agencies to indicate why the SOEKs have not been submitted for analysis and provided the following selections for such reasons: (a) the victim no longer wants the investigation to proceed; (b) the SOEK was obtained from a non-reporting victim; (c) the case is not being pursued by the State Attorney's Office; (d) the suspect has pled guilty or nolo contendere; (e) the agency did not require submission; and (e) a blank text box that enables the agency to provide its own reason. Respondents were allowed to choose more than one answer to this question.

¹⁶ National Institute of Justice, Office of Justice Programs, *Untested Evidence in Sexual Assault Cases*, <http://www.nij.gov/topics/law-enforcement/investigations/sexual-assault/Pages/untested-sexual-assault.aspx#determining> (last visited Nov. 28, 2015).

¹⁷ *Id.*

¹⁸ Katherine Driessen, *City done with lab testing of rape kit backlog*, Houston Chronicle (February 23, 2015), <http://www.chron.com/news/politics/houston/article/City-done-with-lab-testing-of-rape-kit-backlog-6096424.php>.

¹⁹ National Institute of Justice, *supra* note 16.

²⁰ The White House, *supra* note 1, at 2.

²¹ The New York County District Attorney's Office, *DISTRICT ATTORNEY VANCE AWARDS \$38 MILLION IN GRANTS TO HELP 32 JURISDICTIONS IN 20 STATES TEST BACKLOGGED RAPE KITS* (Sept. 10, 2015) <http://manhattanda.org/press-release/district-attorney-vance-awards-38-million-grants-help-32-jurisdictions-20-states-test->

²² Senate Bill 2500-A (2015), Specific Appropriation 1247.

²³ Florida Department of Law Enforcement, *Assessment of Unsubmitted Sexual Assault Kits*, 12/30/2015.

Forty-seven percent of the responding jurisdictions reported they had no untested kits. Of the remaining 53 percent of the jurisdictions that reported having untested kits the survey found that:

- 77 percent of the respondents (jurisdictions) reported that one of the reasons they did not submit the SOEK was because the victim did not want to proceed with the investigation.
- 58 percent of the respondents reported that one of the reasons they did not submit the SOEK is that the State Attorney's Office declined to prosecute.
- 38 percent of the respondents reported that one of the reasons they did not submit the SOEK is that the suspect pled guilty.
- 34 percent of the respondents reported that one of the reasons they did not submit the SOEK is that it was collected from a non-reporting victim.

In addition to the above responses, other reasons why SOEKs were not submitted included: the allegation was unfounded; victim deceased; collection preceded analysis technology; sexual contact is admitted by perpetrator and the case hinges on consent; suspect convicted on other charges, SOEKs not needed; and environmental damage to packaging.

The survey only measured what percent of the respondents reported that one or more of the selections on the survey as a reason they did not submit all of their SOEKs for analysis. There is no way to tell how many of the 13,435 SOEKs that have not been submitted for analysis are from non-reporting victims. The survey only tells you the percentage of the respondents (jurisdictions) that said it was one of the reasons they did not submit the SOEK.

State Regulation of SOEK Analyses

Like Florida, some states have adopted legislation requiring audits to be conducted of the untested SOEKs in the possession of law enforcement agencies and reports of such audits to be filed with the state.²⁴

In other states, legislation has been adopted which specifies requirements, such as procedures and timeframes, for SOEK use, submission, and analysis. For example:

- Colorado enacted legislation effective June 5, 2013, which requires the state's Department of Public Safety to adopt rules that require forensic evidence to be collected when requested by a sexual offense victim, specify standards for what evidence must be submitted to an accredited crime laboratory, and specify time frames for when such evidence must be submitted, analyzed, and compared in DNA databases. The law also directed the department to adopt a plan for prioritizing the analysis of its backlog of SOEKs and to include a requirement in its rules after the backlog is resolved that evidence be submitted for analysis within 21 days after receipt by a law enforcement agency.²⁵
- Illinois enacted legislation effective September 1, 2010, which requires law enforcement agencies to submit sexual offense evidence collected in connected with an investigation within 10 business days after receipt to an approved crime laboratory and requires crime laboratories to analyze such evidence within six months.²⁶
- Ohio adopted legislation effective March 23, 2015, which requires law enforcement agencies to forward the contents of a SOEK related to an investigation initiated after the act's effective date

²⁴ See Arkansas House Bill 1208 (2015) (requiring annual audits of untested SOEKs stored by law enforcement agencies and healthcare providers and submission of reports to the State Crime Laboratory and Legislature); Kentucky Senate Joint Resolution 20 (2015) (directing the state's Auditor of Public Accounts to study the number of untested SOEKs in the possession of law enforcement and prosecutorial agencies and to report such information to the Legislative Research Commission); Virginia Senate Bill 658 (2014) (requiring law enforcement agencies to inventory and report all untested physical evidence recovery kits to the Department of Forensic Science and requiring the Department to report to the General Assembly).

²⁵ COLO. REV. STAT. §24-33.5-113 (2015).

²⁶ 725 IL. COMP. STAT. 202/10 and 202/15 (2015).

to a crime laboratory within 30 days for analysis and directs the crime laboratory to perform the analysis as soon as possible after receipt.²⁷

Effect of Bill

The bill creates s. 943.326, F.S., to require a SOEK, or other DNA evidence if such kit is not collected, to be submitted to a member of the statewide criminal analysis laboratory system²⁸ for forensic testing within the earlier of 30 days after:

- Receipt of the evidence by a law enforcement agency if a report of the sexual offense is made to the law enforcement agency; or
- A request to have the evidence tested is made by the alleged victim, the alleged victim's parent or guardian if the alleged victim is a minor, or the alleged victim's personal representative if the alleged victim is deceased.

The new section of law further requires that an alleged victim or a specified representative of the victim be informed of the purpose for submitting evidence for testing and the right to request testing by:

- A medical provider conducting a forensic physical examination for purposes of a sexual offense evidence kit; or
- A law enforcement agency that collects other DNA evidence associated with the sexual offense if a kit is not collected.

The bill requires that members of the statewide criminal analysis laboratory system complete the testing of the SOEKs no later than 120 days after submission by a law enforcement agency.

The bill also requires FDLE and each laboratory within the statewide criminal analysis laboratory system, in coordination with the Florida Council Against Sexual Violence, to adopt and disseminate guidelines and procedures for the collection, submission, and testing of DNA evidence obtained in connection with an alleged sexual offense. Such guidelines and procedures must include the requirements of the section, standards for how evidence is to be packaged for submission, what evidence must be submitted to a member of the statewide criminal analysis laboratory system, and timeframes for when the evidence must be submitted, analyzed, and compared to DNA databases.

The bill specifies that:

- The section's testing requirements are satisfied when a member of the statewide criminal analysis laboratory system tests the contents of the SOEK in an attempt to identify the foreign DNA attributable to a suspect.
- If a SOEK is not collected, the laboratory may receive and examine other items directly related to the crime scene, such as clothing or bedding or personal items left behind by the suspect.
- If probative information is obtained from the testing of the SOEK, the examination of other evidence should be based on the needs of the case and determined through cooperation among the investigating agency, the laboratory, and the prosecutor.

Finally, the bill states that the section does not create a cause of action or create any rights for an individual to challenge the admission of evidence or create a cause of action for damages or any other relief for a violation of the section.

The bill takes effect July 1, 2016.

²⁷ OHIO REV. CODE ANN. §2933.82 (2015).

²⁸ The statewide criminal analysis laboratory system consists of six laboratories operated by the Florida Department of Law Enforcement in Ft. Myers, Jacksonville, Pensacola, Orlando, Tallahassee, and Tampa and five local laboratories in Broward, Indian River, Miami-Dade, Palm Beach, and Pinellas Counties. s. 943.32, F.S.

B. SECTION DIRECTORY:

Section 1. Creates s. 943.326, F.S., relating to DNA evidence collected in a sexual assault investigations.

Section 2. Provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill requires testing of SOEKs be completed within 120 days. The average time to process the DNA evidence in a SOEK is approximately 90 days, therefore this provision of the bill should not have an impact on workload.

The bill also requires FDLE and each laboratory within the statewide criminal analysis laboratory system, in coordination with the Florida Council Against Sexual Violence, to adopt and disseminate guidelines and procedures for the collection, submission, and testing of DNA evidence obtained in connection with an alleged sexual offense. FDLE will be able to comply with this requirement within existing resources and reports this bill will not have a fiscal impact on the department.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not authorize rules; instead, it requires FDLE and specified others to adopt guidelines and procedures relating to the collection, submission, and testing of DNA evidence that is obtained in connection with an alleged sexual offense.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The term “rule” is defined as “each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.”²⁹ The bill requires FDLE and specified others to adopt guidelines and procedures that address items including standards for how evidence is to be packaged for submission, what evidence must be submitted to the a member of the statewide criminal analysis laboratory system, and timeframes for when the evidence must be submitted, analyzed, and compared to DNA databases. These items appear to be a description of the procedure requirements of an agency. As such, it may be desirable to amend the bill so that it requires the adoption of rules, rather than guidelines and procedures.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On December 1, 2015, the Criminal Justice Subcommittee adopted a strike all amendment and reported the bill favorably as a committee substitute. The amendment:

- Removed the bill’s requirements for “any” DNA evidence collected in a sexual assault investigation to be analyzed.
- Increased the number of days within which a SOEK must be submitted for testing under certain circumstances from 21 to 30.
- Specified that medical providers and law enforcement agencies must provide certain information to victims or their representatives regarding SOEK testing under certain circumstances.
- Added provisions indicating when the section’s testing requirements are deemed satisfied and when other DNA evidence may be considered.
- Provided that the section does not create certain causes of action or rights.
- Removed the bill’s requirements for FDLE to adopt rules and submit a plan to analyze the untested sexual assault forensic evidence currently held in the statewide criminal analysis laboratory system by a certain date.

On January 28, 2016, the Justice Appropriations Subcommittee adopted a strike all amendment and reported the bill favorably as a committee substitute. The amendment removes the legislative intent provision and requires testing of SOEKs be completed within 120 days after submission.

This analysis is drafted to the committee substitute as adopted by the Justice Appropriations Subcommittee.

²⁹ s. 120.52(16), F.S.
STORAGE NAME: h0179d.JDC.DOCX
DATE: 2/16/2016

1 A bill to be entitled

2 An act relating to evidence collected in sexual
 3 offense investigations; creating s. 943.326, F.S.;
 4 requiring that a sexual offense evidence kit or other
 5 DNA evidence be submitted to a member of the statewide
 6 criminal analysis laboratory system within a specified
 7 timeframe after specified occurrences; requiring a
 8 medical provider or law enforcement agency to inform
 9 an alleged victim of a sexual offense of certain
 10 information relating to sexual offense evidence kits;
 11 requiring the retention of specified evidence;
 12 requiring adoption and dissemination of guidelines and
 13 procedures by certain entities by a specified date;
 14 requiring the testing of sexual offense evidence kits
 15 within a specified timeframe after submission to a
 16 member of the statewide criminal analysis laboratory;
 17 providing requirements for such guidelines and
 18 procedures; providing construction; providing an
 19 effective date.
 20

21 Be It Enacted by the Legislature of the State of Florida:

22
 23 Section 1. Section 943.326, Florida Statutes, is created
 24 to read:

25 943.326 DNA evidence collected in sexual offense
 26 investigations.-

27 (1) A sexual offense evidence kit, or other DNA evidence
 28 if a kit is not collected, must be submitted to a member of the
 29 statewide criminal analysis laboratory system under s. 943.32
 30 for forensic testing within 30 days after:

31 (a) Receipt of the evidence by a law enforcement agency if
 32 a report of the sexual offense is made to the law enforcement
 33 agency; or

34 (b) A request to have the evidence tested is made to the
 35 medical provider or the law enforcement agency by:

36 1. The alleged victim;

37 2. The alleged victim's parent, guardian, or legal
 38 representative, if the alleged victim is a minor; or

39 3. The alleged victim's personal representative, if the
 40 alleged victim is deceased.

41 (2) An alleged victim or, if applicable, the person
 42 representing the alleged victim under subparagraph (1)(b)2. or
 43 subparagraph (1)(b)3. must be informed of the purpose of
 44 submitting evidence for testing and the right to request testing
 45 under subsection (1) by:

46 (a) A medical provider conducting a forensic physical
 47 examination for purposes of a sexual offense evidence kit; or

48 (b) A law enforcement agency that collects other DNA
 49 evidence associated with the sexual offense if a kit is not
 50 collected under paragraph (a).

51 (3) A collected sexual offense evidence kit must be
 52 retained in a secure, environmentally safe manner until the

53 prosecuting agency has approved its destruction.

54 (4) By January 1, 2017, the department and each laboratory
 55 within the statewide criminal analysis laboratory system, in
 56 coordination with the Florida Council Against Sexual Violence,
 57 shall adopt and disseminate guidelines and procedures for the
 58 collection, submission, and testing of DNA evidence that is
 59 obtained in connection with an alleged sexual offense. The
 60 timely submission and testing of sexual offense evidence kits is
 61 a core public safety issue. Testing of sexual offense evidence
 62 kits must be completed no later than 120 days after submission
 63 to a member of the statewide criminal analysis laboratory
 64 system.

65 (a) The guidelines and procedures must include the
 66 requirements of this section, standards for how evidence is to
 67 be packaged for submission, what evidence must be submitted to a
 68 member of the statewide criminal analysis laboratory system, and
 69 timeframes for when the evidence must be submitted, analyzed,
 70 and compared to DNA databases.

71 (b) The testing requirements of this section are satisfied
 72 when a member of the statewide criminal analysis laboratory
 73 system tests the contents of the sexual offense evidence kit in
 74 an attempt to identify the foreign DNA attributable to a
 75 suspect. If a sexual offense evidence kit is not collected, the
 76 laboratory may receive and examine other items directly related
 77 to the crime scene, such as clothing or bedding or personal
 78 items left behind by the suspect. If probative information is

79 obtained from the testing of the sexual offense evidence kit,
 80 the examination of other evidence should be based on the
 81 potential evidentiary value to the case and determined through
 82 cooperation among the investigating agency, the laboratory, and
 83 the prosecutor.

84 (5) This section does not create a cause of action or
 85 create any rights for an individual to challenge the admission
 86 of evidence or create a cause of action for damages or any other
 87 relief for a violation of this section.

88 Section 2. This act shall take effect July 1, 2016.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 203 Residential Properties

SPONSOR(S): Business & Professions Subcommittee; Civil Justice Subcommittee; Wood and others

TIED BILLS: None **IDEN./SIM. BILLS:** SB 722

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	11 Y, 2 N, As CS	Robinson	Bond
2) Business & Professions Subcommittee	13 Y, 0 N, As CS	Anderson	Anstead
3) Judiciary Committee		Robinson <i>TR</i>	Havlicak <i>RH</i>

SUMMARY ANALYSIS

An estoppel certificate is a legal document issued by a homeowners', cooperative, or condominium association (collectively referred to herein as "association") which certifies the total debt owed to the association for unpaid financial obligations of a parcel owner or unit owner.

The bill:

- provides for the ability to request and deliver estoppel certificates through electronic means;
- reduces the period of time in which an association must respond to an estoppel certificate request;
- specifies the required content, effective periods, and approved delivery methods for estoppel certificates;
- requires the designation of a person or entity for receipt of a request for an estoppel certificate;
- establishes fee caps for the preparation and delivery of an estoppel certificate;
- waives the right of an association to collect moneys owed in excess of the amount stated in an estoppel certificate from any person who in good faith relies on such certificate; and
- provides that cooperative associations are subject to the same requirements regarding the issuance of estoppel certificates as homeowner and condominium associations.

The bill does not appear to have a fiscal impact on state or local governments.

The bill has an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Condominium¹ and cooperative² associations are governed internally by an association whose members are the owners of units within the association. Many single-family residential communities are similarly governed by a homeowners' association³ made up of parcel owners. An association is in effect a partnership between unit or parcel owners who share an undivided interest in the common elements of the community.

Sections 718.111(4), 719.104(5), and 720.308, F.S., provide for the collection of periodic and special assessments to fund the association. To operate, an association must collect periodic assessments from the unit or parcel owners in order to pay for common expenses, management, maintenance, insurance, and reserves for anticipated future major expenses. Additionally, special assessments may be levied for expenditures that were not included in the association's annual budget.⁴ A unit or parcel owner is liable for all assessments that come due while he or she is the owner, and is jointly liable with past owners for previous unpaid assessments.⁵ Unpaid assessments may also become a lien on the parcel.⁶

An estoppel certificate issued by an association certifies the total debt owed to the association for unpaid financial obligations by a parcel owner or unit owner as of a specified date.⁷ The association is legally bound⁸ by the amount stated in the estoppel certificate. It may not later assert a contradictory claim of moneys due against any third party who relies on the certificate.⁹

Buyers, lenders, title insurance companies, and other entities involved in the sale or refinance of real property are examples of third-parties who rely on estoppel certificates to ascertain the value of property and ensure that title to property is transferred without any lien or encumbrance.

Present Situation – Form, Effective Period, and Delivery of Estoppel Certificate

An association is required to provide an estoppel certificate within 15 days after receiving a request¹⁰ from a unit or parcel owner, unit or parcel mortgagee, or the designee of the owner or mortgagee.¹¹

¹ A condominium association means, in addition to any entity responsible for the operation of common elements owned in undivided shares by unit owners, any entity which operates or maintains other real property in which unit owners have use rights, where membership in the entity is composed exclusively of unit owners or their elected or appointed representatives and is a required condition of unit ownership. s. 718.103(2), F.S.

² A cooperative association means the corporation for profit or not for profit that owns the record interest in the cooperative property or a leasehold of the property of a cooperative and that is responsible for the operation of the cooperative. s. 719.103(2), F.S.

³ A homeowners' association is a Florida corporation responsible for the operation of a community or a mobile home subdivision in which the voting membership is made up of parcel owners or their agents, or a combination thereof, and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel. s. 720.301(9), F.S.

⁴ ss. 718.103(24), 719.103(23), and 720.308(1)(a), F.S.

⁵ ss. 718.116(1), 719.108(1), and 720.3085(2)(b), F.S.

⁶ ss. 718.116(5), 719.108(4), and 720.3085, F.S.

⁷ ss. 718.116(8), 719.108(6), and 720.30851, F.S.

⁸ "Estoppel" means a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true. *Black's Law Dictionary* (10th ed. 2014), available at Westlaw BLACKS.

⁹ ss. 718.116(8)(a), 719.108(6), and 720.30851(1), F.S.

¹⁰ A request to a condominium association must be in writing. s. 718.116(8), F.S.

Current law provides few criteria for the form of the certificate. An estoppel certificate issued by a homeowners' or condominium association must only set forth all assessments and other moneys owed to the association with respect to the unit or parcel, disclose any fee charged by the association for the preparation of such certificate, and be signed by an officer or authorized agent of the association.¹² An estoppel certificate issued by a cooperative association must only set forth the amount of assessments or other moneys owed.¹³

Some associations provide the amount of assessments and other moneys owed to the association in one lump sum while others provide an itemized breakdown of assessments, late fees, interest, etc. The amount in some certificates reflects only the amount presently owed while others provide the amount owed through a given date a few weeks or months into the future which provides for a longer use of the certificate. Accordingly, the information provided in an estoppel certificate and the period of effectiveness varies among associations.

Effect of Proposed Changes – Form, Effective Period, and Delivery of Estoppel Certificate

The bill amends ss. 718.116(8), 719.108(6), and 720.30851, F.S., to provide uniform requirements for the form, effective period, and delivery of an estoppel certificate.

The bill provides that an estoppel certificate must specify information contained in the official records of the association and authorizes associations to require additional information. The bill provides a form for the estoppel certificate requiring the following information:

- The date of issuance, name of unit/parcel owner, unit designation and address, and person requesting the estoppel certificate.
- The fee for preparation and delivery of the estoppel certificate.
- Assessment information, including the regular periodic assessment amount levied against the unit, date paid through, and due date and amount of the next installment.
- An itemized list of all assessments, special assessments, other moneys owed to the association, capital contribution/resale/transfer fees owed, and credit balances to the association by the unit owner for a specific unit as of the date of issuance.
- An itemized list of any additional assessments, special assessments, and other moneys that are scheduled to become due for each day after the date of issuance for the effective period of the estoppel certificate. In calculating such amounts, the association may assume that any delinquent amounts will remain delinquent.
- All documented violations, if any, of the rules or regulations applicable to the unit.
- The signature of an officer or agent of the association.

The bill provides that an estoppel certificate delivered on the date of issuance has a 30 day effective period. The estoppel certificate is effective for 35 days if mailed to the requester.

Additionally, the bill reduces the period of time in which an association must issue an estoppel certificate from 15 days to 10 business days. The certificate must be delivered on the day of issuance by mail, hand, or electronic transmission. The bill requires associations to designate a person or entity for receipt of a request for an estoppel certificate and make the designation information available upon request.

¹¹ ss. 718.116(8), 719.108(6), and 720.30851, F.S. The cooperative act does not currently require that a cooperative association provide an estoppel certificate to the designee of the owner or mortgagee.

¹² *Id.*

¹³ s. 719.108(6), F.S.

Present Situation - Fees for Preparation of Estoppel Certificate

A homeowners' or condominium association may charge a fee for the preparation of an estoppel certificate as long as the fee is established by a written resolution adopted by the board, or provided by a written management, bookkeeping, or maintenance contract.¹⁴ A cooperative association may also charge a fee to prepare an estoppel certificate.¹⁵

Current law provides only that a preparation fee be "reasonable."¹⁶ Neither the Legislature nor the courts have provided guidance on what constitutes a reasonable fee for an estoppel certificate. This has caused variations in the amount of the fee charged by associations for the preparation of an estoppel certificate.

After a series of public meetings in 2014, the Community Association Living Study Council,¹⁷ by unanimous vote, recommended to the Legislature that a reasonable cap be established for estoppel certificate fees and that such fees be tiered.¹⁸ The Council proposed several additional factors that should be considered when determining the amount of the fee including whether the owner is current in fees, delinquent in fees, or if the estoppel certificate was requested in conjunction with a bulk purchase.¹⁹

Effect of Proposed Changes - Fees for Preparation of Estoppel Certificate

The bill amends ss. 718.116(8), 719.108(6), and 720.30851, F.S., to establish the maximum fees that may be charged by an association for the preparation and delivery of an estoppel certificate as illustrated by **Figure 1** (see next page). Fee caps will be adjusted for inflation every three years and the Department of Business and Professional Regulation must calculate and publish the adjusted rates on its website.

For the preparation and delivery of an estoppel certificate for an account without any delinquent amounts owed to the association, the association may charge a maximum fee of \$250. For the preparation and delivery of an estoppel certificate for an account with delinquent amounts owed, the association may charge up to an additional fee of \$200 (for a maximum total fee of \$450). If the estoppel certificate is requested on an expedited basis and is delivered within 3 days of the request, the association may charge an additional fee of \$100. The bill provides that the preparation and delivery of an estoppel certificate may not be conditioned upon the payment of any other fees not authorized by the bill.

If the association issues the estoppel certificate more than 10 business days after receipt of the request, the association may not collect any fee.

¹⁴ ss. 718.116(8)(d) and 720.30851(3), F.S.

¹⁵ s. 719.108(6), F.S.

¹⁶ ss. 718.116(8)(c) and 719.108(6), F.S. There is no corresponding requirement in ch. 720, F.S., that the fee charged by a homeowners' association be reasonable.

¹⁷ The Community Association Living Study Council was created by the Legislature in 2008 to receive input from the public regarding issues of concern with respect to community association living and to advise the Legislature concerning revisions and improvements to the laws relating to community associations. The council consisted of seven members appointed by the President of the Senate, the Speaker of the House Representatives, and the Governor. An ex officio nonvoting member was appointed by the Director of the Division of Florida Condominiums, Timeshares, and Mobile Homes. The Council was abolished by the Legislature in 2014. See s. 718.50151, F.S. (2013); Ch. 2014-133, L.O.F.

¹⁸ Community Association Living Study Council, *Final Report*, March 31, 2014, available at <http://www.myfloridalicense.com/Dbpr/lsc/documents/2014CALSCReport.pdf> (last visited Jan. 27, 2016).

¹⁹ *Id.*

Figure 1: Maximum Allowable Estoppel Certificate Fees

Authorized Fees	Cap*
Base Fee	
Preparation and Delivery of Estoppel Certificate:	
- Non-Delinquent Account or	Reasonable cost, not to exceed \$250
- Delinquent Account	Reasonable cost, not to exceed \$450
Additional Fee (as applicable)	+
Expedited Delivery within 3 days	\$100
TOTAL	Base Fees + Additional Fee (if applicable)

*Fee caps will be adjusted for inflation every three years based on the change in the Consumer Price Index for All Urban Consumers, U.S. City Average, all items.²⁰ The Department of Business and Professional Regulation must calculate and publish the adjusted rates on its website. The first adjustment should take effect July 1, 2019.

Present Situation – Payment and Allocation of Estoppel Certificate Fee

Any fee charged by a homeowners' or condominium association for an estoppel certificate is payable upon preparation of the certificate.²¹ If the certificate was requested in conjunction with the sale or mortgage of a unit or parcel but the sale does not occur, a homeowners' or condominium association must refund the fee upon written request, but only to a non-owner payor.²² The refund becomes the obligation of the unit or parcel owner and the homeowners' or condominium association may collect it from the owner in the same manner as an assessment.²³

As estoppel certificates are generally required to close the sale or refinancing of a home and must be requested earlier than the time of closing, the fee is typically paid by one party to the transaction, usually the seller, rather than from the closing or settlement proceeds. Accordingly, the estoppel certificate fee, which is similar to other fees paid from closing or settlement proceeds, is most often imposed solely on owners due to the early payment requirement or the obligation to refund the fee if a sale does not occur.

Effect of Proposed Changes – Payment and Allocation of Estoppel Certificate Fee

The bill repeals provisions of current law authorizing a refund of fees by a homeowners' or condominium association to a non-owner payor.

Other Changes

- The bill amends current law to estop an association from collecting any moneys owed in excess of the amount stated in the certificate from any person, which would include owners, who in good faith relied upon the certificate as well as such person's successors and assigns. Current law provides that an association is only estopped from asserting a contradictory claim for amounts due against third parties who rely on an estoppel certificate, and expressly excludes owners from such protection.²⁴

²⁰ A measure produced by the Bureau of Labor Statistics in the United States Department of Labor of the average change over time in the prices paid by urban consumers for a market basket of consumer goods and services.

²¹ ss. 718.116(8)(d) and 720.30851(3), F.S.; The time for payment of the fee to a cooperative association is not provided under current law.

²² *Id.*

²³ *Id.*

²⁴ ss. 718.116(8)(a), 719.108(6), and 720.30851(1), F.S.

- The bill amends ch. 719, F.S., governing cooperative associations, to provide that a cooperative association issue estoppel certificates consistent with standards, procedures and requirements governing condominium and homeowners' associations. This includes establishing the authority to charge estoppel fees by resolution or contract and authorizing a cooperative unit owner to bring an action against the association pursuant to the summary procedure under s. 51.011, F.S., to compel compliance with the estoppel certificate requirements.²⁵
- The bill implements an additional recommendation by the Community Association Living Study Council to authorize the use of digital communications by associations.²⁶ Specifically, the bill provides for the electronic delivery of estoppel certificates and authorizes the electronic submission of estoppel certificate requests.

B. SECTION DIRECTORY:

Section 1 amends s. 718.116, F.S., revising requirements related to the issuance of an estoppel certificate for condominiums.

Section 2 amends s. 719.108, F.S., revising requirements related to the issuance of an estoppel certificate for cooperatives.

Section 3 amends s. 720.30851, F.S., revising requirements related to the issuance of an estoppel certificate for homeowners' associations.

Section 4 provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

²⁵ ss. 718.116(8)(b) and 720.30851(2), F.S.; s. 51.011, F.S., specifies a summary procedure for actions that specifically provide for this procedure by statute or rule. Under the summary procedure, all defenses of law or fact are required to be contained in the defendant's answer which must be filed within five days after service of process of the plaintiff's complaint. If the answer incorporates a counterclaim, the plaintiff must include all defenses of law or fact in his or her answer to the counterclaim and serve it within five days after service of the counterclaim. (Fla. R. Civ. Pro. 1.140, requires an answer, including any counterclaims, within 20 days after service of the complaint.) No other pleadings are permitted, and all defensive motions, including motions to quash, are heard by the court prior to trial. Postponements are not permitted for discovery, and the procedure also provides for an immediate trial, if requested.

²⁶ *Supra* at note 17.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent that an association currently imposes a greater fee for an estoppel certificate than the fees authorized by the bill, the bill may have a positive economic impact on unit and parcel owners of such association by reducing the fee required to obtain an estoppel certificate. In such instance there would be a corresponding negative reduction in the fee collected by the association. Some opponents state that the fee cap may result in increased homeowners' fees.

D. FISCAL COMMENTS:

The Department of Business and Professional Regulation has stated that the prohibition against an association or its agent charging a fee if an estoppel certificate is issued more than 10 business days after it receives the request for a certificate may create a burden on associations for the cost of preparation of the certificate.²⁷

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Estoppel certificates are often prepared on behalf of an association by association counsel or community association management companies pursuant to a contract for services. The fee caps established by the bill may be greater or less than the current rates negotiated between the association and such contractors for the preparation of estoppel certificates.

Article I, section 10 of the United States Constitution and article I, section 10 of the Florida Constitution prohibit the legislature from enacting any law impairing the obligation of contracts. Although written in terms of an absolute prohibition, courts have long interpreted the provisions to only prohibit enactment of any law that is an *unreasonable* impairment of existing contractual rights.

In *Allied Structural Steel Co. v. Spannaus*,²⁸ the United States Supreme Court set forth the following principles in examining a law under an impairment analysis, ruling:

[T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

Referring to the *Allied* opinion, the Florida Supreme Court in *Pomponio v. Claridge of Pompano Condominium, Inc.*²⁹ stated that courts must consider:

(a) Was the law enacted to deal with a broad, generalized economic or social problem?

²⁷ Florida Department of Business and Professional Regulation, Agency Analysis of 2016 Senate Bill 722, p. 2 (Nov. 23, 2016).

²⁸ *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978).

²⁹ *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774, 779 (Fla. 1979).

(b) Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state?

(c) Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

It is unclear whether the bill authorizes an association to provide information regarding multiple units or parcels within a single estoppel certificate. If information regarding multiple units or parcels may be provided within a single estoppel certificate, language regarding the computation of fees may require clarification.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On November 3, 2015, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment requires the Department of Business and Professional Regulation to calculate the adjusted fee caps every three years and post the amounts on its website.

On February 2, 2016, the Business & Professions Subcommittee considered and adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment makes the following changes in regards to homeowners', cooperative, and condominium associations:

- Requires an association to designate a person or entity for receipt of a request for an estoppel certificate and provide the designation information upon request;
- Provides a form and requires specified information to be included in an estoppel certificate and authorizes an association to require additional language;
- Revises the maximum allowable fee for an estoppel certificate from \$200 to \$250; and
- Deletes a provision requiring payment of the fee for an estoppel certificate at closing and reverts to existing statutory language that provides that the fee is payable upon the preparation of the certificate.

This staff analysis is drafted to reflect the committee substitute as passed by the Business & Professions Subcommittee.

1 A bill to be entitled
 2 An act relating to residential properties; amending
 3 ss. 718.116, 719.108, and 720.30851, F.S.; revising
 4 requirements relating to the issuance of an estoppel
 5 certificate to specified persons; requiring that an
 6 estoppel certificate contain certain information;
 7 providing an effective period for a certificate based
 8 upon the date of issuance and form of delivery;
 9 providing that the association waives a specified
 10 claim against a person or such person's successors or
 11 assigns who rely on the certificate in good faith;
 12 authorizing a summary proceeding to be brought to
 13 compel an association to prepare or deliver an
 14 estoppel certificate; specifying the maximum amounts
 15 an association may charge for an estoppel certificate;
 16 providing that the authority to charge a fee for the
 17 estoppel certificate must be established by a
 18 specified written resolution or provided by a written
 19 management, bookkeeping, or maintenance contract;
 20 deleting obsolete provisions; conforming provisions to
 21 changes made by the act; providing an effective date.

22
 23 Be It Enacted by the Legislature of the State of Florida:

24
 25 Section 1. Subsection (8) of section 718.116, Florida
 26 Statutes, is amended to read:

27 718.116 Assessments; liability; lien and priority;
 28 interest; collection.—

29 (8) An association shall issue an estoppel certificate to
 30 a unit owner or the unit owner's designee or a unit mortgagee or
 31 the unit mortgagee's designee within 10 business 15 days after
 32 receiving a written or electronic request for the certificate.
 33 An association must designate a person or entity, and such
 34 designation must be available upon request, with a physical or
 35 electronic address for receipt of a request for an estoppel
 36 certificate issued pursuant to this section. The estoppel
 37 certificate must be delivered by United States mail, by hand
 38 delivery, or by electronic transmission to the requester on the
 39 date of issuance. For purposes of delivery by United States
 40 mail, the estoppel certificate is deemed delivered on the date
 41 it is deposited in the mail.

42 (a) The estoppel certificate must contain all of the
 43 following information as set forth in the official records of
 44 the association and may include additional information, as
 45 determined by the association. The estoppel certificate must be
 46 in substantially the following form:

- 47
- 48 1. Date of issuance:....
 - 49 2. Name of unit owner(s):....
 - 50 3. Unit designation:....
 - 51 Parking/garage space number, if any:....
 - 52 Storage locker number, if any:....

- 53 4. Unit address:....
- 54 5. Fee for preparation and delivery of the estoppel
 55 certificate:....
- 56 6. Requested by:....
- 57
- 58 ASSESSMENT INFORMATION
- 59 7. The regular periodic assessment levied against the
 60 unit is \$.... per ...(insert frequency of payment)....
- 61 8. The regular periodic assessment is paid through
 62 ...(insert date paid through)....
- 63 9. The next installment of the regular periodic
 64 assessment is due ...(insert due date)... in the
 65 amount of \$.....
- 66 10. Provide an itemized list of all assessments,
 67 special assessments, other moneys owed, capital
 68 contribution/resale/transfer fees owed, and credit
 69 balances to the association by the unit owner for a
 70 specific unit on the date of issuance.
- 71 11. Provide an itemized list of any additional
 72 assessments, special assessments, and other moneys
 73 owed that are scheduled to become due for each day
 74 after the date of issuance for the effective period of
 75 the estoppel certificate that are known at the date of
 76 issuance. In calculating the amounts that are
 77 scheduled to become due, the association may assume
 78 that any delinquent amounts will remain delinquent

79 during the effective period of the estoppel
 80 certificate.

81 12. Describe all documented violations, if any, of
 82 the rules or regulations applicable to the unit.

83
 84 Signed:....

85 ...(Officer or Authorized Agent of the Association)...

86 Print Name:....

87
 88 (b) An estoppel certificate that is delivered on the date
 89 of issuance has a 30-day effective period. An estoppel
 90 certificate that is mailed to the requester has a 35-day
 91 effective period.

92 (c) An association waives the right to collect any moneys
 93 owed in excess of the amounts specified in the estoppel
 94 certificate from any person who in good faith relies upon the
 95 estoppel certificate and from the person's successors and
 96 assigns. ~~therefor from a unit owner or his or her designee, or a~~
 97 ~~unit mortgagee or his or her designee, the association shall~~
 98 ~~provide a certificate signed by an officer or agent of the~~
 99 ~~association stating all assessments and other moneys owed to the~~
 100 ~~association by the unit owner with respect to the condominium~~
 101 ~~parcel.~~

102 ~~(a) Any person other than the owner who relies upon such~~
 103 ~~certificate shall be protected thereby.~~

104 (d) ~~(b)~~ A summary proceeding pursuant to s. 51.011 may be

105 brought to compel compliance with this subsection, and in any
 106 such action the prevailing party is entitled to recover
 107 reasonable attorney ~~attorney's~~ fees.

108 ~~(e)(e)~~ Notwithstanding any limitation on transfer fees
 109 contained in s. 718.112(2)(i), an ~~the~~ association or its
 110 ~~authorized~~ agent may charge a reasonable fee for the preparation
 111 of the estoppel certificate. However, the fee for the estoppel
 112 certificate may not exceed \$250 if on the date the certificate
 113 is issued, no delinquent amounts are owed to the association for
 114 the applicable unit. If an estoppel certificate is requested on
 115 an expedited basis and delivered within 3 business days after
 116 the request, the association may charge an additional fee of
 117 \$100. If delinquent amounts are owed to the association for the
 118 applicable unit, an additional fee for the estoppel certificate
 119 may not exceed \$200. The association may not charge a fee for an
 120 estoppel certificate that is issued more than 10 business days
 121 after it receives the request for the certificate. The maximum
 122 allowable fees charged in accordance with this section shall be
 123 adjusted every 3 years in an amount equal to the annual
 124 increases for that 3-year period in the Consumer Price Index for
 125 All Urban Consumers, U.S. City Average, All Items. The
 126 Department of Business and Professional Regulation shall
 127 periodically calculate the maximum allowable fees under this
 128 section, rounded to the nearest dollar, and publish the amounts,
 129 as adjusted, on its website. An association may not require
 130 payment of any fees, other than those authorized in this

131 paragraph, as a condition for the preparation or delivery of an
 132 estoppel certificate ~~The amount of the fee must be included on~~
 133 ~~the certificate.~~

134 ~~(f)(d)~~ The authority to charge a fee for the estoppel
 135 certificate must ~~shall~~ be established by a written resolution
 136 adopted by the board or provided by a written management,
 137 bookkeeping, or maintenance contract and is payable upon the
 138 preparation of the certificate. ~~If the certificate is requested~~
 139 ~~in conjunction with the sale or mortgage of a unit but the~~
 140 ~~closing does not occur and no later than 30 days after the~~
 141 ~~closing date for which the certificate was sought the preparer~~
 142 ~~receives a written request, accompanied by reasonable~~
 143 ~~documentation, that the sale did not occur from a payor that is~~
 144 ~~not the unit owner, the fee shall be refunded to that payor~~
 145 ~~within 30 days after receipt of the request. The refund is the~~
 146 ~~obligation of the unit owner, and the association may collect it~~
 147 ~~from that owner in the same manner as an assessment as provided~~
 148 ~~in this section.~~

149 Section 2. Subsection (6) of section 719.108, Florida
 150 Statutes, is amended to read:

151 719.108 Rents and assessments; liability; lien and
 152 priority; interest; collection; cooperative ownership.—

153 (6) An association shall issue an estoppel certificate to
 154 a unit owner or the unit owner's designee or a unit mortgagee or
 155 the unit mortgagee's designee within 10 business 15 days after
 156 receiving a written or electronic request for the certificate.

157 An association must designate a person or entity, and such
 158 designation must be available upon request, with a physical or
 159 electronic address for receipt of a request for an estoppel
 160 certificate issued pursuant to this section. The estoppel
 161 certificate must be delivered by United States mail, by hand
 162 delivery, or by electronic transmission to the requester on the
 163 date of issuance. For purposes of delivery by United States
 164 mail, the estoppel certificate is deemed delivered on the date
 165 it is deposited in the mail.

166 (a) The estoppel certificate must contain all of the
 167 following information as set forth in the official records of
 168 the association and may include additional information, as
 169 determined by the association. The estoppel certificate must be
 170 in substantially the following form:

- 171
- 172 1. Date of issuance:....
 - 173 2. Name of unit owner(s):....
 - 174 3. Unit designation:....
 - 175 Parking/garage space number, if any:....
 - 176 Storage locker number, if any:....
 - 177 4. Unit address:....
 - 178 5. Fee for preparation and delivery of the estoppel
 179 certificate:....
 - 180 6. Requested by:....

181

182 ASSESSMENT INFORMATION

183 7. The regular periodic assessment levied against the
 184 unit is \$.... per ...(insert frequency of payment)....
 185 8. The regular periodic assessment is paid through
 186 ...(insert date paid through)....
 187 9. The next installment of the regular periodic
 188 assessment is due ...(insert due date)... in the
 189 amount of \$.....
 190 10. Provide an itemized list of all assessments,
 191 special assessments, other moneys owed, capital
 192 contribution/resale/transfer fees owed, and credit
 193 balances to the association by the unit owner for a
 194 specific unit on the date of issuance.
 195 11. Provide an itemized list of any additional
 196 assessments, special assessments, and other moneys
 197 owed that are scheduled to become due for each day
 198 after the date of issuance for the effective period of
 199 the estoppel certificate that are known at the date of
 200 issuance. In calculating the amounts that are
 201 scheduled to become due, the association may assume
 202 that any delinquent amounts will remain delinquent
 203 during the effective period of the estoppel
 204 certificate.
 205 12. Describe all documented violations, if any, of
 206 the rules or regulations applicable to the unit.
 207
 208 Signed:....

209 ... (Officer or Authorized Agent of the Association)...

210 Print Name:....

211

212 (b) An estoppel certificate that is delivered on the date
 213 of issuance has a 30-day effective period. An estoppel
 214 certificate that is mailed to the requester has a 35-day
 215 effective period.

216 (c) An association waives the right to collect any moneys
 217 owed in excess of the amounts specified in the estoppel
 218 certificate from any person who in good faith relies upon the
 219 estoppel certificate and from that person's successors and
 220 assigns.

221 (d) A summary proceeding pursuant to s. 51.011 may be
 222 brought to compel compliance with this subsection, and in any
 223 such action the prevailing party is entitled to recover
 224 reasonable attorney fees. ~~by a unit owner or mortgagee, the~~
 225 ~~association shall provide a certificate stating all assessments~~
 226 ~~and other moneys owed to the association by the unit owner with~~
 227 ~~respect to the cooperative parcel. Any person other than the~~
 228 ~~unit owner who relies upon such certificate shall be protected~~
 229 ~~thereby.~~

230 (e) Notwithstanding any limitation on transfer fees
 231 contained in s. 719.106(1)(i), an ~~the~~ association or its
 232 authorized agent may charge a reasonable fee for the preparation
 233 of the estoppel certificate. However, the fee for the estoppel
 234 certificate may not exceed \$250 if on the date the certificate

235 is issued, no delinquent amounts are owed to the association for
236 the applicable unit. If an estoppel certificate is requested on
237 an expedited basis and delivered within 3 business days after
238 the request, the association may charge an additional fee of
239 \$100. If delinquent amounts are owed to the association for the
240 applicable unit, an additional fee for the estoppel certificate
241 may not exceed \$200. The association may not charge a fee for an
242 estoppel certificate that is issued more than 10 business days
243 after it receives a request for the certificate. The maximum
244 allowable fees charged in accordance with this section shall be
245 adjusted every 3 years in an amount equal to the annual
246 increases for that 3-year period in the Consumer Price Index for
247 All Urban Consumers, U.S. City Average, All Items. The
248 Department of Business and Professional Regulation shall
249 periodically calculate the maximum allowable fees under this
250 section, rounded to the nearest dollar, and publish the amounts,
251 as adjusted, on its website. An association may not require
252 payment of any fees, other than those authorized in this
253 paragraph, as a condition for the preparation or delivery of an
254 estoppel certificate.

255 (f) The authority to charge a fee for the estoppel
256 certificate must be established by a written resolution adopted
257 by the board or provided by a written management, bookkeeping,
258 or maintenance contract and is payable upon the preparation of
259 the certificate.

260 Section 3. Section 720.30851, Florida Statutes, is amended

261 to read:

262 720.30851 Estoppel certificates.—An association shall
 263 issue an estoppel certificate to a parcel owner or the parcel
 264 owner's designee or a mortgagee or the mortgagee's designee
 265 within 10 business ~~15~~ days after receiving a written or
 266 electronic request for the certificate. An association must
 267 designate a person or entity, and such designation must be
 268 available upon request, with a physical or electronic address
 269 for receipt of a request for an estoppel certificate issued
 270 pursuant to this section. The estoppel certificate must be
 271 delivered by United States mail, by hand delivery, or by
 272 electronic transmission to the requester on the date of
 273 issuance. For purposes of delivery by United States mail, the
 274 estoppel certificate is deemed delivered on the date it is
 275 deposited in the mail.

276 (1) The estoppel certificate must contain all of the
 277 following information as set forth in the official records of
 278 the association and may include additional information, as
 279 determined by the association. The estoppel certificate must be
 280 in substantially the following form:

- 281
- 282 1. Date of issuance:....
- 283 2. Name of parcel owner(s):....
- 284 3. Parcel designation:....
- 285 Parking/garage space number, if any:....
- 286 Storage locker number, if any:....

- 287 4. Parcel address:....
- 288 5. Fee for preparation and delivery of the estoppel
- 289 certificate:....
- 290 6. Requested by:....
- 291
- 292 ASSESSMENT INFORMATION
- 293 7. The regular periodic assessment levied against the
- 294 parcel is \$.... per ...(insert frequency of
- 295 payment)....
- 296 8. The regular periodic assessment is paid through
- 297 ...(insert date paid through)....
- 298 9. The next installment of the regular periodic
- 299 assessment is due ...(insert due date)... in the
- 300 amount of \$.....
- 301 10. Provide an itemized list of all assessments,
- 302 special assessments, other moneys owed, capital
- 303 contribution/resale/transfer fees owed, and credit
- 304 balances to the association by the parcel owner for a
- 305 specific parcel on the date of issuance.
- 306 11. Provide an itemized list of any additional
- 307 assessments, special assessments, and other moneys
- 308 owed that are scheduled to become due for each day
- 309 after the date of issuance for the effective period of
- 310 the estoppel certificate that are known at the date of
- 311 issuance. In calculating the amounts that are
- 312 scheduled to become due, the association may assume

313 that any delinquent amounts will remain delinquent
 314 during the effective period of the estoppel
 315 certificate.

316 12. Describe all documented violations, if any, of
 317 the rules or regulations applicable to the parcel.

318
 319 Signed:....
 320 ...(Officer or Authorized Agent of the Association)...
 321 Print Name:....

322
 323 (2) An estoppel certificate that is delivered on the date
 324 of issuance has a 30-day effective period. An estoppel
 325 certificate that is mailed to the requester has a 35-day
 326 effective period.

327 (3) An association waives the right to collect any moneys
 328 owed in excess of the amounts specified in the estoppel
 329 certificate from any person who in good faith relies upon the
 330 estoppel certificate and from that person's successors and
 331 assigns. ~~the date on which a request for an estoppel certificate~~
 332 ~~is received from a parcel owner or mortgagee, or his or her~~
 333 ~~designee, the association shall provide a certificate signed by~~
 334 ~~an officer or authorized agent of the association stating all~~
 335 ~~assessments and other moneys owed to the association by the~~
 336 ~~parcel owner or mortgagee with respect to the parcel. An~~
 337 ~~association may charge a fee for the preparation of such~~
 338 ~~certificate, and the amount of such fee must be stated on the~~

339 certificate.

340 ~~(1) Any person other than a parcel owner who relies upon a~~
 341 ~~certificate receives the benefits and protection thereof.~~

342 (4)(2) A summary proceeding pursuant to s. 51.011 may be
 343 brought to compel compliance with this section, and the
 344 prevailing party is entitled to recover reasonable attorney
 345 attorney's fees.

346 (5) An association or its agent may charge a reasonable
 347 fee for the preparation of the estoppel certificate. However,
 348 the fee for the estoppel certificate may not exceed \$250 if on
 349 the date the certificate is issued, no delinquent amounts are
 350 owed to the association for the applicable parcel. If an
 351 estoppel certificate is requested on an expedited basis and
 352 delivered within 3 business days after the request, the
 353 association may charge an additional fee of \$100. If delinquent
 354 amounts are owed to the association for the applicable parcel,
 355 an additional fee for the certificate may not exceed \$200. The
 356 association may not charge a fee for an estoppel certificate
 357 that is issued more than 10 business days after it receives the
 358 request for the certificate. The maximum allowable fees charged
 359 in accordance with this section shall be adjusted every 3 years
 360 in an amount equal to the annual increases for that 3-year
 361 period in the Consumer Price Index for All Urban Consumers, U.S.
 362 City Average, All Items. The department shall periodically
 363 calculate the maximum allowable fees under this section, rounded
 364 to the nearest dollar, and publish the amounts, as adjusted, on

365 its website. An association may not require payment of any fees,
 366 other than those authorized in this subsection, as a condition
 367 for the preparation or delivery of an estoppel certificate.

368 ~~(6)(3)~~ The authority to charge a fee for the estoppel
 369 certificate must ~~shall~~ be established by a written resolution
 370 adopted by the board or provided by a written management,
 371 bookkeeping, or maintenance contract and is payable upon the
 372 preparation of the certificate. ~~If the certificate is requested~~
 373 ~~in conjunction with the sale or mortgage of a parcel but the~~
 374 ~~closing does not occur and no later than 30 days after the~~
 375 ~~closing date for which the certificate was sought the preparer~~
 376 ~~receives a written request, accompanied by reasonable~~
 377 ~~documentation, that the sale did not occur from a payor that is~~
 378 ~~not the parcel owner, the fee shall be refunded to that payor~~
 379 ~~within 30 days after receipt of the request. The refund is the~~
 380 ~~obligation of the parcel owner, and the association may collect~~
 381 ~~it from that owner in the same manner as an assessment as~~
 382 ~~provided in this section.~~

383 Section 4. This act shall take effect July 1, 2016.

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COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Judiciary Committee
 2 Representative Wood offered the following:

Amendment (with title amendment)

5 Remove everything after the enacting clause and insert:

6 Section 1. Subsection (8) of section 718.116, Florida
 7 Statutes, is amended to read:

8 718.116 Assessments; liability; lien and priority;
 9 interest; collection.-

10 (8) An association shall issue an estoppel certificate to
 11 a unit owner or the unit owner's designee or a unit mortgagee or
 12 the unit mortgagee's designee within 10 business 15 days after
 13 receiving a written or electronic request for the certificate.
 14 An association must designate a person or entity, and such
 15 designation must be available upon request, with a physical or
 16 electronic address for receipt of a request for an estoppel
 17 certificate issued pursuant to this section. The estoppel

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18 certificate must be delivered by United States mail, by hand
19 delivery, or by electronic transmission to the requester on the
20 date of issuance. For purposes of delivery by United States
21 mail, the estoppel certificate is deemed delivered on the date
22 it is deposited in the mail.

23 (a) The estoppel certificate must contain all of the
24 following information as set forth in the official records of
25 the association, in substantially the following form, and may
26 include additional information as determined by the association:

27
28 Date of issuance:....

29 Effective through: ...(insert effective period)....

30
31 Legal Name of Association:....

32 Association Address:....

33 DBPR License/Registration No. (if applicable):....

34
35 1. Name of unit owner(s):....

36 2. Unit designation:....

37 Parking/garage space number, if any:....

38 Storage locker number, if any:....

39 3. Unit address:....

40 4. Fee for preparation and delivery of the estoppel
41 certificate:....

42 5. Requested by:....

43 6. The regular periodic assessment levied against the

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- 44 unit is \$.... per ...(insert frequency of payment)....
45 7. The regular periodic assessment is paid through
46 ...(insert date paid through)....
47 8. The next installment of the regular periodic
48 assessment is due ...(insert due date)... in the
49 amount of \$.....
50 9. Provide an itemized list of all assessments,
51 special assessments, other moneys owed, capital
52 contribution/resale/transfer fees owed, and credit
53 balances to the association by the unit owner for a
54 specific unit on the date of issuance. Specify any
55 delinquent amounts.
56 10. Provide an itemized list of any additional
57 assessments, special assessments, and other moneys
58 owed that are scheduled to become due for each day
59 after the date of issuance for the effective period of
60 the estoppel certificate that are known at the date of
61 issuance. In calculating the amounts that are
62 scheduled to become due, the association may assume
63 that any delinquent amounts will remain delinquent
64 during the effective period of the estoppel
65 certificate.
66 11. Describe all documented violations, if any, of
67 the declaration, bylaws, rules, or regulations
68 applicable to the unit.
69

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70 Prepared by:...(Association or Authorized Agent of the
71 Association)...

72
73 Signed:....

74 ...(Officer or Authorized Agent of the Association)...

75 Print Name:....
76

77 (b) An estoppel certificate that is delivered on the date
78 of issuance has a 30-day effective period, except that an
79 estoppel certificate which is delivered by United States mail
80 has a 35-day effective period.

81 (c) An association waives the right to collect any moneys
82 owed in excess of the amounts specified in the estoppel
83 certificate from any person who in good faith relies upon the
84 estoppel certificate and from the person's successors and
85 assigns. therefor from a unit owner or his or her designee, or a
86 unit mortgagee or his or her designee, the association shall
87 provide a certificate signed by an officer or agent of the
88 association stating all assessments and other moneys owed to the
89 association by the unit owner with respect to the condominium
90 parcel.

91 ~~(a) Any person other than the owner who relies upon such~~
92 ~~certificate shall be protected thereby.~~

93 (d)(b) A summary proceeding pursuant to s. 51.011 may be
94 brought to compel compliance with this subsection, and in any
95 such action the prevailing party is entitled to recover

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96 reasonable attorney ~~attorney's~~ fees.

97 ~~(e)~~ Notwithstanding any limitation on transfer fees
98 contained in s. 718.112(2)(i), an ~~the~~ association or its
99 ~~authorized~~ agent may charge a reasonable fee for the preparation
100 of the estoppel certificate. However, the fee for the estoppel
101 certificate may not exceed \$250 if on the date the certificate
102 is issued, no delinquent amounts are owed to the association for
103 the applicable unit. If an estoppel certificate is requested on
104 an expedited basis and delivered within 3 business days after
105 the request, the association may charge an additional fee of
106 \$100. If delinquent amounts are owed to the association for the
107 applicable unit, an additional fee for the estoppel certificate
108 may not exceed \$200. The association may not charge a fee for an
109 estoppel certificate that is issued more than 10 business days
110 after it receives the request for the certificate. The maximum
111 allowable fees charged in accordance with this section shall be
112 adjusted every 3 years in an amount equal to the annual
113 increases for that 3-year period in the Consumer Price Index for
114 All Urban Consumers, U.S. City Average, All Items. The
115 Department of Business and Professional Regulation shall
116 periodically calculate the maximum allowable fees under this
117 section, rounded to the nearest dollar, and publish the amounts,
118 as adjusted, on its website. An association may not require
119 payment of any fees, other than those authorized in this
120 paragraph, as a condition for the preparation or delivery of an

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121 estoppel certificate ~~The amount of the fee must be included on~~
122 ~~the certificate.~~

123 ~~(f)(d) The authority to charge a fee for the certificate~~
124 ~~shall be established by a written resolution adopted by the~~
125 ~~board or provided by a written management, bookkeeping, or~~
126 ~~maintenance contract and is payable upon the preparation of the~~
127 ~~certificate.~~ If the certificate is requested in conjunction with
128 the sale or mortgage of a unit but the closing does not occur
129 and no later than 30 days after the closing date for which the
130 certificate was sought the preparer receives a written request,
131 accompanied by reasonable documentation, that the sale did not
132 occur from a payor that is not the unit owner, the fee shall be
133 refunded to that payor within 30 days after receipt of the
134 request. The refund is the obligation of the unit owner, and the
135 association may collect it from that owner in the same manner as
136 an assessment as provided in this section.

137 (g) The authority to charge a fee for the estoppel
138 certificate must be established by a written resolution adopted
139 by the board or provided by a written management, bookkeeping,
140 or maintenance contract and is payable upon the preparation of
141 the certificate.

142 Section 2. Subsection (6) of section 719.108, Florida
143 Statutes, is amended to read:

144 719.108 Rents and assessments; liability; lien and
145 priority; interest; collection; cooperative ownership.-

146 (6) An association shall issue an estoppel certificate to

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147 a unit owner or the unit owner's designee or a unit mortgagee or
148 the unit mortgagee's designee within 10 business ~~15~~ days after
149 receiving a written or electronic request for the certificate.
150 An association must designate a person or entity, and such
151 designation must be available upon request, with a physical or
152 electronic address for receipt of a request for an estoppel
153 certificate issued pursuant to this section. The estoppel
154 certificate must be delivered by United States mail, by hand
155 delivery, or by electronic transmission to the requester on the
156 date of issuance. For purposes of delivery by United States
157 mail, the estoppel certificate is deemed delivered on the date
158 it is deposited in the mail.

159 (a) The estoppel certificate must contain all of the
160 following information as set forth in the official records of
161 the association, in substantially the following form, and may
162 include additional information as determined by the association:

163
164 Date of issuance:....

165 Effective through: ...(insert effective period)....

166
167 Legal Name of Association:....

168 Association Address:....

169 DBPR License/Registration No. (if applicable):....

170
171 1. Name of unit owner(s):....

172 2. Unit designation:....

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- 173 Parking/garage space number, if any:....
- 174 Storage locker number, if any:....
- 175 3. Unit address:....
- 176 4. Fee for preparation and delivery of the estoppel
177 certificate:....
- 178 5. Requested by:....
- 179 6. The regular periodic assessment levied against the
180 unit is \$.... per ...(insert frequency of payment)....
- 181 7. The regular periodic assessment is paid through
182 ...(insert date paid through)....
- 183 8. The next installment of the regular periodic
184 assessment is due ...(insert due date)... in the
185 amount of \$.....
- 186 9. Provide an itemized list of all assessments,
187 special assessments, other moneys owed, capital
188 contribution/resale/transfer fees owed, and credit
189 balances to the association by the unit owner for a
190 specific unit on the date of issuance. Specify any
191 delinquent amounts.
- 192 10. Provide an itemized list of any additional
193 assessments, special assessments, and other moneys
194 owed that are scheduled to become due for each day
195 after the date of issuance for the effective period of
196 the estoppel certificate that are known at the date of
197 issuance. In calculating the amounts that are
198 scheduled to become due, the association may assume

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199 that any delinquent amounts will remain delinquent
200 during the effective period of the estoppel
201 certificate.

202 11. Describe all documented violations, if any, of
203 the cooperative documents, rules, or regulations
204 applicable to the unit.

205
206 Prepared by:...(Association or Authorized Agent of the
207 Association)...

208
209 Signed:....

210 ...(Officer or Authorized Agent of the Association)...

211 Print Name:....

212
213 (b) An estoppel certificate that is delivered on the date
214 of issuance has a 30-day effective period, except that an
215 estoppel certificate which is delivered by U.S. mail has a 35-
216 day effective period.

217 (c) An association waives the right to collect any moneys
218 owed in excess of the amounts specified in the estoppel
219 certificate from any person who in good faith relies upon the
220 estoppel certificate and from that person's successors and
221 assigns.

222 (d) A summary proceeding pursuant to s. 51.011 may be
223 brought to compel compliance with this subsection, and in any
224 such action the prevailing party is entitled to recover

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225 ~~reasonable attorney fees. by a unit owner or mortgagee, the~~
226 ~~association shall provide a certificate stating all assessments~~
227 ~~and other moneys owed to the association by the unit owner with~~
228 ~~respect to the cooperative parcel. Any person other than the~~
229 ~~unit owner who relies upon such certificate shall be protected~~
230 ~~thereby.~~

231 (e) Notwithstanding any limitation on transfer fees
232 contained in s. 719.106(1)(i), an the association or its
233 authorized agent may charge a reasonable fee for the preparation
234 of the estoppel certificate. However, the fee for the estoppel
235 certificate may not exceed \$250 if on the date the certificate
236 is issued, no delinquent amounts are owed to the association for
237 the applicable unit. If an estoppel certificate is requested on
238 an expedited basis and delivered within 3 business days after
239 the request, the association may charge an additional fee of
240 \$100. If delinquent amounts are owed to the association for the
241 applicable unit, an additional fee for the estoppel certificate
242 may not exceed \$200. The association may not charge a fee for an
243 estoppel certificate that is issued more than 10 business days
244 after it receives a request for the certificate. The maximum
245 allowable fees charged in accordance with this section shall be
246 adjusted every 3 years in an amount equal to the annual
247 increases for that 3-year period in the Consumer Price Index for
248 All Urban Consumers, U.S. City Average, All Items. The
249 Department of Business and Professional Regulation shall
250 periodically calculate the maximum allowable fees under this

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251 section, rounded to the nearest dollar, and publish the amounts,
252 as adjusted, on its website. An association may not require
253 payment of any fees, other than those authorized in this
254 paragraph, as a condition for the preparation or delivery of an
255 estoppel certificate.

256 (f) If the certificate is requested in conjunction with
257 the sale or mortgage of a unit but the closing does not occur
258 and no later than 30 days after the closing date for which the
259 certificate was sought the preparer receives a written request,
260 accompanied by reasonable documentation, that the sale did not
261 occur from a payor that is not the unit owner, the fee shall be
262 refunded to that payor within 30 days after receipt of the
263 request. The refund is the obligation of the unit owner, and the
264 association may collect it from that owner in the same manner as
265 an assessment as provided in this section.

266 (g) The authority to charge a fee for the estoppel
267 certificate must be established by a written resolution adopted
268 by the board or provided by a written management, bookkeeping,
269 or maintenance contract and is payable upon the preparation of
270 the certificate.

271 Section 3. Section 720.30851, Florida Statutes, is amended
272 to read:

273 720.30851 Estoppel certificates.—An association shall
274 issue an estoppel certificate to a parcel owner or the parcel
275 owner's designee or a mortgagee or the mortgagee's designee
276 within ~~15~~ 10 business days after receiving a written or

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277 electronic request for the certificate. An association must
278 designate a person or entity, and such designation must be
279 available upon request, with a physical or electronic address
280 for receipt of a request for an estoppel certificate issued
281 pursuant to this section. The estoppel certificate must be
282 delivered by United States mail, by hand delivery, or by
283 electronic transmission to the requester on the date of
284 issuance. For purposes of delivery by United States mail, the
285 estoppel certificate is deemed delivered on the date it is
286 deposited in the mail.

287 (1) The estoppel certificate must contain all of the
288 following information as set forth in the official records of
289 the association, in substantially the following form, and may
290 include additional information as determined by the association:

291
292 Date of issuance:....

293 Effective through: ...(insert effective period)....

294
295 Legal Name of Association:....

296 Association Address:....

297 DBPR License/Registration No. (if applicable):....

298
299 1. Name of parcel owner(s):....

300 2. Parcel designation:....

301 Parking/garage space number, if any:....

302 Storage locker number, if any:....

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- 303 | 3. Parcel address:....
- 304 | 4. Fee for preparation and delivery of the estoppel
- 305 | certificate:....
- 306 | 5. Requested by:....
- 307 | 6. The regular periodic assessment levied against the
- 308 | parcel is \$... per ...(insert frequency of
- 309 | payment)....
- 310 | 7. The regular periodic assessment is paid through
- 311 | ...(insert date paid through)....
- 312 | 8. The next installment of the regular periodic
- 313 | assessment is due ...(insert due date)... in the
- 314 | amount of \$.....
- 315 | 9. Provide an itemized list of all assessments,
- 316 | special assessments, other moneys owed, capital
- 317 | contribution/resale/transfer fees owed, and credit
- 318 | balances to the association by the parcel owner for a
- 319 | specific parcel on the date of issuance. Specify any
- 320 | delinquent amounts.
- 321 | 10. Provide an itemized list of any additional
- 322 | assessments, special assessments, and other moneys
- 323 | owed that are scheduled to become due for each day
- 324 | after the date of issuance for the effective period of
- 325 | the estoppel certificate that are known at the date of
- 326 | issuance. In calculating the amounts that are
- 327 | scheduled to become due, the association may assume
- 328 | that any delinquent amounts will remain delinquent

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329 during the effective period of the estoppel
330 certificate.

331 11. Describe all documented violations, if any, of
332 the governing documents applicable to the parcel.

333
334 Prepared by:...(Association or Authorized Agent of the
335 Association)...

336
337 Signed:....
338 ...(Officer or Authorized Agent of the Association)...

339 Print Name:....

340
341 (2) An estoppel certificate that is delivered on the date
342 of issuance has a 30-day effective period, except that an
343 estoppel certificate which is delivered by U.S. mail has a 35-
344 day effective period.

345 (3) An association waives the right to collect any moneys
346 owed in excess of the amounts specified in the estoppel
347 certificate from any person who in good faith relies upon the
348 estoppel certificate and from that person's successors and
349 assigns. ~~the date on which a request for an estoppel certificate~~
350 ~~is received from a parcel owner or mortgagee, or his or her~~
351 ~~designee, the association shall provide a certificate signed by~~
352 ~~an officer or authorized agent of the association stating all~~
353 ~~assessments and other moneys owed to the association by the~~
354 ~~parcel owner or mortgagee with respect to the parcel. An~~

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355 ~~association may charge a fee for the preparation of such~~
356 ~~certificate, and the amount of such fee must be stated on the~~
357 ~~certificate.~~

358 ~~(1) Any person other than a parcel owner who relies upon a~~
359 ~~certificate receives the benefits and protection thereof.~~

360 ~~(4)(2)~~ A summary proceeding pursuant to s. 51.011 may be
361 brought to compel compliance with this section, and the
362 prevailing party is entitled to recover reasonable attorney
363 attorney's fees.

364 (5) An association or its agent may charge a reasonable
365 fee for the preparation of the estoppel certificate. However,
366 the fee for the estoppel certificate may not exceed \$250 if on
367 the date the certificate is issued, no delinquent amounts are
368 owed to the association for the applicable parcel. If an
369 estoppel certificate is requested on an expedited basis and
370 delivered within 3 business days after the request, the
371 association may charge an additional fee of \$100. If delinquent
372 amounts are owed to the association for the applicable parcel,
373 an additional fee for the certificate may not exceed \$200. The
374 association may not charge a fee for an estoppel certificate
375 that is issued more than 10 business days after it receives the
376 request for the certificate. The maximum allowable fees charged
377 in accordance with this section shall be adjusted every 3 years
378 in an amount equal to the annual increases for that 3-year
379 period in the Consumer Price Index for All Urban Consumers, U.S.
380 City Average, All Items. The department shall periodically

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381 calculate the maximum allowable fees under this section, rounded
382 to the nearest dollar, and publish the amounts, as adjusted, on
383 its website. An association may not require payment of any fees,
384 other than those authorized in this subsection, as a condition
385 for the preparation or delivery of an estoppel certificate.

386 ~~(6)(3) The authority to charge a fee for the certificate~~
387 ~~shall be established by a written resolution adopted by the~~
388 ~~board or provided by a written management, bookkeeping, or~~
389 ~~maintenance contract and is payable upon the preparation of the~~
390 ~~certificate. If the certificate is requested in conjunction with~~
391 ~~the sale or mortgage of a parcel but the closing does not occur~~
392 ~~and no later than 30 days after the closing date for which the~~
393 ~~certificate was sought the preparer receives a written request,~~
394 ~~accompanied by reasonable documentation, that the sale did not~~
395 ~~occur from a payor that is not the parcel owner, the fee shall~~
396 ~~be refunded to that payor within 30 days after receipt of the~~
397 ~~request. The refund is the obligation of the parcel owner, and~~
398 ~~the association may collect it from that owner in the same~~
399 ~~manner as an assessment as provided in this section.~~

400 (7) The authority to charge a fee for the estoppel
401 certificate must be established by a written resolution adopted
402 by the board or provided by a written management, bookkeeping,
403 or maintenance contract and is payable upon the preparation of
404 the certificate.

405 Section 4. This act shall take effect July 1, 2016.
406

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T I T L E A M E N D M E N T



Remove everything before the enacting clause and insert:
An act relating to residential properties; amending ss. 718.116,
719.108, and 720.30851, F.S.; revising requirements relating to
the issuance of an estoppel certificate to specified persons;
requiring that an estoppel certificate contain certain
information; providing an effective period for a certificate
based upon the date of issuance and form of delivery; providing
that the association waives a specified claim against a person
or such person's successors or assigns who rely on the
certificate in good faith; authorizing a summary proceeding to
be brought to compel an association to prepare or deliver an
estoppel certificate; specifying the maximum amounts an
association may charge for an estoppel certificate; providing
that the authority to charge a fee for the estoppel certificate
must be established by a specified written resolution or
provided by a written management, bookkeeping, or maintenance
contract; deleting obsolete provisions; conforming provisions to
changes made by the act; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 555 Driving Under the Influence

SPONSOR(S): Highway & Waterway Safety Subcommittee; Plakon; Cortes, B. and others

TIED BILLS: None **IDEN./SIM. BILLS:** SB 1244

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Highway & Waterway Safety Subcommittee	12 Y, 1 N, As CS	Pitts	Smith
2) Judiciary Committee		Keegan 	Havlicak 
3) Economic Affairs Committee			

SUMMARY ANALYSIS

Current Florida law gives the court the discretion to order mandatory Ignition Interlock Device (IID) installation for all first-time offenders of Driving Under the Influence (DUI), in addition to any other authorized penalties. If the court exercises this discretion, the installation period must be for at least six months.

The bill requires that all first time convicted DUI offenders have an IID placed on their vehicle at the convicted person's sole expense, for at least six months.

The bill may have an indeterminate, but significant negative impact on state funds. The Department of Highway Safety and Motor Vehicles (DHSMV) estimates that additional resources will be necessary to monitor and oversee the IID program should all first time DUI offenders require mandatory IID installation.

The effective date of the bill is October 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

While studies reveal a downward trend in alcohol use by drivers over the past forty years,¹ crashes involving alcohol impairment currently cost over \$37 billion annually.² Studies also establish a strong correlation between alcohol intoxication and the risk of being involved in a crash. Drivers with an alcohol level of 0.08 percent were approximately four times more likely to be involved in a crash than an unintoxicated driver, and drivers with an alcohol level of 0.15 percent were twelve times more likely to be involved in a crash.³

Criminal Penalties

Criminal penalties vary depending on factors such as the number of prior convictions, how much time has passed between convictions, and the offender's blood-alcohol or breath-alcohol concentration (BAC).

First- Time Offender Penalties

A first conviction for driving under the influence is a first degree misdemeanor⁴ and will result in a fine of at least \$500, but no more than \$1,000, a period of up to six months in jail,⁵ a period of up to one year on probation, participation in at least fifty hours of community service, and a mandatory vehicle impoundment of the vehicle operated by the driver during the DUI.⁶ The court has the discretion to order Ignition Interlock Device (IID) installation for a first-time offender, in addition to any other authorized penalties, for a period of at least six months.⁷

If a first-time offender's BAC is 0.15 percent or higher, or if a passenger under eighteen years of age is present in the vehicle during the offense, the penalties are enhanced. Such an offender is subject to a fine of at least \$1,000, but no more than \$2,000, a period of up to nine months in jail, and mandatory IID installation upon all vehicles that are individually or jointly leased or owned and routinely operated by the convicted person for not less than six months.⁸

It is a third degree felony⁹ for an offender to commit a DUI offense involving serious bodily injury to another person, and a second degree felony¹⁰ if the DUI offense results in the death of any person or unborn child.¹¹ It is a first degree felony¹² if an offender knew or should have known that a crash

¹ The National Highway Traffic Safety Administration has conducted several National Roadside Surveys since the first Survey was conducted in 1973. The results of these surveys have revealed a downward trend in alcohol use by vehicle operators from 1973 to 2014, when the most recent Survey was completed. U.S. Dept. of Transportation, *Results of the 2013-2014 National Roadside Survey of Alcohol and Drug Use by Drivers*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (Feb. 2015), http://www.nhtsa.gov/staticfiles/nti/pdf/812118-Roadside_Survey_2014.pdf.

² U.S. Dept. of Transportation, *Impaired Driving*, <http://www.nhtsa.gov/Impaired> (last visited Feb. 15, 2016).

³ U.S. Dept. of Transportation, *Drug and Alcohol Crash Risk – Fact Sheet*, <http://www.nhtsa.gov/staticfiles/nti/pdf/11388c-CrashRiskStudy-FactSheet.pdf> (last visited Feb. 15, 2016).

⁴ Absent statutorily prescribed penalties, a first degree misdemeanor is punishable by up to one year in jail and a \$1,000 fine. ss. 775.082 and 775.083, F.S.

⁵ s. 316.193(2), F.S.

⁶ s. 316.193(6)(a), F.S.

⁷ s. 316.1937, F.S.

⁸ s. 316.193(4), F.S.

⁹ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. ss. 775.082 and 775.083, F.S.

¹⁰ A second degree felony is punishable by up to fifteen years imprisonment and a \$10,000 fine. ss. 775.082 and 775.083, F.S.

¹¹ s. 316.193(3), F.S.

¹² A first degree felony is punishable by up to thirty years imprisonment and a \$10,000 fine. ss. 775.082 and 775.083, F.S.

occurred and failed to give information and render aid and the crash results in the death of any person or unborn child.¹³

Ignition Interlock Device (IID)

Section 316.193, F.S., requires IID's to be installed on the vehicles of persons convicted of DUI. The following table summarizes Florida's IID sentencing requirements:

DUI Conviction	IID Requirement
1 st Conviction	If court ordered
1 st Conviction if BAC is ≥ 0.15 , or minor in car	Mandatory for at least 6 continuous months
2 nd Conviction	Mandatory for at least 1 year
2 nd Conviction if BAC is ≥ 0.15 , or minor in car	Mandatory for at least 2 continuous years
3 rd Conviction	Mandatory for at least 2 years

The Florida Legislature's Office of Program Policy Analysis & Government Accountability conducted a study researching ignition interlock devices and DUI recidivism rates. An ignition interlock device prevents the start of a vehicle with a breath sample above .025, collects data, and records and stores visual evidence of device use. Research shows that ignition interlock devices, while installed, were more effective at reducing re-arrest rates for alcohol-impaired driving when compared to other sanctions, such as license suspensions. The study found the six month recidivism rate for first-time DUI offenders that were not required to install an IID was 1.74 percent. When compared, the recidivism rate for first-time offenders required to use the IID was less with a rate of 0.34 percent. However, the study also found that only 49 percent of Florida DUI offenders installed an IID, as required, after completing their period of license revocation.¹⁴

Proposed Changes

The bill amends s. 316.193, F.S., requiring that all first time convicted DUI offenders have an IID placed on their vehicle at the convicted person's sole expense, for at least six months.

B. SECTION DIRECTORY:

Section 1 Amends s. 316.193, F.S., related to driving under the influence.

Section 2 Provides an effective date of October 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

The bill may have an indeterminate, but significant negative impact on state funds. DHSMV estimates that additional resources will be necessary to monitor and oversee the IID program should all first time DUI offenders require mandatory IID installation.

¹³ s. 316.193(3), F.S.

¹⁴ The Florida Legislature Office of Program Policy Analysis & Government Accountability, *Ignition Interlock Devices and DUI Recidivism Rates*, <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1414rpt.pdf> (last visited February 1, 2016).

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

An individual who is convicted for a first DUI must have an IID placed on their vehicle for at least six months, at the convicted person's sole expense.

D. FISCAL COMMENTS:

None

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require a municipality or county to expend funds or to take any action requiring the expenditure of funds. The bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate. The bill does not require a reduction of the percentage of state tax shared with municipalities or counties.

2. Other:

None

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

None

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 1, 2016, the Highway & Waterway Safety Subcommittee adopted a strike-all amendment to HB 555 and reported the bill favorably as a committee substitute. The strike-all amendment:

- Requires that all first time convicted DUI offenders have an IID placed on their vehicle at the convicted person's sole expense, for at least six months.

This analysis is written to the Committee Substitute as it was reported out of the Highway & Waterway Safety Subcommittee.

1 A bill to be entitled
 2 An act relating to driving under the influence;
 3 amending s. 316.193, F.S.; requiring mandatory
 4 placement, at the convicted person's sole expense, of
 5 an ignition interlock device for a specified period
 6 for a first conviction for driving under the
 7 influence; deleting obsolete provisions; conforming
 8 provisions to changes made by the act; providing an
 9 effective date.

10

11 Be It Enacted by the Legislature of the State of Florida:

12

13 Section 1. Subsection (2) of section 316.193, Florida
 14 Statutes, is amended to read:

15 316.193 Driving under the influence; penalties.—

16 (2)(a) Except as provided in paragraph (b), subsection
 17 (3), or subsection (4), any person who is convicted of a
 18 violation of subsection (1) shall be punished:

19 1. By a fine of:

20 a. Not less than \$500 or more than \$1,000 for a first
 21 conviction.

22 b. Not less than \$1,000 or more than \$2,000 for a second
 23 conviction; and

24 2. By imprisonment for:

25 a. Not more than 6 months for a first conviction.

26 b. Not more than 9 months for a second conviction.

27 3. By mandatory placement, at the convicted person's sole
 28 expense, of an ignition interlock device approved by the
 29 department in accordance with s. 316.1938:

30 a. For a first conviction, for a period of at least 6
 31 months; or

32 b. For a second conviction, by mandatory placement for a
 33 period of at least 1 year, at the convicted person's sole
 34 expense, of an ignition interlock device approved by the
 35 department in accordance with s. 316.1938

36
 37 upon all vehicles that are individually or jointly leased or
 38 owned and routinely operated by the convicted person, when the
 39 convicted person qualifies for a permanent or restricted
 40 license. ~~The installation of such device may not occur before~~
 41 ~~July 1, 2003.~~

42 (b)1. Any person who is convicted of a third violation of
 43 this section for an offense that occurs within 10 years after a
 44 prior conviction for a violation of this section commits a
 45 felony of the third degree, punishable as provided in s.
 46 775.082, s. 775.083, or s. 775.084. In addition, the court shall
 47 order the mandatory placement for a period of not less than 2
 48 years, at the convicted person's sole expense, of an ignition
 49 interlock device approved by the department in accordance with
 50 s. 316.1938 upon all vehicles that are individually or jointly
 51 leased or owned and routinely operated by the convicted person,
 52 when the convicted person qualifies for a permanent or

53 restricted license. ~~The installation of such device may not~~
 54 ~~occur before July 1, 2003.~~

55 2. Any person who is convicted of a third violation of
 56 this section for an offense that occurs more than 10 years after
 57 the date of a prior conviction for a violation of this section
 58 shall be punished by a fine of not less than \$2,000 or more than
 59 \$5,000 and by imprisonment for not more than 12 months. In
 60 addition, the court shall order the mandatory placement for a
 61 period of at least 2 years, at the convicted person's sole
 62 expense, of an ignition interlock device approved by the
 63 department in accordance with s. 316.1938 upon all vehicles that
 64 are individually or jointly leased or owned and routinely
 65 operated by the convicted person, when the convicted person
 66 qualifies for a permanent or restricted license. ~~The~~
 67 ~~installation of such device may not occur before July 1, 2003.~~

68 3. Any person who is convicted of a fourth or subsequent
 69 violation of this section, regardless of when any prior
 70 conviction for a violation of this section occurred, commits a
 71 felony of the third degree, punishable as provided in s.
 72 775.082, s. 775.083, or s. 775.084. However, the fine imposed
 73 for such fourth or subsequent violation may be not less than
 74 \$2,000.

75 ~~(c) In addition to the penalties in paragraph (a), the~~
 76 ~~court may order placement, at the convicted person's sole~~
 77 ~~expense, of an ignition interlock device approved by the~~
 78 ~~department in accordance with s. 316.1938 for at least 6~~

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79 | ~~continuous months upon all vehicles that are individually or~~
80 | ~~jointly leased or owned and routinely operated by the convicted~~
81 | ~~person if, at the time of the offense, the person had a blood-~~
82 | ~~alcohol level or breath alcohol level of .08 or higher.~~

83 | Section 2. This act shall take effect October 1, 2016.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 739 Secondhand Dealers
SPONSOR(S): Criminal Justice Subcommittee; Passidomo and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 948

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	11 Y, 0 N, As CS	Keegan	White
2) Judiciary Committee		Keegan 	Havlicak 

SUMMARY ANALYSIS

Sections 538.03-538.17, F.S., regulate specific types of secondhand dealers and their business practices. These secondhand dealers must meet detailed recording and reporting requirements for any secondhand dealer transaction. Secondhand dealers must keep secondhand goods for at least 15 days before they can be modified, transferred, disposed of, or used in any way.

The bill amends the secondhand dealers transaction form requirements to include digital photos of the relevant goods and expands the holding period for the following secondhand goods from 15 to 30 days: a gemstone, an item of jewelry, an antique furnishing, fixture, or decorative object, or an item of art.

Section 538.08, F.S., authorizes a person alleging ownership of secondhand goods in the possession of a secondhand dealer to file a civil action of replevin when a secondhand dealer contests the identification or ownership of the property. The bill amends the process for this action by authorizing lienors alleging a right of possession to be plaintiffs and entitling plaintiffs to the process of summary procedure provided in s. 51.011, F.S.

The bill also creates a noncriminal violation punishable pursuant to s. 775.083, F.S., by a fine of up to \$2,500, which is committed by a secondhand dealer if:

- An owner or a lienor makes a written demand for return of the property and provides proof of ownership or proof of the right of possession to the secondhand dealer at least five calendar days before filing a replevin action;
- The secondhand dealer knows or should have known based on the proof that the property belongs to the owner or lienor;
- The secondhand dealer fails to return the property and does not file an action for interpleader to determine conflicting claims to the property; and
- The owner or lienor prevails in the replevin action against the secondhand dealer.

The bill may have an economic impact on secondhand dealers because the bill requires them to take digital photos for each secondhand goods transaction and to hold certain secondhand goods for 30, rather than 15, days. The bill also creates a noncriminal violation that may result in the imposition of a fine against the secondhand dealer. Additionally, the bill expands requirements under ch. 538, F.S., any violation of which is a first degree misdemeanor. Therefore, the bill may increase the need for jail beds.

The bill is effective July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Sections 538.03-538.17, F.S., regulate secondhand dealers and their business practices. A "secondhand dealer" is defined as any person, corporation, or other business entity that is engaged in the business of purchasing, consigning, or trading secondhand goods, but that is not a secondary metals recycler subject to Part II of Chapter 538, F.S.¹ Additionally, the following persons and business entities that fall under the definition of a secondhand dealer are excluded from the requirements of ch. 538, F.S.:

- A secondhand goods transaction involving an organization or entity registered with the state as a nonprofit, religious, or charitable organization or any school-sponsored association or organization other than a secondary metals recycler;²
- A law enforcement officer acting in an official capacity;
- A trustee in bankruptcy, executor, administrator, or receiver;³
- A public official acting under judicial process or authority;⁴
- A sale on the execution, or by virtue of any process issued by a court;⁵
- A garage sale operator who holds garage sales less than 10 weekends per year;
- A person at antique, coin, or collectible shows or sales;
- A person selling household personal property as agent of the property owner or the property owner's representative;⁶
- The purchase, consignment, or trade of secondhand goods from one secondhand dealer to another secondhand dealer when the seller complies with ch. 538, F.S.;
- A person accepting a secondhand good as a trade-in for a similar item of greater value;
- An auction business⁷ operating as an auction business in the buying and selling of specified property;
- A business that is registered as an antique dealer⁸ that purchases secondhand goods from the property owner or her or his representative at the property owner's residence pursuant to a written agreement;
- A business that contracts with another party to offer its secondhand goods for sale, purchase, consignment, or trade via an Internet website, and that maintains a shop, store, or other business premises for this purpose, if the business meets statutory requirements;⁹
- Any person offering his or her own personal property for sale, purchase, consignment, or trade via an Internet website, or a person or entity offering the personal property of others for sale, purchase, consignment, or trade via an Internet website, when that person or entity does not have, and is not required to have, a local occupational or business license for this purpose;
- A business whose primary business is the sale, rental, or trade of motion picture videos or video games, if the business meets statutory requirements;¹⁰ and
- A motor vehicle dealer as defined in s. 320.27, F.S.¹¹

¹ s. 538.03(1)(g), F.S.

² "Secondary metals recycler" as used in this analysis means a secondary metals recycler subject to Part II of Chapter 538, F.S.

³ The party must present proof of such status to the secondhand dealer for the exclusion to apply. s. 538.03(2)(c), F.S.

⁴ The party must present proof of such status to the secondhand dealer for the exclusion to apply. s. 538.03(2)(d), F.S.

⁵ Proof thereof must be presented to the secondhand dealer for the exclusion to apply. s. 538.03(2)(e), F.S.

⁶ Such a sale must be pursuant to a written agreement. s. 538.03(2)(h), F.S.

⁷ An "auction business" means a sole proprietorship, partnership, or corporation which in the regular course of business arranges, manages, sponsors, advertises, promotes, or carries out auctions, employs auctioneers to conduct auctions in its facilities, or uses or allows the use of its facilities for auctions." s. 468.382(1), F.S.

⁸ The business must be registered with the Department of Revenue for sales tax purposes as an antique dealer. ch. 212, F.S.

⁹ Section 538.03(2)(m), F.S., provides a detailed list of the requirements a business must meet for the exclusion to apply.

¹⁰ Section 538.03(2)(o), F.S., provides a detailed list of the requirements a business must meet for the exclusion to apply.

¹¹ s. 538.03(2), F.S.

A “secondhand good” is defined as meaning “personal property previously owned or used, which is not regulated metals property regulated under part II and which is purchased, consigned, or traded as used property. Such secondhand goods do not include office furniture, pianos, books, clothing, organs, coins, motor vehicles, costume jewelry, cardio and strength training or conditioning equipment designed primarily for indoor use, and secondhand sports equipment that is not permanently labeled with a serial number. For purposes of this paragraph, ‘secondhand sports equipment’ does not include golf clubs.”¹²

Records and Reporting Requirements

Secondhand dealers must maintain detailed records related to each secondhand dealer transaction.¹³ To ensure compliance with these requirements, a law enforcement officer is statutorily authorized to inspect the entire registered premises and required records of any secondhand dealer during normal business hours.¹⁴ A “transaction” is defined as “any purchase, consignment, or trade of secondhand goods by a secondhand dealer.”¹⁵ When a secondhand dealer conducts a transaction, the dealer must complete a secondhand dealers transaction form at the time the transaction is completed.¹⁶ Dealers are required to keep copies of completed transaction forms for at least three years and must keep copies on the registered secondhand dealer premises for at least one year after the transaction.¹⁷

Secondhand dealers are required to present completed transaction forms to the appropriate law enforcement official¹⁸ within 24 hours of the transaction, and must include a wide variety of information relating to the transaction, the seller or buyer, and the secondhand property involved.¹⁹ The required information includes:

- A complete description of the goods acquired;
- The location, date, and time of the transaction;
- A description of the person from whom the goods were acquired; and
- Any other information required on the secondhand dealer transaction form.

The reporting requirements currently do not require a secondhand dealer to include photographs of the goods with the secondhand dealer transaction form.

Holding Period

A secondhand dealer is prohibited from selling, bartering, exchanging, altering, adulterating, using, or disposing of any secondhand goods within 15 calendar days of acquiring the goods.²⁰ This holding period does not apply to the person known to the secondhand dealer to be the same person who provided the goods to the secondhand dealer, when the person wishes to recover the goods.²¹ If a law enforcement officer has probable cause that goods in a secondhand dealer’s possession were stolen, the law enforcement officer may issue a 90-day hold order²² to prevent the stolen goods from being sold while an investigation is conducted.²³

¹² s. 583.03(1)(h), F.S.

¹³ s. 583.04, F.S.

¹⁴ s. 538.05(1), F.S.

¹⁵ s. 538.03(1)(j), F.S.

¹⁶ s. 538.04(1), F.S.

¹⁷ *Id.*

¹⁸ “‘Appropriate law enforcement official’ means the sheriff of the county in which a secondhand dealer is located or, if the secondhand dealer is located within a municipality, both the police chief of the municipality and the sheriff; however, the sheriff or police chief may designate as the appropriate law enforcement official for that county or municipality, as applicable, any law enforcement officer working within that respective county or municipality.” s. 538.03(1)(b), F.S.

¹⁹ s. 538.04(1), F.S.

²⁰ s. 538.06(1), F.S.

²¹ The holding period is inapplicable only if the secondhand dealer can produce the record of the original transaction. s. 538.06(1), F.S.

²² s. 538.06(3), F.S.

²³ Adam Sacasa, *Stolen Items at Pawn Shops Often a Challenge to Get Back*, SUN SENTINEL (July 13, 2014), http://articles.sun-sentinel.com/2014-07-13/news/fl-pawn-stolen-property-recovery-20140712_1_pawn-shops-palm-beach-county-sheriff-property (last visited Dec. 30, 2015).

Petition for Return of Stolen Goods

If a person is alleging ownership of property in the possession of a secondhand dealer, and the secondhand dealer is contesting the identification or ownership of the property, the person may file a civil action of replevin²⁴ in the county or circuit court.²⁵ The petition must contain statutorily-prescribed allegations.²⁶ For example, the petition must include a description of the property and indicate that the plaintiff is entitled to possession of the property under a security agreement and that the property is wrongfully held by the defendant.²⁷ The court is required to award the prevailing party attorney fees and costs, and when the petitioner is the prevailing party, the court must order payment of filing fees to the clerk and service fees to the sheriff.²⁸

Summary Procedure

Summary procedure is an expedited process for considering civil disputes.²⁹ Summary procedure is provided for in statute,³⁰ and it streamlines civil litigation in a number of ways. For example, the time period for responding to a complaint is significantly shortened,³¹ fewer pleadings are permitted to be filed,³² and reasons for postponing a case are restricted.³³ Summary procedure is only available in those actions specified by statute or rule.³⁴ Summary procedure is not currently authorized in statute or rule to apply to actions of replevin against a secondhand dealer.

Criminal Liability and Punishment

Unless otherwise provided, any person who knowingly violates the regulations of ch. 538, F.S., commits a first degree misdemeanor, punishable by up to one year in jail and a \$10,000 fine.³⁵ When a secondhand dealer returns stolen property to a lawful owner, and the person who transacted the property to the secondhand dealer is convicted of theft, a violation of ch. 538, F.S., or dealing in stolen property, the court must order the defendant to pay restitution to the secondhand dealer or the owner of the stolen property.³⁶

Effect of the Bill

The bill amends the secondhand dealers transaction form requirements specified in s. 538.04(1), F.S., to include a requirement for digital photos of the goods involved in the transaction, which clearly depict the items.

The bill expands the holding period specified in s. 538.06(1), F.S., from 15 days to 30 days for a precious metal,³⁷ a gemstone, an item of jewelry, an antique furnishing, fixture, or decorative object, or an item of art as defined in s. 686.501, F.S.³⁸ The bill specifies that the term “antique” means “being at least 30 years old and having special value because of age.”

²⁴ An action of replevin is a lawsuit by someone claiming the right to have personal property returned from another person’s possession. THE LEGAL DICTIONARY, *Replevin*, <http://legal-dictionary.thefreedictionary.com/replevin> (last visited Dec. 30, 2015). Replevin actions in this state are governed by ch. 78, F.S.

²⁵ s. 538.08(1), F.S.

²⁶ *Id.*

²⁷ *Id.*

²⁸ s. 538.08(2), F.S.

²⁹ Daniel Morman, *Application of Summary Procedure by Agreement*, 76-Feb. FLA. BAR. J. 12, 12 (Feb. 2002).

³⁰ s. 51.011, F.S.

³¹ s. 51.011(1), F.S.

³² *Id.*

³³ s. 51.011(2), F.S.

³⁴ s. 51.011, F.S.

³⁵ s. 538.07(1), F.S.

³⁶ s. 538.07(2), F.S.

³⁷ Section 538.03(1)(e), F.S., defines “precious metals” to mean “any item containing any gold, silver, or platinum, or any combination thereof, excluding any chemical or any automotive, photographic, electrical, medical, or dental materials or electronic parts.”

³⁸ Section 686.501(1), F.S., defines “art” as “a painting, sculpture, drawing, work of graphic art, pottery, weaving, batik, macrame, quilt, print, photograph, or craft work executed in materials including, but not limited to, clay, textile, paper, fiber, wood, tile, metal, plastic, or glass. The term shall also include a rare map which is offered as a limited edition or a map 80 years old or older; or a rare

The bill amends the process for an action of replevin against a secondhand dealer specified in s. 538.08, F.S., by:

- Expanding the action of replevin to include lienors with a right of possession as plaintiffs;
- Removing the term “petition” and replacing it with the term “complaint,” as “complaint” is the term utilized in ch. 78, F.S., which governs replevin actions.³⁹
- Entitling plaintiffs to the process of summary procedure provided in s. 51.011, F.S.
- Specifying that a secondhand dealer commits a noncriminal violation punishable pursuant to s. 775.083, F.S., by a fine of up to \$2,500, if:
 - An owner or a lienor makes a written demand for return of the property and provides proof of ownership or proof of the right of possession to the secondhand dealer at least five calendar days before filing a replevin action;
 - The secondhand dealer knows or should have known based on the proof that the property belongs to the owner or lienor;
 - The secondhand dealer fails to return the property and does not file an action for interpleader⁴⁰ to determine conflicting claims to the property; and
 - The owner or lienor prevails in the replevin action against the secondhand dealer.

The bill takes effect on July 1, 2016.

B. SECTION DIRECTORY:

Section 1. Amends s. 538.04, F.S., relating to recordkeeping requirements; penalties.

Section 2. Amends s. 538.06, F.S., relating to holding period.

Section 3. Amends s. 538.08, F.S., relating to stolen goods; petition for return.

Section 4. Provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have an impact on state revenues.

2. Expenditures:

The bill does not appear to have an impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have an impact on local government revenues.

document or rare print which includes, but is not limited to, a print, engraving, etching, woodcut, lithograph, or serigraph which is offered as a limited edition, or one 80 years old or older.”

³⁹ See, e.g., s. 78.055, F.S.

⁴⁰ The procedure of interpleader allows conflicting claimants seeking a judgment for a single fund or piece of property to litigate their claims in a single civil suit. FLA. R. CIV. P. 1.240; 32 FLA. JUR. 2d *Interpleader, or Third- and Fourth-Party Practice* § 1 (Nov. 2015).

2. Expenditures:

As noted above, the bill expands various requirements under ch. 538, F.S., any violation of which is a first degree misdemeanor. Therefore, this bill may have a positive jail bed impact on local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill requires a secondhand dealer to hold specified property for 30 days instead of 15 days, and requires secondhand dealers to take digital photos for each transaction. These new requirements may increase operating costs for secondhand dealers. Additionally, the bill provides that a secondhand dealer commits a noncriminal violation if the dealer has failed to return property to an owner or lienor under specified circumstances. A secondhand dealer who commits such violation may be liable for a fine up to \$2,500.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create the need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 19, 2016, the Criminal Justice Subcommittee adopted a proposed committee substitute (PCS) with one amendment and reported the bill favorably as a committee substitute. The PCS: (a) limited the bill's 30-day holding period to specified property; (b) removed language specifying that a secondhand dealer has a duty to return goods and references to loss-of-use damages; and (c) created a noncriminal violation. The amendment: (a) provided that a "plaintiff" rather than a "claimant" is entitled to the summary procedure provided in s. 51.011, F.S.; and (b) clarified the elements of the noncriminal violation created by the bill in s. 538.08(5), F.S.

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

1 A bill to be entitled
 2 An act relating to secondhand dealers; amending s.
 3 538.04, F.S.; requiring that the record of a
 4 secondhand dealer transaction include digital
 5 photographs of goods; amending s. 538.06, F.S.;
 6 increasing the required holding period for certain
 7 goods acquired by a dealer; providing a definition;
 8 amending s. 538.08, F.S.; authorizing an action in
 9 replevin against a secondhand dealer based on a right
 10 of possession to stolen goods; revising the form for a
 11 complaint for return of stolen goods; providing that a
 12 plaintiff in a replevin action is entitled to a
 13 certain summary procedure; providing that it is a
 14 noncriminal violation for a secondhand dealer to have
 15 not previously returned property under certain
 16 circumstances to an owner or lienor who prevailed in a
 17 replevin action; providing a penalty; providing an
 18 effective date.

19
 20 Be It Enacted by the Legislature of the State of Florida:

21
 22 Section 1. Paragraphs (c) and (d) of subsection (1) of
 23 section 538.04, Florida Statutes, are redesignated as paragraphs
 24 (d) and (e), respectively, and a new paragraph (c) is added to
 25 that subsection to read:

26 538.04 Recordkeeping requirements; penalties.—

27 (1) A secondhand dealer shall complete a secondhand
 28 dealers transaction form at the time of the actual transaction.
 29 A secondhand dealer shall maintain a copy of a completed
 30 transaction form on the registered premises for at least 1 year
 31 after the date of the transaction. However, the secondhand
 32 dealer shall maintain a copy of the transaction form for not
 33 less than 3 years. Unless other arrangements are agreed upon by
 34 the secondhand dealer and the appropriate law enforcement
 35 official, the secondhand dealer shall, within 24 hours after
 36 acquiring any secondhand goods, deliver to such official a
 37 record of the transaction on a form approved by the Department
 38 of Law Enforcement. Such record shall contain:

39 (c) Digital photographs of the goods, clearly showing the
 40 items required to be included on the record as provided in
 41 paragraph (b).

42 Section 2. Subsection (1) of section 538.06, Florida
 43 Statutes, is amended to read:

44 538.06 Holding period.—

45 (1)(a) A secondhand dealer shall not sell, barter,
 46 exchange, alter, adulterate, use, or in any way dispose of any
 47 secondhand good that is:

48 1. A precious metal, a gemstone, an item of jewelry, an
 49 antique furnishing, fixture, or decorative object, or an item of
 50 art as defined in s. 686.501, within 30 calendar days after the
 51 date on which the good is acquired.

52 2. Not described in subparagraph 1., ~~goods~~ within 15

53 calendar days after ~~of~~ the date on which the good is acquired ~~of~~
54 ~~acquisition of the goods.~~

55

56 Such holding periods are not applicable when the person known by
57 the secondhand dealer to be the person from whom the goods were
58 acquired desires to redeem, repurchase, or recover the goods,
59 provided the dealer can produce the record of the original
60 transaction with verification that the customer is the person
61 from whom the goods were originally acquired.

62 (b) For purposes of this subsection, the term "antique"
63 means being at least 30 years old and having special value
64 because of age.

65 Section 3. Section 538.08, Florida Statutes, is amended to
66 read:

67 538.08 Stolen goods; complaint ~~petition~~ for return.-

68 (1) If the secondhand dealer contests the identification,
69 ~~or~~ ownership, or right of possession of the property, the person
70 alleging ownership or right of possession of the property may,
71 provided that a timely report of the theft of the goods was made
72 to the proper authorities, bring an action for replevin in the
73 county or circuit court. The complaint may be ~~by petition~~ in
74 substantially the following form:

75 Plaintiff A. B. sues defendant C. D., and alleges:

76 1. This is an action to recover possession of personal
77 property in County, Florida.

78 2. The description of the property is: ...(list

79 property).... To the best of plaintiff's knowledge, information,
 80 and belief, the value of the property is \$.....

81 3. Plaintiff is the lawful owner of the property or is
 82 entitled to ~~the~~ possession of the property under a security
 83 agreement dated, ...(year)..., a copy of which is
 84 attached.

85 4. To plaintiff's best knowledge, information, and belief,
 86 the property is located at

87 5. The property is wrongfully detained by defendant.
 88 Defendant came into possession of the property by ...(describe
 89 method of possession).... To plaintiff's best knowledge,
 90 information, and belief, defendant detains the property because
 91 ...(give reasons)....

92 6. The property has not been taken under an execution or
 93 attachment against plaintiff's property.

94 (2) The filing fees shall be waived by the clerk of the
 95 court, and the service fees shall be waived by the sheriff. The
 96 court shall award the prevailing party attorney ~~attorney's~~ fees
 97 and costs. In addition, when the filing party prevails in the
 98 replevin action, the court shall order payment of filing fees to
 99 the clerk and service fees to the sheriff.

100 (3) Upon the filing of the complaint ~~petition~~, the court
 101 shall set a hearing to be held at the earliest possible time.
 102 The plaintiff is entitled to the summary procedure provided in
 103 s. 51.011. Upon ~~the~~ receipt of the complaint ~~a petition for a~~
 104 ~~writ by a secondhand dealer~~, the secondhand dealer shall hold

105 the property at issue until the court determines the respective
 106 interests of the parties.

107 (4) In addition to the civil complaint ~~petition~~ for return
 108 remedy, the state may file a motion as part of a pending
 109 criminal case related to the property. The criminal court has
 110 jurisdiction to determine ownership, ~~to~~ order return or other
 111 disposition of the property, and ~~to~~ order ~~any~~ appropriate
 112 restitution to any person. Such order shall be entered upon
 113 hearing after proper notice has been given to the secondhand
 114 dealer, the victim, and the defendant in the criminal case.

115 (5) A secondhand dealer commits a noncriminal violation,
 116 punishable by a fine of up to \$2,500 as provided in s. 775.083,
 117 if all of the following occur:

118 (a) An owner or a lienor makes a written demand for return
 119 of the property and provides proof of ownership or proof of the
 120 right of possession to the secondhand dealer at least 5 calendar
 121 days before filing a replevin action.

122 (b) The secondhand dealer knows or should have known based
 123 on the proof provided under paragraph (a) that the property
 124 belongs to the owner or lienor.

125 (c) The secondhand dealer fails to return the property and
 126 does not file an action for interpleader to determine
 127 conflicting claims to the property.

128 (d) The owner or lienor prevails in the replevin action
 129 against the secondhand dealer.

130 Section 4. This act shall take effect July 1, 2016.



Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Judiciary Committee
 2 Representative Passidomo offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

3
 4
 5 Section 1. Present paragraphs (c) through (j) of
 6 subsection (1) of section 538.03, Florida Statutes, are
 7 redesignated as paragraphs (d) through (k), respectively, a new
 8 paragraph (c) is added to that subsection, and present
 9 paragraphs (g) and (h) of that subsection are amended, to read:

10 538.03 Definitions; applicability.-

11 (1) As used in this part, the term:

12 (c) "Automated kiosk" means an interactive device that is
 13 permanently installed within a secure retail space and that:

14 1. Is remotely monitored by a live representative during
 15 all business operating hours;
 16



Amendment No. 1

17 2. Verifies a seller's identity by official identification
18 issued in the United States;

19 3. Performs automated reading and recording of item serial
20 numbers;

21 4. Compares item serial numbers against databases of
22 stolen items;

23 5. Securely stores goods accepted by the kiosk; and

24 6. Captures and stores images during the transaction.

25 (h)(g) "Secondhand dealer" means any person, corporation,
26 or other business organization or entity which is not a
27 secondary metals recycler subject to part II and which is
28 engaged in the business of purchasing, consigning, or trading
29 secondhand goods. The term includes any secondhand dealer
30 engaged in the business of purchasing secondhand goods by means
31 of an automated kiosk.

32 (i)(h) "Secondhand goods" means personal property
33 previously owned or used, which is not regulated metals property
34 regulated under part II and which is purchased, consigned, or
35 traded as used property. The term includes gift certificates and
36 credit memos as defined in s. 501.95 which are purchased,
37 consigned, or traded by a secondhand dealer. The term does ~~Such~~
38 ~~secondhand goods~~ do not include office furniture, pianos, books,
39 clothing, organs, coins, motor vehicles, costume jewelry, cardio
40 and strength training or conditioning equipment designed
41 primarily for indoor use, and secondhand sports equipment that
42 is not permanently labeled with a serial number. As used in ~~For~~

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Amendment No. 1

43 ~~purposes of~~ this paragraph, the term "secondhand sports
44 equipment" does not include golf clubs.

45 Section 2. Paragraphs (c) and (d) of subsection (1) of
46 section 538.04, Florida Statutes, are redesignated as paragraphs
47 (d) and (e), respectively, and a new paragraph (c) is added to
48 that subsection, and subsection (8) is added to that section to
49 read:

50 538.04 Recordkeeping requirements; penalties.—

51 (1) A secondhand dealer shall complete a secondhand
52 dealers transaction form at the time of the actual transaction.
53 A secondhand dealer shall maintain a copy of a completed
54 transaction form on the registered premises for at least 1 year
55 after the date of the transaction. However, the secondhand
56 dealer shall maintain a copy of the transaction form for not
57 less than 3 years. Unless other arrangements are agreed upon by
58 the secondhand dealer and the appropriate law enforcement
59 official, the secondhand dealer shall, within 24 hours after
60 acquiring any secondhand goods, deliver to such official a
61 record of the transaction on a form approved by the Department
62 of Law Enforcement. Such record shall contain:

63 (c) Digital photos of the goods, clearly showing the items
64 required to be included on the record as provided in paragraph

65 (b).

66 (8) When secondhand goods are purchased by means of an
67 automated kiosk, the serial number reported pursuant to this
68 section may be the International Mobile Station Equipment



Amendment No. 1

69 Identity (IMEI), the mobile equipment identifier (MEID), or
70 other unique identifying number assigned to the device by the
71 manufacturer. If the IMEI, MEID, or other unique identifying
72 number is not available at the time of receipt or purchase, the
73 report filed pursuant to this section must be updated with the
74 IMEI, MEID, or other unique identifying number as soon as
75 possible, but no later than 10 business days after the date of
76 acquisition. The holding requirements of s. 538.06 and s.
77 538.09(3) do not begin until all required reports are complete
78 and submitted to the appropriate law enforcement official.

79 Section 3. Subsection (1) of section 538.06, Florida
80 Statutes, is amended to read:

81 538.06 Holding period.—

82 (1)(a) A secondhand dealer may ~~shall~~ not sell, barter,
83 exchange, alter, adulterate, use, or in any way dispose of any
84 secondhand good:

85 1. That is a precious metal, a gemstone, jewelry; an
86 antique furnishing, fixture, or decorative object; or an item of
87 art as defined in s. 686.501 within 30 calendar days after the
88 date on which the good is acquired.

89 2. That is not described in subparagraph 1. ~~goods~~ within
90 15 calendar days after of the date on which the good is acquired
91 ~~of acquisition of the goods.~~

92 3. Within 30 calendar days after the date on which the
93 good is acquired if the secondhand dealer uses an automated
94 kiosk.

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Amendment No. 1

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Such holding periods are not applicable when the person known by the secondhand dealer to be the person from whom the goods were acquired desires to redeem, repurchase, or recover the goods, provided the dealer can produce the record of the original transaction with verification that the customer is the person from whom the goods were originally acquired.

(b) As used in this subsection, the term "antique" means the item is at least 30 years old and has special value because of its age.

Section 4. Section 538.08, Florida Statutes, is amended to read:

538.08 Stolen goods; complaint ~~petition~~ for return.-

(1) If the secondhand dealer contests the identification, ~~or~~ ownership, or right of possession of the property, the person alleging ownership or right of possession of the property may, provided that a timely report of the theft of the goods was made to the proper authorities, bring an action for replevin in the county or circuit court. The complaint may be ~~by petition~~ in substantially the following form:

Plaintiff A. B. sues defendant C. D., and alleges:

1. This is an action to recover possession of personal property in County, Florida.



Amendment No. 1

119 2. The description of the property is: ...(list
120 property).... To the best of plaintiff's knowledge, information,
121 and belief, the value of the property is \$.....

122 3. Plaintiff is the lawful owner of the property or is
123 entitled to the possession of the property under a security
124 agreement dated, ...(year)...., a copy of which is
125 attached.

126 4. To plaintiff's best knowledge, information, and belief,
127 the property is located at

128 5. The property is wrongfully detained by defendant.
129 Defendant came into possession of the property by ...(describe
130 method of possession).... To plaintiff's best knowledge,
131 information, and belief, defendant detains the property because
132 ...(give reasons)....

133 6. The property has not been taken under an execution or
134 attachment against plaintiff's property.

135
136 (2) The filing fees shall be waived by the clerk of the
137 court, and the service fees shall be waived by the sheriff. The
138 court shall award the prevailing party attorney ~~attorney's~~ fees
139 and costs. In addition, when the filing party prevails in the
140 replevin action, the court shall order payment of filing fees to
141 the clerk and service fees to the sheriff.

142 (3) Upon the filing of the complaint ~~petition~~, the court
143 shall set a hearing to be held at the earliest possible time.
144 The plaintiff is entitled to the summary procedure provided in



Amendment No. 1

145 s. 51.011. Upon the receipt of the complaint ~~a petition for a~~
146 ~~writ by a secondhand dealer,~~ the secondhand dealer shall hold
147 the property at issue until the court determines the respective
148 interests of the parties.

149 (4) In addition to the civil complaint ~~petition~~ for return
150 remedy, the state may file a motion as part of a pending
151 criminal case related to the property. The criminal court has
152 jurisdiction to determine ownership, to order return or other
153 disposition of the property, and to order ~~any~~ appropriate
154 restitution to any person. Such order shall be entered upon
155 hearing after proper notice has been given to the secondhand
156 dealer, the victim, and the defendant in the criminal case.

157 (5) A secondhand dealer commits a noncriminal violation,
158 punishable as provided in s. 775.083 by a fine of up to \$2,500,
159 if all of the following occur:

160 (a) An owner or a lienor makes a written demand for return
161 of the property and provides proof of ownership or proof of the
162 right of possession to the secondhand dealer at least 5 calendar
163 days before filing a replevin action.

164 (b) The secondhand dealer knows or should have known based
165 on the proof provided under paragraph (a) that the property
166 belongs to the owner or lienor.

167 (c) The secondhand dealer fails to return the property and
168 does not file an action in interpleader to determine conflicting
169 claims to the property.



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170 (d) The owner or lienor prevails in the replevin action
171 against the secondhand dealer.

172 Section 5. Subsection (3) of section 538.09, Florida
173 Statutes, is amended to read:

174 538.09 Registration.-

175 (3) The secondhand dealer's registration shall be
176 conspicuously displayed at her or his registered location. A
177 secondhand dealer must hold secondhand goods at the registered
178 location for the period required by s. 538.06 until 15 days
179 after the secondhand transaction or until any extension of the
180 holding period has expired, whichever is later. Storage at a
181 registered location outside the appropriate law enforcement
182 official's jurisdiction is permissible only upon agreement with
183 such law enforcement official and if the secondhand dealer
184 provides proof that he or she is able to and agrees to deliver
185 the stored secondhand goods to the appropriate law enforcement
186 official within 2 business days upon request.

187 Section 6. This act shall take effect July 1, 2016.

188
189 -----

T I T L E A M E N D M E N T

191 Remove everything before the enacting clause and insert:
192 An act relating to secondhand dealers; amending s. 538.03, F.S.;
193 revising definitions; amending s. 538.04, F.S.; requiring that
194 the record of a secondhand dealer transaction include digital
195 photos of the items; specifying what may be used as a serial



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196 number; providing that certain holding requirements do not begin
197 until certain reports are submitted to the appropriate law
198 enforcement official; amending s. 538.06, F.S.; revising the
199 required holding period for certain goods acquired by a dealer;
200 defining the term "antique"; amending s. 538.08, F.S.;

201 authorizing an action in replevin against a secondhand dealer
202 based on a right of possession to stolen goods; revising the
203 form for a complaint for return of stolen goods; providing that
204 a plaintiff in a replevin action is entitled to a certain
205 summary procedure; providing that a secondhand dealer commits a
206 noncriminal violation under certain circumstances; providing a
207 penalty; amending s. 538.09, F.S.; revising the period of time a
208 secondhand dealer must hold secondhand goods at a registered
209 location; authorizing a secondhand dealer to store secondhand
210 goods outside the appropriate law enforcement official's
211 jurisdiction, subject to certain conditions; providing an
212 effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 761 Fraudulent Activities Associated with Payment Systems
SPONSOR(S): Criminal Justice Subcommittee; Young; Cruz and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 912

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	11 Y, 0 N, As CS	White	White
2) Appropriations Committee	25 Y, 0 N	McAuliffe	Leznoff
3) Judiciary Committee		White <i>TW</i>	Havlicak <i>RN</i>

SUMMARY ANALYSIS

The Department of Agriculture and Consumer Services (DACS) is responsible for inspecting measuring devices, i.e., fuel pumps, which are used in this state to sell fuel at wholesale and retail. In executing this responsibility, DACS also inspects the pumps for devices, commonly referred to as "skimmers," which steal payment card information from customers paying for their gas at the pump.

During recent investigations, DACS has found that skimmed payment card information is being used as part of elaborate fraud schemes to purchase hundreds of gallons of gas that is pumped into unapproved, hidden gas tanks in vans, SUVs, and trucks. Such gas is then usually resold by the criminals to independent truck drivers at a fraction of its usual cost.

To establish greater protection for consumer payment card information and enhance penalties for crimes involved in the fraud schemes, the bill:

- Requires owners and managers of retail fuel pumps in this state to affix or install one or more security measures on each fuel pump which restrict the unauthorized access of customer payment card information.
- Increases the penalty for the offense of unlawfully conveying and fraudulently obtaining fuel from an unranked third degree felony to a second degree felony ranked as a Level 5 offense on the Offense Severity Ranking Chart (OSRC).
- Reduces the number of counterfeit credit cards or related specified documents required to constitute second degree felony trafficking from 10 to five and ranks this felony as a Level 5 offense on the OSRC.
- Creates a second degree felony ranked as a Level 5 offense on the OSRC for the offense of possessing five or more counterfeit credit cards or related specified documents.

On January 5, 2016, the Criminal Justice Impact Conference determined that this bill will have an insignificant impact on state prison beds (i.e., will increase the number of prison beds needed by less than 10). The bill may also increase the need for local jail beds and have a minimal fiscal impact on the owners and managers of retail petroleum fuel pumps. Please see "Fiscal Analysis & Economic Impact Statement."

The bill takes effect on October 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Skimming

As discussed below, the Department of Agriculture and Consumer Services (DACS) is responsible for inspecting measuring devices, i.e., fuel pumps, which are used in this state to sell fuel at wholesale and retail.¹ In executing this responsibility, DACS also inspects the fuel pumps for devices, commonly referred to as “skimmers,” which steal payment card information from customers paying for their gas at the pump.²

In addition to being used for typical fraudulent purchases, skimmed payment card information has also been used, according to DACS, as part of elaborate schemes to purchase hundreds of gallons of gas that is pumped into unapproved, hidden gas tanks in vans, SUVs, and trucks. Such gas is then usually resold by the criminals to independent truck drivers at a fraction of its usual cost.³

The DACS has been working in cooperation with local, state, and federal law enforcement officials to investigate the criminals operating the above-described schemes.⁴ Since March 2015, DACS has found 166 skimmers statewide and estimates that between 100 and 5,000 consumers are victimized by each skimmer with an average of \$1,000 stolen from each victim.⁵ Additionally, since 2008, DACS has arrested 47 persons for the theft of fuel using skimmed credit card information.⁶

Regulation of Petroleum Fuel Measuring Devices

Under s. 525.07(1), F.S., DACS is required to inspect all measuring devices used in selling or distributing petroleum fuel⁷ at wholesale and retail. The section further authorizes DACS to establish by rule the tolerances, in excess or deficiency, to be allowed for such measuring devices and requires each person who owns or operates a measuring device to ensure accurate measurement and to place an appropriate security seal on each device so that the metering adjustment cannot be changed without breaking the seal.⁸

If DACS determines that a measuring device is operating outside the tolerances established in rule, DACS is authorized to:

- Give written notice to the operator or owner of the measuring device which provides a reasonable time to repair the measuring device; or

¹ s. 525.07, F.S.

² See Florida Department of Agriculture and Consumer Services, *Protecting Consumers at the Pump* (on file with the House Criminal Justice Subcommittee).

³ *Id.*

⁴ *Id.*

⁵ Florida Department of Agriculture and Consumer Services, *Commissioner Putnam Highlights "Protection at the Pump" Legislation, Announces Six Skimmers Found in Tampa Bay Area*, <http://www.freshfromflorida.com/News-Events/Press-Releases/2015-Press-Releases/Commissioner-Putnam-Highlights-Protection-at-the-Pump-Legislation-Announces-Six-Skimmers-Found-in-Tampa-Bay-Area> (last visited Jan. 16, 2016).

⁶ See Florida Department of Agriculture and Consumer Services, *Protecting Consumers at the Pump* (on file with the House Criminal Justice Subcommittee).

⁷ The term “petroleum fuel” is defined to mean “all gasoline, kerosene (except when used as aviation turbine fuel), diesel fuel, benzene, other like products of petroleum under whatever name designated, or an alternative fuel used for illuminating, heating, cooking, or power purposes, sold, offered, or exposed for sale in this state.” s. 525.01(1)(b), F.S. “Alternative fuel” is defined to mean “1. Methanol, denatured ethanol, or other alcohols; 2. Mixtures of gasoline or other fuels with methanol, denatured ethanol, or other alcohols; 3. Hydrogen; 4. Coal-derived liquid fuels; and 5. Fuels, other than alcohol, derived from biological materials.” s. 525.01(1)(c), F.S.

⁸ s. 525.07(2) and (3), F.S.

- Condemn or prohibit the further use of the measuring device by using an appropriate security seal to obstruct the mechanism so that it cannot be operated without breaking the seal.⁹

The section further specifies that it is unlawful for any person to:

- Operate any measuring device that has been condemned or prohibited from further use by the department without the written consent of the department.
- Install or operate a petroleum fuel measuring device in this state which gives short measure.
- Break, cut, or remove any seal applied by the department to a petroleum fuel measuring device or container, except under specified circumstances involving repair of the device.¹⁰

A violation of the section's provisions:

- May result in the imposition of administrative fines by DACS and suspension or revocation of the registration issued by DACS to the owner or operator of a measuring device.
- Constitutes a first degree misdemeanor¹¹ if knowingly committed.¹²

Effect of Bill

The bill adds a new subsection (10) to s. 525.07, F.S., to require each owner or manager of a retail petroleum fuel measuring device to affix or install at least one of the following security measures onto the fuel measuring device to restrict the unauthorized access of customer payment card¹³ information:

- Pressure-sensitive security tape that is placed over the panel opening that leads to the scanning device for the fuel measuring device in a manner that restricts the unauthorized opening of the panel.
- A device or system that renders the fuel measuring device or the scanning device¹⁴ in the fuel measuring device inoperable if there is an unauthorized opening of the panel.
- A device or system that encrypts the customer payment card information in the scanning device.
- Another security measure approved by the DACS.

If DACS determines that an owner or a manager does not have a security measure or has an altered or damaged security measure, the owner or manager shall have five calendar days after written notice from DACS to achieve compliance. After the fifth day of noncompliance, DACS may prohibit further use of the retail petroleum fuel measuring device until compliance is achieved. If a repeat violation occurs, DACS may take the measuring device out of service.

The bill requires DACS to enforce the aforementioned requirements and authorizes DACS to adopt rules to implement the new subsection.

Unlawful Conveyance of Fuel/Fraudulent Obtainment of Fuel

Section 316.80(1), F.S., states that it is unlawful for any person to maintain or possess any conveyance or vehicle that is equipped with fuel tanks, bladders, drums, or other containers that do not conform to federal regulations¹⁵ or have not been approved by the United States Department of Transportation for the purpose of hauling, transporting, or conveying fuel over any public highway. A person who violates

⁹ s. 525.07(4), F.S.

¹⁰ s. 525.07(5)-(7), F.S.

¹¹ A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. ss. 775.082 and 775.083, F.S.

¹² s. 525.16, F.S.

¹³ The bill defines "payment card" as meaning "a credit card, charge card, debit card, or any other card that is issued to an authorized card user and that allows the user to obtain, purchase, or receive goods, services, money, or anything else of value from a merchant." ss. 525.07(10)(b) and 817.625(1)(c), F.S.

¹⁴ The bill defines "scanning device" as meaning "a scanner, reader, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of a payment card." ss. 525.07(10)(b) and 817.625(1)(a), F.S.

¹⁵ These regulations are set forth in Title 49 of the Code of Federal Regulations, entitled "Transportation."

this prohibition commits a third degree felony¹⁶ and is subject to the revocation of driver license privileges as provided in s. 322.26, F.S.

Additionally, s. 316.80(2), F.S., specifies that it is a third degree felony for any person to violate the above-described offense and to have or attempted to have fraudulently obtained fuel by:

- Presenting a credit card or a credit card account number in violation of Part II of ch. 817, F.S., entitled the "State Credit Card Crime Act";
- Using unauthorized access to any computer network in violation of s. 815.06;¹⁷ or
- Using a fraudulently scanned or lost or stolen payment access device, whether credit card or contactless device.¹⁸

The third degree felony offenses established in s. 316.80(1) and (2), F.S., are not currently ranked in the Offense Severity Ranking Chart (OSRC),¹⁹ and, as such, default to Level 1 offenses for purposes of a defendant's sentencing scoresheet.²⁰

Effect of Bill

The bill amends s. 316.80(2), F.S., to make it a second degree felony, rather than third degree felony as in current law, to unlawfully convey and fraudulently obtain fuel. The bill also amends s. 921.0022(3)(e), F.S., to rank this second degree felony as a Level 5 on the OSRC, which is one level higher than the Level 4 default ranking that applies to an unranked second degree felony offense.

State Credit Card Crime Act

Part II of ch. 817, F.S., entitled the "State Credit Card Crime Act," sets forth various criminal offenses prohibiting the theft, fraudulent use, and trafficking of credit cards²¹ and counterfeit credit cards.²² Relevant to this bill is s. 817.611, F.S., which specifies that it is a second degree felony²³ for any person to traffic in or attempt to traffic in 10 or more counterfeit credit cards, invoices, vouchers, sales drafts, or other representations or manifestations of counterfeit credit cards, or credit card account numbers of another in any six-month period. The term "traffic" means "to sell, transfer, distribute, dispense, or otherwise dispose of a property or to buy, receive, possess, obtain control of, or use property with the intent to sell, transfer, distribute, dispense, or otherwise dispose of such property."²⁴

This second degree felony offense is not currently ranked on the OSRC, and, as such, defaults to a Level 4 offense for purposes of a defendant's sentencing scoresheet.²⁵

¹⁶ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. ss. 775.082 and 775.083, F.S.

¹⁷ Section 815.06, F.S., specifies multiple offenses relating to unauthorized access of computer networks which range from a first degree misdemeanor to a first degree felony, e.g., it is a third degree felony to access a network with the knowledge that such access is unauthorized.

¹⁸ Section 316.80(2), F.S.

¹⁹ The Offense Severity Ranking Chart ranges from a Level 1 (least severe) to a Level 10 (most severe). A higher level results in a greater number of sentencing points being calculated on a defendant's sentencing scoresheet. The scoresheet determines the lowest permissible sentence that a defendant may receive, unless the trial court is statutorily-authorized to depart from such sentence. ss. 921.0022 and 921.0024, F.S.

²⁰ If an offense is not listed in the ranking chart, it defaults to a: (a) Level 1 for a third degree felony; (b) Level 4 for a second degree felony; (c) Level 7 for a first degree felony; (d) Level 9 for a first degree felony punishable by life; and (e) Level 10 for a life felony. s. 921.0023, F.S.

²¹ The term "credit card" is defined to mean, "any instrument or device, whether known as a credit card, credit plate, bank service card, banking card, check guarantee card, electronic benefits transfer (EBT) card, or debit card or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining money, goods, services, or anything else of value on credit or for use in an automated banking device to obtain any of the services offered through the device." s. 817.58(4), F.S.

²² The term "counterfeit credit card" is defined as, "any credit card which is fictitious, altered, or forged; any facsimile or false representation, depiction, or component of a credit card; or any credit card which is stolen, obtained as part of a scheme to defraud, or otherwise unlawfully obtained, and which may or may not be embossed with account information or a company logo." s. 817.58(3), F.S.

²³ A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. ss. 775.082 and 775.083, F.S.

²⁴ s. 817.58(10), F.S.

²⁵ s. 921.0023, F.S.

Effect of Bill

The bill amends s. 817.611, F.S., to reduce the number of counterfeit credit cards or related specified documents required to constitute a trafficking offense from 10 to five. It also amends the section to make the possession of, in addition to the trafficking of, such counterfeit credit cards or related specified documents a second degree felony. Finally, the bill amends s. 921.0022(3)(e), F.S., to rank the second degree felony violation of s. 817.611, F.S., as a Level 5 on the OSRC.

B. SECTION DIRECTORY:

Section 1. Amending s. 316.80, F.S., relating to unlawful conveyance of fuel and obtaining fuel fraudulently.

Section 2. Amending s. 525.07, F.S., relating to the powers and duties of DACS, inspections, and unlawful acts.

Section 3. Amending s. 817.611, F.S., relating to trafficking in counterfeit credit cards.

Section 4. Amending s. 921.0022, F.S., relating to the OSRC.

Section 5. Providing an effective date of October 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The Criminal Justice Impact Conference met on January 5, 2016, and determined that this bill will have an insignificant prison bed impact on the Department of Corrections (i.e., the bill will increase the number of prison beds needed by less than 10) due to its: (a) increase in s. 316.80(2), F.S., of the penalties applicable to the offense of unlawfully conveying and fraudulently obtaining fuel from an unranked third degree felony to a second degree felony ranked at a Level 5; (b) reduction in s. 817.611, F.S., of the number of counterfeit credit cards or related specified documents necessary to constitute trafficking; (c) creation in s. 817.611, F.S., of the second degree felony for possession of counterfeit credit cards or related specified documents; and (d) ranking of the currently unranked second degree felonies in s. 817.611, F.S., as Level 5 offenses.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

Due to the bill's addition of a requirement for an owner or manager of a retail petroleum fuel measuring device to install one or more security measures, the bill may increase the need for local jail beds because a knowing violation of this requirement constitutes a first degree misdemeanor under s. 525.16(2), F.S.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a fiscal impact on owners or managers of retail petroleum fuel measuring devices due to its requirement for the installation of one or more security measures on such device. As this requirement may be satisfied by the installation of pressure-sensitive security tape, the fiscal impact is anticipated to be minimal.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This 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:

The bill authorizes the DACS to adopt rules to implement s. 525.07(10), F.S., relating to the bill's new requirement for implementation of one or more security measures to protect customer payment card information for each retail petroleum measuring device in this state.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 19, 2016, the Criminal Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment: (a) substitutes the phrase "owner or manager" for "owner or operator" throughout s. 525.07, F.S., to clarify that the section's requirements apply to managers of petroleum fuel measuring devices, i.e., fuel pumps, not mere operators of such pumps; (b) specifies additional means by which owners and managers may comply with the security measure requirement set forth in s. 525.07(10), F.S.; and (c) addresses altered or damaged security measures in s. 525.07(10)(b), F.S.

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

1 A bill to be entitled
 2 An act relating to fraudulent activities associated
 3 with payment systems; amending s. 316.80, F.S.;
 4 revising the felony classification for unlawful
 5 conveyance of fuel; amending s. 525.07, F.S; revising
 6 terminology to specify requirements for managers,
 7 rather than operators, of petroleum fuel measuring
 8 devices with respect to accurate measurement;
 9 requiring retail petroleum fuel measuring devices
 10 fitted with scanning devices to have certain security
 11 measures; providing requirements for such measures;
 12 requiring the owner or operator of a device to have
 13 certain security measures in place within a specified
 14 timeframe upon notice from the Department of
 15 Agriculture and Consumer Services; authorizing the
 16 department, under certain circumstances, to prohibit
 17 use of or to remove from service such devices that are
 18 noncompliant; defining terms; providing applicability;
 19 requiring the Department of Agriculture and Consumer
 20 Services to enforce provisions; providing for
 21 rulemaking; amending s. 817.611, F.S.; reducing the
 22 number of counterfeit credit cards that a person can
 23 be in possession of to qualify as unlawful; amending
 24 s. 921.0022, F.S.; ranking unlawful conveyance or
 25 fraudulent acquisition of fuel as a level 5 offense;
 26 ranking trafficking in or possession of counterfeit

27 credit cards as a level 5 offense; providing an
 28 effective date.

29

30 Be It Enacted by the Legislature of the State of Florida:

31

32 Section 1. Subsection (2) of section 316.80, Florida
 33 Statutes, is amended to read:

34 316.80 Unlawful conveyance of fuel; obtaining fuel
 35 fraudulently.—

36 (2) A ~~Any~~ person who violates subsection (1) commits a
 37 felony of the second ~~third~~ degree, punishable as provided in s.
 38 775.082, s. 775.083, or s. 775.084, if he or she has attempted
 39 to or has fraudulently obtained motor or diesel fuel by:

40 (a) Presenting a credit card or a credit card account
 41 number in violation of ss. 817.57–817.685;

42 (b) Using unauthorized access to any computer network in
 43 violation of s. 815.06; or

44 (c) Using a fraudulently scanned or lost or stolen payment
 45 access device, whether credit card or contactless device.

46 Section 2. Subsections (3) and (4) of section 525.07,
 47 Florida Statutes, are amended, and subsection (10) is added to
 48 that section, to read:

49 525.07 Powers and duties of department; inspections;
 50 unlawful acts.—

51 (3) Each person who owns or manages ~~All persons who own or~~
 52 ~~operate~~ a petroleum fuel measuring device is ~~shall be~~

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

53 responsible for ensuring accurate measure by the device within
 54 the tolerances defined by the rule. An appropriate security seal
 55 shall be placed on all measuring devices found to be giving
 56 accurate measure within the tolerances defined by the department
 57 in such a way that the metering adjustment cannot be changed
 58 without breaking the seal.

59 (4) A ~~Any~~ measuring device that is found to be operating
 60 outside the tolerances defined by the department is ~~shall be~~
 61 deemed inaccurate, and the department, at its discretion, shall
 62 either:

63 (a) Give, in writing, the ~~operator or~~ owner or manager of
 64 the measuring device a reasonable time to repair the measuring
 65 device; or

66 (b) Condemn or prohibit the further use of the measuring
 67 device by using an appropriate security seal to obstruct the
 68 mechanism so that it cannot be operated without breaking the
 69 seal. The measuring device shall not be operated in this state
 70 again without the written consent of the department.

71 (10) (a) Each person who owns or manages a retail petroleum
 72 fuel measuring device shall have affixed to or installed onto
 73 the measuring device a security measure to restrict the
 74 unauthorized access of customer payment card information. The
 75 security measure must include one or more of the following:

76 1. Placement of pressure-sensitive security tape over the
 77 panel opening that leads to the scanning device for the retail
 78 petroleum fuel measuring device in a manner that will restrict

79 the unauthorized opening of the panel.

80 2. A device or system that will render the retail
 81 petroleum fuel measuring device or the scanning device in the
 82 measuring device inoperable if there is an unauthorized opening
 83 of the panel.

84 3. A device or system that encrypts the customer payment
 85 card information in the scanning device.

86 4. Another security measure approved by the department.

87 (b) The owner or manager of a retail petroleum fuel
 88 measuring device without a security measure or with an altered
 89 or damaged security measure, upon written notice from the
 90 department of such noncompliance, shall have 5 calendar days to
 91 comply with this subsection. After the fifth day of
 92 noncompliance, the department may prohibit further use of the
 93 retail petroleum fuel measuring device until a security measure
 94 is installed, replaced, or repaired. A repeat violation found on
 95 the same retail petroleum fuel measuring device is cause for the
 96 department to immediately take the measuring device out of
 97 service.

98 (c) For purposes of this subsection, the terms "scanning
 99 device" and "payment card" have the same meanings as provided in
 100 s. 817.625.

101 (d) This subsection applies only to retail petroleum fuel
 102 measuring devices that have a scanning device.

103 (e) The department shall enforce, and may adopt rules to
 104 implement, this subsection.

105 Section 3. Section 817.611, Florida Statutes, is amended
 106 to read:

107 817.611 Traffic in or possess counterfeit credit cards.—
 108 Any person who traffics in, ~~or~~ attempts to traffic in, or
 109 possesses 5 ~~10~~ or more counterfeit credit cards, invoices,
 110 vouchers, sales drafts, or other representations or
 111 manifestations of counterfeit credit cards, or credit card
 112 account numbers of another in any 6-month period is guilty of a
 113 felony of the second degree, punishable as provided in s.
 114 775.082, s. 775.083, or s. 775.084.

115 Section 4. Paragraph (e) of subsection (3) of section
 116 921.0022, Florida Statutes, is amended to read:

117 921.0022 Criminal Punishment Code; offense severity
 118 ranking chart.—

- 119 (3) OFFENSE SEVERITY RANKING CHART
- 120 (e) LEVEL 5

121

Florida Statute	Felony Degree	Description
316.027(2)(a)	3rd	Accidents involving personal injuries other than serious bodily injury, failure to stop; leaving scene.

122

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123

316.1935(4) (a) 2nd Aggravated fleeing or
eluding.

124

125

316.80(2) 2nd Unlawful conveyance; obtaining
fuel fraudulently.

126

127

322.34(6) 3rd Careless operation of
motor vehicle with
suspended license,
resulting in death or
serious bodily injury.

128

129

327.30(5) 3rd Vessel accidents
involving personal
injury; leaving scene.

130

379.367(4) 3rd Willful molestation of a
commercial harvester's
spiny lobster trap, line,
or buoy.

131

379.3671 3rd Willful molestation,

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	(2) (c) 3.	possession, or removal of a commercial harvester's trap contents or trap gear by another harvester.
132	381.0041(11) (b)	3rd Donate blood, plasma, or organs knowing HIV positive.
133	440.10(1) (g)	2nd Failure to obtain workers' compensation coverage.
134	440.105(5)	2nd Unlawful solicitation for the purpose of making workers' compensation claims.
135	440.381(2)	2nd Submission of false, misleading, or incomplete information with the purpose of avoiding or reducing workers' compensation premiums.
136	624.401(4) (b) 2.	2nd Transacting insurance

			without a certificate or authority; premium collected \$20,000 or more but less than \$100,000.
137	626.902(1)(c)	2nd	Representing an unauthorized insurer; repeat offender.
138	790.01(2)	3rd	Carrying a concealed firearm.
139	790.162	2nd	Threat to throw or discharge destructive device.
140	790.163(1)	2nd	False report of deadly explosive or weapon of mass destruction.
141	790.221(1)	2nd	Possession of short- barreled shotgun or machine gun.
142	790.23	2nd	Felons in possession of firearms, ammunition, or

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143			electronic weapons or devices.
143	796.05 (1)	2nd	Live on earnings of a prostitute; 1st offense.
144	800.04 (6) (c)	3rd	Lewd or lascivious conduct; offender less than 18 years of age.
145	800.04 (7) (b)	2nd	Lewd or lascivious exhibition; offender 18 years of age or older.
146	806.111 (1)	3rd	Possess, manufacture, or dispense fire bomb with intent to damage any structure or property.
147	812.0145 (2) (b)	2nd	Theft from person 65 years of age or older; \$10,000 or more but less than \$50,000.
148	812.015 (8)	3rd	Retail theft; property stolen is valued at \$300

			or more and one or more specified acts.
149	812.019(1)	2nd	Stolen property; dealing in or trafficking in.
150	812.131(2)(b)	3rd	Robbery by sudden snatching.
151	812.16(2)	3rd	Owning, operating, or conducting a chop shop.
152	817.034(4)(a)2.	2nd	Communications fraud, value \$20,000 to \$50,000.
153	817.234(11)(b)	2nd	Insurance fraud; property value \$20,000 or more but less than \$100,000.
154	817.2341(1), (2)(a) & (3)(a)	3rd	Filing false financial statements, making false entries of material fact or false statements regarding property values relating to the solvency

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155			of an insuring entity.
156	817.568 (2) (b)	2nd	Fraudulent use of personal identification information; value of benefit, services received, payment avoided, or amount of injury or fraud, \$5,000 or more or use of personal identification information of 10 or more persons.
157	<u>817.611</u>	<u>2nd</u>	<u>Traffic in or possess counterfeit credit cards.</u>
158			
159	817.625 (2) (b)	2nd	Second or subsequent fraudulent use of scanning device or reencoder.
160	825.1025 (4)	3rd	Lewd or lascivious exhibition in the presence of an elderly person or disabled adult.

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161

827.071(4) 2nd Possess with intent to promote any photographic material, motion picture, etc., which includes sexual conduct by a child.

162

827.071(5) 3rd Possess, control, or intentionally view any photographic material, motion picture, etc., which includes sexual conduct by a child.

163

839.13(2)(b) 2nd Falsifying records of an individual in the care and custody of a state agency involving great bodily harm or death.

164

843.01 3rd Resist officer with violence to person; resist arrest with violence.

165

847.0135(5)(b) 2nd Lewd or lascivious exhibition using computer; offender 18

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years or older.

166

847.0137 3rd Transmission of pornography by
(2) & (3) electronic device or equipment.

167

847.0138 3rd Transmission of material
(2) & (3) harmful to minors to a minor by
electronic device or equipment.

168

874.05(1)(b) 2nd Encouraging or recruiting
another to join a
criminal gang; second or
subsequent offense.

169

874.05(2)(a) 2nd Encouraging or recruiting
person under 13 years of
age to join a criminal
gang.

170

893.13(1)(a)1. 2nd Sell, manufacture, or
deliver cocaine (or other
s. 893.03(1)(a), (1)(b),
(1)(d), (2)(a), (2)(b), or
(2)(c)4. drugs).

171

893.13(1)(c)2. 2nd Sell, manufacture, or

deliver cannabis (or other
s. 893.03(1)(c), (2)(c)1.,
(2)(c)2., (2)(c)3.,
(2)(c)5., (2)(c)6.,
(2)(c)7., (2)(c)8.,
(2)(c)9., (3), or (4)
drugs) within 1,000 feet
of a child care facility,
school, or state, county,
or municipal park or
publicly owned
recreational facility or
community center.

172

893.13(1)(d)1.

1st

Sell, manufacture, or
deliver cocaine (or other
s. 893.03(1)(a), (1)(b),
(1)(d), (2)(a), (2)(b), or
(2)(c)4. drugs) within
1,000 feet of university.

173

893.13(1)(e)2.

2nd

Sell, manufacture, or
deliver cannabis or other
drug prohibited under s.
893.03(1)(c), (2)(c)1.,
(2)(c)2., (2)(c)3.,

174	893.13(1)(f)1.	1st	<p>(2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) within 1,000 feet of property used for religious services or a specified business site.</p>
175	893.13(4)(b)	2nd	<p>Sell, manufacture, or deliver cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), or (2)(a), (2)(b), or (2)(c)4. drugs) within 1,000 feet of public housing facility.</p>
176	893.1351(1)	3rd	<p>Deliver to minor cannabis (or other s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) drugs).</p> <p>Ownership, lease, or rental for trafficking in or</p>

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manufacturing of controlled
substance.

177

178

Section 5. This act shall take effect October 1, 2016.



Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Judiciary Committee
 2 Representative Young offered the following:

Amendment (with title amendment)

Remove lines 108-177 and insert:

6 (1) As used in this section, the term "related document"
 7 means an invoice, a voucher, a sales draft, or other
 8 representation or manifestation of a counterfeit credit card or
 9 a credit card number of a cardholder if not authorized by the
 10 cardholder.

11 (2) A ~~Any~~ person who traffics in, ~~or~~ attempts to traffic
 12 in, or possesses ~~10 or more~~ counterfeit credit cards or related
 13 documents, invoices, vouchers, sales drafts, or other
 14 representations or manifestations of counterfeit credit cards,
 15 or credit card account numbers of another in any 6-month period
 16 is guilty of:



Amendment No. 1

17 (a) A felony of the second degree, punishable as provided
18 in s. 775.082, s. 775.083, or s. 775.084, if the person traffics
19 in, attempts to traffic in, or possesses 5 to 14 counterfeit
20 credit cards or related documents.

21 (b) A felony of the first degree, punishable as provided in
22 s. 775.082, s. 775.083, or s. 775.084, if the person traffics
23 in, attempts to traffic in, or possesses 15 to 49 counterfeit
24 credit cards or related documents.

25 (c) A felony of the first degree, punishable as provided in
26 s. 775.082, s. 775.083, or s. 775.084, if the person traffics
27 in, attempts to traffic in, or possesses 50 or more counterfeit
28 credit cards or related documents.

29 Section 4. Paragraphs (e), (g), and (i) of subsection (3)
30 of section 921.0022, Florida Statutes, are amended to read:

31 921.0022 Criminal Punishment Code; offense severity
32 ranking chart.—

33 (3) OFFENSE SEVERITY RANKING CHART

34 (e) LEVEL 5

35

Florida	Felony	Description
Statute	Degree	Description
316.027(2)(a)	3rd	Accidents involving personal injuries other than serious bodily injury, failure to stop; leaving scene.

36



Amendment No. 1

37	316.1935(4)(a)	2nd	Aggravated fleeing or eluding.
38	<u>316.80(2)</u>	<u>2nd</u>	<u>Unlawful conveyance; obtaining fuel fraudulently.</u>
39	322.34(6)	3rd	Careless operation of motor vehicle with suspended license, resulting in death or serious bodily injury.
40	327.30(5)	3rd	Vessel accidents involving personal injury; leaving scene.
41	379.367(4)	3rd	Willful molestation of a commercial harvester's spiny lobster trap, line, or buoy.
42	379.3671 (2)(c)3.	3rd	Willful molestation, possession, or removal of a commercial harvester's trap contents or trap gear by another harvester.
43	381.0041(11)(b)	3rd	Donate blood, plasma, or organs knowing HIV positive.



Amendment No. 1

44	440.10(1)(g)	2nd	Failure to obtain workers' compensation coverage.
45	440.105(5)	2nd	Unlawful solicitation for the purpose of making workers' compensation claims.
46	440.381(2)	2nd	Submission of false, misleading, or incomplete information with the purpose of avoiding or reducing workers' compensation premiums.
47	624.401(4)(b)2.	2nd	Transacting insurance without a certificate or authority; premium collected \$20,000 or more but less than \$100,000.
48	626.902(1)(c)	2nd	Representing an unauthorized insurer; repeat offender.
49	790.01(2)	3rd	Carrying a concealed firearm.
50	790.162	2nd	Threat to throw or discharge destructive device.



Amendment No. 1

51

790.163(1) 2nd False report of deadly explosive or weapon of mass destruction.

52

790.221(1) 2nd Possession of short-barreled shotgun or machine gun.

53

790.23 2nd Felons in possession of firearms, ammunition, or electronic weapons or devices.

54

796.05(1) 2nd Live on earnings of a prostitute; 1st offense.

55

800.04(6)(c) 3rd Lewd or lascivious conduct; offender less than 18 years of age.

56

800.04(7)(b) 2nd Lewd or lascivious exhibition; offender 18 years of age or older.

57

806.111(1) 3rd Possess, manufacture, or dispense fire bomb with intent to damage any structure or



Amendment No. 1

58			property.
	812.0145(2) (b)	2nd	Theft from person 65 years of age or older; \$10,000 or more but less than \$50,000.
59			
	812.015(8)	3rd	Retail theft; property stolen is valued at \$300 or more and one or more specified acts.
60			
	812.019(1)	2nd	Stolen property; dealing in or trafficking in.
61			
	812.131(2) (b)	3rd	Robbery by sudden snatching.
62			
	812.16(2)	3rd	Owning, operating, or conducting a chop shop.
63			
	817.034(4) (a) 2.	2nd	Communications fraud, value \$20,000 to \$50,000.
64			
	817.234(11) (b)	2nd	Insurance fraud; property value \$20,000 or more but less than \$100,000.
65			
	817.2341(1),	3rd	Filing false financial



Amendment No. 1

66	(2) (a) & (3) (a)		statements, making false entries of material fact or false statements regarding property values relating to the solvency of an insuring entity.
67	817.568 (2) (b)	2nd	Fraudulent use of personal identification information; value of benefit, services received, payment avoided, or amount of injury or fraud, \$5,000 or more or use of personal identification information of 10 or more persons.
68	<u>817.611 (2) (a)</u>	<u>2nd</u>	<u>Traffic in or possess 5 to 14 counterfeit credit cards or related documents.</u>
69	817.625 (2) (b)	2nd	Second or subsequent fraudulent use of scanning device or reencoder.
	825.1025 (4)	3rd	Lewd or lascivious exhibition in the presence of an elderly



Amendment No. 1

70			person or disabled adult.
827.071(4)	2nd	Possess with intent to promote any photographic material, motion picture, etc., which includes sexual conduct by a child.	
71			
827.071(5)	3rd	Possess, control, or intentionally view any photographic material, motion picture, etc., which includes sexual conduct by a child.	
72			
839.13(2)(b)	2nd	Falsifying records of an individual in the care and custody of a state agency involving great bodily harm or death.	
73			
843.01	3rd	Resist officer with violence to person; resist arrest with violence.	
74			
847.0135(5)(b)	2nd	Lewd or lascivious exhibition using computer; offender 18	

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Amendment No. 1

			years or older.
75	847.0137 (2) & (3)	3rd	Transmission of pornography by electronic device or equipment.
76	847.0138 (2) & (3)	3rd	Transmission of material harmful to minors to a minor by electronic device or equipment.
77	874.05(1)(b)	2nd	Encouraging or recruiting another to join a criminal gang; second or subsequent offense.
78	874.05(2)(a)	2nd	Encouraging or recruiting person under 13 years of age to join a criminal gang.
79	893.13(1)(a)1.	2nd	Sell, manufacture, or deliver cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4. drugs).
80	893.13(1)(c)2.	2nd	Sell, manufacture, or deliver cannabis (or other s.



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893.03(1)(c), (2)(c)1.,
(2)(c)2., (2)(c)3., (2)(c)5.,
(2)(c)6., (2)(c)7., (2)(c)8.,
(2)(c)9., (3), or (4) drugs)
within 1,000 feet of a child
care facility, school, or
state, county, or municipal
park or publicly owned
recreational facility or
community center.

81

893.13(1)(d)1. 1st Sell, manufacture, or deliver
cocaine (or other s.
893.03(1)(a), (1)(b), (1)(d),
(2)(a), (2)(b), or (2)(c)4.
drugs) within 1,000 feet of
university.

82

893.13(1)(e)2. 2nd Sell, manufacture, or deliver
cannabis or other drug
prohibited under s.
893.03(1)(c), (2)(c)1.,
(2)(c)2., (2)(c)3., (2)(c)5.,
(2)(c)6., (2)(c)7., (2)(c)8.,
(2)(c)9., (3), or (4) within
1,000 feet of property used for



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religious services or a
specified business site.

83

893.13(1)(f)1.	1st	Sell, manufacture, or deliver cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), or (2)(a), (2)(b), or (2)(c)4. drugs) within 1,000 feet of public housing facility.
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84

893.13(4)(b)	2nd	Deliver to minor cannabis (or other s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) drugs).
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85

893.1351(1)	3rd	Ownership, lease, or rental for trafficking in or manufacturing of controlled substance.
-------------	-----	--

86

87 (g) LEVEL 7

88

Florida	Felony	
Statute	Degree	Description

89



Amendment No. 1

90	316.027(2)(c)	1st	Accident involving death, failure to stop; leaving scene.
91	316.193(3)(c)2.	3rd	DUI resulting in serious bodily injury.
92	316.1935(3)(b)	1st	Causing serious bodily injury or death to another person; driving at high speed or with wanton disregard for safety while fleeing or attempting to elude law enforcement officer who is in a patrol vehicle with siren and lights activated.
93	327.35(3)(c)2.	3rd	Vessel BUI resulting in serious bodily injury.
94	402.319(2)	2nd	Misrepresentation and negligence or intentional act resulting in great bodily harm, permanent disfiguration, permanent disability, or death.
	409.920 (2)(b)1.a.	3rd	Medicaid provider fraud; \$10,000 or less.



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95	409.920 (2) (b) 1.b.	2nd	Medicaid provider fraud; more than \$10,000, but less than \$50,000.
96	456.065 (2)	3rd	Practicing a health care profession without a license.
97	456.065 (2)	2nd	Practicing a health care profession without a license which results in serious bodily injury.
98	458.327 (1)	3rd	Practicing medicine without a license.
99	459.013 (1)	3rd	Practicing osteopathic medicine without a license.
100	460.411 (1)	3rd	Practicing chiropractic medicine without a license.
101	461.012 (1)	3rd	Practicing podiatric medicine without a license.
102	462.17	3rd	Practicing naturopathy without

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a license.

103

463.015(1) 3rd Practicing optometry without a license.

104

464.016(1) 3rd Practicing nursing without a license.

105

465.015(2) 3rd Practicing pharmacy without a license.

106

466.026(1) 3rd Practicing dentistry or dental hygiene without a license.

107

467.201 3rd Practicing midwifery without a license.

108

468.366 3rd Delivering respiratory care services without a license.

109

483.828(1) 3rd Practicing as clinical laboratory personnel without a license.

110

483.901(9) 3rd Practicing medical physics without a license.



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111	484.013(1)(c)	3rd	Preparing or dispensing optical devices without a prescription.
112	484.053	3rd	Dispensing hearing aids without a license.
113	494.0018(2)	1st	Conviction of any violation of chapter 494 in which the total money and property unlawfully obtained exceeded \$50,000 and there were five or more victims.
114	560.123(8)(b)1.	3rd	Failure to report currency or payment instruments exceeding \$300 but less than \$20,000 by a money services business.
115	560.125(5)(a)	3rd	Money services business by unauthorized person, currency or payment instruments exceeding \$300 but less than \$20,000.
116	655.50(10)(b)1.	3rd	Failure to report financial



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transactions exceeding \$300 but
less than \$20,000 by financial
institution.

117

775.21(10) (a) 3rd Sexual predator; failure to
register; failure to renew
driver license or
identification card; other
registration violations.

118

775.21(10) (b) 3rd Sexual predator working where
children regularly congregate.

119

775.21(10) (g) 3rd Failure to report or providing
false information about a
sexual predator; harbor or
conceal a sexual predator.

120

782.051(3) 2nd Attempted felony murder of a
person by a person other than
the perpetrator or the
perpetrator of an attempted
felony.

121

782.07(1) 2nd Killing of a human being by the
act, procurement, or culpable



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negligence of another
(manslaughter).

122

782.071 2nd Killing of a human being or
unborn child by the operation
of a motor vehicle in a
reckless manner (vehicular
homicide).

123

782.072 2nd Killing of a human being by the
operation of a vessel in a
reckless manner (vessel
homicide).

124

784.045(1)(a)1. 2nd Aggravated battery;
intentionally causing great
bodily harm or disfigurement.

125

784.045(1)(a)2. 2nd Aggravated battery; using
deadly weapon.

126

784.045(1)(b) 2nd Aggravated battery; perpetrator
aware victim pregnant.

127

784.048(4) 3rd Aggravated stalking; violation
of injunction or court order.



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128	784.048(7)	3rd	Aggravated stalking; violation of court order.
129	784.07(2)(d)	1st	Aggravated battery on law enforcement officer.
130	784.074(1)(a)	1st	Aggravated battery on sexually violent predators facility staff.
131	784.08(2)(a)	1st	Aggravated battery on a person 65 years of age or older.
132	784.081(1)	1st	Aggravated battery on specified official or employee.
133	784.082(1)	1st	Aggravated battery by detained person on visitor or other detainee.
134	784.083(1)	1st	Aggravated battery on code inspector.
135	787.06(3)(a)2.	1st	Human trafficking using coercion for labor and services



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of an adult.

136

787.06(3)(e)2. 1st Human trafficking using coercion for labor and services by the transfer or transport of an adult from outside Florida to within the state.

137

790.07(4) 1st Specified weapons violation subsequent to previous conviction of s. 790.07(1) or (2).

138

790.16(1) 1st Discharge of a machine gun under specified circumstances.

139

790.165(2) 2nd Manufacture, sell, possess, or deliver hoax bomb.

140

790.165(3) 2nd Possessing, displaying, or threatening to use any hoax bomb while committing or attempting to commit a felony.

141

790.166(3) 2nd Possessing, selling, using, or attempting to use a hoax weapon



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of mass destruction.

142

790.166(4) 2nd Possessing, displaying, or threatening to use a hoax weapon of mass destruction while committing or attempting to commit a felony.

143

790.23 1st,PBL Possession of a firearm by a person who qualifies for the penalty enhancements provided for in s. 874.04.

144

794.08(4) 3rd Female genital mutilation; consent by a parent, guardian, or a person in custodial authority to a victim younger than 18 years of age.

145

796.05(1) 1st Live on earnings of a prostitute; 2nd offense.

146

796.05(1) 1st Live on earnings of a prostitute; 3rd and subsequent offense.

147



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148	800.04(5)(c)1.	2nd	Lewd or lascivious molestation; victim younger than 12 years of age; offender younger than 18 years of age.
149	800.04(5)(c)2.	2nd	Lewd or lascivious molestation; victim 12 years of age or older but younger than 16 years of age; offender 18 years of age or older.
150	800.04(5)(e)	1st	Lewd or lascivious molestation; victim 12 years of age or older but younger than 16 years; offender 18 years or older; prior conviction for specified sex offense.
151	806.01(2)	2nd	Maliciously damage structure by fire or explosive.
152	810.02(3)(a)	2nd	Burglary of occupied dwelling; unarmed; no assault or battery.
	810.02(3)(b)	2nd	Burglary of unoccupied dwelling; unarmed; no assault



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or battery.

153

810.02(3)(d) 2nd Burglary of occupied conveyance; unarmed; no assault or battery.

154

810.02(3)(e) 2nd Burglary of authorized emergency vehicle.

155

812.014(2)(a)1. 1st Property stolen, valued at \$100,000 or more or a semitrailer deployed by a law enforcement officer; property stolen while causing other property damage; 1st degree grand theft.

156

812.014(2)(b)2. 2nd Property stolen, cargo valued at less than \$50,000, grand theft in 2nd degree.

157

812.014(2)(b)3. 2nd Property stolen, emergency medical equipment; 2nd degree grand theft.

158

812.014(2)(b)4. 2nd Property stolen, law



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enforcement equipment from
authorized emergency vehicle.

159

812.0145(2) (a) 1st Theft from person 65 years of
age or older; \$50,000 or more.

160

812.019(2) 1st Stolen property; initiates,
organizes, plans, etc., the
theft of property and traffics
in stolen property.

161

812.131(2) (a) 2nd Robbery by sudden snatching.

162

812.133(2) (b) 1st Carjacking; no firearm, deadly
weapon, or other weapon.

163

817.034(4) (a) 1. 1st Communications fraud, value
greater than \$50,000.

164

817.234(8) (a) 2nd Solicitation of motor vehicle
accident victims with intent to
defraud.

165

817.234(9) 2nd Organizing, planning, or
participating in an intentional
motor vehicle collision.



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166 817.234(11)(c) 1st Insurance fraud; property value
\$100,000 or more.

167 817.2341 1st Making false entries of
(2)(b) & (3)(b) material fact or false
statements regarding property
values relating to the solvency
of an insuring entity which are
a significant cause of the
insolvency of that entity.

168 817.535(2)(a) 3rd Filing false lien or other
unauthorized document.

169 817.611(2)(b) 1st Traffic in or possess 15 to 49
counterfeit credit cards or
related documents.

170 825.102(3)(b) 2nd Neglecting an elderly person or
disabled adult causing great
bodily harm, disability, or
disfigurement.

171 825.103(3)(b) 2nd Exploiting an elderly person or
disabled adult and property is



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valued at \$10,000 or more, but
less than \$50,000.

172

827.03(2)(b) 2nd Neglect of a child causing
great bodily harm, disability,
or disfigurement.

173

827.04(3) 3rd Impregnation of a child under
16 years of age by person 21
years of age or older.

174

837.05(2) 3rd Giving false information about
alleged capital felony to a law
enforcement officer.

175

838.015 2nd Bribery.

176

838.016 2nd Unlawful compensation or reward
for official behavior.

177

838.021(3)(a) 2nd Unlawful harm to a public
servant.

178

838.22 2nd Bid tampering.

179

843.0855(2) 3rd Impersonation of a public



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officer or employee.

180

843.0855(3) 3rd Unlawful simulation of legal
process.

181

843.0855(4) 3rd Intimidation of a public
officer or employee.

182

847.0135(3) 3rd Solicitation of a child, via a
computer service, to commit an
unlawful sex act.

183

847.0135(4) 2nd Traveling to meet a minor to
commit an unlawful sex act.

184

872.06 2nd Abuse of a dead human body.

185

874.05(2)(b) 1st Encouraging or recruiting
person under 13 to join a
criminal gang; second or
subsequent offense.

186

874.10 1st,PBL Knowingly initiates, organizes,
plans, finances, directs,
manages, or supervises criminal
gang-related activity.



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187

893.13(1)(c)1. 1st Sell, manufacture, or deliver cocaine (or other drug prohibited under s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4.) within 1,000 feet of a child care facility, school, or state, county, or municipal park or publicly owned recreational facility or community center.

188

893.13(1)(e)1. 1st Sell, manufacture, or deliver cocaine or other drug prohibited under s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4., within 1,000 feet of property used for religious services or a specified business site.

189

893.13(4)(a) 1st Deliver to minor cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4. drugs).



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190	893.135(1)(a)1.	1st	Trafficking in cannabis, more than 25 lbs., less than 2,000 lbs.
191	893.135 (1)(b)1.a.	1st	Trafficking in cocaine, more than 28 grams, less than 200 grams.
192	893.135 (1)(c)1.a.	1st	Trafficking in illegal drugs, more than 4 grams, less than 14 grams.
193	893.135 (1)(c)2.a.	1st	Trafficking in hydrocodone, 14 grams or more, less than 28 grams.
194	893.135 (1)(c)2.b.	1st	Trafficking in hydrocodone, 28 grams or more, less than 50 grams.
195	893.135 (1)(c)3.a.	1st	Trafficking in oxycodone, 7 grams or more, less than 14 grams.
196	893.135	1st	Trafficking in oxycodone, 14



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	(1) (c) 3.b.		grams or more, less than 25 grams.
197			
	893.135 (1) (d) 1.	1st	Trafficking in phencyclidine, more than 28 grams, less than 200 grams.
198			
	893.135 (1) (e) 1.	1st	Trafficking in methaqualone, more than 200 grams, less than 5 kilograms.
199			
	893.135 (1) (f) 1.	1st	Trafficking in amphetamine, more than 14 grams, less than 28 grams.
200			
	893.135 (1) (g) 1.a.	1st	Trafficking in flunitrazepam, 4 grams or more, less than 14 grams.
201			
	893.135 (1) (h) 1.a.	1st	Trafficking in gamma- hydroxybutyric acid (GHB), 1 kilogram or more, less than 5 kilograms.
202			
	893.135 (1) (j) 1.a.	1st	Trafficking in 1,4-Butanediol, 1 kilogram or more, less than 5



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state after indicating intent
to leave; failure to comply
with reporting requirements.

209

943.0435(9)(a) 3rd Sexual offender; failure to
comply with reporting
requirements.

210

943.0435(13) 3rd Failure to report or providing
false information about a
sexual offender; harbor or
conceal a sexual offender.

211

943.0435(14) 3rd Sexual offender; failure to
report and reregister; failure
to respond to address
verification; providing false
registration information.

212

944.607(9) 3rd Sexual offender; failure to
comply with reporting
requirements.

213

944.607(10)(a) 3rd Sexual offender; failure to
submit to the taking of a
digitized photograph.



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214

944.607(12) 3rd Failure to report or providing false information about a sexual offender; harbor or conceal a sexual offender.

215

944.607(13) 3rd Sexual offender; failure to report and reregister; failure to respond to address verification; providing false registration information.

216

985.4815(10) 3rd Sexual offender; failure to submit to the taking of a digitized photograph.

217

985.4815(12) 3rd Failure to report or providing false information about a sexual offender; harbor or conceal a sexual offender.

218

985.4815(13) 3rd Sexual offender; failure to report and reregister; failure to respond to address verification; providing false registration information.



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219			
220	(i) LEVEL 9		
221			
	Florida	Felony	
	Statute	Degree	Description
222	316.193	1st	DUI manslaughter; failing to
	(3) (c) 3.b.		render aid or give information.
223	327.35	1st	BUI manslaughter; failing to
	(3) (c) 3.b.		render aid or give information.
224	409.920	1st	Medicaid provider fraud;
	(2) (b) 1.c.		\$50,000 or more.
225	499.0051(9)	1st	Knowing sale or purchase of
			contraband prescription drugs
			resulting in great bodily harm.
226	560.123(8) (b) 3.	1st	Failure to report currency or
			payment instruments totaling or
			exceeding \$100,000 by money
			transmitter.
227	560.125(5) (c)	1st	Money transmitter business by
			unauthorized person, currency,



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or payment instruments totaling
or exceeding \$100,000.

228

655.50(10)(b)3. 1st Failure to report financial
transactions totaling or
exceeding \$100,000 by financial
institution.

229

775.0844 1st Aggravated white collar crime.

230

782.04(1) 1st Attempt, conspire, or solicit
to commit premeditated murder.

231

782.04(3) 1st,PBL Accomplice to murder in
connection with arson, sexual
battery, robbery, burglary,
aggravated fleeing or eluding
with serious bodily injury or
death, and other specified
felonies.

232

782.051(1) 1st Attempted felony murder while
perpetrating or attempting to
perpetrate a felony enumerated
in s. 782.04(3).

233



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234	782.07(2)	1st	Aggravated manslaughter of an elderly person or disabled adult.
235	787.01(1)(a)1.	1st,PBL	Kidnapping; hold for ransom or reward or as a shield or hostage.
236	787.01(1)(a)2.	1st,PBL	Kidnapping with intent to commit or facilitate commission of any felony.
237	787.01(1)(a)4.	1st,PBL	Kidnapping with intent to interfere with performance of any governmental or political function.
238	787.02(3)(a)	1st,PBL	False imprisonment; child under age 13; perpetrator also commits aggravated child abuse, sexual battery, or lewd or lascivious battery, molestation, conduct, or exhibition.
	787.06(3)(c)1.	1st	Human trafficking for labor and



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services of an unauthorized
alien child.

239

787.06(3)(d) 1st Human trafficking using
coercion for commercial sexual
activity of an unauthorized
adult alien.

240

787.06(3)(f)1. 1st,PBL Human trafficking for
commercial sexual activity by
the transfer or transport of
any child from outside Florida
to within the state.

241

790.161 1st Attempted capital destructive
device offense.

242

790.166(2) 1st,PBL Possessing, selling, using, or
attempting to use a weapon of
mass destruction.

243

794.011(2) 1st Attempted sexual battery;
victim less than 12 years of
age.

244

794.011(2) Life Sexual battery; offender



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younger than 18 years and
commits sexual battery on a
person less than 12 years.

245

794.011(4)(a) 1st,PBL Sexual battery, certain
circumstances; victim 12 years
of age or older but younger
than 18 years; offender 18
years or older.

246

794.011(4)(b) 1st Sexual battery, certain
circumstances; victim and
offender 18 years of age or
older.

247

794.011(4)(c) 1st Sexual battery, certain
circumstances; victim 12 years
of age or older; offender
younger than 18 years.

248

794.011(4)(d) 1st,PBL Sexual battery, certain
circumstances; victim 12 years
of age or older; prior
conviction for specified sex
offenses.

249



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250 794.011(8)(b) 1st,PBL Sexual battery; engage in
sexual conduct with minor 12 to
18 years by person in familial
or custodial authority.

251 794.08(2) 1st Female genital mutilation;
victim younger than 18 years of
age.

252 800.04(5)(b) Life Lewd or lascivious molestation;
victim less than 12 years;
offender 18 years or older.

253 812.13(2)(a) 1st,PBL Robbery with firearm or other
deadly weapon.

254 812.133(2)(a) 1st,PBL Carjacking; firearm or other
deadly weapon.

255 812.135(2)(b) 1st Home-invasion robbery with
weapon.

817.535(3)(b) 1st Filing false lien or other
unauthorized document; second
or subsequent offense; property
owner is a public officer or



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employee.

256

817.535(4)(a)2. 1st Filing false claim or other
unauthorized document;
defendant is incarcerated or
under supervision.

257

817.535(5)(b) 1st Filing false lien or other
unauthorized document; second
or subsequent offense; owner of
the property incurs financial
loss as a result of the false
instrument.

258

817.568(7) 2nd, Fraudulent use of personal
PBL identification information of
an individual under the age of
18 by his or her parent, legal
guardian, or person exercising
custodial authority.

259

817.611(2)(c) 1st Traffic in or possess 50 or
more counterfeit credit cards
or related documents.

260

827.03(2)(a) 1st Aggravated child abuse.



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261	847.0145(1)	1st	Selling, or otherwise transferring custody or control, of a minor.
262	847.0145(2)	1st	Purchasing, or otherwise obtaining custody or control, of a minor.
263	859.01	1st	Poisoning or introducing bacteria, radioactive materials, viruses, or chemical compounds into food, drink, medicine, or water with intent to kill or injure another person.
264	893.135	1st	Attempted capital trafficking offense.
265	893.135(1)(a)3.	1st	Trafficking in cannabis, more than 10,000 lbs.
266	893.135 (1)(b)1.c.	1st	Trafficking in cocaine, more than 400 grams, less than 150 kilograms.



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267
893.135 1st Trafficking in illegal drugs,
(1)(c)1.c. more than 28 grams, less than
30 kilograms.

268
893.135 1st Trafficking in hydrocodone, 200
(1)(c)2.d. grams or more, less than 30
kilograms.

269
893.135 1st Trafficking in oxycodone, 100
(1)(c)3.d. grams or more, less than 30
kilograms.

270
893.135 1st Trafficking in phencyclidine,
(1)(d)1.c. more than 400 grams.

271
893.135 1st Trafficking in methaqualone,
(1)(e)1.c. more than 25 kilograms.

272
893.135 1st Trafficking in amphetamine,
(1)(f)1.c. more than 200 grams.

273
893.135 1st Trafficking in gamma-
(1)(h)1.c. hydroxybutyric acid (GHB), 10
kilograms or more.

274



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275 893.135 1st Trafficking in 1,4-Butanediol,
(1)(j)1.c. 10 kilograms or more.

276 893.135 1st Trafficking in Phenethylamines,
(1)(k)2.c. 400 grams or more.

277 896.101(5)(c) 1st Money laundering, financial
instruments totaling or
exceeding \$100,000.

896.104(4)(a)3. 1st Structuring transactions to
evade reporting or registration
requirements, financial
transactions totaling or
exceeding \$100,000.

278
279
280 -----
281 **T I T L E A M E N D M E N T**

282 Remove lines 21-27 and insert:

283 rulemaking; amending s. 817.611, F.S.; defining the term
284 "related document"; revising the prohibition against trafficking
285 in or possession of counterfeit credit cards; revising
286 penalties; amending s. 921.0022, F.S.; revising the ranking of
287 unlawful conveyance or fraudulent acquisition of fuel on the



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288 offense severity ranking chart; ranking trafficking in or
289 possession of counterfeit credit cards; providing an

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 769 Mental Health Treatment
SPONSOR(S): Children, Families & Seniors Subcommittee; Peters
TIED BILLS: None **IDEN./SIM. BILLS:** CS/CS/SB 862

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Children, Families & Seniors Subcommittee	8 Y, 0 N, As CS	McElroy	Brazzell
2) Appropriations Committee	22 Y, 0 N	Smith	Leznoff
3) Judiciary Committee		Aziz PA	Havlicak RW

SUMMARY ANALYSIS

HB 769 addresses issues related to administration of psychotropic medications, evaluations of individuals' competency and transportation to competency and commitment hearings for forensic clients. The bill makes changes to ch. 916, F.S., as follows:

- Requires an admitting physician in a state forensic or civil facility to continue the administration of psychotropic medication previously prescribed in jail when a forensic client lacks the capacity to make an informed decision and, in the physician's opinion, the abrupt cessation of medication could risk the health and safety of the client. This authority is limited to the time period required to obtain a court order for the medication.
- Requires that a court hold a hearing within 30 days after receiving notification from a treatment facility that a defendant who was previously adjudicated incompetent or was previously adjudicated not guilty by reason of insanity is now competent to proceed or no longer meets criteria for continued commitment.
- Requires the defendant to be transported to the committing court's jurisdiction for the hearing.
- Permits a court to dismiss charges for specified nonviolent offenses for an individual whom the court has determined to be incompetent to proceed and who remains incompetent for 3 years after the original determination.
- Changes the timeframe for mandatory dismissal of all charges for an individual whom the court has determined to be incompetent to proceed and who remains incompetent for 5 continuous, uninterrupted years since the court's original determination of incompetency.

The bill would have an insignificant fiscal impact to state expenditures.

The bill provides an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Competency

The Due Process Clause of the 14th Amendment prohibits the states from trying and convicting defendants who are incompetent to stand trial.¹ The states must have procedures in place that adequately protect the defendant's right to a fair trial, which includes his or her participation in all material stages of the process.² Defendants must be able to appreciate the range and nature of the charges and penalties that may be imposed, understand the adversarial nature of the legal process, and disclose to counsel facts pertinent to the proceedings. Defendants also must manifest appropriate courtroom behavior and be able to testify relevantly.³

If a defendant is suspected of being incompetent, the court, counsel for the defendant, or the state may file a motion for examination to have the defendant's cognitive state assessed.⁴ If the motion is well-founded the court will appoint experts to evaluate the defendant's cognitive state. The defendant's competency is then determined by the judge in a subsequent hearing.⁵ If the defendant is found to be competent, the criminal proceeding resumes.⁶ If the defendant is found to be incompetent to proceed, the proceeding may not resume unless competency is restored.⁷

Chapter 916, F.S., governs the state forensic system, which is a network of state facilities and community services for persons who have mental health issues and who are involved with the criminal justice system. Offenders who are charged with a felony and adjudicated incompetent to proceed⁸ and offenders who are adjudicated not guilty by reason of insanity may be involuntarily committed to state civil⁹ and forensic¹⁰ treatment facilities by the circuit court,¹¹ or in lieu of such commitment, may be released on conditional release¹² by the circuit court if the person is not serving a prison sentence.¹³ Conditional release is release into the community accompanied by outpatient care and treatment. The committing court retains jurisdiction over the defendant while the defendant is under involuntary commitment or conditional release.¹⁴

¹ See *Pate v. Robinson*, 383 U.S. 375 (1966); *Bishop v. U.S.*, 350 U.S. 961 (1956); *Jones v. State*, 740 So.2d 520 (Fla. 1999).

² *Id.* See also Rule 3.210(a)(1), Fla.R.Crim.P.

³ *Id.* See also ss. 916.12, 916.3012, and 985.19, F.S.

⁴ Rule 3.210, Fla.R.Crim.P.

⁵ *Id.*

⁶ Rule 3.212, Fla.R.Crim.P.

⁷ *Id.*

⁸ "Incompetent to proceed" means "the defendant does not have sufficient present ability to consult with her or his lawyer with a reasonable degree of rational understanding" or "the defendant has no rational, as well as factual, understanding of the proceedings against her or him." s. 916.12(1), F.S.

⁹ A "civil facility" is: a mental health facility established within the Department of Children and Families (DCF) or by contract with DCF to serve individuals committed pursuant to ch. 394, F.S., and defendants pursuant to ch. 916, F.S., who do not require the security provided in a forensic facility; or an intermediate care facility for the developmentally disabled, a foster care facility, a group home facility, or a supported living setting designated by the Agency for Persons with Disabilities (APD) to serve defendants who do not require the security provided in a forensic facility. Section 916.106(4), F.S. DCF oversees two state-operated forensic facilities, Florida State Hospital and North Florida Evaluation and Treatment Center, and two privately-operated, maximum security forensic treatment facilities, South Florida Evaluation and Treatment Center and Treasure Coast Treatment Center.

¹⁰ A "forensic facility" is a separate and secure facility established within DCF or APD to service forensic clients. A separate and secure facility means a security-grade building for the purpose of separately housing persons who have mental illness from persons who have intellectual disabilities or autism and separately housing persons who have been involuntarily committed pursuant to ch. 916, F.S., from non-forensic residents. Section 916.106(10), F.S.

¹¹ ss. 916.13, 916.15, and 916.302, F.S.

¹² Conditional release is release into the community accompanied by outpatient care and treatment. S. 916.17, F.S.

¹³ s. 916.17(1), F.S.

¹⁴ s. 916.16(1), F.S.

Sections 916.13 and 916.15, F.S., set forth the criteria under which a court may involuntarily commit a defendant charged with a felony who has been adjudicated incompetent to proceed, or who has been found not guilty by reason of insanity. If a person is committed pursuant to either statute, the administrator at the commitment facility must submit a report to the court:

- No later than 6 months after a defendant's admission date and at the end of any period of extended commitment; or
- At any time the administrator has determined that the defendant has regained competency or no longer meets the criteria for involuntary commitment.¹⁵

The statutes are silent as to a time frame in which the court must hold a hearing to determine continued competency or the continued need for involuntary commitment. The statutes are additionally silent as to transportation of the defendant to the committing court's jurisdiction for these hearings. The time frame for the hearings are set forth in Florida Rules of Criminal Procedure which require the court to hold a hearing within 30 days of receiving a report from a facility administrator that indicates that a person adjudicated incompetent to proceed or not guilty by reason of insanity no longer meets the criteria for commitment.¹⁶ However, there is no express requirement within the Florida Rules of Criminal Procedure to transport the defendant to committing court's jurisdiction for these hearings.

Dismissal of Charges

Section 916.145, F.S., requires all charges against any defendant adjudicated incompetent to proceed due to mental illness be dismissed if the defendant remains incompetent to proceed five years after the initial determination. However, a court may extend the time period to dismiss the charges beyond 5 years if the court's order specifies its reasons for believing that a defendant will become competent to proceed within the foreseeable future and specifies the time within which a defendant is expected to become competent to proceed.¹⁷ Any charges dismissed under this section are dismissed without prejudice which allows the state to refile the charges should a defendant be declared competent to proceed in the future.¹⁸

Psychotropic Medication Treatment

Currently, forensic clients¹⁹ must give express and informed consent to treatment.²⁰ If they refuse and the situation is deemed an emergency that puts the client's safety at risk, treatment may be given for 48 hours.²¹ If the person still refuses to give consent, a court order must be sought for continuation of the treatment.²² In non-emergency situations, treatment may not be given without the client's consent.²³ Instead, the facility administrator or designee must petition the court for an order authorizing necessary and essential treatment for the client, including administration of psychotropic medication.²⁴ There will be a delay between the time in which the petition is filed and the hearing for the petition. In this interim the client will not receive any psychotropic medication, even if he or she was receiving this medication at the jail. This creates a delay in treatment which could potentially lead to a client's decompensation and prolong the client's length of stay at the facility.

¹⁵ s. 916.13(2), F.S.; section 916.15(3), F.S.

¹⁶ Rules 3.212(c)(6) and 3.218(b), Fla.R.Crim.P.

¹⁷ s. 916.145, F.S.

¹⁸ Id.

¹⁹ Forensic clients are individuals who have been committed to DCF, pursuant to ch. 916, F.S., because they have been charged with committing a felony but been adjudicated incompetent, adjudicated not guilty by reason of insanity, or determined to be incompetent to proceed.

²⁰ s. 916.107(3)(a), F.S.

²¹ s. 916.107(3)(a)1., F.S.

²² Id.

²³ s. 916.107(3)(a)2., F.S.

²⁴ Id.

Effect of Proposed Changes

Competency

The bill amends ss. 916.13 and 916.15, F.S., to require a competency hearing to be held within 30 days after the court has been notified that a defendant is competent to proceed, or no longer meets the criteria for continued commitment. The bill also requires that the defendant be transported to committing court's jurisdiction for these hearings. These requirements are consistent with Rule 3.212(c)(6), Florida Rules of Criminal Procedure, and should help make vacancies available at secure facilities for individuals awaiting admission. As statutorily mandated, forensic individuals committed to the care of DCF for involuntary hospitalization must be admitted within 15 days of commitment.

Dismissal of Charges

The bill amends s. 916.145, F.S., to require that all charges be dismissed if the defendant remains incompetent to proceed for 5 continuous, uninterrupted years after the initial determination. The bill also permits a court to dismiss charges for an individual whom the court has determined to be incompetent to proceed and who remains incompetent for 3 years after the original determination, unless the charge is:

- Arson;
- Sexual battery;
- Robbery;
- Kidnapping;
- Aggravated child abuse;
- Aggravated abuse of an elderly person or disabled adult;
- Aggravated assault with a deadly weapon;
- Murder;
- Manslaughter;
- Aggravated manslaughter of an elderly person or disabled adult;
- Aggravated manslaughter of a child;
- Unlawful throwing, projecting, placing, or discharging of a destructive device or bomb;
- Armed burglary;
- Aggravated battery;
- Aggravated stalking;
- A forcible felony as defined in s. 776.08, F.S., that is not otherwise listed;
- An offense involving the possession, use, or discharge of a firearm;
- An attempt to commit any of these offenses;
- Any offense allegedly committed by a defendant who has had a forcible or violent felony conviction within the five years preceding the date of arrest for the nonviolent felony sought to be dismissed;
- Any offense allegedly committed by a defendant who, after having been found incompetent and under court supervision in a community-based program, is formally charged by a State Attorney with a new felony offense; or
- An offense for which there is an identifiable victim and the victim has not consented to the dismissal.

Psychotropic Medication Treatment

The bill requires jail physicians to provide a current psychotropic medication order at the time of an inmate's transfer to a forensic or civil facility. The bill authorizes an admitting physician at a state forensic or civil facility to continue the administration of psychotropic medication previously prescribed in jail, when a forensic client lacks the capacity to make an informed decision and, in the opinion of the physician, the abrupt cessation of medication could risk the health and safety of the client during the time a court order to medicate is pursued. This authority is for non-emergency situations and is limited to the time period required to obtain a court order for the medication. This provision applies to all forensic clients since it appears in the general provisions of ch. 916, F.S. Therefore, forensic clients who are either mentally ill, or have autism or mental retardation as a diagnosis would be subject to this provision when admitted to facilities operated by DCF or APD. Continuation of the medication could be beneficial as it may help prevent possible decompensation thereby potentially decreasing the client's length of stay in the facility.

The bill requires the administrator or designee of the civil or forensic facility to petition the committing court or the circuit court serving the county where the facility is located within 5 days of the inmate's admission, excluding weekends and legal holidays, for an order authorizing continued treatment.

B. SECTION DIRECTORY:

Section 1: Amends s. 916.107, F.S., relating to rights of forensic clients.

Section 2: Amends s. 916.13, F.S., relating to involuntary commitment of defendant adjudicated incompetent.

Section 3: Amends s. 916.145, F.S., relating to dismissal of charges.

Section 4: Amends s. 916.15, F.S., relating to involuntary commitment of defendant adjudicated not guilty by reason of insanity.

Section 5: Provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

This bill would have an insignificant impact on the state courts.

The bill amends s. 916.145, F.S., allowing for the discretionary dismissal of charges against non-violent defendants found incompetent to proceed after 3 years instead of the current 5 years. If the charge is for an offense other than those serious crimes specifically enumerated in the bill, the court may dismiss the charges between 3 and 5 years after the determination that the defendant was incompetent to proceed. Allowing a shorter timeframe for dismissal of charges is likely to reduce the workload of the judiciary and the state courts system, as the criminal courts have to monitor and hold status hearings for these defendants until their charges are dismissed or competency is restored. The majority of these defendants are non-violent and on conditional release in community placements. Reducing the dismissal period for non-violent incompetent defendants would eliminate years of monitoring and status hearings by the criminal courts. The impact, if any, cannot be determined because the early dismissal provision is discretionary.²⁵

²⁵ Office of the State Court Administrator, "CS/HB 769 Judicial Impact Statement", 01/25/2016, On file with the House Appropriations Committee.

The bill requires the courts to hold competency and commitment status hearings within 30 days after the court receives notice that the defendant is competent to proceed or no longer meets the criteria for continued commitment. There should be no impact to the judicial or court workload because the courts are already required to do so pursuant to Florida Rules of Criminal Procedure 3.212 and 3.218.²⁶

Pursuant to s.916.106 F.S., the DCF is responsible for the treatment of forensic clients who have been determined incompetent to proceed due to mental illness or who have been acquitted of a felony by reason of insanity. The bill requires transportation be provided by DCF for clients to the committing court's jurisdiction for competency and commitment status hearings. This should have no fiscal impact on the Department.²⁷

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

²⁶ Id.

²⁷ The Department of Children and Families, "HB 769 Legislative Bill Analysis", 11/20/2015, On file with the House Appropriations Committee.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 13, 2016, the Children, Families & Seniors Subcommittee adopted an amendment to HB 769. The amendment:

- Permits a court to dismiss charges for specified nonviolent offenses for an individual whom the court has determined to be incompetent to proceed and who remains incompetent for 3 years after the original determination.
- Changes the timeframe for mandatory dismissal of all charges for an individual whom the court has determined to be incompetent to proceed and who remains incompetent to 5 continuous, uninterrupted years since the court's original determination of incompetency.

The bill was reported favorably as a committee substitute. The analysis is drafted to the committee substitute.

1 A bill to be entitled

2 An act relating to mental health treatment; amending
3 s. 916.107, F.S.; provides for continuation of
4 psychotropic medication by forensic and civil
5 facilities for individuals receiving such medication
6 before admission; amending s. 916.13, F.S.; providing
7 a timeframe within which competency hearings must be
8 held; requiring that a defendant be transported for
9 the hearing; amending s. 916.145, F.S.; revising the
10 time for dismissal of certain charges for defendants
11 who remain incompetent to proceed to trial; providing
12 exceptions; amending s. 916.15, F.S.; providing a
13 timeframe within which commitment hearings must be
14 held; requiring that a defendant be transported for
15 the hearing; providing an effective date.

16
17 Be It Enacted by the Legislature of the State of Florida:

18
19 Section 1. Paragraph (a) of subsection (3) of section
20 916.107, Florida Statutes, is amended to read:

21 916.107 Rights of forensic clients.—

22 (3) RIGHT TO EXPRESS AND INFORMED CONSENT.—

23 (a) A forensic client shall be asked to give express and
24 informed written consent for treatment. If a client refuses such
25 treatment as is deemed necessary and essential by the client's
26 multidisciplinary treatment team for the appropriate care of the

27 client, such treatment may be provided under the following
 28 circumstances:

29 1. In an emergency situation in which there is immediate
 30 danger to the safety of the client or others, such treatment may
 31 be provided upon the written order of a physician for up to a
 32 ~~period not to exceed~~ 48 hours, excluding weekends and legal
 33 holidays. If, after the 48-hour period, the client has not given
 34 express and informed consent to the treatment initially refused,
 35 the administrator or designee of the civil or forensic facility
 36 shall, within 48 hours, excluding weekends and legal holidays,
 37 petition the committing court or the circuit court serving the
 38 county in which the facility is located, at the option of the
 39 facility administrator or designee, for an order authorizing the
 40 continued treatment of the client. In the interim, the need for
 41 treatment shall be reviewed every 48 hours and may be continued
 42 without the consent of the client upon the continued written
 43 order of a physician who has determined that the emergency
 44 situation continues to present a danger to the safety of the
 45 client or others.

46 2. In a situation other than an emergency situation, the
 47 administrator or designee of the facility shall petition the
 48 court for an order authorizing necessary and essential treatment
 49 for the client.

50 a. If the client has been receiving psychotropic
 51 medication at the jail at the time of transfer to the forensic
 52 or civil facility and lacks the capacity to make an informed

53 decision regarding mental health treatment at the time of
 54 admission, the admitting physician shall order continued
 55 administration of psychotropic medication if, in the clinical
 56 judgment of the physician, abrupt cessation of that psychotropic
 57 medication could pose a risk to the health or safety of the
 58 client while a court order to medicate is pursued. The
 59 administrator or designee of the forensic or civil facility
 60 shall, within 5 days after a client's admission, excluding
 61 weekends and legal holidays, petition the committing court or
 62 the circuit court serving the county in which the facility is
 63 located, at the option of the facility administrator or
 64 designee, for an order authorizing the continued treatment of a
 65 client with psychotropic medication. The jail physician shall
 66 provide a current psychotropic medication order at the time of
 67 transfer to the forensic or civil facility or upon request of
 68 the admitting physician after the client is evaluated.

69 b. The court order shall allow such treatment for up to a
 70 period not to exceed 90 days after following the date that of
 71 the entry of the order was entered. Unless the court is notified
 72 in writing that the client has provided express and informed
 73 written consent in writing or that the client has been
 74 discharged by the committing court, the administrator or
 75 designee of the facility shall, before the expiration of the
 76 initial 90-day order, petition the court for an order
 77 authorizing the continuation of treatment for an additional 90
 78 days another 90-day period. This procedure shall be repeated

79 until the client provides consent or is discharged by the
80 committing court.

81 3. At the hearing on the issue of whether the court should
82 enter an order authorizing treatment for which a client was
83 unable to or refused to give express and informed consent, the
84 court shall determine by clear and convincing evidence that the
85 client has mental illness, intellectual disability, or autism,
86 that the treatment not consented to is essential to the care of
87 the client, and that the treatment not consented to is not
88 experimental and does not present an unreasonable risk of
89 serious, hazardous, or irreversible side effects. In arriving at
90 the substitute judgment decision, the court must consider at
91 least the following factors:

- 92 a. The client's expressed preference regarding treatment;
- 93 b. The probability of adverse side effects;
- 94 c. The prognosis without treatment; and
- 95 d. The prognosis with treatment.

96
97 The hearing shall be as convenient to the client as may be
98 consistent with orderly procedure and shall be conducted in
99 physical settings not likely to be injurious to the client's
100 condition. The court may appoint a general or special magistrate
101 to preside at the hearing. The client or the client's guardian,
102 and the representative, shall be provided with a copy of the
103 petition and the date, time, and location of the hearing. The
104 client has the right to have an attorney represent him or her at

105 the hearing, and, if the client is indigent, the court shall
 106 appoint the office of the public defender to represent the
 107 client at the hearing. The client may testify or not, as he or
 108 she chooses, and has the right to cross-examine witnesses and
 109 may present his or her own witnesses.

110 Section 2. Subsection (2) of section 916.13, Florida
 111 Statutes, is amended to read:

112 916.13 Involuntary commitment of defendant adjudicated
 113 incompetent.—

114 (2) A defendant who has been charged with a felony and who
 115 has been adjudicated incompetent to proceed due to mental
 116 illness, and who meets the criteria for involuntary commitment
 117 ~~to the department under the provisions of~~ this chapter, may be
 118 committed to the department, and the department shall retain and
 119 treat the defendant.

120 (a) Within ~~No later than~~ 6 months after the date of
 121 admission and at the end of any period of extended commitment,
 122 or at any time the administrator or designee determines ~~shall~~
 123 ~~have determined~~ that the defendant has regained competency to
 124 proceed or no longer meets the criteria for continued
 125 commitment, the administrator or designee shall file a report
 126 with the court pursuant to the applicable Florida Rules of
 127 Criminal Procedure.

128 (b) A competency hearing shall be held within 30 days
 129 after the court receives notification that the defendant is
 130 competent to proceed or no longer meets the criteria for

131 | continued commitment. The defendant must be transported to the
 132 | committing court's jurisdiction for the hearing.

133 | Section 3. Section 916.145, Florida Statutes, is amended
 134 | to read:

135 | (Substantial rewording of section. See
 136 | s. 916.145, F.S., for present text.)

137 | 916.145 Dismissal of charges.--

138 | (1) The charges against a defendant adjudicated
 139 | incompetent to proceed due to mental illness shall be dismissed
 140 | without prejudice to the state if the defendant remains
 141 | incompetent to proceed for 5 continuous, uninterrupted years
 142 | after such determination, unless the court in its order
 143 | specifies its reasons for believing that the defendant will
 144 | become competent to proceed within the foreseeable future and
 145 | specifies the time within which the defendant is expected to
 146 | become competent to proceed. The court may dismiss such charges
 147 | after at least 3 years but not more than 5 years after such
 148 | determination, unless the charge is:

149 | (a) Arson;

150 | (b) Sexual battery;

151 | (c) Robbery;

152 | (d) Kidnapping;

153 | (e) Aggravated child abuse;

154 | (f) Aggravated abuse of an elderly person or disabled
 155 | adult;

156 | (g) Aggravated assault with a deadly weapon;

- 157 (h) Murder;
- 158 (i) Manslaughter;
- 159 (j) Aggravated manslaughter of an elderly person or
160 disabled adult;
- 161 (k) Aggravated manslaughter of a child;
- 162 (l) Unlawful throwing, projecting, placing, or discharging
163 of a destructive device or bomb;
- 164 (m) Armed burglary;
- 165 (n) Aggravated battery;
- 166 (o) Aggravated stalking;
- 167 (p) A forcible felony as defined in s. 776.08 and not
168 listed elsewhere in this subsection;
- 169 (q) An offense where an element of the offense requires
170 the possession, use, or discharge of a firearm;
- 171 (r) An attempt to commit an offense listed in this
172 subsection;
- 173 (s) An offense allegedly committed by a defendant who has
174 had a forcible or violent felony conviction within the 5 years
175 immediately preceding the date of arrest for the nonviolent
176 felony sought to be dismissed;
- 177 (t) An offense allegedly committed by a defendant who,
178 after having been found incompetent and placed under court
179 supervision in a community-based program, is formally charged by
180 a state attorney or the Office of the Statewide Prosecutor with
181 a new felony offense; or
- 182 (u) An offense for which there is an identifiable victim

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183 and such victim has not consented to the dismissal.

184 (2) This section does not prohibit the state from refiling
185 dismissed charges if the defendant is declared to be competent
186 to proceed in the future.

187 Section 4. Subsection (5) is added to section 916.15,
188 Florida Statutes, to read:

189 916.15 Involuntary commitment of defendant adjudicated not
190 guilty by reason of insanity.—

191 (5) The commitment hearing shall be held within 30 days
192 after the court receives notification that the defendant no
193 longer meets the criteria for continued commitment. The
194 defendant must be transported to the committing court's
195 jurisdiction for the hearing.

196 Section 5. This act shall take effect July 1, 2016.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 969 Orders of No Contact
SPONSOR(S): Criminal Justice Subcommittee; Stevenson
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1412

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N, As CS	Clark	White
2) Judiciary Committee		Clark <i>RC</i>	Havlicak <i>RH</i>

SUMMARY ANALYSIS

Section 903.047, F.S., governs the conditions of pretrial release. The conditions include refraining from criminal activity, refraining from contact with the victim, and complying with any other condition imposed. The requirement that a defendant refrain from contact with the victim is implemented through a no contact order.

An order of no contact generally prohibits a defendant from being near or communicating with a victim. Existing law could be read to require a court to issue an order of no contact to every person who is released on pretrial release if there is a victim. The bill clarifies that courts have the discretion to issue an order of no contact to a person on pretrial release. The order of no contact shall be provided in writing, specifying the applicable prohibited acts before the defendant is released from custody on pretrial release.

The bill does not appear to have a fiscal impact on state or local government.

The bill has an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Conditions of Pretrial Release

Section 903.047, F.S., governs the conditions of pretrial release. The conditions include refraining from criminal activity, refraining from contact with the victim, and complying with any other condition imposed.¹ The requirement that a defendant refrain from contact with the victim is implemented through a no contact order.

A person who fails to comply with the conditions of pretrial release, if the original arrest was for an act of domestic violence, commits a first degree misdemeanor.² The statute currently requires that the defendant receive a copy of the order of no contact before he or she is released from custody on pretrial release. The order is effective immediately upon issuance and is enforceable for the duration of the pretrial release or until modified by the court.

Existing law could be read to require a court to issue an order of no contact to every person who is released on pretrial release if there is a victim. For example, in *Pilorge v. State*, the District Court of Appeal held that there was insufficient evidence to establish that the defendant was informed of the no contact condition of his pretrial release.³ Pilorge had been arrested for aggravated battery and attempted false imprisonment and was released on bond with the condition of having no contact with the victim pursuant to s. 903.047, F.S.⁴ Subsequently, Pilorge made contact with the victim and was charged with violating a condition of his pretrial release pursuant to s. 741.29, F.S.⁵

The *Pilorge* court found the statute requires the imposition of the no contact condition to be proven by substantial competent evidence in order to convict the person of the crime.⁶ The statute requires that the court impose the no contact condition on a person charged with domestic violence, but it does not create a presumption the defendant knows that he or she is to have no contact.⁷

The Fifth DCA held in *Sheppard v. State* that the state had the burden to prove that the defendant received adequate notice of his pretrial no contact condition.⁸ In *Sheppard*, the court found that “[t]he State has the burden of proving, by substantial, competent evidence, that the condition was imposed on a defendant charged with domestic violence.”⁹

Effect of the Bill

As noted above, an order of no contact generally prohibits a defendant from being near or communicating with a victim. The bill clarifies that courts have the discretion to issue an order of no contact to a person on pretrial release. The order of no contact shall be provided in writing, specifying the applicable prohibited acts before the defendant is released from custody on pretrial release.

¹ s. 903.047, F.S.

² s. 741.29(6), F.S.

³ 876 So. 2d 591 (Fla. 5th DCA 2004).

⁴ *Id.* at 591.

⁵ *Id.* at 592.

⁶ *Id.*

⁷ *Id.* (“As written, this statute requires the court to impose the no contact provision on a person charged with domestic violence. It does not create a presumption that the defendant knows that he or she is to have no contact.”).

⁸ 974 So. 2d 529, 530 (Fla. 5th DCA 2008).

⁹ *Id.* at 530.

B. SECTION DIRECTORY:

Section 1. Amends s. 903.047, F.S., relating to conditions of pretrial release.

Section 2. Provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require a municipality or county to expend funds or to take any action requiring the expenditure of funds. The bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate. The bill does not require a reduction of the percentage of state tax shared with municipalities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 3, 2016, the Criminal Justice Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute moved language in the bill, as filed, to clarify that courts have the discretion, but are not required, to issue an order of no contact to a person on pretrial release.

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

1 A bill to be entitled
 2 An act relating to orders of no contact; amending s.
 3 903.047, F.S.; revising the requirements for notifying
 4 a defendant of a no contact order if issued by the
 5 court as a condition of pretrial release; providing an
 6 effective date.

7
 8 Be It Enacted by the Legislature of the State of Florida:

9
 10 Section 1. Subsection (1) of section 903.047, Florida
 11 Statutes, is amended to read:

12 903.047 Conditions of pretrial release.—

13 (1) As a condition of pretrial release, whether such
 14 release is by surety bail bond or recognizance bond or in some
 15 other form, the defendant must:

16 (a) Refrain from criminal activity of any kind.

17 (b) If the court issues an order of no contact, refrain
 18 from any contact of any type with the victim, except through
 19 pretrial discovery pursuant to the Florida Rules of Criminal
 20 Procedure. An order of no contact is effective immediately and
 21 enforceable for the duration of the pretrial release or until it
 22 is modified by the court. The defendant shall be informed in
 23 writing ~~receive a copy~~ of the order of no contact, specifying
 24 ~~which specifies~~ the applicable prohibited acts, before the
 25 defendant is released from custody on pretrial release. As used
 26 in this section, unless otherwise specified by the court, the

27 term "no contact" includes the following prohibited acts:
 28 1. Communicating orally or in any written form, either in
 29 person, telephonically, electronically, or in any other manner,
 30 either directly or indirectly through a third person, with the
 31 victim or any other person named in the order. If the victim and
 32 the defendant have children in common, at the request of the
 33 defendant, the court may designate an appropriate third person
 34 to contact the victim for the sole purpose of facilitating the
 35 defendant's contact with the children. However, this
 36 subparagraph does not prohibit an attorney for the defendant,
 37 consistent with rules regulating The Florida Bar, from
 38 communicating with any person protected by the no contact order
 39 for lawful purposes.
 40 2. Having physical or violent contact with the victim or
 41 other named person or his or her property.
 42 3. Being within 500 feet of the victim's or other named
 43 person's residence, even if the defendant and the victim or
 44 other named person share the residence.
 45 4. Being within 500 feet of the victim's or other named
 46 person's vehicle, place of employment, or a specified place
 47 frequented regularly by such person.
 48 (c) Comply with all conditions of pretrial release.
 49 Section 2. This act shall take effect July 1, 2016.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1089 Criminal History Information
SPONSOR(S): Rooney and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 628

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	8 Y, 0 N	Clark	White
2) Justice Appropriations Subcommittee	12 Y, 0 N	McAuliffe	Lloyd
3) Judiciary Committee		Clark <i>RC</i>	Havlicak <i>RN</i>

SUMMARY ANALYSIS

Section 943.053(3)(b), F.S., in relevant part, provides that the fee per record for criminal history information provided by the Florida Department of Law Enforcement (FDLE) is \$24.00 per name submitted, except that the fee for the guardian ad litem program and vendors of the Department of Children and Families, the Department of Juvenile Justice, and the Department of Elder Affairs is \$8.00 for each name submitted.

The bill adds the Agency for Persons with Disabilities (APD) to the list of other state agencies; thereby, authorizing APD's vendors to pay \$8.00 per background screening.

FDLE estimates a future loss of revenue of \$115,200 annually due to the bill's authorization for APD to pay \$8.00, rather than \$24.00 per record. FDLE began receiving such revenue from APD at the end of May 2015. In Fiscal Year 2014-15, FDLE's Operating Trust Fund revenues were \$98.9 million and the trust funds expenditures were \$91.7 million. Therefore, the trust fund balance is sufficient to absorb this loss of revenue.

The bill is effective July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Section 943.053, F.S., in relevant part, provides that the fee per record for criminal history information provided by the Florida Department of Law Enforcement (FDLE) is \$24.00 per name submitted, except that the fee for the guardian ad litem program and vendors of the Department of Children and Families (DCF), the Department of Juvenile Justice, and the Department of Elder Affairs is \$8.00 for each name submitted.¹

Until May 25, 2015, the DCF performed background screening services for the Agency for Persons with Disabilities (APD). As such, the screening fee for state criminal history records checks for APD's providers, vendors, employers, Consumer Directed Care Plus (CDC+) participants, and representatives (collectively hereinafter referred to as "vendors") was \$8.00.

On May 25, 2015, however, the APD began participating in the state Provider Background Screening Clearinghouse, which required APD's background screenings to be processed separately from the DCF's screenings. Due to this separation, APD's vendors are now required to pay \$24.00 per screening.

Effect of the Bill

The bill amends s. 943.053(3)(b), F.S., to include APD on the list of other state agencies; thereby, authorizing APD's vendors to pay \$8.00 per background screening.

B. SECTION DIRECTORY:

Section 1. Amends s. 943.053, F.S., relating to dissemination of criminal justice information; fees.

Section 2. Provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

FDLE estimates a future loss of revenue of \$115,200 annually due to the bill's authorization for APD to pay \$8.00, rather than \$24.00 per record. FDLE began receiving such revenue from APD at the end of May 2015. In Fiscal Year 2014-15, FDLE's Operating Trust Fund revenues were \$98.9 million and the trust funds expenditures were \$91.7 million. Therefore, the trust fund balance is sufficient to absorb this loss of revenue.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

¹ s. 943.053(3)(b), F.S.
STORAGE NAME: h1089d.JDC.DOCX
DATE: 2/16/2016

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill reduces the amount that the APD's vendors will have to pay for background screening fees from \$24.00 to \$8.00.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

1 A bill to be entitled
 2 An act relating to criminal history information;
 3 amending s. 943.053, F.S.; providing a reduced fee for
 4 criminal history information provided to the Agency
 5 for Persons with Disabilities under specified
 6 provisions; providing an effective date.

7
 8 Be It Enacted by the Legislature of the State of Florida:
 9

10 Section 1. Paragraph (b) of subsection (3) of section
 11 943.053, Florida Statutes, is amended to read:

12 943.053 Dissemination of criminal justice information;
 13 fees.—

14 (3)

15 (b) The fee per record for criminal history information
 16 provided pursuant to this subsection and s. 943.0542 is \$24 per
 17 name submitted, except that the fee for the guardian ad litem
 18 program and vendors of the Department of Children and Families,
 19 the Department of Juvenile Justice, the Agency for Persons with
 20 Disabilities, and the Department of Elderly Affairs shall be \$8
 21 for each name submitted; the fee for a state criminal history
 22 provided for application processing as required by law to be
 23 performed by the Department of Agriculture and Consumer Services
 24 shall be \$15 for each name submitted; and the fee for requests
 25 under s. 943.0542, which implements the National Child
 26 Protection Act, shall be \$18 for each volunteer name submitted.

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27 The state offices of the Public Defender shall not be assessed a
28 fee for Florida criminal history information or wanted person
29 information.

30 Section 2. This act shall take effect July 1, 2016.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1149 Alternative Sanctioning
SPONSOR(S): Criminal Justice Subcommittee; Spano
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 1256

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	11 Y, 0 N, As CS	Aziz	White
2) Justice Appropriations Subcommittee	13 Y, 0 N	McAuliffe	Lloyd
3) Judiciary Committee		Aziz <i>PA</i>	Havlicak <i>RN</i>

SUMMARY ANALYSIS

Any person who is found guilty by a jury or the court sitting without a jury, or who enters a plea of guilty or nolo contendere may be placed on probation regardless of whether adjudication is withheld. Section 948.06, F.S., provides procedures regarding a violation of the terms and conditions imposed on a person who is on probation. Upon violation, the probationer is arrested and brought before the sentencing court. At the first hearing on the violation, the probationer is advised of the charge. If the probationer admits the charge, the court may immediately revoke, modify, or continue the probation or place the probationer into a community control program.

The bill creates an alternative sanctioning program ("program") for technical violations of probation. The bill defines "technical violation" as any alleged violation of supervision that is not a new felony offense, misdemeanor offense, or criminal traffic offense. The bill allows the chief judge of each judicial circuit, in consultation with the state attorney, public defender, and Department of Corrections, to establish an alternative sanctioning program and determine which technical violations will be eligible for alternative sanctioning.

An eligible probationer who commits a technical violation may choose to participate in the program and admit to the violation, comply with a probation officer's recommended sanctions, and waive his or her right to a hearing on the violation. A probation officer's recommended alternative sanction must be reviewed by the court, which may approve the sanction or remove the probationer from the program.

The Criminal Justice Impact Conference met on January 29, 2016, and found the bill will have an indeterminate impact on prison beds. However, since the bill offers alternatives to returning someone under community supervision to prison for a technical violation it will likely decrease the need for prison beds.

The bill is effective July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Probation

Section 948.01, F.S., provides the circumstances under which the trial court can place a person on probation¹ or community control² (collectively, hereinafter referred to as “probation”). Any person who is found guilty by a jury or the court sitting without a jury or who enters a plea of guilty or nolo contendere may be placed on probation regardless of whether adjudication is withheld.³

The Department of Corrections (“Department”) supervises all probationers sentenced in circuit court.⁴ Section 948.03, F.S., provides a list of standard conditions of probation. In addition to the standard conditions of probation, the court may add additional conditions of probation that it deems proper.⁵

Section 948.06, F.S., provides procedures regarding a violation of the terms and conditions required of a person on probation. Upon violation, the probationer is arrested and brought before the sentencing court. At the first hearing on the violation, the probationer is advised of the charge. If the probationer admits the charge, the court may immediately revoke, modify, or continue the probation or place the probationer into a community control program.⁶

If the probationer denies having violated the terms of the probation, the court may commit him or her to jail or release him or her with or without bail to await further hearing, or it may dismiss the charge of probation violation.⁷ Unless dismissed, the court must conduct a hearing and determine whether the probationer has violated the terms of his or her probation.⁸ If the court finds that the probationer has violated, the court may immediately revoke, modify, or continue the probation or place the probationer into a community control program.⁹

If probation is revoked, the court must adjudicate the probationer guilty of the offense charged and proven or admitted, unless he or she has previously been adjudicated guilty. The court may then impose any sentence that it might have originally imposed for the offense for which the probationer was placed on probation or into community control.

Technical Violations

Section 948.06(1)(g), F.S., describes technical violations as a violation of probation that is not a new felony or misdemeanor.¹⁰ During Fiscal Year 2014-15, approximately 94,000 violation reports were submitted due to probation violations. Of this number, 61,777 (or 66%) were technical violations.¹¹ Because of overcrowded court dockets, it often takes weeks and multiple hearings for a probationer to

¹ Section 948.001(5), F.S., defines “probation” as a form of community supervision requiring specified contacts with parole and probation officers and other terms and conditions as provided in s. 948.03, F.S.

² Section 948.001(3), F.S., defines “community control” as a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, administered by officers with restricted caseloads. Community control is an individualized program in which the freedom of an offender is restricted within the community, home, or noninstitutional residential placement and specific sanctions are imposed and enforced.

³ s. 948.01(1), F.S.

⁴ *Id.*

⁵ s. 948.03(2), F.S.

⁶ s. 948.06(2)(a), F.S.

⁷ s. 948.06(2)(c), F.S.

⁸ s. 948.06(2)(d), F.S.

⁹ s. 948.06(2)(e), F.S.

¹⁰ Section 948.06(1)(g), F.S., allows the chief judge of each judicial circuit to direct the Department to use a notification letter for technical violations in lieu of a violation report, affidavit, and warrant.

¹¹ Department of Corrections, Agency Analysis 2016 House Bill 1149 p. 2 (Jan. 20, 2016).

be sentenced as the result of a violation of probation. If the probationer is charged with a technical violation, these hearings often result in the court reinstating or modifying the probation with additional sanctions imposed. If the probationer is held in jail pending a violation hearing, he or she may lose employment and be unable to pay victim restitution, attend treatment, or comply with supervision requirements.

In an effort to improve the violation of probation process, the Department's Office of Community Corrections developed the Alternative Sanctions Program to reduce recidivism for supervised probationers by utilizing collaborative efforts between courts, probation, and law enforcement. The program, created through administrative order in each circuit, allows a technical violation to be addressed immediately with the probationer through an administrative process.¹² Circuit court judges in 12 counties within six judicial circuits have agreed to implement the Alternative Sanctions Program via administrative order, including Alachua, Brevard, Desoto, Flagler, Manatee, Palm Beach, Pinellas, Putnam, Sarasota, Seminole, St. Johns, and Volusia.¹³

Effect of the Bill

The bill creates an alternative sanctioning program ("program") for technical violations of probation. The bill defines technical violations as any alleged violation of supervision that is not a new felony offense, misdemeanor offense, or criminal traffic offense. The bill allows the chief judge of each judicial circuit, in consultation with the state attorney, public defender, and the Department, to establish an alternative sanctioning program and determine which technical violations will be eligible for alternative sanctioning.

If an eligible offender on probation is alleged to have committed a technical violation, the offender may either waive participation in the program or elect to participate. By participating in the program, the offender admits to the violation, agrees to the probation officer's recommended sanction, and waives the right to:

- Be represented by legal counsel;
- Require the state to prove his or her guilt before a neutral and detached hearing body;
- Subpoena witnesses and present to a judge evidence in his or her defense;
- Confront and cross-examine adverse witnesses; and
- Receive a written statement from a factfinder as to the evidence relied on and the reasons for the sanction imposed.

Before imposing the sanction, the probation officer must submit the recommended sanction and documentation of the offender's admission of violation and agreement with the sanction to the court. The court has the discretion to impose the recommended sanction or to direct the Department to submit a violation report, affidavit, and warrant like a normal case not in the program. Any participation by the offender in the program is solely voluntary and the offender may elect to discontinue participation in the program as long as it is before the issuance of the court order imposing the recommended sanction. When an offender quits the program, the probation officer may submit a violation report, affidavit and warrant to the court concerning the violation. Any prior admission by the offender may not be used as evidence in subsequent proceedings.

The chief judge, in order to establish the program, must issue an administrative order specifying eligibility, which technical violations will be eligible for the program, which sanctions may be recommended by a probation officer, and the process for reporting violations of the program.

B. SECTION DIRECTORY:

Section 1. Amends s. 948.06, F.S., relating to violation of probation or community control; revocation; modification; continuance; failure to pay restitution or cost of supervision.

¹² *Id.*

¹³ *Id.*

Section 2. Provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The Criminal Justice Impact Conference met on January 29, 2016, and found the bill will have an indeterminate impact on prison beds. However, since the bill offers alternatives to returning someone under community supervision to prison for a technical violation it will likely decrease the need for prison beds.

The Office of State Court Administration reports that the fiscal impact cannot be accurately determined due to the unavailability of data needed to quantifiably establish the bill's effects on judicial time and workload.¹⁴

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The Department reports that the bill may decrease expenditures by reducing law enforcement arrests, jail incarceration of offenders pending technical violation hearings, probation officer time spent at these violation hearings, and court personnel involved in the violation hearing process.¹⁵

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

¹⁴ Office of State Court Administrator, Agency Analysis of 2016 House Bill 1149, p. 2 (Jan. 16, 2016).

¹⁵ Department of Corrections, Agency Analysis 2016 House Bill 1149 p. 4 (Jan. 20, 2016).

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 25, 2016, the Criminal Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment modified the definition of "technical violation" in the bill so that it only applies to that paragraph and not the entire section. This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.

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Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (h) of subsection (1) of section 948.06, Florida Statutes, is redesignated as paragraph (i), and a new paragraph (h) is added to that subsection, to read:
948.06 Violation of probation or community control; revocation; modification; continuance; failure to pay restitution or cost of supervision.—

(1)

(h)1. The chief judge of each judicial circuit, in consultation with the state attorney, the public defender, and the department, may establish an alternative sanctioning program in which the department, after receiving court approval, may enforce specified sanctions for certain technical violations of supervision. For purposes of this paragraph, the term "technical violation" means any alleged violation of supervision that is not a new felony offense, misdemeanor offense, or criminal traffic offense.

2. To establish an alternative sanctioning program, the chief judge must issue an administrative order specifying:

a. Eligibility criteria.

b. The technical violations that are eligible for the program.

c. The sanctions that may be recommended by a probation officer for each technical violation.

53 d. The process for reporting technical violations through
 54 the alternative sanctioning program, including approved forms.

55 3. If an offender is alleged to have committed a technical
 56 violation of supervision that is eligible for the program, the
 57 offender may:

58 a. Waive participation in the alternative sanctioning
 59 program, in which case the probation officer may submit a
 60 violation report, affidavit, and warrant to the court in
 61 accordance with this section; or

62 b. Elect to participate in the alternative sanctioning
 63 program after receiving written notice of an alleged technical
 64 violation and a disclosure of the evidence against the offender,
 65 admit to the technical violation, agree to comply with the
 66 probation officer's recommended sanction if subsequently ordered
 67 by the court, and agree to waive the right to:

68 (I) Be represented by legal counsel.

69 (II) Require the state to prove his or her guilt before a
 70 neutral and detached hearing body.

71 (III) Subpoena witnesses and present to a judge evidence
 72 in his or her defense.

73 (IV) Confront and cross-examine adverse witnesses.

74 (V) Receive a written statement from a factfinder as to
 75 the evidence relied on and the reasons for the sanction imposed.

76 4. If the offender admits to committing the technical
 77 violation and agrees with the probation officer's recommended
 78 sanction, the probation officer must, before imposing the

79 sanction, submit the recommended sanction to the court as well
 80 as documentation reflecting the offender's admission to the
 81 technical violation and agreement with the recommended sanction.

82 5. The court may impose the recommended sanction or may
 83 direct the department to submit a violation report, affidavit,
 84 and warrant to the court in accordance with this section.



85 6. An offender's participation in an alternative
 86 sanctioning program is voluntary. The offender may elect to
 87 waive or discontinue participation in an alternative sanctioning
 88 program at any time before the issuance of a court order
 89 imposing the recommended sanction.

90 7. If an offender waives or discontinues participation in
 91 an alternative sanctioning program, the probation officer may
 92 submit a violation report, affidavit, and warrant to the court
 93 in accordance with this section. The offender's prior admission
 94 to the technical violation may not be used as evidence in
 95 subsequent proceedings.

96 Section 2. This act shall take effect July 1, 2016.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1181 Bad Faith Assertions of Patent Infringement
SPONSOR(S): Civil Justice Subcommittee; Grant
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1298

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	11 Y, 0 N, As CS	Malcolm	Bond
2) Judiciary Committee		Malcolm 	Havlicak 

SUMMARY ANALYSIS

In 2015, the Legislature enacted the "Patent Troll Prevention Act" (Act) to provide a private right of action for a person who has received a bad faith patent infringement claim. The bill amends the Act by removing the ability of a party pursuing a private right of action under the bill to recover punitive damages, and by revising the criteria by which a demand letter is deemed to be a bad faith assertion of patent infringement in violation of the Act.

The bill also repeals the provision in the Act that authorizes a target of a bad faith assertion of patent infringement to seek a protective order or a court order requiring the plaintiff to post a bond.

The bill does not appear to have a fiscal impact on state or local government.

The bill provides an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Patent Law

A patent is the grant of a property right in an invention to its inventor, issued by the United States Patent and Trademark Office generally for a term of 20 years.¹ A patent confers the right to exclude others from making, using, or selling the invention in the United States or importing the invention into the United States.²

Article I, s. 8, cl 8, of the United States Constitution gives Congress the power to enact laws relating to patents.³ Based on this grant of power, Congress enacted a number of patent statutes, most significantly, the Patent Act of 1952.⁴ Congress, in turn, has vested the federal courts with exclusive jurisdiction to determine patent validity and infringement.⁵

Enforcement of Patents

A patent holder may enforce its rights by filing infringement suits in federal court.⁶ The patent holder bears the burden of establishing infringement by each alleged infringer.⁷ Patent litigation is generally very expensive: the average suit in which \$1 million to \$25 million is at stake costs \$1.6 million through discovery and \$2.8 million through trial.⁸

Although Congress has not expressly preempted state law in all areas of patent law, federal courts have generally held that most patent litigation is implicitly preempted by Congress.⁹ Accordingly, the Federal Circuit, which has exclusive appellate jurisdiction over patent cases, has held that state law claims against abusive patent infringement practices are mostly preempted by the federal Patent Act because

a patentee must be allowed to make its rights [under the federal Patent Act] known to a potential infringer so that the latter can determine whether to cease its allegedly infringing activities, negotiate a license if one is offered, or decide to run the risk of liability and/or the imposition of an injunction. The federal patent laws thus bar state-law liability for communications concerning alleged infringement so long as those communications are not made in "bad faith."¹⁰

¹ United States Patent and Trademark Office, *General Information Concerning Patents* (Oct. 2014) <http://www.uspto.gov/patents-getting-started/general-information-concerning-patents#heading-2> (last visited Jan. 23, 2016).

² 35 U.S.C. §154 (2012).

³ "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Art. I, §8, cl. 8, U.S. Const.

⁴ P.L. 82-593, 66 Stat. 792 (codified at 35 U.S.C.).

⁵ 28 U.S.C. §1338(a) ("No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents . . .").

⁶ See *id.*; 35 U.S.C. §271 (2012).

⁷ 35 U.S.C. §101 (2012).

⁸ Brian Yeh, *An Overview of the "Patent Trolls" Debate*, Congressional Research Service (April 16, 2013).

⁹ See *Globetrotter Software, Inc. v. Elan Computer Grp., Inc.*, 362 F.3d 1367, 1374 (Fed. Cir. 2004).

¹⁰ *Id.* at 1374-75 (quoting *Va. Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 869 (Fed.Cir.1997)).

To avoid preemption, a person that raises a state law cause of action based on abusive patent infringement practices must prove that the infringement allegations were “objectively baseless,” meaning that no reasonable litigant could have expected to succeed.¹¹

Patent Trolls

“Patent assertion entities,” commonly referred to as “patent trolls,” describes a business that focuses on purchasing and asserting patents against companies that already use the patented technology in their business operations (after infringement and lock-in have occurred), rather than developing and transferring technology to licensees.¹² Patent trolls frequently operate by sending notices of alleged patent infringement to large numbers of businesses to threaten litigation if the business does not pay a licensing fee.¹³ Often defendants, especially smaller companies and startups, will choose to settle to avoid expending time and resources on costly litigation. Patent trolls simply transfer a legal right not to be sued for the transfer of money.¹⁴

State Attempts to Limit Bad Faith Patent Infringement Claims

As of the beginning of 2016, 27 states, including Florida, have passed statutes outlawing certain acts of bad faith patent enforcement;¹⁵ the majority of statutes, including Florida’s, are modeled after a Vermont statute, which prohibits “bad faith” assertions of patent infringement.¹⁶ Other states have outlawed assertions that “contain false, misleading, or deceptive information”¹⁷ or have defined specific acts as illegal, such as threatening litigation and not filing suit or making infringement assertions that “lack a reasonable basis in fact or law.”¹⁸ Most of the new statutes create a private right of action for the targets of unlawful infringement assertions, and all of the statutes provide for enforcement by state officials, such as the state attorney general.¹⁹ However, whether such state law attempts to curb bad faith patent claims are preempted by federal law is unknown.²⁰

Florida’s Patent Troll Prevention Act

In 2015, the Florida Legislature passed the Patent Troll Prevention Act (Act), Part VII of ch. 501, F.S.²¹ The Act creates a private right of action for a person who has received a bad faith assertion of patent infringement. In determining whether an assertion of patent infringement violates the Act, a court may consider a number of factors, including whether:

- the demand letter contained basic information regarding the patent, the patent owner, and the specific infringing conduct, or whether such information was provided when requested;
- the demand letter requested payment of a license fee or a response within an unreasonable period of time or requested an unreasonable license fee;

¹¹ *Id.* at 1377; *Dominant Semiconductors Sdn. Bhd. v. OSRAM GmbH*, 524 F.3d 1254, 1260 (Fed. Cir. 2008).

¹² Thomas A. Hemphill, *The Paradox of Patent Assertion Entities*, American Enterprise Institute (Aug. 12, 2013) <http://www.aei.org/publication/the-paradox-of-patent-assertion-entities/> (last visited Jan. 23, 2016).

¹³ See Paul R. Gugliuzza, *Patent Trolls and Preemption*, Boston University School of Law Public Law & Legal Theory Paper No. 15-03, 1-4 (Jan. 20, 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2539280 (last visited Jan. 23, 2016).

¹⁴ Hemphill, *supra* Note 12.

¹⁵ Gugliuzza, *supra* Note 13 at 4-5; Patent Progress's Guide to State Patent Legislation (Jan. 4, 2016) <http://www.patentprogress.org/patent-progress-legislation-guides/patent-progresss-guide-state-patent-legislation/> (last visited Jan. 23, 2016).

¹⁶ VT. STAT. ANN., tit. 9, § 4197(a) (2014).

¹⁷ WIS. STAT. § 100.197(2)(b) (2014).

¹⁸ *E.g.*, 815 ILL. COMP. STAT. 505/2RRR(b)(1), (3) (2014).

¹⁹ *E.g.*, VT. STAT. ANN., tit. 9, § 4199(a); WIS. STAT. § 100.197(3)(b); TENN. CODE ANN. § 29-40-103 to -104; 815 ILL. COMP. STAT. 505/7, 505/10a.

²⁰ See Gugliuzza, *supra* Note 13.

²¹ ss. 7-13, ch. 2015-92, Laws of Fla.

- the assertion of patent infringement is deceptive or unenforceable, and the person knew, or should have known, that the claim or assertion was unenforceable; and
- the person has previously sued or threatened to sue to enforce the claim and a court found the claim to be meritless.

Alternatively, a court may consider a number of factors as evidence that a person has not made a bad faith assertion of patent infringement, including whether:

- The demand letter contained the required identifying and contact information;
- The person engaged in a good faith effort to establish that the target has infringed the patent and negotiated an appropriate remedy;
- The person made a substantial investment in the patent;
- The person is the inventor of the patented product or is the original assignee;
- The person has demonstrated good faith business practices in previous efforts to enforce.

A target of a patent infringement claim that violates the Act may seek a protective order or court order requiring the plaintiff to post a bond equal to the lesser of \$250,000 or the defendant's estimated litigation expenses.

A person who prevails on a claim of bad faith assertion of patent infringement pursuant to the Act may be awarded equitable relief, damages, costs and fees, including attorney fees, and punitive damages in an amount equal to \$50,000 or three times the total damages, costs, and fees, whichever is greater.

Universities, technology transfer companies affiliated with universities, and certain patent infringement assertions related to pharmaceutical and biologic licensing and patents are exempt from liability under the Act.

Effect of the Bill

The bill amends Patent Troll Prevention Act (Act) to remove those portions of the Act that provide the factors that a court uses in determining whether an assertion of patent infringement violates the Act and replaces those portions with a description of attributes that qualify a demand letter as a bad faith assertion of patent infringement.

Pursuant to the bill, a demand letter constitutes a bad faith assertion of patent infringement if it includes a claim that the target, or a person affiliated with the target, has infringed a patent and that the target is legally liable for the infringement, and one or more of the following is met:

- The demand letter falsely asserts that the sender has filed a lawsuit in connection with the claim.
- The demand letter asserts a claim that is objectively baseless because:
 - The sender, or a person the sender represents, lacks the right to license or enforce the patent against the target;
 - The patent is unenforceable pursuant to a final judgment or an administrative order; or
 - The infringing activity alleged in the letter occurred after the expiration of the patent.
- The demand letter is likely to materially mislead a reasonable person because it does not contain sufficient information to inform the target of:
 - the identity of the person asserting the claim, including his or her name and address;
 - the patent alleged to have been infringed, including the patent number; and
 - at least one product, service, or technology of the target alleged to infringe the patent, or at least one activity of the end user which is alleged to infringe the patent.
- The demand letter fails to respond to a request from the target for the above information.

The bill repeals the provision in the Act that authorized the award of punitive damages for a prevailing plaintiff in a private cause of action pursuant to the Act. The bill also repeals the provision in the Act

that authorized a target of a bad faith assertion of patent infringement that violates the Act to seek a protective order or court order requiring the plaintiff to post a bond.

The bill also provides that the Act may not be construed: to limit the rights and remedies available to the state or a person under any other law; to alter or restrict the Attorney General's authority under any other law regarding patent infringement claims; or, to prohibit a person who owns a patent from notifying other parties of his or her ownership, offering to sell or license the patent, notifying other parties of such parties' infringement of the patent, or seeking compensation for infringement of, or license to, the patent.

B. SECTION DIRECTORY:

Section 1 amends s. 501.991, F.S., relating to legislative intent; construction.

Section 2 amends s. 501.992, F.S., relating to definitions.

Section 3 amends s. 501.993, F.S., relating to bad faith assertions of patent infringement.

Section 4 repeals s. 501.994, F.S., relating to bond.

Section 5 amends s. 510.995, F.S., relating to private right of action.

Section 6 provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

As explained above, Congress has not expressly preempted state law in all areas of patent law; however, federal courts have generally held that most patent litigation has been implicitly preempted by Congress.²² Accordingly, state law claims against abusive patent infringement practices are mostly preempted by the federal Patent Act.²³ To avoid preemption, an accused infringer that raises a state law cause of action based on abusive patent infringement practices must prove that the infringement allegations were “objectively baseless,” meaning that no reasonable litigant could have expected to succeed.²⁴ Because the bill provides that a demand letter that, among other things, asserts a claim that is objectively baseless, it appears the bill may avoid preemption.

Additionally, for a Florida court to exercise personal jurisdiction over a non-resident defendant, it must comply with the two-step analysis articulated by the Florida Supreme Court:²⁵ First, the court must determine whether the complaint satisfies the requirements of Florida’s long-arm statute²⁶, and second, it must determine “whether the complaint alleges sufficient minimum contacts to satisfy [constitutional] due process requirements.”²⁷

The Federal Circuit has consistently held that the act of sending a cease and desist letter into a state is not sufficient to justify an exercise of personal jurisdiction over the non-resident patent owner. The Federal Circuit has stated,

Principles of fair play and substantial justice afford a patentee sufficient latitude to inform others of its patent rights without subjecting itself to jurisdiction in a foreign forum. A patentee should not subject itself to personal jurisdiction in a forum solely by informing a party who happens to be located there of suspected infringement. Grounding personal jurisdiction on such contacts alone would not comport with principles of fairness.²⁸

Based on this precedent, to the extent the bill would apply to a non-patent owner whose sole contacts with the state are sending cease and desist notices or letters offering to license a patent, a Florida court may lack personal jurisdiction over such a person.²⁹

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

²² See *Globetrotter*, 362 F.3d at 1374.

²³ *Id.* at 1377.

²⁴ *Id.*; *Dominant Semiconductors*, 524 F.3d at 1260.

²⁵ *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989).

²⁶ s. 48.193, F.S.

²⁷ 554 So. 2d at 502.

²⁸ *Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1360-61 (Fed. Cir. 1998); see also *Genetic Implant Sys., Inc. v. Core-Vent Corp.*, 123 F.3d 1455, 1458 (Fed. Cir. 1997) (“sending infringement letters, without more activity in a forum state, is not sufficient to satisfy the requirements of due process. Other activities are required in order for a patentee to be subject to personal jurisdiction in the forum.”).

²⁹ Memorandum from The Patent Troll Prevention Task Force, Re: Technical Input Memorandum to The Patent Troll Prevention Act, HB 1103, Senate Amendment to SB 1362 (April 15, 2015)(on file with the Civil Justice Subcommittee).

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 26, 2016, the Civil Justice Subcommittee adopted three amendments and reported the bill favorably as a committee substitute. The amendments:

- require a demand letter to include specific patent information and provide specific information when requested by the target;
- remove the Attorney General enforcement provision and restores the private cause of action, which provides a recipient of a bad faith demand letter to equitable relief, actual damages, and attorney fees and costs; and
- restore the exemption in current law for universities and technology transfer companies affiliated with universities.

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

1 A bill to be entitled
 2 An act relating to bad faith assertions of patent
 3 infringement; amending s. 501.991, F.S.; providing
 4 construction; amending s. 501.992, F.S.; revising
 5 definitions; amending s. 501.993, F.S.; prohibiting a
 6 person from sending a demand letter to a target which
 7 makes a bad faith assertion of patent infringement;
 8 specifying what constitutes such a demand letter;
 9 repealing s. 501.994, F.S., relating to the
 10 requirement that a plaintiff post a specified bond in
 11 certain circumstances; amending s. 501.995, F.S.;
 12 authorizing the award of actual damages; deleting
 13 provisions authorizing the award of punitive damages;
 14 providing an effective date.

15
 16 Be It Enacted by the Legislature of the State of Florida:

17
 18 Section 1. Section 501.991, Florida Statutes, is amended
 19 to read:

20 501.991 Legislative intent; construction.—

21 (1) The Legislature recognizes that it is preempted from
 22 passing any law that conflicts with federal patent law. However,
 23 the Legislature recognizes that the state is dedicated to
 24 building an entrepreneurial and business-friendly economy where
 25 businesses and consumers alike are protected from abuse and
 26 fraud. This includes protection from abusive and bad faith

27 demands and litigation.

28 (2) Patents encourage research, development, and
 29 innovation. Patent holders have a legitimate right to enforce
 30 their patents. The Legislature does not wish to interfere with
 31 good faith patent litigation or the good faith enforcement of
 32 patents. However, the Legislature recognizes a growing issue:
 33 the frivolous filing of bad faith patent claims that have led to
 34 technical, complex, and especially expensive litigation.

35 (3) The expense of patent litigation, which may cost
 36 millions of dollars, can be a significant burden on companies
 37 and small businesses. Not only do bad faith patent infringement
 38 claims impose undue burdens on individual businesses, they
 39 undermine the state's effort to attract and nurture
 40 technological innovations. Funds spent to help avoid the threat
 41 of bad faith litigation are no longer available for serving
 42 communities through investing in producing new products, helping
 43 businesses expand, or hiring new workers. The Legislature wishes
 44 to help businesses avoid these costs by encouraging good faith
 45 assertions of patent infringement and the expeditious and
 46 efficient resolution of patent claims.

47 (4) This part may not be construed to:

48 (a) Limit the rights and remedies available to the state
 49 or a person under any other law;

50 (b) Alter or restrict the Attorney General's authority
 51 under any other law regarding claims of patent infringement; or

52 (c) Prohibit a person who owns, or has a right to license

53 or enforce, a patent from:

54 1. Notifying other parties of such person's ownership of,
 55 or rights under, the patent;

56 2. Offering the patent to other parties for license or
 57 sale;

58 3. Notifying other parties of such parties' infringement
 59 of the patent as provided by 35 U.S.C. s. 287; or

60 4. Seeking compensation for past or present infringement
 61 of, or license to, the patent.

62 Section 2. Subsections (1) and (3) of section 501.992,
 63 Florida Statutes, are amended to read:

64 501.992 Definitions.—As used in this part, the term:

65 (1) "Demand letter" means a ~~letter, e-mail, or other~~
 66 written communication, including e-mail, asserting or claiming
 67 that a person has engaged in patent infringement.

68 (3) "Target" means a person residing in, incorporated in,
 69 or organized under the laws of this state who purchases, rents,
 70 leases, or otherwise obtains a product or service in the
 71 commercial market which is not for resale in the commercial
 72 market ~~and who:~~

73 ~~(a) Has received a demand letter or against whom a written~~
 74 ~~assertion or allegation of patent infringement has been made; or~~

75 ~~(b) Has been threatened in writing with litigation or~~
 76 ~~against whom a lawsuit has been filed alleging patent~~
 77 ~~infringement.~~

78 Section 3. Section 501.993, Florida Statutes, is amended

79 to read:

80 501.993 Bad faith assertions of patent infringement.—A
 81 person may not send a demand letter to a target which makes ~~make~~
 82 a bad faith assertion of patent infringement. A demand letter
 83 makes a bad faith assertion of patent infringement if it:

84 (1) Includes a claim that the target, or a person
 85 affiliated with the target, has infringed a patent and that the
 86 target is legally liable for such infringement; and ~~A court may~~
 87 ~~consider the following factors as evidence that a person has~~
 88 ~~made a bad faith assertion of patent infringement:~~

89 ~~(a) The demand letter does not contain the following~~
 90 ~~information:~~

91 1. ~~The patent number;~~

92 2. ~~The name and address of the patent owner and assignee,~~
 93 ~~if any; and~~

94 3. ~~Factual allegations concerning the specific areas in~~
 95 ~~which the target's products, services, or technology infringe or~~
 96 ~~are covered by the claims in the patent.~~

97 ~~(b) Before sending the demand letter, the person failed~~
 98 ~~to conduct an analysis comparing the claims in the patent to the~~
 99 ~~target's products, services, or technology, or the analysis did~~
 100 ~~not identify specific areas in which the target's products,~~
 101 ~~services, and technology were covered by the claims of the~~
 102 ~~patent.~~

103 ~~(c) The demand letter lacked the information listed under~~
 104 ~~paragraph (a), the target requested the information, and the~~

105 ~~person failed to provide the information within a reasonable~~
 106 ~~period.~~

107 ~~(d) The demand letter requested payment of a license fee~~
 108 ~~or response within an unreasonable period.~~

109 ~~(e) The person offered to license the patent for an amount~~
 110 ~~that is not based on a reasonable estimate of the value of the~~
 111 ~~license.~~

112 ~~(f) The claim or assertion of patent infringement is~~
 113 ~~unenforceable, and the person knew, or should have known, that~~
 114 ~~the claim or assertion was unenforceable.~~

115 ~~(g) The claim or assertion of patent infringement is~~
 116 ~~deceptive.~~

117 ~~(h) The person, including its subsidiaries or affiliates,~~
 118 ~~has previously filed or threatened to file one or more lawsuits~~
 119 ~~based on the same or a similar claim of patent infringement and:~~

120 ~~1. The threats or lawsuits lacked the information listed~~
 121 ~~under paragraph (a); or~~

122 ~~2. The person sued to enforce the claim of patent~~
 123 ~~infringement and a court found the claim to be meritless.~~

124 ~~(i) Any other factor the court finds relevant.~~

125 ~~(2) Meets one or more of the following criteria A court~~
 126 ~~may consider the following factors as evidence that a person has~~
 127 ~~not made a bad faith assertion of patent infringement:~~

128 ~~(a) The demand letter falsely asserts that the sender has~~
 129 ~~filed a lawsuit in connection with the claim contained the~~
 130 ~~information listed under paragraph (1)(a).~~

131 (b) The demand letter asserts a claim that is objectively
 132 baseless due to any of the following:

133 1. The sender, or a person whom the sender represents,
 134 lacks a current right to license the patent to, or enforce the
 135 patent against, the target.

136 2. The patent is invalid or unenforceable pursuant to a
 137 final judgment or an administrative order.

138 3. The infringing activity alleged in the demand letter
 139 occurred after the expiration of the patent ~~The demand letter~~
 140 ~~did not contain the information listed under paragraph (1)(a),~~
 141 ~~the target requested the information, and the person provided~~
 142 ~~the information within a reasonable period.~~

143 (c) The demand letter is likely to materially mislead a
 144 reasonable person because it does not contain sufficient
 145 information to inform the target of all of the following:

146 1. The identity of the person asserting the claim,
 147 including the name and address of such person.

148 2. The patent alleged to have been infringed, including
 149 the patent number of such patent.

150 3. At least one product, service, or technology of the
 151 target alleged to infringe the patent, or at least one activity
 152 of the target which is alleged to infringe the patent ~~The person~~
 153 ~~engaged in a good faith effort to establish that the target has~~
 154 ~~infringed the patent and negotiated an appropriate remedy.~~

155 (d) The demand letter fails to respond to a request from
 156 the target for the information described in paragraph (c) ~~The~~

157 ~~person made a substantial investment in the use of the patented~~
 158 ~~invention or discovery or in a product or sale of a product or~~
 159 ~~item covered by the patent.~~

160 ~~(e) The person is the inventor or joint inventor of the~~
 161 ~~patented invention or discovery, or in the case of a patent~~
 162 ~~filed by and awarded to an assignee of the original inventor or~~
 163 ~~joint inventors, is the original assignee.~~

164 ~~(f) The person has:~~

165 ~~1. Demonstrated good faith business practices in previous~~
 166 ~~efforts to enforce the patent, or a substantially similar~~
 167 ~~patent; or~~

168 ~~2. Successfully enforced the patent, or a substantially~~
 169 ~~similar patent, through litigation.~~

170 ~~(g) Any other factor the court finds relevant.~~

171 Section 4. Section 501.994, Florida Statutes, is repealed.

172 Section 5. Section 501.995, Florida Statutes, is amended
 173 to read:

174 501.995 Private right of action.—A person aggrieved by a
 175 violation of this part may bring an action in a court of
 176 competent jurisdiction. A court may award the following remedies
 177 to a prevailing plaintiff in an action brought pursuant to this
 178 section:

- 179 (1) Equitable relief;
- 180 (2) Actual damages; and
- 181 (3) Costs and fees, including reasonable attorney fees;

182 ~~and~~

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2016

183 ~~(4) Punitive damages in an amount equal to \$50,000 or~~
184 ~~three times the total damages, costs, and fees, whichever is~~
185 ~~greater.~~

186 Section 6. This act shall take effect July 1, 2016.



Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	_____	(Y/N)
ADOPTED AS AMENDED	_____	(Y/N)
ADOPTED W/O OBJECTION	_____	(Y/N)
FAILED TO ADOPT	_____	(Y/N)
WITHDRAWN	_____	(Y/N)
OTHER		

1 Committee/Subcommittee hearing bill: Judiciary Committee
 2 Representative Grant offered the following:

Amendment (with title amendment)

Remove lines 155-186 and insert:

~~(d) The person made a substantial investment in the use of the patented invention or discovery or in a product or sale of a product or item covered by the patent.~~

~~(e) The person is the inventor or joint inventor of the patented invention or discovery, or in the case of a patent filed by and awarded to an assignee of the original inventor or joint inventors, is the original assignee.~~

~~(f) The person has:~~

~~1. Demonstrated good faith business practices in previous efforts to enforce the patent, or a substantially similar patent; or~~

~~2. Successfully enforced the patent, or a substantially~~



Amendment No. 1

18 ~~similar patent, through litigation.~~

19 ~~(g) Any other factor the court finds relevant.~~

20 Section 4. Section 501.994, Florida Statutes, is repealed.

21 Section 5. Section 501.995, Florida Statutes, is amended
22 to read:

23 501.995 Private right of action.—A person aggrieved by a
24 violation of this part may bring an action in a court of
25 competent jurisdiction. A court may award the following remedies
26 to a prevailing plaintiff in an action brought pursuant to this
27 section:

28 (1) Equitable relief;

29 (2) Actual damages;

30 (3) Costs and fees, including reasonable attorney fees;

31 and

32 (4) Punitive damages in an amount not to exceed \$75,000
33 ~~equal to \$50,000 or three times the total damages, costs, and~~
34 ~~fees, whichever is greater.~~ However, such punitive damages may
35 only be awarded if the court determines that the person
36 asserting the patent infringement claim has repeatedly violated
37 this part.

38 Section 6. This act shall take effect upon becoming law.

39

40

41

T I T L E A M E N D M E N T

42

Remove lines 12-13 and insert:



COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 1181 (2016)

Amendment No. 1

43 | authorizing the award of actual damages; revising
44 | provisions authorizing the award of punitive damages;

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1231 Service of Process
SPONSOR(S): Civil Justice Subcommittee; Cortes, B.
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1432

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	10 Y, 0 N, As CS	Bond	Bond
2) Judiciary Committee		Bond <i>MB</i>	Havlicak <i>RN</i>

SUMMARY ANALYSIS

Service of process is the formal delivery of a writ, summons, or other legal process or notice to a person affected by that document. Substitute service of process (process on an alternative person) is allowed in certain circumstances.

This bill provides that if the only address for a person to be served is a virtual office or an executive or mini office suite, substitute service may be made by leaving a copy of the process with the person in charge of the virtual office or executive or mini office suite, provided the process server determines that the person to be served maintains a virtual office or an executive or mini office suite at that location.

Service of process is an essential component of jurisdiction. The bill provides that a Florida court does not have jurisdiction over a case where another state is attempting to enforce an order, penalty or fine imposed or issued by a state agency where there is no mandatory right of appeal.

This bill does not appear to have a fiscal impact on state or local governments.

The effective date of this bill is July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Service of original process and of many witness subpoenas is made by delivering a copy of the process or subpoena to the person to be served with a copy of the complaint, petition, or other initial pleading or paper.¹ The process server must document the service of process by placing the date and time of service and the process server's identification number and initials on the copy served.² The person serving the process or subpoena is obligated to file a return of service form with the court to show that service was made.³

While direct service upon the person to be served is preferred, it is not always practicable. Some people are busy, and some hide. Accordingly, the law allows for substituted service in certain circumstances, such as:

- Service at the person's residence if delivered to another person residing in the home who is at least 15 years of age;⁴
- Service upon the spouse of the person to be served, which can be served anywhere in the county with the consent of the spouse;⁵
- Service upon a sole proprietor can be made upon the person in charge of the business during business hours, provided there have been 2 prior attempts;⁶

Another circumstance in which substitute service is provided for is found in s. 48.031(6), F.S., which provides:

(6) If the only address for a person to be served, which is discoverable through public records, is a private mailbox, substitute service may be made by leaving a copy of the process with the person in charge of the private mailbox, but only if the process server determines that the person to be served maintains a mailbox at that location.

Laws on service of process are strictly construed against the party attempting to prove proper service of process.⁷ As to this particular statute, the courts have ruled that it may not be used unless the private mailbox is the only address that can be discovered.⁸

Service of process upon a person is essential to obtaining jurisdiction over the person. However, s. 48.193(1)(b), F.S., provides that jurisdiction may not be appropriate despite having obtained service of process on the person. It provides that a penalty or fine imposed by an agency of another state is not enforceable in Florida unless the other state provides a mandatory right of review.

¹ s. 48.031, F.S.

² ss. 48.29(6) and 48.031(5), F.S.

³ s. 48.031(5), F.S.

⁴ s. 48.031(1), F.S.

⁵ s. 48.031(2)(a), F.S.

⁶ s. 48.031(2)(b), F.S.

⁷ *Carlini v. State Dept. of Legal Affairs*, 521 So.2d 254 (Fla. 4th DCA 1988) ("Statutes dealing with service of process are to be strictly construed. . . . The burden of proof to sustain the validity of service of process is upon the person who seeks to invoke the jurisdiction of the court, and to achieve proper service of process, there must be a strict compliance with the applicable statute." [internal citations omitted]).

⁸ *Beckley v. Best Restorations, Inc.*, 13 So.3d 125 (Fla. 4th DCA 2009).

Effect of the Bill

The bill amends s. 48.031(6), F.S., to provide that if the only address discoverable for a person to be served is a virtual office, substitute service may be made by leaving a copy of the process with the person in charge of the virtual office, provided that the process server determines that the person to be served maintains a virtual office at that location. The bill defines a virtual office as an office that provides communication and address services without providing any dedicated office space and in which all communication is routed through a common receptionist.

The bill further amends s. 48.031(6), F.S., to provide that if the only address discoverable for a person to be served is an executive or mini office suite, substitute service may be made by leaving a copy of the process with the person in charge of the an executive or mini office suite, provided that the process server determines that the person to be served maintains an executive or mini office suite at that location. The bill defines an executive or mini office suite as an office that provides communication, dedicated office space, and other support services in which all communication is routed through a common receptionist.

The bill expands s. 48.193(1)(b), F.S., to provide that an order issued, or a penalty or fine imposed, by an agency of another state is not enforceable unless the other state provided a mandatory right of appellate review.

B. SECTION DIRECTORY:

Section 1 amends s. 48.031, F.S., regarding service of process.

Section 2 amends s. 48.193, F.S., regarding acts subjecting person to jurisdiction of courts of state.

Section 3 provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 26, 2016, the Civil Justice Subcommittee adopted a proposed committee substitute as amended and reported the bill favorably as a committee substitute. The committee substitute differs from the bill as filed by removal of sections on electronic service of process and adding a provision regarding jurisdiction. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

1 A bill to be entitled
 2 An act relating to process and service of process;
 3 amending s. 48.031, F.S.; providing for service of
 4 process when the only address discoverable through
 5 public records for a person to be served is a virtual
 6 office or an executive or mini office suite; providing
 7 definitions; amending s. 48.193, F.S.; providing that
 8 orders issued by agencies of other states are not
 9 enforceable in certain circumstances; providing an
 10 effective date.

11
 12 Be It Enacted by the Legislature of the State of Florida:

13
 14 Section 1. Subsection (6) of section 48.031, Florida
 15 Statutes, is amended to read:

16 48.031 Service of process generally; service of witness
 17 subpoenas.—

18 (6) (a) If the only address for a person to be served,
 19 which is discoverable through public records, is a private
 20 mailbox, a virtual office, or an executive or mini office suite,
 21 substitute service may be made by leaving a copy of the process
 22 with the person in charge of the private mailbox, virtual
 23 office, or executive or mini office suite, but only if the
 24 process server determines that the person to be served maintains
 25 a mailbox, a virtual office, or an executive or mini office
 26 suite at that location.

27 (b) As used in this subsection, the term "virtual office"
 28 means an office that provides communication and address services
 29 without providing any dedicated office space, and the term
 30 "executive or mini office suite" means an office that provides
 31 communication, dedicated office space, and other support
 32 services. In both types of offices, all communication is routed
 33 through a common receptionist.

34 Section 2. Paragraph (b) of subsection (1) of section
 35 48.193, Florida Statutes, is amended to read:

36 48.193 Acts subjecting person to jurisdiction of courts of
 37 state.—

38 (1)

39 (b) Notwithstanding any provision of this subsection, an
 40 order issued, or a penalty or fine imposed, by an agency of any
 41 other state is shall not be enforceable against any person or
 42 entity incorporated or having its principal place of business in
 43 this state if where such other state does not provide a
 44 mandatory right of review of such agency decision in a state
 45 court of competent jurisdiction.

46 Section 3. This act shall take effect July 1, 2016.



Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Judiciary Committee
 2 Representative Cortes, B. offered the following:

Amendment (with title amendment)

Between lines 33 and 34, insert:

Section 2. Paragraph (b) of subsection (3) of section 48.081, Florida Statutes, is amended to read:

48.081 Service on corporation.-

(3)

(b) If the address for the registered agent, officer, director, or principal place of business is a residence, ~~or~~ private mailbox, virtual office, executive office, or mini suite, service on the corporation may be made by serving the registered agent, officer, or director in accordance with s. 48.031.



Amendment No. 1

18

19

T I T L E A M E N D M E N T

20

Remove line 7 and insert:

21

definitions; amending s. 48.081, F.S.; amending a reference to

22

s. 48.031, F.S., to conform to changes made therein; amending s.

23

48.193, F.S.; providing that

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 4003 Repeal of a Prohibition on Cohabitation
SPONSOR(S): Rehwinkel Vasilinda; Stark and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 498

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	10 Y, 3 N	White	White
2) Judiciary Committee		White TW	Havlicak RAH

SUMMARY ANALYSIS

Florida's cohabitation law, s. 798.02, F.S., was created in 1868, and makes it a second degree misdemeanor if any:

- Man and woman, not being married to each other, lewdly and lasciviously associate and cohabit together; or
- Man or woman, married or unmarried, engages in open and gross lewdness and lascivious behavior.

In recent years, states such as Arizona, Idaho, Maine, New Mexico, North Dakota, Virginia, and West Virginia, have repealed their cohabitation laws. In 2006, North Carolina's cohabitation law was found unconstitutional as violating one's substantive due process rights.

The bill repeals the portion of s. 798.02, F.S., which makes it a second degree misdemeanor for any man and woman, not being married to each other, to lewdly and lasciviously associate and cohabit together.

The bill may have a negative jail bed impact, i.e., it may decrease the need for jail beds.

The bill is effective upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Florida is one of only three states that criminalize cohabitation.¹ Section 798.02, F.S., created in 1868,² makes it a second degree misdemeanor³ if any:

- Man and woman, not being married to each other, lewdly and lasciviously associate and cohabit together; or
- Man or woman, married or unmarried, engages in open and gross lewdness and lascivious behavior.⁴

While rarely used in the criminal context, cohabitation laws have been used as a rationale to sanction people in a civil context. For example, in 1979, the Florida Department of Business and Professional Regulation suspended a company's liquor license after finding that six of the company's agents, servants or employees violated s. 798.02, F.S.⁵ In 1999, North Carolina officials refused to grant victim's compensation to an unmarried victim of domestic violence because she was cohabiting with her boyfriend, and was therefore a criminal.⁶ In 2001, authorities in Virginia cited that state's cohabitation law to revoke a professional license of the owner of a day care center.⁷

In recent years, states such as Arizona, Idaho, Maine, New Mexico, North Dakota, Virginia, and West Virginia, have repealed their cohabitation laws.⁸

In addition, North Carolina's cohabitation law⁹ was found unconstitutional as violating an individual's substantive due process rights.¹⁰ In its ruling, the North Carolina court relied on *Lawrence v. Texas*,¹¹ which held that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Writing for the United States Supreme Court, Justice Kennedy said "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home."¹² Justice Kennedy also stated that the following quote by Justice Stevens' in an earlier case should be controlling:

[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty'

¹ The other states with cohabitation laws are Michigan (s. 750.335, M.C.L.A.) and Mississippi (s. 97-29-1, M.C.A.).

² Laws 1868, chapter 1637, subsection 8, section 6.

³ A second degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. ss. 775.082 and 775.083, F.S.

⁴ The statute was last amended in 1971 by ch. 71-136, L.O.F., which made the offense a misdemeanor of the second degree, punishable as provided in ss. 775.082 or 775.083, F.S., in lieu of punishment "by imprisonment in the state prison not exceeding two years, or in the county jail not exceeding one year, or by fine not exceeding three hundred dollars."

⁵ *G & B of Jacksonville, Inc. v. State, Dept. of Business Regulation, Division of Beverage*, 371 So. 2d 139 (Fla. 1st DCA 1979). Section 561.29, F.S., gives the Division authority to suspend a beverage license if the Division finds sufficient cause that a licensee or its agents, officers, servants or employees, on the licensed premises, while in the scope of employment, have violated any law of this State.

⁶ *Family denied compensation because victim lived with killer*, April 1, 1999, http://lubbockonline.com/stories/040199/nat_040199068.shtml (last visited on September 11, 2015).

⁷ *Antiquated, unconstitutional law held up day care license for nearly a year*, March 19, 2002, <http://acluva.org/1746/social-services-reinstates-license-for-day-care-operator-accused-of-violating-virginia-cohabitation-law/> (last visited on September 11, 2015).

⁸ E-mail from Rochelle Finzel, Group Director of the National Conference of State Legislatures, dated February 14, 2014 (on file with the Criminal Justice Subcommittee).

⁹ s. 14-184, N.C.G.S.

¹⁰ *Hobbs v. Smith*, No. 05-CVS 267, 2006 WL 3103008 (N.S. Super. 2006).

¹¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹² *Id* at 562.

protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.¹³

Effect of the Bill

The bill repeals the portion of s. 798.02, F.S., which makes it a second degree misdemeanor for any man and woman, not being married to each other, to lewdly and lasciviously associate and cohabit together.

B. SECTION DIRECTORY:

Section 1. Amends s. 798.02, F.S., relating to lewd and lascivious behavior.

Section 2. Provides that the bill is effective upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill may have a negative jail bed impact, i.e., it may decrease the need for jail beds, because it repeals an offense punishable as a second degree misdemeanor.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

¹³*Id.* at 578 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

2. Other:

As discussed above, a North Carolina court, relying on *Lawrence v. Texas*, recently found North Carolina's cohabitation law unconstitutional as violating one's substantive due process rights. It could be argued that Florida's cohabitation statute is also unconstitutional on the same grounds.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

HB 4003

2016

1 A bill to be entitled
2 An act relating to the repeal of a prohibition on
3 cohabitation; amending s. 798.02, F.S.; deleting
4 provisions prohibiting cohabitation by unmarried men
5 and women; providing an effective date.

6

7 Be It Enacted by the Legislature of the State of Florida:

8

9 Section 1. Section 798.02, Florida Statutes, is amended to
10 read:

11 798.02 Lewd and lascivious behavior. ~~If any man and woman,~~
12 ~~not being married to each other, lewdly and lasciviously~~
13 ~~associate and cohabit together, or~~ If any man or woman, married
14 or unmarried, engages in open and gross lewdness and lascivious
15 behavior, they shall be guilty of a misdemeanor of the second
16 degree, punishable as provided in s. 775.082 or s. 775.083.

17 Section 2. This act shall take effect upon becoming a law.