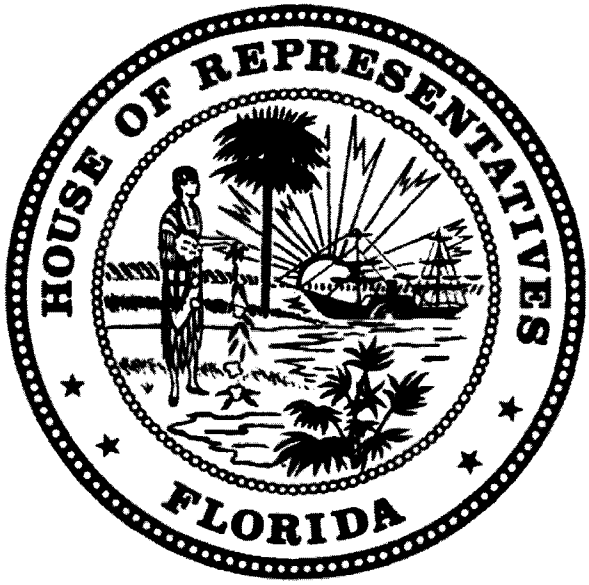

Judiciary Committee

Thursday, February 4, 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 04, 2016 09:00 am
End Date and Time:	Thursday, February 04, 2016 12:00 pm
Location:	Sumner Hall (404 HOB)
Duration:	3.00 hrs

Consideration of the following bill(s):

CS/CS/HB 3 Civil Remedies for Terrorism by Criminal Justice Subcommittee, Civil Justice Subcommittee, Hill
HB 43 Churches or Religious Organizations by Plakon, Cortes, B.
CS/HB 75 Electronic Monitoring Devices by Criminal Justice Subcommittee, Torres
CS/HB 81 Infectious Disease Elimination Pilot Program by Health Quality Subcommittee, Edwards
HB 93 Law Enforcement Officer Body Cameras by Jones, S., Williams, A.
CS/HJR 197 Term Limits for Appellate Courts by Civil Justice Subcommittee, Wood, Sullivan
CS/HB 329 Animals Confined in Unattended Motor Vehicles by Criminal Justice Subcommittee, Cortes, B.
HB 387 Offenses Evidencing Prejudice by Stevenson
HB 455 Alimony by Burton
HB 549 Offenses Concerning Racketeering and Illegal Debts by Burton
HB 967 Family Law by Stevenson
HB 4009 Slungshot by Combee

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 3, 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 3, 2016.

NOTICE FINALIZED on 02/02/2016 4:08PM by Ingram.Michele

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 3 Civil Remedies for Terrorism
SPONSOR(S): Criminal Justice Subcommittee; Civil Justice Subcommittee; Hill
TIED BILLS: None **IDEN./SIM. BILLS:** SB 996

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 0 N, As CS	Malcolm	Bond
2) Criminal Justice Subcommittee	9 Y, 0 N, As CS	Keegan	White
3) Judiciary Committee		Malcolm	Havlicak

SUMMARY ANALYSIS

Current law provides a civil cause of action for a person who has been injured by specified criminal activities such as extortion, battery, elderly exploitation, and certain drug offenses. A plaintiff who prevails on such a claim is entitled to treble damages, specified minimum damages, and attorney fees and court costs.

The bill creates a separate civil cause of action for a person injured by an act of terrorism or any crime that facilitated or furthered an act of terrorism. A prevailing plaintiff is entitled to recover treble damages, minimum damages of $1,000, and attorney fees and court costs. The cause of action is not available to a person whose injuries are the result of his or her participation in the act that caused the injury.

The bill does not appear to have 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

Terrorism-related Crimes in Florida

Terrorism is defined in current law as an activity that involves a violent act or an act dangerous to human life which is a violation of the criminal laws of this state or of the United States, or that involves a violation of s. 815.06, F.S., related to computer crimes, and is intended to intimidate, injure, or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of government through destruction of property, assassination, murder, kidnapping, or aircraft piracy.[1] Terrorism is not an independent crime in Florida; rather, it is a predicate act for the crime of capital murder.[2]

Although terrorism is not an independent crime, if a person is convicted of committing a felony or misdemeanor that *facilitated or furthered* an act of terrorism, the court must reclassify the felony or misdemeanor to the next highest degree.[3] Additionally, if the underlying crime that facilitated or furthered an act of terrorism is a first-degree misdemeanor or greater, the offense severity ranking[4] is increased, thus further increasing the defendant's potential sentence.[5]

Intentional Torts

In Florida, "an intentional tort is one in which [a person] exhibits a deliberate intent to injure or engages in conduct which is substantially certain to result in injury or death."[6] A defendant will be held liable for an intentional tort if the plaintiff's injuries were the natural and probable consequence of the defendant's intended actions.[7] In addition to being liable for economic and non-economic damages, a defendant who commits an intentional tort may be liable for punitive damages.[8] Intentional torts recognized in Florida include assault,[9] battery,[10] and intentional infliction of emotional distress.[11]

Although there is no specific cause of action in Florida that expressly allows a victim of terrorism to recover damages caused by an individual terrorist, existing intentional torts, such as battery and

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[1] ss. 775.30, 782.04(5), and 775.31(3), F.S.
[2] s. 782.04(1)(a)2.r., (3)(r), and (4)(s), F.S.
[3] s. 775.31(1), F.S. For example, if a defendant is charged with a third-degree felony, the offense is reclassified as a second-degree felony.
[4] 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. s. 921.0022, F.S. If an offense is not listed in the ranking chart, it defaults to a ranking based on the degree of the felony. s. 921.0023, F.S.
[5] s. 775.31(2), F.S.
[6] *Boza v. Carter*, 993 So. 2d 561, 562 (Fla. 1st DCA 2008) (quoting *D'Amario v. Ford Motor Co.*, 806 So.2d 424, 438 (Fla. 2001)).
[7] 55 Fla. Jur 2d Torts § 6 (2015).
[8] s. 768.72, F.S.
[9] *Lay v. Kremer*, 411 So. 2d 1347, 1349 (Fla. 1st DCA 1982) ("Assault is defined as an intentional, unlawful offer of corporal injury to another by force, or force unlawfully directed toward another under such circumstances as to create a fear of imminent peril, coupled with the apparent present ability to effectuate the attempt.").
[10] *Paul v. Holbrook*, 696 So. 2d 1311, 1312 (Fla. 5th DCA 1997) ("A battery consists of the infliction of a harmful or offensive contact upon another with the intent to cause such contact or the apprehension that such contact is imminent.")
[11] *Gallogly v. Rodriguez*, 970 So. 2d 470 (Fla. 2d DCA 2007); *see Johnson v. Thigpen*, 788 So. 2d 410, 412 (Fla. 1st DCA 2001) (In order to state a cause of action for intentional infliction of emotional distress, the plaintiff must demonstrate that: 1) the wrongdoer acted recklessly or intentionally; 2) the conduct was extreme and outrageous; 3) the conduct caused the plaintiff's emotional distress; and 4) plaintiff's emotional distress was severe.).

intentional infliction of emotional distress, would likely apply. However, existing intentional torts may not allow a victim of terrorism to recover damages from individuals or organizations who provided material support to the terrorist.[12]

Civil Remedies for Criminal Practices

Chapter 772, F.S., provides a civil cause of action for persons injured by certain criminal activities. Section 772.104, F.S., provides a civil cause of action for a person who has been injured by "any person who has received proceeds derived . . . from a pattern of criminal activity."[13] The "criminal activity" for which a defendant may be liable encompasses a broad range of criminal conduct including public assistance fraud, use of explosives, homicide, extortion, and computer-related crimes.[14] Chapter 722, F.S., also provides specific causes of action for a person injured by financial crimes such as theft, fraud, and elderly exploitation, and by certain drug crimes.[15]

Although punitive damages are generally not recoverable for claims raised pursuant to ch. 772, F.S., a plaintiff may recover treble damages and is entitled to minimum damages of $200, or $1,000 in the case of drug crimes, and attorney fees and court costs.[16] However, a defendant may recover attorney fees and court costs if the court finds that the plaintiff's claim was without substantial fact or legal support.[17]

The civil remedies in ch. 772, F.S., do not preclude any other remedy provided by law.[18] In cases where the defendant has been found guilty or pled guilty or nolo contendere to the same criminal act that forms the basis of the plaintiff's civil cause of action pursuant to ch. 772, F.S., the defendant is estopped from denying the essential elements of the criminal activity in the civil case.[19]

Effect of Proposed Changes

The bill creates s. 772.13, F.S., to provide a specific civil cause of action for a person injured by an act of terrorism or any crime that facilitated or furthered an act of terrorism. A prevailing plaintiff will be entitled to recover treble damages, minimum damages of $1,000, and attorney fees and court costs. The cause of action created by the bill is not available to a person whose injuries are the result of his or her participation in the same act that resulted in the act of terrorism or crime that facilitated or furthered the act of terrorism.

If the court finds that the plaintiff raised a claim that lacked support in fact or law, the defendant is entitled to reasonable attorney fees and court costs.

In awarding attorney fees and court costs pursuant to newly created s. 772.13, F.S., the court may not consider the ability of the opposing party to pay such fees and costs. Additionally, s. 772.13, F.S., does not limit any right to recover attorney fees or costs provided under other provisions of law.[20]

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[12] *See Boza*, 993 So. 2d at 562 ("As a general principle, a party has no legal duty to control the conduct of a third person to prevent that person from causing harm to another.").
[13] ss. 772.103(1) and 772. 104(1), F.S.
[14] s. 772.102(1), F.S. "Criminal activity" also includes an attempt to commit, conspiring to commit, or soliciting, coercing, or intimidating another person to commit any of the enumerated acts. *Id.* This cause of action is only available if the defendant engages in two or more similar acts of criminal activity within a five-year period. *Id.* at (4).
[15] ss. 772.11 and 772.12, F.S.
[16] ss. 772.104(1),(3), 772.11(1), and 772.12(2), F.S.
[17] s. 772.104(3), F.S.
[18] s. 772.18, F.S.
[19] s. 772.14, F.S.; *J.P. Transp., Inc., v. Fidelity and Cas. Co. of New York*, 750 So. 2d 752, 753 (Fla. 5th DCA 2000); *Peterson v. Therma Building, Inc.*, 958 So. 2d 977, 979 (Fla. 2d DCA 2007).
[20] See ch. 57, F.S.; Fla. R. Civ. P. Taxation of Costs (2015).

B. SECTION DIRECTORY:

Section 1 creates s. 772.13, F.S., related to civil remedy for terrorism or facilitating or furthering terrorism.

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 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 December 2, 2015, the Civil Justice Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute differs from the bill as filed by removing the name of the act and creating a new section in ch. 772, F.S., to provide a separate civil cause of action for a person injured by an act of terrorism or any crime that facilitated or furthered an act of terrorism.

On January 25, 2016, the Criminal Justice Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The committee substitute clarified that the bill does not limit the right for a party to recover attorney fees and costs under other provisions of law.

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

A bill to be entitled

An act relating to civil remedies for terrorism; creating s. 772.13, F.S.; creating a cause of action relating to terrorism; specifying a measure of damages; prohibiting claims by specified individuals; providing for attorney fees and court costs; providing construction; providing an effective date.

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

Section 1. Section 772.13, Florida Statutes, is created to read:

772.13 Civil remedy for terrorism or facilitating or furthering terrorism.—

(1) A person who is injured by an act of terrorism as defined in s. 775.30 or a violation of a law for which the penalty is increased pursuant to s. 775.31 for facilitating or furthering terrorism has a cause of action for threefold the actual damages sustained and, in any such action, is entitled to minimum damages in the amount of $1,000 and reasonable attorney fees and court costs in the trial and appellate courts.

(2) A person injured by reason of his or her participation in the same act or transaction that resulted in the act of terrorism or resulted in the defendant's penalty increase pursuant to s. 775.31 may not bring a claim under this section.

(3) The defendant is entitled to recover reasonable

attorney fees and court costs in the trial and appellate courts upon a finding that the claimant raised a claim that was without support in fact or law.

(4) In awarding attorney fees and court costs under this section, the court may not consider the ability of the opposing party to pay such fees and court costs.

(5) This section does not limit a right to recover attorney fees or costs under other provisions of law.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 43 Churches or Religious Organizations
SPONSOR(S): Plakon; Cortes, B. and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 110

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	9 Y, 4 N	Malcolm	Bond
2) Judiciary Committee		Malcolm	Havlicak RH

SUMMARY ANALYSIS

Conscience protection laws prevent individuals and entities from being required to perform services that violate their religious beliefs or moral convictions. These laws have historically applied to abortion, sterilization, and contraception. The bill creates conscience protections for clergy, churches, and religious organizations and their employees who object to solemnizing any marriage or providing services, facilities, or goods related to a marriage if doing so violates the organization or individual's sincerely held religious beliefs.

The bill also protects the state tax exempt status, and the right to apply for grants, contracts, and participation in government programs, of covered organizations that refuse to solemnize a marriage or provide services, facilities, or goods related to a marriage.

The bill does not 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:

Conscience Clauses

Conscience clauses allow individuals and entities to refuse to provide a service or undertake an activity that violates his or her religious or moral beliefs. A number of states and the federal government have enacted conscience clauses on a wide array of issues, including abortion,[1] the draft,[2] birth control,[3] education,[4] and adoption.[5] Florida currently provides conscience clause protections for physicians and hospitals that refuse to perform abortions or dispense contraceptives, family planning devices, services or information for medical or religious reasons.[6] In June of 2015, Texas enacted conscience clause protections for clergy and religious organizations and their employees regarding marriage services identical to this bill.[7]

Free Exercise Clause

The First Amendment to the United States Constitution provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[8] Prior to 1990, the United States Supreme Court, in determining the constitutionality of laws that infringe upon the free exercise clause of First Amendment to the United State Constitution, "used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest."[9] Using this test, the Court has held that an employee who was fired for refusing to work on her Sabbath could not be denied unemployment benefits,[10] and that Amish children could not be required to comply with a state law demanding that they remain in school until the age of 16 where their religion required them to focus on Amish values and beliefs during their adolescent years.[11]

However, in 1990, the Court in *Employment Div., Dept. of Human Resources of Ore. v. Smith* rejected the compelling interest test.[12] *Smith* concerned two members of the Native American Church who were fired for ingesting peyote for religious purposes. When they sought unemployment benefits, Oregon rejected their claims on the ground that consumption of peyote was a crime, but the Oregon Supreme Court, applying the compelling interest test, held that the denial of benefits violated the free exercise clause.[13] The United States Supreme Court reversed. It found that the "use of the [compelling interest] test whenever a person objected on religious grounds to the enforcement of a generally applicable law 'would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.'"[14] The Court abandoned the compelling interest test in favor of a bright-

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[1] 42 U.S.C. § 300a-7 (2000).
[2] 50 U.S.C. app. § 456(j) (2010).
[3] COLO. REV. STAT. 25-6-102(9) (2015).
[4] MO. CONST. art. I, § 5; N.H. REV. STAT. ANN. § 186:11 (2015).
[5] VA. CODE ANN. § 63.2-1709.3(A) (2012); N.D. CENT. CODE § 50-12-07.1.
[6] ss. 381.0051(5) and 390.0111(8), F.S.
[7] 2015 TEX. GEN. LAWS ch. 434.
[8] Article 1, section 3 of the Florida Constitution contains a nearly identical provision ("There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof . . . .").
[9] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760-61 (2014).
[10] *Sherbert v. Verner*, 374 U.S. 398, at 408–09 (1963).
[11] *Wisconsin v. Yoder*, 406 U.S. 205, at 210–11, 234–36 (1972).
[12] 494 U.S. 872, 875 (1990). The "compelling interest test" is also called the "balancing test." *See id.* at 875.
[13] *Id.* at 875.
[14] *Burwell*, 134 S. Ct. at 2760-61 (quoting *Smith*, 494 U.S. at 888).

line test in which, under the First Amendment, "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."[15]

Religious Freedom and Restoration Act

In response to *Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA) to provide religious liberty protections broader than those in *Smith*.[16] The RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[17] If the government substantially burdens a person's exercise of religion, that person is entitled to an exemption from the rule unless the government "demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest."[18] In its original form, the RFRA applied to both the federal government and the states; however, the Supreme Court in *City of Boerne v. Flores* ruled the RFRA's application to the states unconstitutional because "[t]he stringent test RFRA demands . . . far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*."[19]

In 1998, in response to *Flores*, the Florida legislature enacted a state version of the RFRA that is similar in substance to the federal RFRA.[20] The Florida RFRA (FRFRA), ch. 761, F.S., provides that the government[21] may not substantially burden a person's exercise of religion[22], even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.[23]

In interpreting the FRFRA, the Florida Supreme Court has held that "a substantial burden on the free exercise of religion is one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires."[24] According to the Court, laws that merely inconvenience the exercise of religion do not create a substantial burden.[25] Although the FRFRA prohibits a court from conducting a factual inquiry into the validity of a person's beliefs, the court will examine the relationship between the person's religious exercise and the level of government interference to determine whether the interference is a substantial burden or merely inconveniences the exercise of religion.[26]

Ministerial Exception

In 2012, the United States Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* unanimously rejected application of its free exercise clause analysis from *Smith*[27] instead

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[15] *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997).
[16] *See* 42 U.S.C. § 2000bb(a)(2).
[17] 42 U.S.C. § 2000bb-1(a).
[18] 42 U.S.C. § 2000bb–1(b).
[19] 512 U.S. 507, 533-34 (1997).
[20] A number of states have also enacted state versions of the RFRA. *See* National Conference of State Legislatures, *State Religious Freedom Restoration Acts*, http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx (last visited Sept. 9, 2015).
[21] "Government" includes any branch, department, agency, instrumentality, or official or other person acting under color of law of the state, a county, special district, municipality, or any other subdivision of the state. s. 761.02(1), F.S.
[22] "Exercise of religion" means an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief. s. 761.02(3), F.S.
[23] s. 761.03, F.S.
[24] *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 (Fla. 2004)
[25] *Id.* at 1035.
[26] *See id.* (finding that Boca Raton's grave marker regulations did not substantially burden the appellant's religious beliefs because they "merely inconvenience the plaintiffs' practices of marking graves and decorating them with religious symbols.") (quoting *Warner*, F. Supp. 2d 1272, 1287 (S.D. Fla. 1999)).
[27] 494 U.S. 872.

recognizing a "'ministerial exception,' grounded in the First Amendment, that precludes application of [employment discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers."[28] Observing that "members of a religious group put their faith in the hands of their ministers," the Court reasoned that applying employment discrimination in the context of religious institutions to require "a church to accept or retain an unwanted minister, or [punish] a church for failing to do so, intrudes upon more than a mere employment decision."[29] Such action, the Court concluded,

> interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[30]

Right to Marriage and *Obergefell*

The United State Supreme Court has consistently held that marriage is a fundamental right under the due process clause of the Fourteenth Amendment.[31] In June 2015, the Supreme Court in *Obergefell v. Hodges* extended the right to marriage to same-sex couples finding that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."[32]

Effect of Proposed Changes

The bill creates s. 761.061(1), F.S., to provide that a clergy member, minister, church, religious organization, or any organization supervised or controlled by or in connection with a church or religious organization may not be required to solemnize any marriage or provide services, facilities, or goods related to the marriage if such action would cause the clergy member, minister, church or organization to violate a sincerely held religious belief. These provisions extend to any individual employed by a church or religious organization while acting in the scope of his or her employment.

The bill also provides that a refusal to solemnize any marriage or provide services, facilities, or goods related to the marriage pursuant to s. 761.061(1), F.S., may not serve as the basis for any cause of action or any other action by this state or any political subdivision to penalize or withhold benefits or privileges, including tax exemptions, governmental contracts, grants, or licenses.

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

B. SECTION DIRECTORY:

Section 1 creates s. 761.061, F.S., related to the rights of churches and religious organizations or individuals.

Section 2 provides for an effective date of July 1, 2016.

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[28] 132 S. Ct. 694, 705 (2012). *See* 42 U.S.C. s. 2000e-1 (providing an exemption for religious organizations and institutions from religious discrimination from the Civil Rights Act of 1964 related to employment discrimination).
[29] *Hosanna-Tabor*, 132 S. Ct. at 706.
[30] *Id.*
[31] *Obergefell v. Hodges,*135 S. Ct. 2584, 2598; *see, e.g., M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); *Zablocki v. Redhail*, 434 U.S. 374, 383-87 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977); *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 639–40, (1974); *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).
[32] 135 S. Ct. 2584, 2604 (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:

   The bill appears to implicate separate constitutional provisions: the free exercise clause, and the due process and equal protection clauses.

   Free Exercise Clause
   The First Amendment to the United States Constitution provides, in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." Likewise, Article 1, Section 3 of the Florida Constitution provides that "There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof . . . ."

   As discussed above, with respect to internal decisions of religious institutions, the Supreme Court has recognized a "ministerial exemption" under the First Amendment to the United States Constitution. However, that exemption has only been applied by the Supreme Court in employment discrimination cases.

In addition to these constitutional protections, as discussed above, Florida's Religious Freedom Restoration Act (FRFRA) guarantees that "The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability . . . ."[33]

It may be argued that the language of this bill does not create a new right for churches, religious organizations, and their employees but rather codifies an existing right guaranteed by both the United States and Florida Constitutions and the FRFRA—the right to be free from the government compelling them, as clergy and religious organizations, to engage in conduct their religion forbids.

Due Process and Equal Protection

The due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution provide that "no state shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."[34] Similarly, Florida's equal protection clause states that "no person shall be deprived of any right because of race, religion, national origin, or physical disability,"[35] and the state's due process clause provides that "no person shall be deprived of life liberty or property without due process of law."[36]

A court's analysis of an equal protection or substantive due process claim depends on the nature of the right and the classification of people involved. A court will analyze government action that infringes a fundamental right or discriminates according to race, ethnicity, religion, and national origin with the strictest scrutiny.[37] To survive a constitutional challenge under strict scrutiny, the government must show that the regulation is the least restrictive means necessary to further a compelling state interest.[38] In addition to already recognized protected classes, federal and state courts also recognize quasi-suspect classes.[39] If a claim does not involve a fundamental right, a suspect class, or quasi-suspect class, then a court will uphold the law if it bears a reasonable relationship to the attainment of a legitimate government objective.[40]

Although the United State Supreme Court in *Obergefell* held that the due process and equal protection clauses of the Fourteenth Amendment provide the right to same-sex marriage, the Court did not indicate the standard of review it would apply in determining the constitutionality of state action that may infringe this right nor did it indicate whether an individual's sexual orientation is a protected class.

However, the United States Supreme Court has a history of disfavoring private-party discrimination and, instead, finding that state action may unconstitutionally facilitate private parties' discrimination against a protected class.[41] For example, in *Shelley v. Kraemer*, the Supreme Court found that judicial enforcement of racially restrictive covenants in private neighborhoods was sufficient to give

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[33] s. 761.03(1), F.S.
[34] U.S. CONST. amend. XIV, s. 1.
[35] FLA. CONST. art. I, s. 2.
[36] *Id.* at art. I. s. 9.
[37] *See, e.g., San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); *Bullock v. Carter*, 405 U.S. 134 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Skinner*, 316 U.S. 535 (1942).
[38] *See Roe*, 410 U.S. at 155.
[39] BLACK'S LAW DICTIONARY (10th ed. 2014) defines quasi-suspect classification as "[a] statutory classification based on gender or legitimacy, and therefore subject to intermediate scrutiny under equal protection analysis." BLACK'S defines intermediate scrutiny as "[a] standard lying between the extremes of rational-basis review and strict scrutiny. Under the standard, if a statute contains a quasi-suspect classification (such as gender or legitimacy), the classification must be substantially related to the achievement of an important governmental objective."
[40] *Vance v. Bradley*, 440 U.S. 93, 97 (1979).
[41] *Reitman v. Mulkey*, 387 U.S. 369, 375 (1967) (reasoning that "'(t)he instant case presents an undeniably analogous situation' wherein the State had taken affirmative action designed to make private discriminations legally possible."); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 717 (1961) (finding that discrimination by a lessee of an agency created by the State was sufficient to find that the there was "discriminatory state action in violation of the Equal Protection Clause of the Fourteenth Amendment.").

rise to state action that promoted discrimination and thus was in violation of the Fourteenth Amendment.[42]

In recent years, some courts have begun recognizing homosexuals as a quasi-suspect class and applying intermediate scrutiny to find laws with discriminatory effects against homosexuals unconstitutional.[43] Further, some courts, including a Florida state court, have found that laws prohibiting qualified homosexuals from participating in state-sanctioned activity, like adoption, that qualified heterosexuals can participate in freely are not justifiable even under the deferential rational basis review and are unconstitutional.[44] However, in 2004, the Eleventh Circuit Court of Appeals held that Florida's law prohibiting homosexuals from adopting did not burden a fundamental right and withstood rational basis scrutiny.[45] This case remains good law[46] and established federal precedent that, under Florida law, homosexuals are not a suspect or quasi-suspect class.

On the other hand, the Supreme Court in *Obergefell*

> emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.[47]

It is unclear how a court would analyze a challenge to the bill in light of the constitutional provisions and case law provided above. To date, there does not appear to be any precedent directly concerning a conflict between these constitutional rights and how such conflict would be resolved.

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 what entity would qualify as "an organization . . . in connection with a church or religious organization" or how such an organization is different than an "organization supervised or controlled by . . . a church or religious organization."

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

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[42] *Shelley v. Kraemer*, 334 U.S. 1, 21 (1948).
[43] *See Windsor v. U.S.*, 699 F. 3d 169, 181-82 (2d Cir. 2012), *aff'd on other grounds*, 133 S.Ct. 2675 (2013); *Golinski v. Office of Personnel Mgmt*, 824 F. Supp. 2d 968, 985-86 (N.D. Cal. 2012).
[44] *Florida Dept. of Children and Families v. Adoption of X.X.G.*, 45 So. 3d 79, 86 (Fla. 3d DCA 2010); *Bassett v. Snyder*, 2014 WL 5847607 (E.D. Mich. 2014). BLACK'S LAW DICTIONARY (10th ed. 2014) defines the "rational-basis test" as "[t]he criterion for judicial analysis of a statute that does not implicate a fundamental right or a suspect or quasi-suspect classification under the Due Process or Equal Protection Clause, whereby the court will uphold a law if it bears a reasonable relationship to the attainment of a legitimate governmental objective. Rational basis is the most deferential of the standards of review that courts use in due-process and equal-protection analysis."
[45] *Lofton v. Secretary of Dept. of Children and Family Services*, 358 F.3d 804, 818 (11th Cir. 2004).
[46] The Supreme Court denied certiorari on January 10, 2005. *See Lofton v. Secretary, Florida Dept. of Children and Families*, 543 U.S. 1081 (2005).
[47] *Obergefell*, 135 S.Ct. at 2607.

A bill to be entitled

An act relating to churches or religious organizations; creating s. 761.061, F.S.; providing that churches or religious organizations, related organizations, or certain individuals may not be required to solemnize any marriage or provide services, accommodations, facilities, goods, or privileges for related purposes if such action would violate a sincerely held religious belief; prohibiting certain legal actions, penalties, or governmental sanctions against such individuals or entities; providing an effective date.

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

Section 1. Section 761.061, Florida Statutes, is created to read:

761.061 Rights of certain churches or religious organizations or individuals.—

(1) A church or religious organization, an organization supervised or controlled by or in connection with a church or religious organization, an individual employed by a church or religious organization while acting in the scope of that employment, or a clergy member or minister may not be required to solemnize any marriage or provide services, accommodations, facilities, goods, or privileges for a purpose related to the

solemnization, formation, or celebration of any marriage if such an action would cause the church, organization, or individual to violate a sincerely held religious belief of the entity or individual.

(2) A refusal to solemnize any marriage or provide services, accommodations, facilities, goods, or privileges under subsection (1) may not serve as the basis for a civil or criminal cause of action or any other action by this state or a political subdivision of this state to penalize or withhold benefits or privileges, including tax exemptions or governmental contracts, grants, or licenses, from any entity or individual protected under subsection (1).

Section 2. 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		

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Rodríguez, J. offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Section 761.061, Florida Statutes, is created to read:

761.061 Rights of certain churches or religious organizations or individuals.—

(1) A church or religious organization within the meaning of s. 760.10(9), an individual employed by a church or religious organization within the meaning of s. 760.10(9) while acting in the scope of that employment, or a clergy member or minister may not be required to solemnize any marriage.

(2) A church or religious organization within the meaning of s. 760.10(9), an individual employed by a church or religious organization within the meaning of s. 760.10(9) while acting in

the scope of that employment, or a clergy member or minister may not be required to provide services, accommodations facilities, goods, or privileges outside the meaning of s. 760.02(11) for a purpose related to the solemnization, formation, or celebration of any marriage if such an action would violate a sincerely held religious belief.

(3) A refusal to solemnize any marriage or provide services, accommodations, facilities, goods, or privileges under subsection (1) or (2) may not serve as the basis for a civil or criminal cause of action or any other action by this state or a political subdivision of this state to penalize or withhold benefits or privileges, including tax exemptions or governmental contracts, grants, or licenses, from any entity or individual protected under subsection (1) or (2).

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

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 churches or religious organizations; creating s. 761.061, F.S.; providing that churches, religious organizations, or certain individuals may not be required to solemnize any marriage or provide certain services, accommodations, facilities, goods, or privileges for related purposes if such action would violate a sincerely held religious belief; prohibiting

certain legal actions, penalties, or governmental sanctions against such individuals or entities; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 75 Electronic Monitoring Devices
SPONSOR(S): Criminal Justice Subcommittee; Torres and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 954

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	11 Y, 0 N	McAuliffe	Lloyd
3) Judiciary Committee		Keegan	Havlicak

SUMMARY ANALYSIS

Electronic monitoring devices (EMDs) are used to keep track of the location of arrestees, criminal defendants, and offenders who have been placed on probation, community control, or conditional release (community supervision).

A criminal defendant who tampers with or circumvents an EMD that was ordered as a condition of pretrial release may be detained while awaiting trial for the duration of his or her criminal case. Similarly, an offender who has been sentenced to use an EMD as a condition of community supervision can have his or her community supervision revoked for tampering or interfering with the EMD. Pursuant to s. 948.11(7), F.S., it is a third degree felony for a person to intentionally alter, tamper with, damage, or destroy any electronic monitoring equipment pursuant to court or commission order, unless that person is the owner of the equipment or an agent of the owner, and is performing ordinary maintenance and repairs.

The bill repeals s. 948.11(7), F.S., and moves its provisions into newly-created s. 843.23, F.S. This section makes it a third degree felony for a person to intentionally and without authority, remove, destroy, alter, tamper with, damage, or circumvent the operation of specified EMDs, or to solicit another person to do so.

The bill amends s. 948.11(1), F.S., to clarify that the Department of Corrections (Department) may electronically monitor offenders sentenced to community control only when the court has imposed electronic monitoring as a condition of community control.

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 (an increase of ten or fewer beds).

The bill is effective October 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Electronic monitoring devices (EMDs) are used to keep track of the location of arrestees, criminal defendants, and people who have been placed on probation, community control,[1] or conditional release[2] (community supervision). The use of EMDs is a common practice throughout the nation, with over five million offenders being monitored in some form in the United States.[3] Likewise, Florida has used EMDs to monitor the location of released felons for years. As of July 31, 2015, there were 4,318 offenders in Florida using EMDs while being monitored on community supervision by the Department of Corrections (Department).[4]

Judges generally have discretion to require criminal defendants and offenders on community supervision to wear an EMD.[5] Additionally, judges are required to impose electronic monitoring in certain instances (e.g., judges are required to impose electronic monitoring on offenders placed on community supervision for specified sexual offenses).[6] The Commission on Offender Review (Commission) is given the authority to determine the conditions of release, including ordering an offender to use an EMD, when an offender is released on conditional release, control release, parole, or conditional medical release.[7]

Aside from the authority given to the courts and the Commission, the Department is authorized by s. 948.11(1), F.S., to order electronic monitoring of offenders serving a community control sentence. However, the Department does not exercise such authority because courts have held that an offender's community control may not be revoked for noncompliance with electronic monitoring when such monitoring was ordered by the Department instead of a judge.[8]

A criminal defendant who tampers with or circumvents an EMD that was ordered as a condition of pretrial release may be detained while awaiting trial for the duration of his or her criminal case.[9] Similarly, an offender who has been sentenced to use an EMD as a condition of community supervision can have his or her community supervision revoked for tampering or interfering with the EMD.[10]

In 2005, the Florida Legislature made it a crime to interfere with an EMD.[11] Section 948.11(7), F.S., makes it a third degree felony[12] for a person to intentionally alter, tamper with, damage or destroy any electronic monitoring equipment pursuant to court or commission order, unless that person is:

- The owner of the equipment or an agent of the owner; and

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[1] Community control is a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, administered by officers with restricted caseloads. s. 948.001(3), F.S.

[2] Conditional release requires mandatory postrelease supervision for specified inmates. The conditions of supervision for conditional releasees are established by the Florida Commission on Offender Review. Conditional releasees are supervised by DOC probation officers. s. 947.1405, F.S.

[3] United States Department of Justice, *Electronic Monitoring Reduces Recidivism*, NATIONAL INSTITUTE OF JUSTICE (Sept. 2011), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAAahUKEwjc9O6m-NbIAhXGSiYKHfQwDPU&url=https%3A%2F%2Fwww.ncjrs.gov%2Fpdffiles1%2Fnij%2F234460.pdf&usg=AFQjCNFEOxJWlVamlIbSaotGfkGOT4SlRA&sig2=qiNkzbUrRBTZ-wZ4CaZ9Sw&bvm=bv.105814755,d.eWE (last visited Oct. 22, 2015).

[4] Department of Corrections, Agency Analysis of 2016 House Bill 75, p. 3 (Sept. 24, 2015).

[5] *See, e.g.*, ss. 907.041, 947.1405, 948.101, and 948.30, F.S.

[6] s. 948.30(2)(e), F.S.

[7] s. 947.13, F.S.

[8] *Carson v. State*, 531 So. 2d 1069 (Fla. 4th DCA 1988); *Anthony v. State*, 854 So. 2d 744, 747 (Fla. 2d DCA 2003).

[9] s. 907.041(4)(c)7., F.S.

[10] s. 948.06, F.S.; *Lawson v. State*, 969 So. 2d 222 (Fla. 2007); *State v. Meeks*, 789 So. 2d 982 (Fla. 2001).

[11] Ch. 2005-28, Laws of Fla

[12] A third degree felony is punishable by up to five years in prison and a $5,000 fine. ss. 775.082 and 775.083, F.S.

- Performing ordinary maintenance and repairs.[13]

A close read of s. 948.11(7), F.S., reveals that it is not a crime under current law to *circumvent* an EMD unless the circumvention involves altering, tampering, damaging or destroying the EMD. It is also not a crime to *solicit another person* to remove, destroy, alter, tamper with, damage, or circumvent an EMD.

Effect of the Bill
The bill repeals s. 948.11(7), F.S., and moves its provisions into newly-created s. 843.23, F.S. This section makes it a third degree felony for a person to intentionally and without authority, remove, destroy, alter, tamper with, damage, or circumvent the operation of an EMD that is being used or worn pursuant to a court order or an order of the Commission on Offender Review.

The bill also makes it a third degree felony for a person to request or solicit another person to remove, destroy, alter, tamper with, damage, or circumvent the operation of an EMD that is being used or worn as described above.

The bill defines ""electronic monitoring device" to include any device that is used to track the location of a person.

The bill amends s. 948.11(1), F.S., to clarify that the Department of Corrections may electronically monitor offenders sentenced to community control when the court has imposed electronic monitoring as a condition of community control.

B. SECTION DIRECTORY:

Section 1. Creates s. 843.23, F.S., relating to tampering with an electronic monitoring device.

Section 2. Amends s. 948.11, F.S., relating to electronic monitoring devices.

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 government 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 (an increase of ten or fewer beds). In Fiscal Year 2014-2015, 13 offenders were sentenced for this offense and eight received a prison sentence (mean sentence length was 25.5 months).

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 does not appear to have an impact on local government expenditures.

[13] s. 948.11(7), F.S.

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 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 an amendment and reported the bill favorable as a committee substitute. The committee substitute clarifies that *any* person who intentionally removes, destroys, alters, tampers with, damages, or circumvents the operation of an electronic monitoring device can be prosecuted under the bill.

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

A bill to be entitled

An act relating to electronic monitoring devices; creating s. 843.23, F.S.; defining the term "electronic monitoring device"; prohibiting a person from removing, destroying, altering, tampering with, damaging, or circumventing the operation of an electronic monitoring device being worn or used pursuant to a court order or an order by the Commission on Offender Review; prohibiting the request or solicitation of a person to perform such an act; providing criminal penalties; amending s. 948.11, F.S.; specifying that the Department of Corrections may electronically monitor an offender sentenced to community control when the court has imposed electronic monitoring as a condition of community control; deleting a provision imposing criminal penalties on persons who intentionally alter, tamper with, damage, or destroy electronic monitoring equipment; providing an effective date.

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

Section 1. Section 843.23, Florida Statutes, is created to read:

843.23 Tampering with an electronic monitoring device.—

(1) As used in this section, the term "electronic

monitoring device" includes any device that is used to track the location of a person.

(2) It is unlawful for a person to intentionally and without authority:

(a) Remove, destroy, alter, tamper with, damage, or circumvent the operation of an electronic monitoring device that must be worn or used by that person or another person pursuant to a court order or pursuant to an order by the Commission on Offender Review; or

(b) Request or solicit an individual to remove, destroy, alter, tamper with, damage, or circumvent the operation of an electronic monitoring device required to be worn or used pursuant to a court order or pursuant to an order by the Commission on Offender Review.

(3) A person who violates this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 2. Subsections (1) and (7) of section 948.11, Florida Statutes, are amended to read:

948.11 Electronic monitoring devices.—

(1) The Department of Corrections may~~, at its discretion,~~ electronically monitor an offender sentenced to community control when the court has imposed electronic monitoring as a condition of community control.

~~(7) A person who intentionally alters, tampers with, damages, or destroys any electronic monitoring equipment~~

~~pursuant to court or commission order, unless such person is the owner of the equipment, or an agent of the owner, performing ordinary maintenance and repairs, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.~~

Section 3. 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	_____

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Torres offered the following:

Amendment (with title amendment)

Remove lines 34-40 and insert:

to a court order or pursuant to an order by the Florida Commission on Offender Review; or

(b) Request, authorize, or solicit a person to remove, destroy, alter, tamper with, damage, or circumvent the operation of an electronic monitoring device required to be worn or used pursuant to a court order or pursuant to an order by the Florida Commission on Offender Review.

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

Remove lines 8-10 and insert:

pursuant to any court order or an order by the Florida Commission on Offender Review; prohibiting the request, authorization, or solicitation of a person to perform such an act;

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 81 Infectious Disease Elimination Pilot Program
SPONSOR(S): Health Quality Subcommittee; Edward and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/CS/SB 242

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Quality Subcommittee	11 Y, 1 N, As CS	Siples	O'Callaghan
2) Judiciary Committee		Aziz PA	Havlicak RN
3) Health & Human Services Committee			

SUMMARY ANALYSIS

The bill amends s. 381.0038, F.S., to create the Miami-Dade Infectious Disease Elimination Act (IDEA). The IDEA authorizes the University of Miami and its affiliates to establish a needle and syringe exchange pilot program (pilot program) in Miami-Dade County. The pilot program is to offer free, clean, and unused needles and hypodermic syringes as a means to prevent the transmission of HIV/AIDS and other blood-borne diseases among intravenous drug users, their sexual partners, and offspring. The University of Miami must operate the pilot program at fixed locations on its property or the property of its affiliates.

The pilot program must:

- Provide maximum security of the exchange site and equipment;
- Account for the number, disposal, and storage of needles and syringes;
- Adopt any measure to control the use and dispersal of sterile needles and syringes;
- Operate a one sterile needle and syringe unit to one used unit exchange ratio; and
- Make available educational materials; HIV and viral hepatitis counseling and testing; referral services to provide education regarding HIV, AIDS, and viral hepatitis transmission; and drug-abuse prevention and treatment counseling and referral services.

The bill provides that the possession, distribution, or exchange of needles or syringes as part of the pilot program does not violate the Florida Comprehensive Drug Abuse Prevention and Control Act under ch. 893, F.S., or any other law. However, pilot program staff and participants are not immune from prosecution for the possession or redistribution of needles or syringes in any form if acting outside of the pilot program.

The bill requires the collection of data for annual and final reporting purposes, but prohibits the collection of any personal identifying information from a participant. The pilot program expires on July 1, 2021. Six months prior to expiration, the Office of Program Policy Analysis and Government Accountability is required to submit a report to the Legislature that includes data on the pilot program and a recommendation on whether the pilot program should continue.

The bill prohibits the use of state, county, or municipal funds to operate the pilot program and requires the use of grants and donations from private sources to fund the program. The bill includes a severability clause.

The bill may have a positive fiscal impact on state government or local governments. *See* FISCAL COMMENTS.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Needle and syringe exchange programs (NSEPs) provide sterile needles and syringes in exchange for used needles and syringes to reduce the transmission of human immunodeficiency virus (HIV) and other blood-borne infections associated with reuse of contaminated needles and syringes by injection-drug users (IDUs).

Federal Ban on Funding

In 2009, Congress passed the FY 2010 Consolidated Appropriations Act, which contained language that removed the ban on federal funding of NSEPs. In July 2010, the U.S. Department of Health and Human Services issued implementation guidelines for programs interested in using federal dollars for NSEPs.[1]

However, on December 23, 2011, President Obama signed the FY 2012 omnibus spending bill that, among other things, reinstated the ban on the use of federal funds for NSEPs; this step reversed the 111th Congress' 2009 decision to allow federal funds to be used for NSEPs.[2]

Safe Sharps Disposal

Improperly discarded sharps pose a serious risk for injury and infection to sanitation workers and the community. "Sharps" is a medical term for devices with sharp points or edges that can puncture or cut skin.[3]

Examples of sharps include:[4]

- Needles – hollow needles used to inject drugs (medication) under the skin.
- Syringes – devices used to inject medication into or withdraw fluid from the body.
- Lancets, also called "fingerstick" devices – instruments with a short, two-edged blade used to get drops of blood for testing. Lancets are commonly used in the treatment of diabetes.
- Auto Injectors, including epinephrine and insulin pens – syringes pre-filled with fluid medication designed to be self-injected into the body.
- Infusion sets – tubing systems with a needle used to deliver drugs to the body.
- Connection needles/sets – needles that connect to a tube used to transfer fluids in and out of the body. This is generally used for patients on home hemodialysis.

On November 8, 2011, the U.S. Food and Drug Administration (FDA) launched a new website for patients and caregivers on the safe disposal of sharps that are used at home, at work, and while traveling.[5]

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[1] Matt Fisher, *A History of the Ban on Federal Funding for Syringe Exchange Programs*, The Global Health Policy Center, (Feb. 6, 2012), available at http://www.smartglobalhealth.org/blog/entry/a-history-of-the-ban-on-federal-funding-for-syringe-exchange-programs/ (last visited October 10, 2015).
[2] *Id.*
[3] Food and Drug Administration, *Needles and Other Sharps (Safe Disposal Outside of Health Care Settings)*, available at http://www.fda.gov/MedicalDevices/ProductsandMedicalProcedures/HomeHealthandConsumer/ConsumerProducts/Sharps/ucm200256 47.htm (last visited October 10, 2015).
[4] *Id.*
[5] Food and Drug Administration, *FDA launches website on safe disposal of used needles and other "sharps"*, FDA News Release, Nov. 8, 2011, available at http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm278851.htm (last visited on October 10, 2015).

According to the FDA, used needles and other sharps are dangerous to people and animals if not disposed of safely because they can injure people and spread infections that cause serious health conditions. The most common infections from such injuries are Hepatitis B (HBV), Hepatitis C (HCV), and Human Immunodeficiency Virus (HIV). [6]

Approximately 2.6% of the U.S. population[7] has injected illicit drugs.[8] The danger of used needles and other sharps combined with the number of injections of illicit drugs has prompted communities to try and manage the disposal of sharps within the illicit drug population. In San Francisco in 2000, approximately 2 million syringes were recovered at NSEPs, and an estimated 1.5 million syringes were collected through a pharmacy-based program that provided free-of-charge sharps containers and accepted filled containers for disposal. As a result, an estimated 3.5 million syringes were recovered from community syringe users and safely disposed of as infectious waste.[9] Other NSEPs offer methods for safe disposal of syringes after hours. For example, in Santa Cruz, California, the Santa Cruz Needle Exchange Program, in collaboration with the Santa Cruz Parks and Recreation Department, installed 12 steel sharps containers in public restrooms throughout the county.[10]

National Data & Survey Results

In 2010, 8 percent (3,900) of the estimated 47,500 new HIV infections in the U.S. were attributed to injection drug use.[11] According to the Centers for Disease Control and Prevention (CDC), NSEPs can help prevent blood-borne pathogen transmission by increasing access to sterile syringes among IDUs and enabling safe disposal of used needles and syringes.[12] Often, programs also provide other public health services, such as HIV testing, risk-reduction education, and referrals for substance-abuse treatment.[13]

Based on findings of a survey conducted by staff from the Beth Israel Medical Center in New York City and the North American Syringe Exchange Network, there were 184 NSEPs operating in 36 states, the District of Columbia, and Puerto Rico as of March 2009,[14] compared to 148 NSEPs in 2002 and 68 NSEPs in 1995.[15] The survey found that the proportion of NSEP budgets coming from public sources increased from 62% during 1994-1995 to 79% in 2008.[16]

In 2011, the Beth Israel Medical Center conducted another survey of NSEPs in the U.S.[17] The results revealed that the most frequent drug being used by participants was heroin, followed by cocaine, and

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[6] *Supra* fn. 3.
[7] This population represents persons aged 13 years or older in 2011.
[8] Public Library of Science; Lansky, A., Finlayson, T., Johnson, C., et. al.; *Estimating the Number of Persons Who Inject Drugs in the United States by Meta-Analysis to Calculate National Rates of HIV and Hepatitis C Virus Infections*; May 19, 2014; •DOI: 10.1371/journal.pone.0097596; available at http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0097596 (last visited on October 15, 2015).
[9] *Id.* (citing Brad Drda et al., San Francisco Safe Needle Disposal Program, 1991—2001, 42 J. Am Pharm Assoc. S115—6 (2002), available at http://japha.org/article.aspx?articleid=1035735) (last visited October 11, 2015).
[10] Centers for Disease Control and Prevention, *Update: Syringe Exchange Programs --- United States, 2002*, *supra* note 7.
[11] Centers for Disease Control and Prevention, *HIV and Injection Drug Use*, April 2015, available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAAahUKEwj8nbvLnbvIAhUEFR4KHUQuAPU&url=http%3A%2F%2Fwww.cdc.gov%2Fhiv%2Fpdf%2Fg-l%2Fcdc-hiv-idu-fact-sheet.pdf&usg=AFQjCNHXNVbqd729aWoMiRXcVhqtQsAJ9Q&sig2=s88dqAr_jEqG8X3gJlNBVg&bvm=bv.104819420,d.dmo (last visited on October 11, 2015).
[12] Centers for Disease Control and Prevention, *Syringe Exchange Programs---United States, 2008*, November 19, 2010, 59(45); 1488-1491, available at http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5945a4.htm/Syringe-Exchange-Programs-United-States-2008 (last visited on October 15, 2015).
[13] *Id. See* Table 3.
[14] Supra fn. 12.
[15] Centers for Disease Control and Prevention, Update: Syringe Exchange Programs---United States, 2002, July 15, 2005, 54(27); 673-676, available at http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5427a1.htm (last visited on October 15, 2015).
[16] *Supra* fn. 12.
[17] North American Syringe Exchange Network, *2011 Beth Israel Survey, Results Summary*, (PowerPoint slide) available at http://www.nasen.org/news/2012/nov/29/2011-beth-israel-survey-results-summary/ (last visited October 11, 2015).

that usually the problems NSEPs encountered had to do with the lack of resources and staff shortages.[18]

A separate 2014 report, examining the results of a needle exchange program in the District of Columbia shows an 81 percent decline between 2008 and 2012 in the number of HIV cases in which injection drug use was reported as transmission mode.[19]

A 2012 study compared improper public syringe disposal between Miami, a city without NESPs, and San Francisco, a city with NSEPs.[20] Using visual inspection walk-throughs of high drug-use public areas, the study found that Miami was eight times more likely to have syringes improperly disposed of in public areas.[21]

Heroin Use in Florida

An estimated 1.2 million people in the U.S. are living with HIV/AIDS,[22] and it has been estimated that one-third of those cases are linked directly or indirectly to injection drug use, including the injection of heroin.[23] In 2014, the National Institute on Drug Abuse reported an epidemic of heroin use in South Florida and particularly in Miami-Dade County.[24] The number of heroin-related deaths in Miami-Dade County jumped to 60 in 2014 from 40 in 2013 and 32 in 2012. Statewide, Florida has experienced a steady upswing in heroin deaths, which rose to 408 in 2014 from 199 in 2013 and 108 in 2012.[25]

Florida Comprehensive Drug Abuse Prevention and Control Act

Section 893.147, F.S., regulates the use or possession of drug paraphernalia. Currently, it is unlawful for any person to use, or to possess with intent to use, drug paraphernalia:

- To plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance in violation of ch. 893, F.S.; or
- To inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of ch. 893, F.S.

Any person who violates the above provision is guilty of a misdemeanor of the first degree.[26]

Moreover, it is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used:[27]

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[18] *Id.*
[19] The District of Columbia Department of Health, *2013 Annual Epidemiology and Surveillance Report, Section 2: Newly Diagnosed HIV Cases (2014)*, available at http://doh.dc.gov/page/2013-annual-epidemiology-and-surveillance-report (last visited October 11, 2015).
[20] Hansel E. Tookes, et al., *A Comparison of Syringe Disposal Practices Among Injection Drug Users in a City with Versus a City Without Needle and Syringe Programs*, 123 Drug & Alcohol Dependence 255 (2012), available at http://www.ncbi.nlm.nih.gov/pubmed/22209091 (last visited October 11, 2015).
[21] *Id.* at 255 (finding "44 syringes/1000 census blocks in San Francisco, and 371 syringes/1000 census blocks in Miami.").
[22] Centers for Disease Control and Prevention, *HIV in the United States: At a Glance*, accessible at: http://www.cdc.gov/hiv/statistics/basics/ataglance.html (last visited October 11, 2015).
[23] Health Resources and Services Administration, *Innovative Programs for HIV Positive Substance Users*, available at http://www.drugabuse.gov/publications/topics-in-brief/linked-epidemics-drug-abuse-hivaids (last visited October 11, 2015).
[24] James N. Hall, *Drug Abuse Patterns and Trends in Miami-Dade and Broward Counties, Florida—Update: January 2014*, available at http://www.drugabuse.gov/about-nida/organization/workgroups-interest-groups-consortia/community-epidemiology-work-group-cewg/meeting-reports/highlights-summaries-january-2014/miami (last visited October 11, 2015).
[25] Florida Department of Law Enforcement, Medical Examiners Commission, *Drugs Identified in Deceased Persons by Florida Medical Examiners, 2014 Annual Report*, (September 2015), available at http://www.fdle.state.fl.us/Content/getdoc/0f1f79c0-d251-4904-97c0-2c6fd4cb3c9f/MEC-Publications-and-Forms.aspx (last visited October 11, 2015).
[26] A first degree misdemeanor is punishable by a term of imprisonment not to exceed 1 year and a $1,000 fine. Sections 775.082 and 775.083, F.S.
[27] Section 893.147(2), F.S.

- To plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance in violation of ch. 893, F.S.; or
- To inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of ch. 893, F.S.

Any person who violates the above provision is guilty of a felony of the third degree.[28]

Federal Drug Paraphernalia Statute

Under federal law, it is unlawful for any person to sell or offer for sale drug paraphernalia, use the mails or any other facility of interstate commerce to transport drug paraphernalia or to import or export drug paraphernalia.[29] The penalty for such crime is imprisonment for not more than three years and a fine.[30] Persons authorized by state law to possess or distribute drug paraphernalia are exempt from the federal drug paraphernalia statute.[31]

EFFECT OF PROPOSED CHANGES

The bill amends s. 381.0038, F.S., to allow the University of Miami and its affiliates to establish a 5-year needle and syringe exchange pilot program in Miami-Dade County. The pilot program is to offer free, clean, and unused needles and hypodermic syringes as a means to prevent the transmission of HIV/AIDS and other blood-borne diseases among intravenous drug users and their sexual partners and offspring. The University of Miami must operate the pilot program at fixed locations on its property or the property of its affiliates.

The exchange program must:

- Provide maximum security of the exchange site and equipment;
- Account for the number, disposal, and storage of needles and syringes;
- Adopt any measure to control the use and dispersal of sterile needles and syringes;
- Operate a 1 sterile to 1 used needle and syringe exchange ratio; and
- Make available educational materials; HIV and viral hepatitis counseling and testing; referral services to provide education regarding HIV, AIDS, and viral hepatitis transmission; and drug-abuse prevention and treatment counseling and referral services.

The bill provides that the possession, distribution, or exchange of needles or syringes as part of the pilot program does not violate the Florida Comprehensive Drug Abuse Prevention and Control Act under ch. 893, F.S., or any other law. However, pilot program staff and participants are not immune from prosecution for the possession or redistribution of needles or syringes in any form if acting outside of the pilot program.

The bill requires the collection of data for annual and final reporting purposes, but prohibits the collection of any personal identifying information from a participant. The data collected must include:

- The number of participants served;
- The number of needles and syringes exchanged and distributed;
- The demographic profiles of the participants served;
- The number of participants entering drug counseling and treatment;
- The number of participants receiving HIV, AIDS, or viral hepatitis testing;

[28] A third degree felony is punishable by up to five years imprisonment and a $5,000 fine. Sections 775.082 and 775.083, F.S.
[29] 21 U.S.C. § 863(a).
[30] 21 U.S.C. § 863(b).
[31] 21 U.S.C. § 863(f)(1).

- The rates of HIV, AIDS, viral hepatitis, or other blood borne disease before the pilot program began and every subsequent year thereafter; and
- Other data deemed necessary for the pilot program.

The pilot program expires on July 1, 2021. Six months prior to expiration, the Office of Program Policy Analysis and Government Accountability is required to submit a report to the President of the Senate and the Speaker of the House that includes the data listed above on the pilot program and a recommendation on whether the pilot program should continue.

The bill prohibits the use of state, county, or municipal funds to operate the pilot program and requires the use of grants and donations from private sources to fund the program.

The bill includes a severability clause[32] and provides an effective date of July 1, 2016.

B. SECTION DIRECTORY:

Section 1. Creates an unnumbered section to name the act the "Miami-Dade Infectious Disease Elimination Act (IDEA)."
Section 2. Amends s. 381.0038, F.S., relating to education.
Section 3. Creates an unnumbered section to provide a severability clause.
Section 4. 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:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The pilot program required by the bill may significantly reduce state and local government expenditures for the treatment of blood borne diseases associated with intravenous drug use for individuals in Miami-

[32] A "severability clause" is a provision of a contract or statute that keeps the remaining provisions in force if any portion of that contract or statute is judicially declared void or unconstitutional. Courts may hold a law constitutional in one part and unconstitutional in another. Under such circumstances, a court may sever the valid portion of the law from the remainder and continue to enforce the valid portion. *See Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Florida Hosp. Waterman, Inc. v. Buster*, 984 So.2d 478 (Fla. 2008); *Ray v. Mortham*, 742 So.2d 1276 (Fla. 1999); and *Wright v. State*, 351 So.2d 708 (Fla. 1977).

Dade County.[33] The reduction in expenditures for such treatments depends on the extent to which the needle and syringe exchange pilot program reduces transmission of blood-borne diseases among intravenous drug users, their sexual partners, offspring, and others who might be at risk of transmission.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

   None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

   None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On October 20, 2015, the Health Quality Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. The first amendment restricted the operation of the pilot program to fixed locations on the property of the University of Miami or its affiliates. The second amendment prohibited the pilot program from using not only state funds, but also county or municipal funds. The analysis is drafted to the committee substitute as passed by the Health Quality Subcommittee.

[33] The State of Florida and county governments incur costs for HIV/AIDS treatment through a variety of programs, including Medicaid, the AIDS Drug Assistance Program, and the AIDS Insurance Continuation Program. The lifetime treatment cost of an HIV infection is estimated at $379,668 (in 2010 dollars). Centers for Disease Control and Prevention, *HIV Cost-effectiveness*, (Apr. 16, 2013) available at http://www.cdc.gov/hiv/prevention/ongoing/costeffectiveness/ (last visited October 11, 2015). Miami-Dade County has 3,274 reported cases of individuals living with HIV/AIDS that have an IDU-associated risk. Florida Department of Health, *HIV Infection Among Those with an Injection Drug Use-Associated Risk, Florida, 2012* (PowerPoint slide) (Sept. 17, 2013), available at http://www.floridahealth.gov/diseases-and-conditions/aids/surveillance/_documents/HIV-AIDS-slide%20sets/IDU_2012.pdf (last visited October 11, 2015) (noting that HIV IDU infection risk includes IDU cases, men who have sex with men (MSM)/IDU, heterosexual sex with IDU, children of IDU mom). If 10 percent of those individuals with an IDU-associated risk had avoided infection, this would represent a savings in treatment costs of approximately $124 million.

A bill to be entitled

An act relating to an infectious disease elimination pilot program; creating the "Miami-Dade Infectious Disease Elimination Act (IDEA)"; amending s. 381.0038, F.S.; authorizing the University of Miami and its affiliates to establish a sterile needle and syringe exchange pilot program in Miami-Dade County; specifying locations for operation of the pilot program; establishing pilot program criteria; providing that the distribution of needles and syringes under the pilot program is not a violation of the Florida Comprehensive Drug Abuse Prevention and Control Act or any other law; providing conditions under which a pilot program staff member or participant may be prosecuted; prohibiting the collection of identifying information from program participants; providing funding for the pilot program through private grants and donations; providing for expiration of the pilot program; requiring the Office of Program Policy Analysis and Government Accountability to submit a report and recommendations regarding the pilot program to the Legislature; providing for severability; providing an effective date.

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

Section 1. This act may be cited as the "Miami-Dade Infectious Disease Elimination Act (IDEA)."

Section 2. Section 381.0038, Florida Statutes, is amended to read:

381.0038 Education; sterile needle and syringe exchange pilot program.—The Department of Health shall establish a program to educate the public about the threat of acquired immune deficiency syndrome.

(1) The acquired immune deficiency syndrome education program shall:

(a) Be designed to reach all segments of Florida's population;

(b) Contain special components designed to reach non-English-speaking and other minority groups within the state;

(c) Impart knowledge to the public about methods of transmission of acquired immune deficiency syndrome and methods of prevention;

(d) Educate the public about transmission risks in social, employment, and educational situations;

(e) Educate health care workers and health facility employees about methods of transmission and prevention in their unique workplace environments;

(f) Contain special components designed to reach persons who may frequently engage in behaviors placing them at a high risk of contracting ~~for acquiring~~ acquired immune deficiency

syndrome;

(g) Provide information and consultation to state agencies to educate all state employees; ~~and~~

(h) Provide information and consultation to state and local agencies to educate law enforcement and correctional personnel and inmates;~~.~~

(i) Provide information and consultation to local governments to educate local government employees;~~.~~

(j) Make information available to private employers and encourage them to distribute this information to their employees;~~.~~

(k) Contain special components which emphasize appropriate behavior and attitude change; and~~.~~

(l) Contain components that include information about domestic violence and the risk factors associated with domestic violence and AIDS.

(2) The education program designed by the Department of Health shall use ~~utilize~~ all forms of the media and shall place emphasis on the design of educational materials that can be used by businesses, schools, and health care providers in the regular course of their business.

(3) The department may contract with other persons in the design, development, and distribution of the components of the education program.

(4) The University of Miami and its affiliates may establish a single sterile needle and syringe exchange pilot

program in Miami-Dade County. The pilot program shall operate at fixed locations on the property of the University of Miami or its affiliates. The pilot program shall offer the free exchange of clean, unused needles and hypodermic syringes for used needles and hypodermic syringes as a means to prevent the transmission of HIV, AIDS, viral hepatitis, or other blood-borne diseases among intravenous drug users and their sexual partners and offspring.

(a) The pilot program shall:

1. Provide for maximum security of exchange sites and equipment, including an accounting of the number of needles and syringes in use, the number of needles and syringes in storage, safe disposal of returned needles, and any other measure that may be required to control the use and dispersal of sterile needles and syringes.

2. Operate a one-to-one exchange, whereby the participant shall receive one sterile needle and syringe unit in exchange for each used one.

3. Make available educational materials; HIV and viral hepatitis counseling and testing; referral services to provide education regarding HIV, AIDS, and viral hepatitis transmission; and drug-abuse prevention and treatment counseling and referral services.

(b) The possession, distribution, or exchange of needles or syringes as part of the pilot program established under this

subsection is not a violation of any part of chapter 893 or any other law.

(c) A pilot program staff member, volunteer, or participant is not immune from criminal prosecution for:

1. The possession of needles or syringes that are not a part of the pilot program; or

2. Redistribution of needles or syringes in any form, if acting outside the pilot program.

(d) The pilot program shall collect data for annual and final reporting purposes, which shall include information on the number of participants served, the number of needles and syringes exchanged and distributed, the demographic profiles of the participants served, the number of participants entering drug counseling and treatment, the number of participants receiving HIV, AIDS, or viral hepatitis testing, and other data deemed necessary for the pilot program. However, personal identifying information may not be collected from a participant for any purpose.

(e) State, county, or municipal funds may not be used to operate the pilot program. The pilot program shall be funded through grants and donations from private resources and funds.

(f) The pilot program expires July 1, 2021. Six months before the pilot program expires, the Office of Program Policy Analysis and Government Accountability shall submit a report to the President of the Senate and the Speaker of the House of Representatives that includes the data collection requirements

established in this subsection; the rates of HIV, AIDS, viral hepatitis, or other blood-borne diseases before the pilot program began and every subsequent year thereafter; and a recommendation on whether to continue the pilot program.

Section 3. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

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	_____

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Edwards offered the following:

Amendment (with title amendment)

Remove lines 97-133 and insert:

3. Be limited to individuals who participate in substance abuse intervention or clinical services provided by a licensed service provider as defined in s. 397.311(21).

4. Make available educational materials and referrals to education regarding the transmission of HIV, viral hepatitis, and other blood-borne diseases; provide referrals to drug abuse prevention and treatment; and provide or refer for HIV and viral hepatitis screening.

(b) The possession, distribution, or exchange of needles or syringes as part of the pilot program established under this subsection is not a violation of any part of chapter 893 or any other law.

(c) A pilot program staff member, volunteer, or participant is not immune from criminal prosecution for:

1. The possession of needles or syringes that are not a part of the pilot program; or

2. Redistribution of needles or syringes in any form, if acting outside the pilot program.

(d) The pilot program shall collect data for quarterly, annual and final reporting purposes. The reports shall include information on the number of participants served, the number of needles and syringes exchanged and distributed, the demographic profiles of the participants served, the number of participants entering drug counseling and treatment, the number of participants receiving HIV, AIDS, or viral hepatitis testing, and other data deemed necessary for the pilot program. However, personal identifying information may not be collected from a participant for any purpose. Quarterly reports shall be submitted to the Department of Health in Miami-Dade County by October 15, January 15, April 15 and July 15 of each year. The first quarterly report shall be submitted on October 15, 2016. An annual report shall be submitted to the Department of Health by August 1 every year until the program expires. A final report is due on August 1, 2021, to the Department of Health and shall describe the performance and outcomes of the pilot program and include a summary of the information in the annual reports for all pilot program years.

Amendment No. 1.

(e) State, county, or municipal funds may not be used to operate the pilot program. The pilot program shall be funded through grants and donations from private resources and funds.

(f) The pilot program expires July 1, 2021.

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

Remove lines 15-24 and insert:

participant may be prosecuted; requiring the pilot program to collect data and issue reports; prohibiting the collection of identifying information from program participants; providing funding for the pilot program through private grants and donations; providing for the expiration of the pilot program; providing severability; providing an effective date

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 93 Law Enforcement Officer Body Cameras
SPONSOR(S): Jones, S.; Williams, A. and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 418

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N	Keegan	White
2) Appropriations Committee	18 Y, 0 N	Lloyd	Leznoff
3) Judiciary Committee		Keegan	Havlicak

SUMMARY ANALYSIS

A body camera is a portable electronic device, typically worn on the outside of a vest or a portion of clothing, which records audio and video data. Approximately one-third of local police departments throughout the nation have opted to use body cameras. Preliminary studies on the effects of using body cameras on law enforcement officers indicated a reduction of citizen complaints against officers who wore the cameras while on duty.

Similar to the national trend, only a small number of Florida law enforcement agencies have elected to use body cameras. Currently, Florida law does not require such agencies to have policies in place that govern the use of such technology.

The bill requires law enforcement agencies that permit law enforcement officers to wear body cameras to develop policies and procedures governing the proper use, maintenance, and storage of body cameras and recorded data. The policies and procedures must include:

- General guidelines for the proper use, maintenance, and storage of body cameras;
- Any limitations on which law enforcement officers are permitted to wear body cameras;
- Any limitations on law-enforcement-related encounters in which law enforcement officers are permitted to wear body cameras; and
- General guidelines for the proper storage, retention, and release of audio and video data recorded by body cameras.

The bill requires law enforcement agencies to provide policies and procedures training to all personnel who use, maintain, store, or release body camera recording data, and to retain body camera recording data in compliance with s. 119.021, F.S. Agencies must perform periodic reviews of agency practices to ensure compliance with agency policies and procedures. The bill also exempts body camera recordings from the requirements of ch. 934, F.S. This allows law enforcement officers to wear body cameras during their patrol duties without having to inform each individual they make contact with that they are being recorded.

According to 2014 Criminal Justice Agency Profile Survey, no state law enforcement agency reported using body cameras during the 2014 calendar year. If an agency chooses to use body cameras, the bill may have a minimal impact on state expenditures because the bill creates a new requirement for state law enforcement agencies that use body cameras to establish policies and procedures governing body cameras, and to train personnel accordingly.

The bill may have a minimal impact on local expenditures because the bill creates a new requirement for local law enforcement agencies that use body cameras to establish policies and procedures governing body cameras, and to train personnel accordingly.

The bill is effective upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Law Enforcement Body Cameras

A body camera is a portable electronic device, typically worn on the outside of a vest or a portion of clothing, which records audio and video data. The Bureau of Justice Statistics published the results of a 2013 survey of local police departments in the United States[1] conducted by the Law Enforcement Management and Administrative Statistics (LEMAS)[2] Survey. As of 2013, an estimated 32 percent of local police departments[3] throughout the nation equip at least some of their patrol officers with body cameras.[4]

A limited number of studies have been conducted in the United States to determine the positive and negative effects of using body cameras on law enforcement officers.[5] Most empirical studies in the United States have focused on the effects of using body cameras in the Rialto Police Department (California),[6] the Mesa Police Department (Arizona),[7] the Phoenix Police Department (Arizona),[8] and the Orlando Police Department (Florida).[9] While the relative lack of peer-reviewed research makes it difficult to accurately identify the benefits and drawbacks of requiring the use of body cameras, the findings of all four studies indicated a significant reduction of citizen complaints against officers who wore the cameras while on duty.[10]

More extensive studies have been conducted on the effects of using in-car cameras, commonly referred to as "dash cams," in law enforcement patrol vehicles. The International Association of Chiefs of Police (hereinafter "IACP") published findings in 2003 from an extensive study of the effects of using cameras in patrol vehicles.[11] The IACP study surveyed forty-seven agencies that owned a total of

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[1] Reaves, Brian A., *Local Police Departments, 2013: Equipment and Technology*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, July, 2015, at 1-2 (*available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5321) (last visited Oct. 23, 2015).

[2] LEMAS has been periodically collecting data on U.S. law enforcement agencies for the Bureau of Justice Statistics since 1987. BUREAU OF JUSTICE STATISTICS, *Data Collection: Law Enforcement Management and Administrative Statistics (LEMAS)*, http://www.bjs.gov/index.cfm?ty=dcdetail&iid=248 (last visited Oct. 23, 2015).

[3] The 2013 LEMAS sample design called for responses from 2,353 local police departments and 983 other types of law enforcement agencies. The term "local police department" does not including sheriff's offices or state law enforcement agencies. Reaves, *supra* note 1, at 8; Bureau of Justice Statistics, *supra* note 2.

[4] Reaves, *supra* note 1, at 3-4.

[5] White, Michael D., *Police Officer Body-Worn Cameras: Assessing the Evidence*, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, 2014.

[6] Ramirez, Eugene P., *A Report on Body Worn Cameras*, MANNING & KASS, ELLROD, RAMIREZ, TRESTER LLP (*available at* https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&cad=rja&uact=8&ved=0CDgQFjAEahUKEwixzY_7s8_IAhVDLB4KHZuIDI0&url=https%3A%2F%2Fwww.bja.gov%2Fbwc%2Fpdfs%2F14-005_Report_BODY_WORN_CAMERAS.pdf&usg=AFQjCNGjYEMhjJb_WKQOwPiVoN1YVR0_pg&sig2=nybYo3pMAfVWu-MoRzExPw) (last visited Oct. 19, 2015); White, *supra* note 5.

[7] Roy, Allyson, *On-Officer Video Cameras: Examining the Effects of Police Department Policy and Assignment on Camera Use and Activation*, ARIZONA STATE UNIVERSITY, 2014 (*available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB0QFjAAahUKEwjLkPuGts_IAhWLLB4KHXbBAJk&url=http%3A%2F%2Furbanaillinois.us%2Fsites%2Fdefault%2Ffiles%2Fattachments%2Fofficer-video-cameras-roy.pdf&usg=AFQjCNGJ3vrpVhYmSGKuRtTrFS1MO976jA&sig2=hAkkZlYPZN6zNxhBgROLGg) (last visited Oct. 19, 2015).

[8] Katz et al., *Evaluating the Impact of Officer Worn Body Cameras in the Phoenix Police Department*, Phoenix, AZ: Center for Violence Prevention & Community Safety, ARIZONA STATE UNIVERSITY, 2014.

[9] Jennings, Lynch, & Lorie A. Fridell, *Executive Summary: Evaluating the Impact of Police Officer Body-Worn Cameras: The Orlando Police Department Experience*, UNIVERSITY OF SOUTH FLORIDA, 2015 (*available at* http://www.cityoforlando.net/police/opdusf-body-camera-study-complete/) (last visited Oct. 19, 2015).

[10] Jennings, *supra* note 9, at 2-4; Katz, *supra* note 8, at 3; Ramirez, *supra* note 6, at 7; Roy, *supra* note 7, at 11.

[11] Int'l Ass'n of Chiefs of Police, *The Impact of Video Evidence on Modern Policing: Research and Best Practices from the IACP Study on In-Car Cameras*, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, 2003.

31,498 patrol vehicles and 17,500 camera systems.[12] The study found that the presence of a camera had a small impact on perceptions of officer safety.[13] Only 33 percent of the officers surveyed reported increased personal safety on patrol due to the presence of a camera, while 64 percent reported no change in officer safety.[14] Conversely, findings indicated that the presence of in-car cameras had a significant impact on resolving citizen complaints and internal affairs investigations.[15] The outcomes of citizen complaints involving incidents that were videotaped resulted in exonerations for the officers in 93 percent of recorded incidents.[16] The immediate supervisors of patrol officers also reported that in at least half of complaints, when the complainant learned the incident was videotaped, the complaint was subsequently withdrawn.[17]

Similar to the national trend, only a small number of Florida law enforcement agencies have elected to use body cameras. Out of 301 police departments in Florida,[18] eighteen agencies use body cameras, and another ten agencies have pilot body camera programs in place.[19] Florida law does not currently require agencies to have policies in place that govern the use of such technology.

Privacy

Chapter 934, F.S., governs the security of various types of communications in the State, and limits the ability to intercept, monitor, and record such communications. The chapter provides for criminal penalties[20] and civil remedies[21] in circumstances where communications are intercepted unlawfully. Additionally, s. 934.03(2)(d), F.S., creates the "two party consent rule," which requires that in circumstances justifying an expectation of privacy, all parties to a communication or conversation must consent to having it recorded before it can be done so legally.[22] Chapter 934, F.S., provides a limited exception for law enforcement-related recordings when "such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act."[23]

Public Records

Chapter 119, F.S., the Public Records Act, governs the maintenance and availability of state, county, and municipal records.[24] While the intent of the Act is to make most records available for anyone to copy or inspect them, the public records laws in Florida exempt certain records from public view.[25]

During the 2015 Legislative session, SB 248 was passed and signed into law, making audio or video data recorded by a law enforcement body camera confidential and exempt.[26] Such a body camera recording is confidential and exempt if it is taken within the interior of a private residence; within the interior of a facility that offers health care, mental health care, or social services; or in a place that a reasonable person would expect to be private.[27] The public record exemption provides specific circumstances in which a law enforcement agency may disclose a confidential and exempt body

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[12] *Id.* at 10.
[13] *Id.* at 13.
[14] *Id.*
[15] *Id.* at 15.
[16] *Id.*
[17] *Id.*
[18] There are 262 police departments in Florida, as well as an additional thirty-nine law enforcement agencies that serve university and college campuses and airports. Email from Bernadette Howard, Government Affairs Coordinator, The Florida Police Chiefs Association, Body Cam Data (Oct. 26, 2015) (on file with the Florida House of Representatives, Criminal Justice Subcommittee).
[19] *Id.*
[20] ss. 934.04, 934.21, 934.215, 934.31, and 934.43, F.S.
[21] s. 934.05, F.S.;
[22] *State v. Inciarrano*, 473 So. 2d 1272, 1275 (Fla. 1985); *State v. Walls*, 356 So. 2d 294 (Fla. 1978).
[23] s. 934.03(2)(c), F.S.
[24] s. 119.01, F.S.
[25] ss. 119.071-119.0713, F.S.; *see also Alice P. v. Miami Daily News, Inc.*, 440 So. 2d 1300 (Fla. 3d DCA 1983); *Patterson v. Tribune Co.*, 146 So. 2d 623 (Fla. 2d DCA 1962).
[26] s. 119.071(2)(l), F.S.
[27] s. 119.071(2)(l)2., F.S.

camera recording,[28] and additional circumstances in which a law enforcement agency must disclose such a recording.[29]

There are several additional public record exemptions that may apply to law enforcement body camera recordings. One such exemption relates to criminal investigation records pursuant to s. 119.071(2)(c), F.S. This section exempts records related to active criminal intelligence information and active criminal investigations, as well as documentation of public records requests made by law enforcement agencies.[30] A similar exemption applies to information revealing surveillance techniques, procedures, or personnel.[31] Additionally, exemptions exist to protect private and personal information, such as certain personal identifying information[32] or victim information.[33] Data recorded by body cameras will have to be screened for exempt or confidential and exempt data before being released pursuant to a public record request.

The General Records Schedule, issued by the Florida Department of State, Division of Library and Information Services, establishes the requirements and timelines for agencies to maintain public records.[34] General Records Schedule GS2 governs the records maintenance and retention requirements for law enforcement, correctional facilities, and district medical examiners.[35] Schedule GS2 does not currently specify a retention requirement for video or audio recordings from body cameras.[36] However, a recording from a body camera could fall under existing areas of the retention schedule, depending on what is recorded.

For example, if a body camera records a criminal incident, retention of the recording for most offenses is governed by Item # 129, Criminal Investigative Records, in the Retention Schedule, and must be retained for four anniversary years after the offense is committed.[37] If the recording documents a criminal incident that constitutes a capital or life felony, Item # 31, Criminal Investigative Records: Capital/Life Felony, requires that the recording be retained for one hundred anniversary years after the incident.[38]

Effect of the Bill

The bill requires law enforcement agencies that permit law enforcement officers to wear body cameras to develop policies and procedures governing the proper use, maintenance, and storage of body cameras and recorded data. The policies and procedures must include:

- General guidelines for the proper use, maintenance, and storage of body cameras;
- Any limitations on which law enforcement officers are permitted to wear body cameras;
- Any limitations on law-enforcement-related encounters in which law enforcement officers are permitted to wear body cameras; and
- General guidelines for the proper storage, retention, and release of audio and video data recorded by body cameras.

The bill requires law enforcement agencies that permit law enforcement officers to wear body cameras to provide policies and procedures training to all personnel who use, maintain, store, or release body cameras or recording data. The bill also requires law enforcement agencies to retain body camera recording data in compliance with s. 119.021, F.S., and to perform periodic reviews of agency practices to ensure compliance with the agency's policies and procedures.

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[28] s. 119.071(2)(l)3., F.S.
[29] s. 119.071(2)(l)4., F.S.
[30] s. 119.071(2)(c). F.S.
[31] s. 119.071(2)(d), F.S.
[32] s. 501.171, F.S.
[33] s. 119.071(j), F.S.
[34] Rule 1B-24.003, F.A.C.
[35] Florida Dep't of State, Div. of Library & Info. Servs., GENERAL RECORDS SCHEDULE GS2 (2010).
[36] *Id.*
[37] *Id.* at page 7.
[38] *Id.*

The bill specifies that ch. 934, F.S., does not apply to body camera recordings. This allows law enforcement officers to wear body cameras during their patrol duties without having to inform each individual they make contact with that they are being recorded.

The bill also creates the following definitions:

- "Body camera" means a portable electronic recording device that is worn on a law enforcement officer's person which records audio and video data of the officer's law-enforcement-related encounters and activities;
- "Law enforcement agency" means an agency that has a primary mission of preventing and detecting crime and the enforcement of the penal, criminal, traffic, or highway laws of the state and that in furtherance of that primary mission employs law enforcement officers as defined in s. 943.10, F.S.; and
- "Law enforcement officer" has the same meaning as provided in s. 943.10, F.S.[39]

B. SECTION DIRECTORY:

Section 1. Creates s. 943.1718, F.S., relating to body cameras; policies and procedures.

Section 2. Provides that the bill is effective upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

   According to 2014 Criminal Justice Agency Profile Survey, no state law enforcement agency reported using body cameras during the 2014 calendar year. If an agency chooses to use body cameras, the bill may have a minimal impact on state expenditures because the bill creates a new requirement for state law enforcement agencies that use body cameras to establish policies and procedures governing body cameras, and to train personnel accordingly.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

   The bill may have a minimal impact on local expenditures because the bill creates a new requirement for local law enforcement agencies that use body cameras to establish policies and procedures governing body cameras, and to train personnel accordingly.

[39] Section 943.10(1), F.S., defines "law enforcement officer" to mean any person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof; who is vested with authority to bear arms and make arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state. This definition includes all certified supervisory and command personnel whose duties include, in whole or in part, the supervision, training, guidance, and management responsibilities of full-time law enforcement officers, part-time law enforcement officers, or auxiliary law enforcement officers but does not include support personnel employed by the employing agency.

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 county/municipality mandates provision of Art. VII, s. 18, of the Florida Constitution may apply because this bill requires county and municipal governments to develop policies and procedures governing the proper use, maintenance, and storage of body cameras and recorded data, and train agency personnel accordingly. This may result in an indeterminate negative fiscal impact; however, an exemption may apply if the bill results in an insignificant fiscal impact to county or municipal governments.

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

None.

A bill to be entitled

An act relating to law enforcement officer body cameras; creating s. 943.1718, F.S.; providing definitions; requiring a law enforcement agency that permits its law enforcement officers to wear body cameras to establish policies and procedures addressing the proper use, maintenance, and storage of body cameras and the data recorded by body cameras; requiring such policies and procedures to include specified information; requiring such a law enforcement agency to ensure that specified personnel are trained in the law enforcement agency's policies and procedures; requiring that data recorded by body cameras be retained in accordance with specified requirements; requiring a periodic review of agency body camera practices to ensure conformity with the agency's policies and procedures; exempting the recordings from specified provisions relating to the interception of wire, electronic, and oral communications; providing an effective date.

WHEREAS, advancements in technology allow body cameras to be affordable and practical tools for law enforcement use, and

WHEREAS, body cameras can provide a valuable source of information to both law enforcement and the general public, and

WHEREAS, the audio and video recording of police and

citizen interactions allows law enforcement agencies to improve efforts to reduce crime and properly address citizen complaints, and

WHEREAS, establishing uniform procedural requirements for the use of body cameras by law enforcement will provide consistency and reliability throughout the state, and

WHEREAS, there are currently no statewide mandatory and uniform standards or guidelines that apply to use of body cameras by law enforcement officers, NOW, THEREFORE,

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

Section 1. Section 943.1718, Florida Statutes, is created to read:

943.1718 Body cameras; policies and procedures.—

(1) As used in this section, the term:

(a) "Body camera" means a portable electronic recording device that is worn on a law enforcement officer's person that records audio and video data of the officer's law-enforcement-related encounters and activities.

(b) "Law enforcement agency" means an agency that has a primary mission of preventing and detecting crime and enforcing the penal, criminal, traffic, and motor vehicle laws of the state and in furtherance of that primary mission employs law enforcement officers as defined in s. 943.10.

(c) "Law enforcement officer" has the same meaning as

provided in s. 943.10.

(2) A law enforcement agency that permits its law enforcement officers to wear body cameras shall establish policies and procedures addressing the proper use, maintenance, and storage of body cameras and the data recorded by body cameras. The policies and procedures must include:

(a) General guidelines for the proper use, maintenance, and storage of body cameras.

(b) Any limitations on which law enforcement officers are permitted to wear body cameras.

(c) Any limitations on law-enforcement-related encounters and activities in which law enforcement officers are permitted to wear body cameras.

(d) General guidelines for the proper storage, retention, and release of audio and video data recorded by body cameras.

(3) A law enforcement agency that permits its law enforcement officers to wear body cameras shall:

(a) Ensure that all personnel who wear, use, maintain, or store body cameras are trained in the law enforcement agency's policies and procedures concerning them.

(b) Ensure that all personnel who use, maintain, store, or release audio or video data recorded by body cameras are trained in the law enforcement agency's policies and procedures.

(c) Retain audio and video data recorded by body cameras in accordance with the requirements of s. 119.021, except as otherwise provided by law.

(d) Perform a periodic review of actual agency body camera practices to ensure conformity with the agency's policies and procedures.

(4) Chapter 934 does not apply to body camera recordings made by law enforcement agencies that elect to use body cameras.

Section 2. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HJR 197 Term Limits for Appellate Courts
SPONSOR(S): Civil Justice Subcommittee; Wood; Sullivan and others
TIED BILLS: None **IDEN./SIM. BILLS:** SJR 322

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	8 Y, 5 N, As CS	Bond	Bond
2) Appropriations Committee	13 Y, 6 N	Lloyd	Leznoff
3) Judiciary Committee		Bond MB	Havlicak RH

SUMMARY ANALYSIS

Justices of the Florida Supreme Court and judges of the Florida district courts of appeal are appointed to office by the Governor and serve six year terms. There are no limits on the number of terms a justice or judge may serve, but each justice or judge is subject to the merit retention process and a mandatory retirement age.

Merit retention is the system of retaining justices and judges established by the voters when they amended the Florida Constitution in the 1970s. Newly appointed justices or judges face their first merit retention vote in the next general election that occurs more than one year after their appointment, but before the completion of a full six-year term. If retained in office by a majority of voters, the justice or judge serves a full six-year term. Thereafter, the justice or judge is subject to a merit retention election every six years. No Florida justice or judge has ever lost a merit retention election.

This joint resolution provides that a justice or judge appointed after the effective date may serve no more than two full terms of office. The joint resolution will not affect a justice or judge in office on the effective date.

A joint resolution to amend the constitution must be passed by a three-fifths vote of the membership of each house of the Legislature. The proposed joint resolution, if passed by the Legislature, would be considered by the electorate at the next general election on November 8, 2016.

The joint resolution appears to require a nonrecurring expense for the publication of a proposed constitutional amendment in newspapers of general circulation in each county. The Department of State estimates a minimum of $58,875 payable from the General Revenue Fund in FY 2016-17 for this purpose. The necessary appropriation will be included in the FY 2016-17 House proposed General Appropriation Act. The bill has no fiscal impact on the State Courts System. The minimal impacts related to judge turnover will not be experienced until FY 2030-31 based on historical judicial retention elections. This joint resolution does not appear to have a fiscal impact on local governments.

If adopted at the 2016 general election, the effective date of this resolution is January 3, 2017.

A joint resolution proposing an amendment to the Florida Constitution must be passed by three-fifths of the membership of each house of the Legislature to appear on the next general election ballot. If on the ballot, the constitution requires 60 percent voter approval for passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Appointment of Justices and Judges

Where there is a judicial vacancy in the Florida Supreme Court or a Florida district court of appeal, the Governor must appoint a replacement justice or judge from a list of nominees provided by a judicial nominating commission (JNC).[1] When a judgeship becomes vacant, candidates submit an application to the JNC for that court. The commission sends a list of three to six nominees to the Governor and the Governor fills the vacancy by selecting from that list.[2] At the next general election occurring at least a year after appointment, the newly appointed justice or district court judge sits for a retention election. If a majority of voters choose to retain the justice or judge, the justice or judge is retained for a six year term.[3] Thereafter, the justice or judge will sit for a retention election every six years.

Retention in Office

While the state does have term limits applicable to the Governor, cabinet members, and legislators, no term limits apply to justices or judges. A justice or judge can serve an unlimited number of terms of office, limited only by a failure to be retained or a mandatory retirement age.

Mandatory Retirement Age

The Florida Constitution establishes a mandatory retirement age for justices and judges on or after their 70th birthday. The exact date of retirement depends upon when the 70th birthday occurs. If it occurs during the first half of a six-year term, then the mandatory retirement age is the same as the birthday. If the 70th birthday occurs in the second half of a six-year term, then the justice or judge can remain on the bench until the full term expires.[4]

Past Retention Election Results

Forty-two Supreme Court justices have appeared on the ballot for retention between 1980 and 2014. All 42 were retained by a majority of the voters. For the general elections from 2004 through 2014, all 125 district court of appeal judges that appeared on the ballot were retained.

Effect of the Bill

The joint resolution limits Supreme Court justices and judges of the district courts of appeal to two full terms of office. Given that terms are 6 years each, and that the time from appointment to first retention election ranges from one to three years, the effect of the bill is to create an effective term limit of between 13 and 15 years depending upon the date of appointment.

Term limits apply to the office that a justice or judge is appointed to, meaning that a district court of appeal judge promoted to the Supreme Court starts a new term limit.

[1] art. V, s.11, Fla. Const.
[2] art. V, s. 11(a), Fla. Const.
[3] art. V, s. 10, Fla. Const.
[4] art. V, s. 8, Fla. Const.

The joint resolution does not provide an effective date.[5] Therefore, it would take effect on the first Tuesday after the first Monday in January following the election at which it was approved by the electorate,[6] which is January 3, 2017.

The joint resolution is prospective only. Term limits will only apply to a justice or judge appointed to office after the effective date of the amendment.

B. SECTION DIRECTORY:

n/a

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:

   Current Fiscal Impact

   Article XI, s. 5(d) of the state constitution requires publication of a proposed amendment in a newspaper of general circulation in each county. The Department of State provided the following fiscal analysis for HJR 197 as originally filed:

   The Division of Elections is required to advertise the full text of proposed constitutional amendments in English and Spanish twice in a newspaper of general circulation in each county before the election in which the amendment shall be submitted to the electors. The Division is also required to provide each Supervisor of Elections with either booklets or posters displaying the full text of proposed amendments. The cost to advertise constitutional amendments for the 2014 general election was $135.97 per word. Using 2014 rates, the cost to advertise this amendment for the 2016 general election could be $58,331 at a minimum.[7]

   The amended resolution has 433 words, changing the estimate to $58,875. These funds must be spent regardless of whether the amendment passes, and are payable from the General Revenue Fund in FY 2016-17. The necessary appropriation will be included in the FY 2016-17 House proposed General Appropriations Act.

   Future Fiscal Impact

   This bill may increase judicial workload due to more frequent gaps in service, and increased staff turnover.[8] This bill would increase training costs, as all judges new to the bench are required to take in-person training. Based on historical judicial retention elections, the potential fiscal impacts to the court system would not occur until FY 2030-31 at the earliest.

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[5] While an amendment can specify its effective date, it is common practice in constitutional amendments to simply allow the default effective date to apply.
[6] art. XI, s. 5, Fla. Const.
[7] Department of State analysis dated October 26, 2015, on file with the Civil Justice Subcommittee.
[8] "Because justices and appellate judges hire their own staff, increased turnover of justices and appellate judges may result in increased turnover of law clerks and judicial assistants, thereby requiring additional staff work for administrative items relating to a new staff person." Office of the State Courts Administrator, *2016 Judicial Impact Statement for PCS/HJR 197*, dated November 1, 2015, on file with the Civil Justice Subcommittee.

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:

This section does not apply to proposed constitutional amendments.

2. Other:

Article XI of the Florida Constitution sets forth various methods for proposing amendments to the constitution, along with the methods for approval or rejection of proposals. One method by which constitutional amendments may be proposed is by joint resolution agreed to by three-fifths of the membership of each house of the Legislature.[9] Any such proposal must be submitted to the electors, either at the next general election held more than 90 days after the joint resolution is filed with the Secretary of State, or, if pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision, at an earlier special election held more than 90 days after such filing.[10] If the proposed amendment is approved by a vote of at least 60 percent of the electors voting on the measure, it becomes effective as an amendment to the Florida Constitution on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment.[11]

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

For the current Supreme Court Justices, assuming that none lose a retention election and that all serve until mandatory retirement:

- The average length of service will be 17 years.

[9] art. XI, s. 1, Fla. Const.
[10] art. XI, s. 5(a), Fla. Const.
[11] art. XI, s. 5(e), Fla. Const.

- If this term limit had been in place when appointed, it would have had no effect on 2 of the 7 justices.
- The longest term would be 22 years.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On November 3, 2015, the Civil Justice Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute differs from the bill as filed in that it is prospective only, having no effect on current justices and judges. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

House Joint Resolution

A joint resolution proposing an amendment to Section 8 of Article V and the creation of a new section in Article XII of the State Constitution to create term limits for Supreme Court justices and judges of the district courts of appeal; limiting applicability to justices and judges appointed after the effective date of the amendment.

Be It Resolved by the Legislature of the State of Florida:

That the following amendment to Section 8 of Article V and the creation of a new section in Article XII of the State Constitution are agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE V

JUDICIARY

SECTION 8. Eligibility.—

(a) No person shall be eligible for office of justice or judge of any court unless the person is an elector of the state and resides in the territorial jurisdiction of the court. No justice or judge shall serve after attaining the age of seventy years except upon temporary assignment or to complete a term, one-half of which has been served.

(b) No person is eligible for the office of justice of the supreme court or judge of a district court of appeal unless the person is, and has been for the preceding ten years, a member of the bar of Florida. No person is eligible for the office of circuit judge unless the person is, and has been for the preceding five years, a member of the bar of Florida. Unless otherwise provided by general law, no person is eligible for the office of county court judge unless the person is, and has been for the preceding five years, a member of the bar of Florida. Unless otherwise provided by general law, a person shall be eligible for election or appointment to the office of county court judge in a county having a population of 40,000 or less if the person is a member in good standing of the bar of Florida.

(c) No person may appear on the ballot for retention to the office of justice of the supreme court or judge of a district court of appeal if, by the end of the current term of office, the person has ever served or, but for resignation, would have served, in that office for two consecutive full terms.

ARTICLE XII

SCHEDULE

Applicability of limitations on the terms of justices and judges.—The amendment to Section 8 of Article V shall take effect upon approval by the electors. The limitations of the amendment on the terms of justices of the supreme court and judges of the district courts of appeal apply only to justices

and judges appointed to office after the effective date of the amendment.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE V, SECTION 8

ARTICLE XII

TERM LIMITS FOR APPELLATE COURTS.—Proposing an amendment to the State Constitution to limit the terms of Supreme Court justices and judges of the district courts of appeal. They currently serve unlimited 6-year terms, if retained, until age 70 or beyond that age, if less than one-half of a term remains at age 70. The amendment limits them to two full terms, with partial terms not counting toward the limits. The amendment does not apply to current justices and judges.

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	_____

Committee/Subcommittee hearing bill: Judiciary Committee
Representative Moskowitz offered the following:

Amendment (with ballot and title amendments)

Remove line 12 and insert:

That the following amendment to Section 8 of Article V, Section 4 of Article VI, and

Between lines 45 and 46, insert:

ARTICLE VI

SUFFERAGE AND ELECTIONS

SECTION 4. Disqualifications.—

(a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.

(b) No person may appear on the ballot for re-election to any of the following offices:

(1) Florida representative,

(2) ~~Florida senator,~~

~~(3)~~ Florida Lieutenant governor,

(3)~~(4)~~ any office of the Florida cabinet,

(4)~~(5)~~ U.S. Representative from Florida, or

(5)~~(6)~~ U.S. Senator from Florida

if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for eight consecutive years.

(c) No person may appear on the ballot for re-election to the office of Florida senator if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for one term.

B A L L O T A M E N D M E N T

Remove lines 59-67 and insert:

ARTICLE VI, SECTION 4

ARTICLE XII

TERM LIMITS.—Proposing an amendment to the State Constitution to limit the terms of Supreme Court justices, judges of the district courts of appeal, and state senators. No term limit applies to justices and judges, senators are limited to two terms. The amendment limits justices and judges to two

full terms and limits senators to one full term. The amendment does not apply to current justices and judges.

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

Remove lines 3-6 and insert:

of Article V, section 4 of Article VI, and the creation of a new section in Article XII of the State Constitution to create term limits for Supreme Court justices, judges of the district courts of appeal, and state senators; limiting applicability to

Amendment No. 2

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	_____

Committee/Subcommittee hearing bill: Judiciary Committee
Representative Moskowitz offered the following:

Amendment (with ballot and title amendments)

Remove lines 12-17 and insert:

That the following amendment to Section 5 of Article IV, Section 8 of Article V, and the creation of a new section in Article XII of the State Constitution are agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE IV

EXECUTIVE

SECTION 5. Election of governor, lieutenant governor and cabinet members; qualifications; terms.-

(a) At a state-wide general election in each calendar year the number of which is even but not a multiple of four, the

electors shall choose a governor and a lieutenant governor and members of the cabinet each for a term of four years beginning on the first Tuesday after the first Monday in January of the succeeding year. In primary elections, candidates for the office of governor may choose to run without a lieutenant governor candidate. In the general election, all candidates for the offices of governor and lieutenant governor shall form joint candidacies in a manner prescribed by law so that each voter shall cast a single vote for a candidate for governor and a candidate for lieutenant governor running together.

(b) When elected, the governor, lieutenant governor and each cabinet member must be an elector not less than thirty years of age who has resided in the state for the preceding seven years. The attorney general must have been a member of the bar of Florida for the preceding five years. No person who has, or but for resignation would have, served as governor or acting governor for more than <u>one term</u> ~~six years in two consecutive terms~~ shall be elected governor for the succeeding term.

B A L L O T A M E N D M E N T

Remove lines 58-67 and insert:

ARTICLE IV, SECTION 5
ARTICLE V, SECTION 8
ARTICLE XII

Amendment No. 2

TERM LIMITS.—Proposing an amendment to the State Constitution to limit the terms of Supreme Court justices, judges of the district courts of appeal, and the governor. No term limit currently applies to justices and judges, the governor is generally limited to two terms. The amendment limits justices and judges to two full terms and limits the governor to one full term. The amendment does not apply to current justices and judges.

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

Remove lines 2-6 and insert:

A joint resolution proposing an amendment to Section 5 of Article IV, Section 8 of Article V, and the creation of a new section in Article XII of the State Constitution to create term limits for Supreme Court justices, judges of the district courts of appeal, and the governor; limiting applicability to

Amendment No. 3

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	_____

Committee/Subcommittee hearing bill: Judiciary Committee
Representative Moskowitz offered the following:

Amendment (with ballot and title amendments)

Remove line 12 and insert:

That the following amendment to Section 8 of Article V, Section 4 of Article VI, and

Between lines 45 and 46, insert:

ARTICLE VI

SUFFERAGE AND ELECTIONS

SECTION 4. Disqualifications.—

(a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.

(b) No person may appear on the ballot for re-election to any of the following offices:

(1) Florida representative,

(2) Florida senator,

(3) Florida Lieutenant governor,

~~(4) any office of the Florida cabinet,~~

(4)~~(5)~~ U.S. Representative from Florida, or

(5)~~(6)~~ U.S. Senator from Florida

if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for eight consecutive years.

(c) No person may appear on the ballot for re-election to any office of the Florida cabinet if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for one term.

B A L L O T A M E N D M E N T

Remove lines 59-67 and insert:

ARTICLE VI, SECTION 4

ARTICLE XII

TERM LIMITS.—Proposing an amendment to the State Constitution to limit the terms of Supreme Court justices, judges of the district courts of appeal, and offices of the state cabinet. No term limit applies to justices and judges, and members of the cabinet are limited to two terms. The amendment

limits justices and judges to two full terms and limits cabinet members to one full term. The amendment does not apply to current justices and judges.

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

Remove lines 3-6 and insert:

of Article V, section 4 of Article VI, and the creation of a new section in Article XII of the State Constitution to create term limits for Supreme Court justices, judges of the district courts of appeal, and the Florida cabinet; limiting applicability to

Amendment No. 4

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	_____

Committee/Subcommittee hearing bill: Judiciary Committee
Representative Moskowitz offered the following:

Amendment (with ballot and title amendments)

Remove line 12 and insert:

That the following amendment to Section 8 of Article V, Section 4 of Article VI, and

Between lines 45 and 46, insert:

ARTICLE VI

SUFFERAGE AND ELECTIONS

SECTION 4. Disqualifications.—

(a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.

(b) No person may appear on the ballot for re-election to any of the following offices:

(1) ~~Florida representative,~~
~~(2)~~ Florida senator,
(2)~~(3)~~ Florida Lieutenant governor,
(3)~~(4)~~ any office of the Florida cabinet,
(4)~~(5)~~ U.S. Representative from Florida, or
(5)~~(6)~~ U.S. Senator from Florida

if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for eight consecutive years.

(c) No person may appear on the ballot for re-election to Florida representative if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for two terms.

B A L L O T A M E N D M E N T

Remove lines 59-67 and insert:

ARTICLE VI, SECTION 4

ARTICLE XII

TERM LIMITS.—Proposing an amendment to the State Constitution to limit the terms of Supreme Court justices, judges of the district courts of appeal, and Florida representative. No term limit applies to justices and judges, and representatives are currently limited to four terms. The

amendment limits justices, judges and Florida representatives to two full terms. The amendment does not apply to current justices and judges.

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

Remove lines 3-6 and insert:

of Article V, section 4 of Article VI, and the creation of a new section in Article XII of the State Constitution to create term limits for Supreme Court justices, judges of the district courts of appeal, and Florida representative; limiting applicability to

Amendment No. 5

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	_____

Committee/Subcommittee hearing bill: Judiciary Committee
Representative Moskowitz offered the following:

Amendment (with ballot and title amendments)

Remove line 12 and insert:

That the following amendment to Section 8 of Article V, Section 4 of Article VI, and

Between lines 45 and 46, insert:

ARTICLE VI

SUFFERAGE AND ELECTIONS

SECTION 4. Disqualifications.—

(a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.

(b) No person may appear on the ballot for re-election to any of the following offices:

(1) Florida representative,
(2) Florida senator,
(3) Florida Lieutenant governor,
(4) any office of the Florida cabinet,
(5) U.S. Representative from Florida, or
(6) U.S. Senator from Florida

if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for eight consecutive years.

(c) No person may appear on the ballot for re-election to any city based municipal elected office if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for two terms.

B A L L O T A M E N D M E N T

Remove lines 59-67 and insert:

ARTICLE VI, SECTION 4

ARTICLE XII

TERM LIMITS.—Proposing an amendment to the State Constitution to limit the terms of Supreme Court justices, judges of the district courts of appeal, and all municipal elected officials. No term limit applies to such offices. The amendment limits justices, judges and city based municipal

elected officials to two full terms. The amendment does not apply to current justices and judges.

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

Remove lines 3-6 and insert:

of Article V, section 4 of Article VI, and the creation of a new section in Article XII of the State Constitution to create term limits for Supreme Court justices, judges of the district courts of appeal, and Florida representatives; limiting applicability to

Amendment No. 6

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	_____

Committee/Subcommittee hearing bill: Judiciary Committee
Representative Moskowitz offered the following:

Amendment (with ballot and title amendments)

Remove line 12 and insert:

That the following amendment to Section 8 of Article V, Section 4 of Article VI, and

Between lines 45 and 46, insert:

ARTICLE VI

SUFFERAGE AND ELECTIONS

SECTION 4. Disqualifications.—

(a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.

(b) No person may appear on the ballot for re-election to any of the following offices:

(1) Florida representative,
(2) Florida senator,
(3) Florida Lieutenant governor,
(4) any office of the Florida cabinet,
(5) U.S. Representative from Florida, or
(6) U.S. Senator from Florida

if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for eight consecutive years.

(c) No person may appear on the ballot for re-election to any county based elected office if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for two terms.

B A L L O T A M E N D M E N T

Remove lines 59-67 and insert:

ARTICLE VI, SECTION 4
ARTICLE XII

TERM LIMITS.—Proposing an amendment to the State Constitution to limit the terms of Supreme Court justices, judges of the district courts of appeal, and all municipal elected officials. No term limit applies to such offices. The amendment limits justices, judges and county based elected

officials to two full terms. The amendment does not apply to current justices and judges.

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

Remove lines 3-6 and insert:

of Article V, section 4 of Article VI, and the creation of a new section in Article XII of the State Constitution to create term limits for Supreme Court justices, judges of the district courts of appeal, and county based elected office; limiting applicability to

Amendment No. 7

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	_____

Committee/Subcommittee hearing bill: Judiciary Committee
Representative Moskowitz offered the following:

Amendment (with ballot and title amendments)

Remove lines 41-53 and insert:

the office of justice of the supreme court if, by the end of the current term of office, the person has ever served or, but for resignation, would have served, in that office for 15 consecutive years.

ARTICLE XII

SCHEDULE

Applicability of limitations on the terms of justices and judges.—The amendment to Section 8 of Article V shall take effect upon approval by the electors. The limitations of the amendment on the terms of justices of the supreme court applies only to justices appointed to office after the effective date of the

---

B A L L O T A M E N D M E N T

Remove lines 60-67 and insert:

TERM LIMITS FOR SUPREME COURT.—Proposing an amendment to the State Constitution to limit the terms of Supreme Court justices. They currently serve unlimited 6-year terms, if retained, until age 70 or beyond that age, if less than one-half of a term remains at age 70. The amendment prohibits a justice from appearing on a ballot for retention if the justice served for 15 years. The amendment does not apply to current justices.

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

Remove lines 5-7 and insert:

limits for Supreme Court justices; limiting applicability to justices appointed after the effective date

Amendment No. 8

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	_____

Committee/Subcommittee hearing bill: Judiciary Committee
Representative Moskowitz offered the following:

Amendment (with ballot and title amendments)

Remove lines 41-53 and insert:

the office of justice of the supreme court if, by the end of the current term of office, the person has ever served or, but for resignation, would have served, in that office for twenty consecutive years.

ARTICLE XII

SCHEDULE

Applicability of limitations on the terms of justices and judges.—The amendment to Section 8 of Article V shall take effect upon approval by the electors. The limitations of the amendment on the terms of justices of the supreme court applies only to justices appointed to office after the effective date of the

---

B A L L O T A M E N D M E N T

Remove lines 60-67 and insert:

TERM LIMITS FOR SUPREME COURT.—Proposing an amendment to the State Constitution to limit the terms of Supreme Court justices. They currently serve unlimited 6-year terms, if retained, until age 70 or beyond that age, if less than one-half of a term remains at age 70. The amendment prohibits a justice from appearing on a ballot for retention if the justice served for twenty years. The amendment does not apply to current justices.

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

Remove lines 5-7 and insert:

limits for Supreme Court justices; limiting applicability to justices appointed after the effective date

Amendment No. 9

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	_____

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Moskowitz offered the following:

Amendment (with ballot and title amendments)

Remove lines 41-53 and insert:

the office of justice of the supreme court if, by the end of the current term of office, the person has ever served or, but for resignation, would have served, in that office for twenty-six consecutive years.

ARTICLE XII

SCHEDULE

Applicability of limitations on the terms of justices and judges.—The amendment to Section 8 of Article V shall take effect upon approval by the electors. The limitations of the amendment on the terms of justices of the supreme court applies only to justices appointed to office after the effective date of the

---

B A L L O T A M E N D M E N T

Remove lines 60-67 and insert:

TERM LIMITS FOR SUPREME COURT.—Proposing an amendment to the State Constitution to limit the terms of Supreme Court justices. They currently serve unlimited 6-year terms, if retained, until age 70 or beyond that age, if less than one-half of a term remains at age 70. The amendment prohibits a justice from appearing on a ballot for retention if the justice served for twenty-six years. The amendment does not apply to current justices.

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

Remove lines 5-7 and insert:

limits for Supreme Court justices; limiting applicability to justices appointed after the effective date

Amendment No. 10

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	_____

Committee/Subcommittee hearing bill: Judiciary Committee
Representative Moskowitz offered the following:

Amendment (with ballot and title amendments)

Remove lines 41-53 and insert:

the office of justice of the supreme court if, by the end of the current term of office, the person has ever served or, but for resignation, would have served, in that office for thirty consecutive years.

ARTICLE XII

SCHEDULE

Applicability of limitations on the terms of justices and judges.—The amendment to Section 8 of Article V shall take effect upon approval by the electors. The limitations of the amendment on the terms of justices of the supreme court applies only to justices appointed to office after the effective date of the

---

B A L L O T A M E N D M E N T

Remove lines 60-67 and insert:

TERM LIMITS FOR SUPREME COURT.—Proposing an amendment to the State Constitution to limit the terms of Supreme Court justices. They currently serve unlimited 6-year terms, if retained, until age 70 or beyond that age, if less than one-half of a term remains at age 70. The amendment prohibits a justice from appearing on a ballot for retention if the justice served for thirty years. The amendment does not apply to current justices.

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

Remove lines 5-7 and insert:

limits for Supreme Court justices; limiting applicability to justices appointed after the effective date

Amendment No. 11

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	_____

Committee/Subcommittee hearing bill: Judiciary Committee
Representative Moskowitz offered the following:

Amendment (with ballot and title amendments)

Remove lines 41-53 and insert:

the office of judge of a district court of appeal if, by the end of the current term of office, the person has ever served or, but for resignation, would have served, in that office for fifteen consecutive years.

ARTICLE XII

SCHEDULE

Applicability of limitations on the terms of justices and judges.—The amendment to Section 8 of Article V shall take effect upon approval by the electors. The limitations of the amendment on the terms of judges of a district court of appeal applies only to judges appointed to office after the effective date of the

---

B A L L O T A M E N D M E N T

Remove lines 60-67 and insert:

TERM LIMITS FOR CERTAIN APPELLATE JUDGES.—Proposing an amendment to the State Constitution to limit the terms of judges of a district court of appeal. They currently serve unlimited 6-year terms, if retained, until age 70 or beyond that age, if less than one-half of a term remains at age 70. The amendment prohibits such judges from appearing on a ballot for retention if the judge served for fifteen years. The amendment does not apply to current judges.

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

Remove lines 5-7 and insert:

limits for judges of a district court of appeal; limiting applicability to judges appointed after the effective date

Amendment No. 12

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	_____

Committee/Subcommittee hearing bill: Judiciary Committee
Representative Moskowitz offered the following:

Amendment (with ballot and title amendments)

Remove lines 41-53 and insert:

the office of judge of a district court of appeal if, by the end of the current term of office, the person has ever served or, but for resignation, would have served, in that office for twenty consecutive years.

ARTICLE XII

SCHEDULE

Applicability of limitations on the terms of justices and judges.—The amendment to Section 8 of Article V shall take effect upon approval by the electors. The limitations of the amendment on the terms of judges of a district court of appeal applies only to judges appointed to office after the effective date of the

---

B A L L O T A M E N D M E N T

Remove lines 60-67 and insert:

TERM LIMITS FOR CERTAIN APPELLATE JUDGES.—Proposing an amendment to the State Constitution to limit the terms of judges of a district court of appeal. They currently serve unlimited 6-year terms, if retained, until age 70 or beyond that age, if less than one-half of a term remains at age 70. The amendment prohibits such judges from appearing on a ballot for retention if the judge served for twenty years. The amendment does not apply to current judges.

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

Remove lines 5-7 and insert:

limits for judges of a district court of appeal; limiting applicability to judges appointed after the effective date

Amendment No. 13

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	_____

Committee/Subcommittee hearing bill: Judiciary Committee
Representative Moskowitz offered the following:

Amendment (with ballot and title amendments)

Remove lines 41-53 and insert:

the office of judge of a district court of appeal if, by the end of the current term of office, the person has ever served or, but for resignation, would have served, in that office for twenty-six consecutive years.

ARTICLE XII

SCHEDULE

Applicability of limitations on the terms of justices and judges.—The amendment to Section 8 of Article V shall take effect upon approval by the electors. The limitations of the amendment on the terms of judges of a district court of appeal applies only to judges appointed to office after the effective date of the

---

B A L L O T A M E N D M E N T

Remove lines 60-67 and insert:

TERM LIMITS FOR CERTAIN APPELLATE JUDGES.—Proposing an amendment to the State Constitution to limit the terms of judges of a district court of appeal. They currently serve unlimited 6-year terms, if retained, until age 70 or beyond that age, if less than one-half of a term remains at age 70. The amendment prohibits such judges from appearing on a ballot for retention if the judge served for twenty-six years. The amendment does not apply to current judges.

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

Remove lines 5-7 and insert:

limits for judges of a district court of appeal; limiting applicability to judges appointed after the effective date

Amendment No. 14

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	_____

Committee/Subcommittee hearing bill: Judiciary Committee
Representative Moskowitz offered the following:

Amendment (with ballot and title amendments)

Remove lines 41-53 and insert:

the office of judge of a district court of appeal if, by the end of the current term of office, the person has ever served or, but for resignation, would have served, in that office for thirty consecutive years.

ARTICLE XII

SCHEDULE

Applicability of limitations on the terms of justices and judges.—The amendment to Section 8 of Article V shall take effect upon approval by the electors. The limitations of the amendment on the terms of judges of a district court of appeal applies only to judges appointed to office after the effective date of the

---

B A L L O T A M E N D M E N T

Remove lines 60-67 and insert:

TERM LIMITS FOR CERTAIN APPELLATE JUDGES.—Proposing an amendment to the State Constitution to limit the terms of judges of a district court of appeal. They currently serve unlimited 6-year terms, if retained, until age 70 or beyond that age, if less than one-half of a term remains at age 70. The amendment prohibits such judges from appearing on a ballot for retention if the judge served for thirty years. The amendment does not apply to current judges.

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

Remove lines 5-7 and insert:

limits for judges of a district court of appeal; limiting applicability to judges appointed after the effective date

Amendment No. 15

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	_____

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Moskowitz offered the following:

Amendment (with ballot amendment)

Remove line 44 and insert:

would have served, in that office for three consecutive full

B A L L O T A M E N D M E N T

Remove line 65 and insert:

at age 70. The amendment limits them to three full terms, with

Amendment No. 16

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	_____

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Moskowitz offered the following:

Amendment (with ballot amendment)

Remove line 44 and insert:

would have served, in that office for four consecutive full

B A L L O T A M E N D M E N T

Remove line 65 and insert:

at age 70. The amendment limits them to four full terms, with

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HJR 197 (2016)

Amendment No. 17

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	_____

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Moskowitz offered the following:

Amendment (with ballot amendment)

Remove line 44 and insert:

would have served, in that office for five consecutive full

B A L L O T A M E N D M E N T

Remove line 65 and insert:

at age 70. The amendment limits them to five full terms, with

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 329 Animals Confined in Unattended Motor Vehicles
SPONSOR(S): Criminal Justice Subcommittee; Cortes, B.
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 200

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	9 Y, 4 N, As CS	Keegan	White
2) Judiciary Committee		Keegan	Havlicak

SUMMARY ANALYSIS

Over the past several years, there have been a number of reported tragedies involving children and animals left to die in unattended vehicles. Studies have shown that the temperature in an unattended vehicle can rise sharply, even when the weather is relatively cool. In fact, temperatures have been measured at deadly levels within five minutes of closing the doors of a vehicle.

A "good samaritan" that forcibly enters a motor vehicle to rescue an endangered animal is immune from civil liability arising out of the treatment or care that is rendered. However, under current law, the good samaritan can be both criminally and civilly liable for the damage caused to the vehicle, and criminally liable for the act of forcibly entering the vehicle.

The bill makes it a first degree misdemeanor for any person to intentionally, knowingly, or recklessly confine an animal in an unattended motor vehicle under specified conditions that endanger the health or well-being of the animal. An authorized individual, who removes an endangered animal from a vehicle, may not be held criminally or civilly liable for damages arising from such act.

The bill provides definitions of key terms and an exception for the transportation of specified agricultural animals in motor vehicles designed to transport such animals for agricultural purposes.

The bill may have an economic impact on local governments because the bill creates a new first degree misdemeanor, and thereby may increase the need for jail beds.

The bill is effective October 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Over the past several years, there have been a number of reported tragedies involving children and animals left to die in unattended vehicles. Data shows that the temperature in an unattended vehicle can rise sharply, even when the weather is relatively cool.[1] In a study conducted when the outdoor temperature was ninety degrees Fahrenheit or more, 75 percent of the internal temperature rise occurred in an unattended vehicle within *five minutes* of closing the vehicle doors, and the temperature rise was maximized (between 124-153 degrees Fahrenheit) within fifteen minutes.[2] In a study conducted when the outside air temperature was seventy-two degrees Fahrenheit, the internal vehicle temperature reached 117 degrees Fahrenheit within sixty minutes, with 80 percent of that temperature rise occurring within the first thirty minutes of shutting the vehicle doors.[3]

There are nineteen states throughout the nation that prohibit leaving an animal unattended and confined in a vehicle under circumstances that pose a risk to the animal's welfare.[4] Florida law generally prohibits behavior that is cruel to animals;[5] however, there is no prohibition against leaving an animal unattended and confined in a motor vehicle, even under dangerous conditions.

Good Samaritan Act

The "Good Samaritan Act" (GSA), codified in s. 768.13, F.S., provides immunity from civil liability for damages to any person who:

- Gratuitously and in good faith renders emergency care or treatment either in direct response to declared state emergencies or at the scene of an emergency situation, without objection of the injured victim, if that person acts as an ordinary reasonably prudent person would have acted under the same or similar circumstances.[6]
- Participates in emergency response activities of a community emergency response team if that person acts prudently and within the scope of his or her training.[7]
- Gratuitously and in good faith renders emergency care or treatment to an injured animal at the scene of an emergency if that person acts as an ordinary reasonably prudent person would have acted under the same or similar circumstances.[8]

While the GSA provides immunity from civil liability for damages arising out of any care or treatment rendered, it does not specifically address immunity from liability for property damage related to the rendering of emergency care or treatment, such as the forcible entry of a motor vehicle to rescue an endangered animal.

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[1] Jan Null, *Heatstroke Deaths of Children in Vehicles*, DEPARTMENT OF METEOROLOGY & CLIMATE SCIENCE, SAN JOSE STATE UNIVERSITY, http://noheatstroke.org/ (last visited November 6, 2015); Catherine McLaren et al., *Heat Stress from Enclosed Vehicles: Moderate Ambient Temperatures Cause Significant Temperature Rise in Enclosed Vehicles*, 116 PEDIATRICS 109, 109 (2005).

[2] McLaren, *supra* note 1, at 109.

[3] McLaren, *supra* note 1, at 111.

[4] ARIZ. REV. STAT. ANN. §13-2910(A)(7); CAL. PENAL CODE §597.7; DEL. CODE ANN. tit. 11, §1325; ILL. COMP. STAT. 70/7.1; ME. REV. STAT. §4019; MD. CODE ANN. TRANSP. §21-1004.1; MINN. STAT. ANN. §346.57; NEV. REV. STAT. §574.195; N.H. REV. STAT. ANN. §644:8-aa; N.J. STAT. ANN. §4:22-26; N.Y. AGRIC. & MKTS. LAW §353-d; N.C. GEN. STAT. §14-363.3; N.D. CENT. CODE §36-21.2-12; R.I. GEN. LAWS §4-1-3.2; S.D. CODIFIED LAWS §40-1-36; TENN. CODE ANN. §29-34-209; VT. STAT. ANN. tit. 13, §386; WASH. REV. CODE §16.52.340; and W. VA. CODE §61-8-19.

[5] s. 828.12, F.S.

[6] s. 768.13(2)(a), F.S.

[7] s. 768.13(2)(d), F.S.

[8] s. 768.13(3), F.S.

Criminal Penalties

Criminal mischief is to willfully and maliciously injure or damage by any means any real or personal property belonging to another, including, but not limited to, acts of vandalism. Criminal mischief penalties vary in severity depending on the value of the damage caused.[9] Criminal mischief is punishable as follows:

- Second degree misdemeanor[10] if the damage is $200 or less;
- First degree misdemeanor[11] if the damage is more than $200 but less than $1,000; or
- Third degree felony[12] if the damage is $1,000 or greater.[13]

The term "malicious" is used in various sections of statute,[14] but is never defined. The term is defined in the dictionary as "having or showing a desire to cause harm to another person."[15] Absent a statute providing criminal immunity for breaking into a vehicle to retrieve a distressed animal, an individual who breaks into a vehicle in these circumstances could be prosecuted for criminal mischief.

Tampering with or interfering with a motor vehicle or trailer is to willfully, maliciously, intentionally, or otherwise interfere with any motor vehicle or trailer of another, without authority, which results in the cargo or contents becoming unloaded or damaged, or which results in the mechanical functions of such motor vehicle or trailer becoming inoperative or impaired.[16] A first offense of tampering with or interfering with a motor vehicle or trailer is punishable as a second degree misdemeanor, and a second or subsequent conviction for the offense is punishable as a first degree misdemeanor.[17]

Florida law does not currently provide any immunity from criminal charges associated with forcibly entering a vehicle to remove a distressed animal that is locked inside the vehicle.

Effect of the Bill

The bill makes it a first degree misdemeanor for any person to intentionally, knowingly, or recklessly confine an animal in an unattended motor vehicle under conditions that endanger the health or well-being of the animal due to:

- Heat;
- Cold;
- Lack of adequate ventilation;
- Lack of food or water; or
- Other circumstances that could reasonably be expected to cause suffering, physical injury, or death of the animal.

An authorized individual may use whatever means are reasonably necessary to remove the animal, after making a reasonable effort to locate the responsible party, and if the animal appears to be in immediate danger. An authorized individual must leave written notice on or in the vehicle and must take the animal to an animal shelter, place of safekeeping, or to a veterinary hospital.

An authorized individual may not be held criminally or civilly liable for actions taken while carrying out the provisions of the bill.

The bill provides an exception for the transportation of horses, cattle, pigs, sheep, poultry, or other agricultural animals in motor vehicles designed to transport such animals for agricultural purposes.

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[9] s. 806.13(1)(a), F.S.
[10] A second degree misdemeanor is punishable by up to sixty days in jail and a $500 fine. ss. 775.082 and 775.083, F.S.
[11] 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.
[12] A third degree felony is punishable by up to five years in prison and a $5,000 fine. ss. 775.082 and 775.083, F.S.
[13] s. 806.13(1)(b), F.S.
[14] *See, e.g.*, ss. 57.085, 104.271, 106.265, 255.25, 365.172, 427.727, 628.6013, 934.21, and 1012.85, F.S.
[15] MERRIAM-WEBSTER, *Malicious*, http://www.merriam-webster.com/dictionary/malicious (last visited Nov. 5, 2015).
[16] s. 860.17, F.S.
[17] *Id.*

The bill provides the following definitions:

- "Authorized individual" means a first responder as defined in s. 125.01045, F.S., an animal control officer as defined in s. 828.27, F.S., or any individual who has contacted the local law enforcement agency, fire department, or 911 operator and has been instructed by such entity to use reasonable force to remove an animal from a motor vehicle pursuant to this section.
- "Motor vehicle" has the same meaning as in s. 316.003, F.S.

B. SECTION DIRECTORY:

Section 1. Citing the act as the "Protecting Animal Welfare and Safety Act" or "P.A.W.S. Act."

Section 2. Creating s. 828.075, F.S., relating to animals confined in unattended motor vehicles.

Section 3. Providing that the bill is effective 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 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 creates a new first degree misdemeanor, and thereby may increase the need for jail beds.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate economic impact on vehicle owners and insurance companies. The extent of damage caused by a good samaritan will depend on many factors, such as the age and make of the damaged vehicle.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of article VII, section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

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 November 17, 2016, the Criminal Justice Subcommittee adopted two amendments and reported the bill favorable as a committee substitute. Together, the amendments:

- Clarify the definition of "authorized individual";
- Clarify prohibited circumstances for an animal to be left unattended;
- Remove unnecessary language precluding prosecution for criminal acts; and
- Change the effective date from July 1, 2016 to October 1, 2016.

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

A bill to be entitled

An act relating to animals confined in unattended motor vehicles; providing a short title; creating s. 828.075, F.S.; providing definitions; prohibiting a person from confining an animal in an unattended motor vehicle under certain circumstances; providing a criminal penalty; providing that authorized individuals may use reasonable force to remove animals under certain circumstances; providing an exemption from liability for authorized individuals; providing an exception for the transportation of agricultural animals; providing an effective date.

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

Section 1. This act may be cited as the "Protecting Animal Welfare and Safety Act" or "P.A.W.S. Act".

Section 2. Section 828.075, Florida Statutes, is created to read:

828.075 Animals confined in unattended motor vehicles.—

(1) As used in this section, the term:

(a) "Authorized individual" means a first responder as defined in s. 125.01045, an animal control officer as defined in s. 828.27, or any individual who has contacted the local law enforcement agency, fire department, or 911 operator and has been instructed by such entity to use reasonable force to remove

an animal from a motor vehicle pursuant to this section.

(b) "Motor vehicle" has the same meaning as provided in s. 316.003.

(2) A person who intentionally, knowingly, or recklessly confines an animal in an unattended motor vehicle under conditions that endanger the health or well-being of the animal due to heat, cold, lack of adequate ventilation, lack of food or water, or other circumstances that could reasonably be expected to cause suffering, physical injury, or death of the animal commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(3) After a reasonable effort to locate the person responsible for the animal, an authorized individual may use whatever means are reasonably necessary, including, but not limited to, breaking into the motor vehicle, to remove the animal if the animal appears to be in immediate danger from heat, cold, lack of adequate ventilation, lack of food or water, or other circumstances that could reasonably be expected to cause suffering, physical injury, or death of the animal.

(4) An authorized individual who removes an animal from a motor vehicle pursuant to this section:

(a) Must leave a written notice in a secure and conspicuous location on or within the motor vehicle bearing his or her name and office, and the address of the location where the animal can be claimed;

(b) Shall take the animal to an animal shelter or other

place of safekeeping or, if deemed necessary, to a veterinary hospital for treatment; and

(c) May not be held criminally or civilly liable for actions taken while carrying out the provisions of this section.

(5) This section does not apply to the transportation of horses, cattle, pigs, sheep, poultry, or other agricultural animals in motor vehicles designed to transport such animals for agricultural purposes.

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

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 329 (2016)

Amendment No. 2

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	_____

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Cortes, B. offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. This act may be cited as the "Protecting Animal Welfare and Safety Act" or "P.A.W.S. Act."

Section 2. Section 828.075, Florida Statutes, is created to read:

828.075 Animals in unattended motor vehicles.—

(1) A person who intentionally, knowingly, or recklessly confines an animal in an unattended motor vehicle under conditions that endanger the health or well-being of the animal due to heat, cold, lack of adequate ventilation, lack of food or water, or other circumstances that could reasonably be expected to cause suffering, physical injury, or death of the animal commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(2) This section does not prohibit the transportation of the following animals in motor vehicles designed to transport such animals for agricultural, sporting, or working purposes:

(a) Horses, cattle, pigs, sheep, poultry, or other agricultural animals.

(b) Hunting, working, sporting, or conformation show dogs.

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

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 animals confined in unattended motor vehicles; providing a short title; creating s. 828.075, F.S.; prohibiting a person from confining an animal in an unattended motor vehicle under certain circumstances; providing a criminal penalty; providing an exception for the transportation of certain animals under certain conditions; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 387 Offenses Evidencing Prejudice
SPONSOR(S): Stevenson and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 356

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	10 Y, 0 N	Keegan	White
2) Justice Appropriations Subcommittee	11 Y, 0 N	Smith	Lloyd
3) Judiciary Committee		Keegan	Havlicak

SUMMARY ANALYSIS

Over the years, news outlets have reported a number of violent crimes against mentally and physically disabled people, often involving horrific acts of violence and cruelty. In August 2015, a thirty-six-year-old autistic St. Augustine resident named Carl Starke was followed home and murdered by several individuals, reportedly because he was seen as a "soft target."

Currently, section 775.085, F.S., authorizes civil remedies and reclassifies the criminal penalty for any felony or misdemeanor offense if the circumstances evidence prejudice based on race, color, ancestry, ethnicity, religion, sexual orientation, national origin, homeless status, mental or physical disability, or the advanced age of the victim.

The bill removes prejudice based on mental or physical disability as a factor for reclassifying an offense under s. 775.085, F.S. The bill creates a new section of law, s. 775.0863, F.S., to establish a separate hate crime penalty statute specifically for crimes evidencing prejudice based on mental or physical disability. The new section's language is substantively identical to the language currently in s. 775.085, F.S, which authorizes civil remedies and reclassifies the penalty for any felony or misdemeanor offense if the circumstances evidence prejudice based on mental or physical disability. Offenses that fall under the statute are reclassified as follows:

- A misdemeanor of the second degree is reclassified to a misdemeanor of the first degree.
- A misdemeanor of the first degree is reclassified to a felony of the third degree.
- A felony of the third degree is reclassified to a felony of the second degree.
- A felony of the second degree is reclassified to a felony of the first degree.
- A felony of the first degree is reclassified to a life felony.

The new section created by the bill is substantively identical to existing law.

The bill has no fiscal impact.

The new section of law is cited as "Carl's Law."

The bill is effective October 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

The Current Situation

Hate Crimes

Over the years, news outlets have reported a number of violent crimes against mentally and physically disabled people, often involving horrific acts of cruelty and violence.[1] In August 2015, a thirty-six-year-old autistic St. Augustine resident named Carl Starke was followed home and murdered by several individuals who were reportedly looking for cars to steal.[2] During the investigation that resulted in the days following Carl Starke's murder, the St. Johns County Sheriff, David Shoar, stated that Starke was victimized because he was seen as a "soft target" by the criminals.[3]

Section 775.085, F.S., reclassifies the penalty for any felony or misdemeanor offense if the circumstances evidence prejudice based on race, color, ancestry, ethnicity, religion, sexual orientation, national origin, homeless status, mental or physical disability, or the advanced age of the victim. This is commonly referred to as the "hate crime" statute. Offenses that fall under the statute are reclassified as follows:

- A misdemeanor of the second degree is reclassified to a misdemeanor of the first degree.
- A misdemeanor of the first degree is reclassified to a felony of the third degree.
- A felony of the third degree is reclassified to a felony of the second degree.
- A felony of the second degree is reclassified to a felony of the first degree.
- A felony of the first degree is reclassified to a life felony.

Reclassification of an offense increases the minimum and maximum penalties that a judge may impose for an offense.

A violation of this section may also be addressed by civil action. Section 775.085, F.S., authorizes an aggrieved party[4] to file a civil suit when it is established by clear and convincing evidence[5] that the aggrieved party has been coerced, intimidated, or threatened in violation of this section.[6] A prevailing plaintiff is entitled to treble damages,[7] an injunction, reasonable attorney fees, or any other appropriate relief.[8]

Criminal Penalties

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

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[1] WPVI-TV, *Linda Weston Pleads Guilty in Tacony Dungeon Case*, 6 ABC ACTION NEWS (Sept. 9, 2015), http://6abc.com/news/weston-pleads-guilty-in-tacony-dungeon-case/975747/ (last visited Nov. 20, 2015); David Shortell & Morgan Winsor, *Videos of Mentally Disabled Man Being Beaten Lead to Hate Crime Charges*, CNN (Sept. 23, 2014), http://www.cnn.com/2014/09/22/justice/delaware-disabled-man-beaten/ (last visited Nov. 20, 2015).

[2] Jenna Carpenter, *Shoar: Suspects in Vista Cove Killing Targeted Autistic Man*, THE ST. AUGUSTINE RECORD (Aug. 21, 2015), http://staugustine.com/news/local-news/2015-08-21/two-suspects-identified-tuesday-homicide#.Vk9nSk3ltHh (last visited Nov. 20, 2015).

[3] *Id.*

[4] Section 775.085(2), F.S., specifies that an aggrieved party that brings suit pursuant to this section must be a person or an organization.

[5] Clear and convincing evidence is established when the evidence is of such weight that it "produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

[6] s. 775.085(2), F.S.

[7] Treble damages are authorized as a civil remedy for criminal practices in other areas of statute. *See, e.g.*, s. 772.11, F.S. Treble damages are defined as a remedy equal to three times the amount of actual financial losses suffered by the aggrieved party. LEGAL INFORMATION INSTITUTE, *Treble Damages*, https://www.law.cornell.edu/wex/treble_damages (last visited Feb. 2, 2016).

[8] *Id.*

- 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 thirty years imprisonment and a $10,000 fine;
- A second degree felony is punishable by up to fifteen years imprisonment and a $10,000 fine;
- A third degree felony is punishable by up to five years imprisonment and a $5,000 fine.
- A first degree misdemeanor is punishable by up to one year in jail and a $1,000 fine.
- A second degree misdemeanor is punishable by up to sixty days in jail and a $500 fine.

The Criminal Punishment Code applies to sentencing for felony offenses committed on or after October 1, 1998.[9] 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.[10] If an offense is not listed in the ranking chart, it defaults to a ranking based on the degree of the felony.[11]

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.[12] A defendant's total sentence points are then entered into a mathematical computation that determines the defendant's lowest permissible sentence.[13] 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).[14]

Effect of the Bill

The bill removes prejudice based on mental or physical disability as a factor for reclassifying an offense under s. 775.085, F.S. The bill creates a new section of law, s. 775.0863, F.S., to establish a separate hate crime statute specifically for crimes evidencing prejudice based on mental or physical disability. The new section's language is substantively identical to the language in s. 775.085, F.S., which authorizes civil remedies and reclassifies the penalty for any felony or misdemeanor offense if the circumstances evidence prejudice based on mental or physical disability. Offenses that fall under the statute are reclassified as follows:

- A misdemeanor of the second degree is reclassified to a misdemeanor of the first degree.
- A misdemeanor of the first degree is reclassified to a felony of the third degree.
- A felony of the third degree is reclassified to a felony of the second degree.
- A felony of the second degree is reclassified to a felony of the first degree.
- A felony of the first degree is reclassified to a life felony.

The new section of law is cited as "Carl's Law."

The bill adds cross-references to the Offense Severity Ranking Chart, providing that the reclassification of the degree of a felony through application of ss. 775.085 and 775.0863, F.S., shall not cause the offense to become unlisted in the Offense Severity Ranking Chart.

The bill is effective October, 1, 2016.

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[9] s. 921.002, F.S.
[10] s. 921.0022, F.S.
[11] s. 921.0023, F.S.
[12] s. 921.0024, F.S.
[13] *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."
[14] Section 921.0024(2), F.S.

B. SECTION DIRECTORY:

Section 1. cites the act as "Carl's Law."

Section 2. amends s. 775.085, F.S., relating to evidencing prejudice while committing offense; reclassification.

Section 3. creates s. 775.0863, F.S., relating to evidencing prejudice while committing offense against person with mental or physical disability.

Section 4. amends s. 921.0022, F.S., relating to criminal punishment code; offense severity ranking chart.

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

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill language is substantively identical to existing law and should have no fiscal impact on state government revenues.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill language is substantively identical to existing law and should have no fiscal impact on local government revenues.

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 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

None.

A bill to be entitled

An act relating to offenses evidencing prejudice; providing a short title; amending s. 775.085, F.S.; deleting provisions relating to reclassification of offenses committed while evidencing prejudice based on a mental or physical disability of the victim; creating s. 775.0863, F.S.; providing for reclassification of offenses committed while evidencing prejudice based on a mental or physical disability of the victim; defining the term "mental or physical disability"; providing for a civil cause of action for violations; providing for recovery of treble damages, costs, and attorney fees; specifying an essential element of the offense; amending s. 921.0022, F.S.; revising references to offense reclassification provisions; providing an effective date.

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

Section 1. This act may be cited as "Carl's Law."

Section 2. Subsections (1) and (2) of section 775.085, Florida Statutes, are amended to read:

775.085 Evidencing prejudice while committing offense; reclassification.—

(1)(a) The penalty for any felony or misdemeanor shall be

reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, homeless status, ~~mental or physical disability,~~ or advanced age of the victim:

1. A misdemeanor of the second degree is reclassified to a misdemeanor of the first degree.

2. A misdemeanor of the first degree is reclassified to a felony of the third degree.

3. A felony of the third degree is reclassified to a felony of the second degree.

4. A felony of the second degree is reclassified to a felony of the first degree.

5. A felony of the first degree is reclassified to a life felony.

(b) As used in paragraph (a), the term:

~~1. "Mental or physical disability" means that the victim suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, and has one or more physical or mental limitations that restrict the victim's ability to perform the normal activities of daily living.~~

1.~~2.~~ "Advanced age" means that the victim is older than 65 years of age.

2.~~3.~~ "Homeless status" means that the victim:

a. Lacks a fixed, regular, and adequate nighttime

residence; or

b. Has a primary nighttime residence that is:

(I) A supervised publicly or privately operated shelter designed to provide temporary living accommodations; or

(II) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

(2) A person or organization that establishes by clear and convincing evidence that it has been coerced, intimidated, or threatened in violation of this section has a civil cause of action for treble damages, an injunction, or any other appropriate relief in law or in equity. Upon prevailing in such civil action, the plaintiff may recover reasonable attorney ~~attorney's~~ fees and costs.

Section 3. Section 775.0863, Florida Statutes, is created to read:

775.0863 Evidencing prejudice while committing offense against person with mental or physical disability; reclassification.—

(1)(a) The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on a mental or physical disability of the victim:

1. A misdemeanor of the second degree is reclassified to a misdemeanor of the first degree.

2. A misdemeanor of the first degree is reclassified to a

felony of the third degree.

3. A felony of the third degree is reclassified to a felony of the second degree.

4. A felony of the second degree is reclassified to a felony of the first degree.

5. A felony of the first degree is reclassified to a life felony.

(b) As used in paragraph (a), the term "mental or physical disability" means a condition of mental or physical incapacitation due to a developmental disability, organic brain damage, or mental illness, and one or more mental or physical limitations that restrict a person's ability to perform the normal activities of daily living.

(2) A person or organization that establishes by clear and convincing evidence that it has been coerced, intimidated, or threatened in violation of this section has a civil cause of action for treble damages, an injunction, or any other appropriate relief in law or in equity. Upon prevailing in such civil action, the plaintiff may recover reasonable attorney fees and costs.

(3) It is an essential element of this section that the record reflect that the defendant perceived, knew, or had reasonable grounds to know or perceive that the victim was within the class delineated in this section.

Section 4. Subsection (2) of section 921.0022, Florida Statutes, is amended to read:

921.0022 Criminal Punishment Code; offense severity ranking chart.—

(2) The offense severity ranking chart has 10 offense levels, ranked from least severe, which are level 1 offenses, to most severe, which are level 10 offenses, and each felony offense is assigned to a level according to the severity of the offense. For purposes of determining which felony offenses are specifically listed in the offense severity ranking chart and which severity level has been assigned to each of these offenses, the numerical statutory references in the left column of the chart and the felony degree designations in the middle column of the chart are controlling; the language in the right column of the chart is provided solely for descriptive purposes. Reclassification of the degree of the felony through the application of s. 775.0845, s. 775.085, s. 775.0861, s. 775.0862, s. 775.0863, s. 775.087, s. 775.0875, s. 794.023, or any other law that provides an enhanced penalty for a felony offense, to any offense listed in the offense severity ranking chart in this section shall not cause the offense to become unlisted and is not subject to the provisions of s. 921.0023.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 455 Alimony
SPONSOR(S): Burton and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 668

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	9 Y, 4 N	Robinson	Bond
2) Judiciary Committee		Robinson	Havlicak

SUMMARY ANALYSIS

Alimony is a court-ordered payment from one spouse to another for support or maintenance.
Florida courts may currently award one, or a combination, of five different types of alimony: temporary alimony, bridge-the-gap alimony, rehabilitative alimony, durational alimony, and permanent alimony. A court has broad discretion to determine the type, amount, duration, and later modification or termination of the alimony award.

The bill:

- Provides factors to assist a court in awarding temporary alimony during dissolution proceedings.
- Repeals the current categorization of post-dissolution alimony awards as bridge-the-gap, rehabilitative, durational, or permanent and creates one form of post-dissolution alimony.
- Limits judicial discretion in awarding post-dissolution alimony by establishing a formula to determine a presumptive range for the amount and duration of the alimony award, effectively ending permanent alimony.
- Provides factors to assist a court in determining a post-dissolution alimony award within the presumptive range.
- Authorizes a court to deviate from the presumptive range if the resulting alimony award would be inappropriate or inequitable.
- Revises procedures to initiate payment of alimony awards through the clerk of court depository.
- Provides that certain changes in actual income, or, an obligor's retirement after reaching the retirement age for social security or the obligor's profession, constitute a substantial change in circumstances for purposes of modifying or terminating an alimony award.
- Revises the criteria to determine the existence of a supportive relationship for purposes of modifying or terminating an alimony award, including the consideration of relationships that may have recently ended and repealing the cohabitation requirement.
- Creates a rebuttable presumption that modification or termination of an alimony award is retroactive to the date of the petition for relief.
- Prohibits a party who unreasonably pursues or defends a modification action from recovering attorney's fees and costs and requiring that such party pay the fees and costs of the prevailing party.

The bill also codifies current provisions of law relating to:

- Required adjustments for single support orders.
- Tax treatment of alimony awards.
- Consideration of the income of a successor spouse in an alimony modification proceeding.

This bill does not appear to have a fiscal impact on local governments, but may have an indeterminate fiscal impact on state government.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

ALIMONY

Alimony is a court-ordered payment from one spouse to another for support or maintenance. Alimony is most commonly awarded in an action for dissolution of marriage,[1] but may also be awarded to a spouse in an action for support that does not seek marital dissolution.[2]

While there is some statutory guidance regarding alimony, much of the law governing alimony is common law (that is, established through case precedent). The leading case, *Canakaris v. Canakaris*,[3] set forth many general concepts of alimony but also confirmed that ultimately the setting of alimony is a matter within the broad discretion of a trial court. Writing in favor of broad discretion, the Florida Supreme Court explained:

> Dissolution proceedings present a trial judge with the difficult problem of apportioning assets acquired by the parties and providing necessary support. The judge possesses broad discretionary authority to do equity between the parties and has available various remedies to accomplish this purpose, including lump sum alimony, permanent periodic alimony, rehabilitative alimony, child support, a vested special equity in property, and an award of exclusive possession of property. As considered by the trial court, these remedies are interrelated; to the extent of their eventual use, the remedies are part of one overall scheme.[4]

However, the Court acknowledged problems with the exercise of such broad discretion:

> ...[B]oth appellate and trial judges should recognize the concern which arises from substantial disparities in domestic judgments resulting from basically similar factual circumstances. The appellate courts have not been helpful in this regard. Our decisions and those of the district courts are difficult, if not impossible, to reconcile. The trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result. The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness.[5]

In the 35 years since *Canakaris*, little has changed in the law governing alimony. The legislature has provided some statutory guidance and case law has somewhat narrowed the exercise of judicial discretion. Nevertheless, the application of the law to similar cases has continued to lead to varied and inconsistent alimony awards throughout the state. Expressing frustration with the concept of broad discretion, and the resulting inconsistent decisions of courts within the state regarding the appropriate award of alimony in similar cases, one appellate judge wrote in 2002:

> Broad discretion in the award of alimony is no longer justifiable and should be discarded in favor of guidelines, if not an outright rule.[6]

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[1] s. 61.08(2), F.S.
[2] s. 61.09, F.S.
[3] *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980).
[4] *Id.* at 1202.
[5] *Id.* at 1203.
[6] *Bacon v. Bacon*, 819 So. 2d 950, 954 (Fla. 4th DCA 2002)(Farmer, J., concurring).

ALIMONY AWARDS

Types of Alimony

Florida law recognizes five forms of alimony: temporary, bridge-the-gap, rehabilitative, durational, and permanent periodic alimony as illustrated by **Figure 1**.

Figure 1: Types of Alimony Awards under Florida Law

Type of Alimony Award	***Purpose***	***Duration***	***Modification or Termination***	***Automatic Termination***
Temporary[7]	May be requested by petition or motion after the initiation of dissolution proceedings for support during the dissolution action.	Length of the dissolution action.	Good Cause	Entry of final judgment in dissolution action (including appeals).[8]
Bridge-the-Gap[9]	May be awarded to provide support necessary to make the transition from married to single. Designed to assist with legitimate short-term needs.	Varies, but may not exceed 2 years.	Not modifiable in amount or duration	Remarriage of Recipient or Death of Either Party.
Rehabilitative[10]	May be awarded to assist in establishing the capacity for self-support through the redevelopment of previous skills or credentials; or the acquisition of education, training, or work experience necessary to develop employment skills or credentials. Requires a specific and defined plan.[11]	Varies	Substantial Change in Circumstances or Non-Compliance with Rehabilitation Plan or Completion of the Rehabilitation Plan.[12]	Death of Either Party.
Durational[13]	May be awarded if permanent alimony is inappropriate. Provides economic assistance for a set period of time following a marriage of short or moderate duration.[14]	Varies, but may not exceed the length of the marriage.	Substantial Change in Circumstances (Amount Only) or Exceptional Circumstances (Duration Only)	Remarriage of Recipient or Death of Either Party.
Permanent[15]	May be awarded to provide for the needs and necessities of life as they were established during the marriage for a party who lacks the financial ability to meet such needs following the divorce. May be awarded following a marriage of long duration, moderate duration or short duration under certain circumstances.	Perpetual	Substantial Change in Circumstances, including the existence of a supportive relationship.	Remarriage of Recipient or Death or Either Party.

[7] s. 61.071, F.S.
[8] 24A AM. JR. 2D *Divorce and Separation* §615.
[9] s. 61.08(5), F.S.
[10] s. 61.08(6)(a), F.S.
[11] s. 61.08(6)(b), F.S.
[12] s. 61.08(6)(c), F.S.
[13] s. 61.08(7), F.S.
[14] For purposes of determining the appropriateness of a particular award of alimony, there is a rebuttable presumption that a short-term marriage is a marriage having a duration of less than 7 years; a moderate-term marriage is a marriage having a duration of greater than seven years but less than seventeen years; and a long-term marriage is a marriage having a duration of seventeen years or greater. s. 61.08(4), F.S.
[15] s. 61.08(8), F.S.

Determining an Award of Alimony

A court may order the payment of one, or a combination, of the types of alimony authorized under current law. Unlike child support obligations which are established by a fairly strict formula and expire after a statutorily defined period, the amount and duration of alimony awards are largely within the discretion of the court.

Before a court may make an award of alimony, it must equitably distribute the former spouse's assets.[16] If subsequent to the distribution the requesting spouse has no need for support or the other spouse does not have the ability to pay, an alimony award is inappropriate. The court must make a specific factual determination regarding whether there remains a need for and ability to pay alimony.[17] If an alimony award is appropriate under the circumstances, to determine the proper alimony award the court must consider all relevant factors, including:[18]

- The standard of living established during the marriage.
- The duration of the marriage.
- The age and the physical and emotional condition of each party.
- The financial resources of each party, including the non-marital and the marital assets and liabilities distributed to each.
- The earning capacities, educational levels, vocational skills, and employability of the parties and, when applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment.
- The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party.
- The responsibilities each party will have with regard to any minor children they have in common.
- The tax treatment and consequences of any alimony award, including the designation of alimony as nontaxable and nondeductible.
- All sources of income[19] available to either party, including income available through investments. Income may be imputed to a voluntarily unemployed or underemployed spouse, whether the spouse is the payor or payee.[20]
- Any other factor necessary to do equity and justice between the parties.

The court may also consider the adultery of either spouse and the circumstances surrounding the adultery.[21] However, adultery is not a bar to entitlement to alimony[22] and marital misconduct may not be used as a basis for alimony unless the misconduct causes a depletion of marital assets.[23]

It is within these general guidelines that courts may exercise broad discretion in determining the type, amount, and duration of an alimony award, if any, although the award may not leave the obligor with

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[16] *Canakaris v. Canakaris*, 382 So. 2d 1197, 1202 (Fla. 1980).
[17] *See* s. 61.08(2), F.S.; *Payne v. Payne*, 88 So.3d 1016 (Fla. 2d DCA 2012).
[18] s. 61.08(2), F.S.
[19] Defined very broadly as "any form of payment to an individual, regardless of source, including, but not limited to: wages, salary, commissions and bonuses, compensation as an independent contractor, worker's compensation, disability benefits, annuity and retirement benefits, pensions, dividends, interest, royalties, trusts, and any other payments, made by any person, private entity, federal or state government, or any unit of local government. s. 61.046(7), F.S. Case law has expanded the definition to include in-kind payments and regular gifts and clarified that the source of income must be "available" to the party. *See Fitzgerald v. Fitzgerald*, 912 So. 2d 363 (Fla. 2d DCA 2005); *Weiser v. Weiser*, 782 So. 2d 986 (Fla. 4th DCA 2000), and *Zold v. Zold*, 880 So. 2d 779 (Fla. 5th DCA 2004). However, a party may not voluntarily make income unavailable in order to reduce his or her annual income. *See Geoghegan v. Geoghegan*, 969 So. 2d 482 (Fla. 5th DCA 2007).
[20] *Kovar v. Kovar*, 648 So. 2d 177 (Fla. 4th DCA 1994); *Rojas v. Rojas*, 656 So. 2d 563 (Fla. 3d DCA 1995).
[21] s. 61.08(1), F.S.
[22] *See Coltea v. Coltea*, 856 So. 2d 1047 (Fla. 4th DCA 2003).
[23] *See Noah v. Noah*, 491 So. 2d 1124 (Fla. 1986)(holding that the trial court erred in distributing virtually all assets to the wife on the basis of her husband's adultery where there was no evidence that the adultery depleted the family resources or that the emotional devastation visited on the wife translated into her having a greater financial need).

significantly less net income than the obligee unless there are exceptional circumstances.[24] The court must only make findings of fact relative to the factors enumerated supporting its award or denial of alimony.[25] A party may be ordered to pay an alimony award in periodic payments, payments in lump sum, [26] or a combination of the two. The court may also require the obligor to purchase life insurance or post a bond to secure the actual payment of the alimony award. [27]

Nominal alimony may be awarded when the court finds the requisite entitlement to alimony, but due to insufficient resources available at the time of the final hearing, the court cannot award sufficient alimony to meet the needs of the obligee. Nominal alimony is not a form of alimony, but rather is an award of a de minimis amount, such as $1, to serve as a "placeholder" for one of the five types of alimony currently recognized by the state. The award of nominal alimony reserves jurisdiction for the court to later modify the amount of alimony upon petition of the obligee, should the financial conditions of the obligor improve.[28]

EFFECT OF THE BILL – ALIMONY AWARDS

The bill repeals the current classification scheme of alimony awards and creates one category of alimony, similar to what is currently called "durational alimony." It may be awarded in an amount and duration within a range based on a mathematical formula illustrated by **Figure 2**. The concept of using such alimony for bridging the gap or rehabilitative purposes is retained in the guidelines that judges may use to determine the award within the presumptive range. The new guidelines effectively eliminate permanent alimony.

The bill does not change the categorization or form of temporary alimony and the formula may not be used to calculate temporary alimony.

Presumptive Range

Figure 2: Alimony Formula

	Low End	***High End***
Amount	**(0.015 x YOMA) x GI** If a negative number results, the presumptive amount is $0.	**(0.020 x YOMA) x GI** If a negative number results, the presumptive amount is $0.
Duration	**0.25 x YOMD**	**0.75 x YOMD**

YOMA = Years of marriage (measured from date of marriage through the date of filing the action for dissolution) for purposes of determining the presumptive amount of alimony. For marriages of 20 years or more, 20 years is used in calculating the low end and high end. If the court establishes the duration of an alimony award at 50% percent or less than the actual years of marriage, then the court must use the actual years of marriage, up to a maximum of 25 years, to calculate the high end.
YOMD = Years of marriage (measured from date of marriage through the date of filing the action for dissolution) for purposes of determining the presumptive duration of alimony.
GI = Monthly gross income of the potential payor minus the monthly gross income of the party seeking alimony. If a party is voluntarily unemployed or underemployed, GI is calculated using the party's potential income.

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[24] s. 61.08(9), F.S.
[25] s. 61.08, F.S.
[26] For lump sum alimony to be awarded, there must be a showing of need and ability to pay as well as unusual circumstances which require non-modifiable support and justification that does not substantially endanger the payor's economic status. *Rosario v. Rosario*, 945 So. 2d 629, 632 (Fla. 4th DCA 2006).
[27] s. 61.08(3), F.S.
[28] *Ellis v. Ellis*, 699 So. 2d 280 (Fla. 5th DCA 1997)(award of $1.00 in permanent alimony to wife to leave open the possibility of increasing the alimony should the value of the husband's pension increase, since husband could then pay increased alimony from his social security disability income which was then being used for his own support).

Under the new alimony guidelines created by the bill, the court must first establish the presumptive range of the amount and duration of an alimony award pursuant to the mathematical formula illustrated by **Figure 2**. To determine the range, the court must make initial written findings regarding the monthly gross income of each party and the total years of marriage. Income, for purposes of determining the presumptive range, is consistent with income for purposes of determining an order of child support.[29]

After making such initial findings, the court must use the information to calculate the presumptive alimony amount and duration range pursuant to the formula in **Figure 2.**

> ***Example 1:*** *Spouse 1 and Spouse 2 were married for 6 years (**YOMD** and **YOMA**). Spouse 1 has a monthly gross income of $5,000. Spouse 2 has a monthly gross income of $1,800. The difference between their income is $3,200 (**GI**). Spouse 2 requests alimony. The presumptive alimony range is $288 - $384 for a period of 1.5 years to 4.5 years.*
>
> ***Example 2:*** *Spouse 1 and Spouse 2 were married for 32 years (**YOMD**)(**YOMA** is capped at 20 years). Spouse 1 has a monthly gross income of $2,000. Spouse 2 has a monthly gross income of $12,000. The difference between their income is $10,000 (**GI**). Spouse 1 requests alimony. The presumptive alimony range is $3,000 - $ 4,000 for a period of 8 years to 24 years.*

Determining Alimony Award within Presumptive Range

Marriages less than 2 years

There is a rebuttable presumption for marriages 2 years or less that no alimony may be awarded regardless of the presumptive range determined pursuant to the alimony formula in **Figure 2**. The court may award alimony for such marriages in accordance with the standards for awarding alimony for marriages in excess of 2 years if the court makes written findings that:

- There is clear and convincing need for alimony;
- There is ability to pay alimony; and
- The failure to award alimony would be inequitable.

Marriages longer than 2 years

For marriages longer than 2 years, if there is no agreement between the parties, alimony is presumptively awarded within the range calculated under the formula in **Figure 2**. In determining the amount and duration of the alimony award within the presumptive range, the court retains broad discretion, but must consider all of the following factors:

- The financial resources (including actual and potential income) and ability of each spouse to meet his or her reasonable needs independently.
- The standard of living of the parties during the marriage, but with the consideration that neither party may be able to maintain that standard of living after the divorce.
- Whether there was an equitable distribution of marital property.
- Both parties' income, employment, and employability, obtainable through reasonable diligence and additional training or education, and the details of such additional training or education plans.
- Reduction in employment due to the needs of an unemancipated child of the marriage or the circumstances of the parties.
- Whether either party has foregone or postponed economic, educational, or employment opportunities during the course of the marriage.

[29] Compare lines 78-157 of the bill with s. 61.30(2) and (3), F.S.

- Whether either party has caused the unreasonable depletion or dissipation of marital assets.
- The amount of temporary alimony and the period of time it was paid to the recipient spouse.
- The age, health, and physical and mental condition of the parties, including health care needs and unreimbursed health care expenses.
- Significant economic or noneconomic contributions to the marriage or to the economic, educational, or occupational advancement of a party.
- The tax consequence of the alimony award.
- Any other factor necessary to do equity and justice between the parties.

After consideration of the enumerated factors, the court may establish an alimony award within the presumptive range. The order establishing the award must clearly set forth both the amount and duration of the award. The bill does not authorize the court to order payment of alimony in lump sum. The court must also make a written finding that the obligor has the financial ability to pay the award.

A court retains the authority to order an obligor to secure the actual payment of the alimony award, but only upon a showing of special circumstances. The court must make specific evidentiary findings regarding the availability, cost, and financial impact on the obligated party for the security. The permissible methods of security include the purchase or maintenance of a decreasing term life insurance policy or a bond, or any other assets that may be suitable. The security may be modified if the underlying alimony award is modified and must also be reduced in an amount commensurate with any reduction in the alimony award.

Nominal Alimony

The bill reserves the right of a court to award nominal alimony in the amount of $1 per year if:

- At the time of trial, a party who traditionally provided the primary source of financial support to the family temporarily lacked the ability to pay support but was reasonably anticipated to have the ability to pay support in the future; or
- An alimony recipient is presently able to work but has a medical condition that with a reasonable degree of certainty may inhibit or prevent his or her ability to work during the duration of the alimony period.

The duration of nominal alimony must be established in accordance with the presumptive alimony formula illustrated in **Figure 2.** Before the expiration of the durational period, the amount of the nominal alimony award may be modified to a full award using the presumptive alimony formula in **Figure 2**.

Deviations from the Presumptive Alimony Range

The court may establish an award of alimony that is outside either or both of the presumptive alimony amount and duration range. In such cases, the court must consider all the enumerated factors applicable to determining an award of alimony within the presumptive range and make specific written findings concerning the factors that justify the finding that the application of the presumptive alimony amount and duration range is inappropriate or inequitable.

Determining Award of Temporary Alimony

Current law does not specify guidelines for the court to consider in awarding temporary alimony. This bill requires the court to first determine whether there is a need for temporary alimony and the ability to pay alimony, which restates and codifies the current standard for determining awards of other types of alimony. If both conditions are met, the court must consider the factors used to determine an award of alimony within the presumptive alimony guidelines and make specific written findings of fact regarding the factors that justify an award of temporary alimony. However, a court may not use the presumptive alimony formula in **Figure 2** to calculate temporary alimony.

COMBINED ALIMONY AND CHILD SUPPORT ORDERS

A court may enter a combined order for alimony and child support in a dissolution proceeding.[30] The child support guidelines[31] provide for the adjustment of a party's share of child support if an application of the child support guidelines results in an obligation that is 55% or more of the party's gross income for a single support order.[32] Florida courts have reversed combined support orders that totaled 58%-70% of the obligor's net income as "clearly excessive."[33]

The federal Consumer Credit Protection Act also prohibits the deduction of more than 50-65% of an individual's maximum disposable earnings[34] pursuant to a combined order of support.[35]

Effect of the bill

The bill provides that the 55% adjustment cap applies to a single combined order of alimony and child support. If the calculation of an award of combined support exceeds 55% of the payor's net income, the court must adjust the award of child support to ensure that the cap is not exceeded as consistent with current law.

PAYMENT OF ALIMONY AWARDS

Section 61.08(10), F.S. requires that any alimony order entered after January 1, 1985, direct that the payment of alimony be made through a depository operated by the clerk of court. Parties may opt out of the depository if they have no minor child or if the parties request that the court not direct payment through the depository. If the court does not direct payment through the depository, either party may subsequently apply to initiate payments through the depository by filing an affidavit with the depository alleging default or arrearages in payment.[36] The moving party must provide copies of the affidavit to the court and the other party or parties.[37] Fifteen days after receipt of the affidavit, the depository must notify all parties that future payments must be made through the depository.[38] The depository collects a fee equal to 4% of the alimony payment, except that no fee may exceed $5.25.[39]

Effect of the bill

The bill revises the procedures parties must use to opt in to the depository program. Instead of filing an affidavit with the depository alleging a default or arrearage, a party must file a verified motion with the court and serve a copy on the non-moving party. An evidentiary hearing must be conducted within 15 days after the filing of the motion to establish the default and arrearages, if any. The court must thereafter issue an order directing the clerk of the circuit court to establish or amend a Family Law Case History account for the parties, and directing that the obligor make future payments through the depository.

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[30] s. 61.1301, F.S.
[31] s. 61.30, F.S.
[32] s. 61.30(11)(a)9., F.S.
[33] See *Thomas v. Thomas*, 418 So. 2d 316, (Fla. 4th DCA 1982); *Casella v. Casella*, 569 So. 2d 848, 849 (Fla. 4th DCA 1990) (the court stopped short of ruling that a particular percentage constitutes a bright-line rule, and instead, ruled that each case must be determined individually).
[34] "Disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld. 15 U.S.C. § 1672(b).
[35] 15 U.S.C. § 1673(b).
[36] s. 61.08, F.S.
[37] *Id.*
[38] *Id.*
[39] s. 61.181(2)(b), F.S.

INCOME TAX TREATMENT OF ALIMONY PAYMENTS

Gross income for federal income tax purposes includes amounts received as alimony or separate maintenance payments.[40] The payment to, or for the benefit of, a spouse or former spouse under a divorce or separation instrument[41] will qualify and be deemed and treated by the Internal Revenue Service (IRS) as "alimony" for income tax purposes. Alimony is deductible from the obligor's gross income and taxable income to the obligee, if:[42]

- The payment is made in cash;
- The divorce or separation instrument does not designate the payment as a payment that is not includable in gross income under the Internal Revenue Code and not allowable as a deduction under the Internal Revenue Code;
- The spouses are not members of the same household at the time the payment is made; and
- There is no requirement to make any payment (in cash or property) after the death of the obligee.

Florida courts may override the default IRS rule by providing in the judgment of dissolution or support that alimony payments are excluded from the gross income of the obligee and not deductible by the obligor.[43] However, the usual treatment of alimony has been to make the alimony taxable to the recipient and deductible by the payor.[44]The spouses may also validly override the default taxability rules of the IRS by designating that payments otherwise qualifying as alimony or separate maintenance payments under the Internal Revenue Code be nondeductible by the obligor and excludable from the gross income of the obligee in a marital settlement agreement or related agreement.[45]

Effect of the Bill

The bill codifies and restates current law.

MODIFICATION AND TERMINATION OF ALIMONY

Section 61.14, F.S. provides that either party may request modification of an award of alimony, whether such award was agreed to by the parties in a marital settlement agreement[46] or ordered by the court, if the circumstances or the financial ability of either party changes. The moving party must show a substantial change in circumstances, that the change was not contemplated at the time of the final judgment of dissolution, and that the change is sufficient, material, involuntary and permanent in nature.[47] The change in circumstances must be alleged to have occurred subsequent to the last

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[40] 26 U.S.C. § 71(a).

[41] A divorce or separation instrument means a decree of divorce or separate maintenance or a written instrument incident to such a decree, or a written separation agreement, or a decree requiring a spouse to make payments for the support or maintenance of the other spouse. 26 U.S.C. § 71(b)(2).

[42] 26 U.S.C. § 71(b)(1).

[43] *Rykiel v. Rykiel*, 838 So. 2d 508, 511-12 (Fla. 2003).

[44] *See generally Garcia v. Garcia*, 696 So. 2d 1279 (Fla. 2d DCA 1997); *Rihl v. Rihl*, 727 So. 2d 272 (Fla. 3d DCA 1999).

[45] 26 CFR. § 1.71-1T, Q8 & A8.

[46]Despite such statutory authorization, a marital settlement agreement becomes a contractual duty which, when endorsed by court order, may not be set aside or revisited, according to principles of collateral estoppel and res judicata. Florida courts do not take lightly agreements made by husband and wife concerning spousal support. A marital settlement agreement as to alimony or property rights which is entered before the dissolution of marriage is binding upon the parties. *See, e.g., Perry v. Perry*, 976 So. 2d 1151 (Fla. 4th DCA 2008) and *Griffith v. Griffith*, 860 So. 2d 1069, 1073 (Fla. 1st DCA 2003).

[47] *Townsend v. Townsend*, 585 So. 2d 468 (Fla. 2d DCA 1991); Courts have found a substantial change in circumstance where: an obligor's health deteriorated due to two heart attacks, he was unable to continue gainful employment, and received social security disability income as his full income (*Scott v. Scott*, 109 So. 3d 804 (Fla. 5th DCA 2012)). An obligor demonstrated a showing of a substantial change in circumstance through a detrimental impact on his business in manufacturing cathode ray television tubes due to advancing technology that made his product obsolete. The court also noted that the obligor was forced to remove money from family trust accounts to meet his alimony obligation. (*Shawfrank v. Shawfrank*, 97 So. 3d 934, 937 (Fla. 1st DCA 2012)). The court found a substantial change in circumstance where

judgment or order awarding alimony.[48] The court has jurisdiction to modify an award of alimony as equity requires.[49] A modification order may be retroactive to the date of the filing of the action, or the filing of the petition for modification.[50]

Supportive Relationship

A court may reduce or terminate an award of alimony based on the existence of a supportive relationship.[51] The court must make specific written findings that, since the granting of a divorce and the award of alimony, the obligee has entered into a supportive relationship with a person, unrelated to the obligee by consanguinity or affinity, with whom he or she resides. In determining whether a supportive relationship exists, the court may consider:[52]

- The extent to which the obligee and the other person have held themselves out as a married couple, including referring to each other in terms such as "my husband" or "my wife."
- The period of time that the obligee has resided with the other person in a permanent place of abode.
- The extent to which the obligee and the other person have pooled their assets or income or otherwise exhibited financial interdependence.
- The extent to which the obligee or the other person has supported the other, in whole or in part.
- The extent to which the obligee or the other person has performed valuable services for the other.
- The extent to which the obligee or the other person has performed valuable services for the other's company or employer.
- Whether the obligee and the other person have worked together to create or enhance anything of value.
- Whether the obligee and the other person have jointly contributed to the purchase of any real or personal property.
- Evidence in support of a claim that the obligee and the other person have an express agreement regarding property sharing or support.
- Evidence in support of a claim that the obligee and the other person have an implied agreement regarding property sharing or support.
- Whether the obligee and the other person have provided support to the children of one another, regardless of any legal duty to do so.

The obligor has the burden to prove by a preponderance of the evidence that a supportive relationship exists.[53]

Effect of the Bill – Supportive Relationship

The bill revises the criteria to determine the existence of a supportive relationship for purposes of modification or termination of alimony. Specifically, the bill provides that:

- The court may consider evidence of cohabitation, but cohabitation is not a requirement of a supportive relationship. The obligor does not have to prove cohabitation.
- The court may consider whether the obligor's failure to comply with court ordered financial obligations to the obligee was a significant factor in the establishment of the relationship.

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financial affidavits showed that obligee's income jumped from $1,710 to $4,867 a month, making her income higher than the obligor's income of $3,418 a month. (*Koski v. Koski*, 98 So. 3d 93, 94 (Fla. 4th DCA 2012)).

[48] *Johnson v. Johnson*, 537 So. 2d 637 (Fla. 2d DCA 1998).

[49] s. 61.14(1)(a), F.S.

[50] *Id.*

[51] A supportive relationship is a relationship that provides economic support equivalent to a marriage. The existence of a conjugal relationship, though it may be relevant to the nature and extent of the relationship, is not determinative of the existence of a supportive relationship.

[52] s. 61.14(1)(b), F.S.

[53] s. 61.14(1)(b), F.S.

- The court may consider whether the parties referred to each other in the more generic term, "spouse", rather than husband or wife.

The bill also authorizes a court to terminate or modify an alimony award based on a supportive relationship that may have existed in the year before the filing of the petition for modification, although a current supportive relationship may not exist.

A reduction or termination of alimony based on a supportive relationship is retroactive to the date of the filing of the petition for reduction or termination.

Retirement of the Obligor

Retirement of the obligor can be considered as part of the totality of circumstances in order to determine if a substantial change in circumstances exists to warrant a modification of alimony. However, retirement does not by itself constitute a substantial change in circumstances.[54] The Florida Supreme Court directed that in modification cases based upon the retirement of the obligor courts should consider:[55]

- The obligor's age, health, and motivation for retirement.
- The type of work the obligor performs and the age at which others engaged in that line of work normally retire.
- Whether the retirement placed the obligee in peril of poverty.
- The assets of the parties.

There are no additional statutory standards relating to modification or termination of alimony based upon retirement of the obligor. Any modification is strictly within the trial court's discretion subject only to the guidance provided by the Supreme Court.

Effect of the Bill – Retirement of the Obligor

The bill provides that retirement constitutes a substantial change in circumstances if the obligor has reached the full retirement age for social security benefits[56] and has retired or if the obligor has reached the customary retirement age for his or her occupation and retired. The obligor may file an action within 1 year of the anticipated retirement date and the court must determine the customary retirement age for the obligor's profession if the obligor has not reached the full retirement age for social security. However, such determination is not adjudicative of the petition for modification.

If an obligor voluntarily retires before reaching the full retirement age for social security benefits or the customary retirement age for his or her profession, the court must determine if the retirement is reasonable under the factors set out by the Supreme Court. If the voluntary retirement is reasonable it constitutes a substantial change in circumstances.

There is a rebuttal presumption that the obligor's alimony obligation must be modified or terminated upon a finding of substantial change in circumstances based upon retirement. The bill provides factors that may overcome the presumption when applied to the circumstances of the obligor and obligee, including:

- Age, health, assets, liabilities, and earned and imputed income of the parties.
- The ability of the parties to maintain full-time or part-time employment.
- Any other factor deemed relevant by the court.

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[54] *Pimm v. Pimm*, 601 So. 2d 534 (Fla. 1992).
[55] *Id.*
[56] Full retirement age (also called "normal retirement age") had been 65 for many years. However, beginning with people born in 1938 or later, that age gradually increases until it reaches 67 for people born after 1959. SOCIAL SECURITY ADMINISTRATION, https://www.ssa.gov/planners/retire/ageincrease.html (last visited November 12, 2015).

Remarriage of the Obligor

The financial status of a successor spouse is ordinarily irrelevant in a modification proceeding, as it is improper for a court to consider the income of the obligor's current spouse in an action to modify the obligor's alimony obligation. An exception exists if it is determined that the obligor has deliberately limited his or her income for the purpose of reducing an alimony obligation and is living off the income of a successor spouse.[57]

Effect of the Bill – Remarriage of the Obligor

The bill restates and codifies current law.

Change in Actual Income

The bill provides that a party is entitled to pursue an immediate modification of alimony under the following circumstances, which constitute a substantial change in circumstances:

- If the actual income earned by a party exceeds, by at least 10 percent, the amount imputed to that party at the time an alimony award was determined. The increase in an obligor's income alone does not constitute a basis for modification unless at the time the award was established the obligor was considered unemployed or underemployed and the court did not impute income to that party at his or her maximum potential income.
- If the obligor becomes involuntarily underemployed or unemployed for a period of 6 months following the entry of the last order of alimony.

Retroactive Effect of Modification or Termination Order

The bill provides that there is a rebuttable presumption that a modification or termination of an alimony award is retroactive to the date of the filing of the petition, unless the obligee demonstrates that the result is inequitable.

Modification and Termination of an Alimony Award under the Presumptive Guidelines

The amount of an award of alimony under the presumptive guidelines may be modified consistent with current law, subject to the revisions regarding modification made by this bill. However, the duration of such awards, or an award provided for by an agreement of the parties, may not be modified.

An award of alimony under the presumptive guidelines automatically terminates upon the remarriage of the obligee or the death of either party.

ATTORNEY FEES AND COSTS IN MODIFICATION ACTIONS

Section 61.16(1), F.S., authorizes the recovery of attorney's fees and costs in alimony modification proceedings. The statute provides in relevant part:

> The court may from time to time, *after considering the financial resources of both parties*, order a party to pay a reasonable amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter, including enforcement and *modification* proceedings and appeals.

Providing for the recovery of attorney's fees and costs ensures that both parties will have similar ability to secure competent legal representation in the modification proceeding. Further, it is not necessary that one spouse be completely unable to pay attorney's fees in order for the trial court to require the

[57] *Harmon v. Harmon* 523 So. 2d 187 (Fla. 2d DCA 1988); *Hayden v. Hayden*, 662 So. 2d 714 (Fla. 4th DCA 1995).

other spouse to pay such fees.[58] Instead, the court views the relative disparity of financial circumstances between the spouses when awarding fees. Accordingly, a party may prevail in a modification action but, if in possession of greater financial resources relative to his or her spouse, still be required to pay the spouses' attorney's fees and costs based upon public policy considerations.

Effect of the bill

The bill provides that a party who unreasonably pursues or defends an action for modification of alimony may not recover his or her attorney's fees or costs under s. 61.16, F.S. Further such party must pay the reasonable attorney's fees and costs of the prevailing party regardless of his or her financial resources relative to the prevailing party.

APPLICABILITY

The revisions made by the bill apply to all initial determinations of alimony and all alimony modification actions pending or brought on or after October 1, 2016. The changes in current law do not constitute a substantial change in circumstances for purposes of modifying an alimony award and may not serve as the sole basis to seek modification of an alimony award made before October 1, 2016.

B. SECTION DIRECTORY:

Section 1 amends s. 61.071, F.S., relating to alimony pendent lite; suit money.

Section 2 amends s. 61.08, F.S., relating to alimony.

Section 3 amends s. 61.14, F.S., relating to enforcement and modification of support, maintenance, or alimony agreements or orders.

Section 4 provides for applicability and construction of the effect of the bill.

Section 5 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 bill appears to have an impact on the State Courts System which is indeterminate at this time.

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.

[58] *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980).

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill is likely to impact future alimony awards.

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:

- It is unclear if a court may use the presumptive alimony formula in **Figure 2** to calculate an alimony award in an action for support unconnected with martial dissolution under s. 61.90, F.S. If the formula may be used, it is unclear how the court will calculate the years of marriage, as the **YOMA** and **YOMD** variables depend upon the date an action for dissolution was filed.

- Lines 627-630 of the bill amend current law to provide a rebuttable presumption that the modification or termination of an alimony award is retroactive. The establishment of the rebuttable presumption may require an amendment to current law in lines 474-481 of the bill.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

A bill to be entitled

An act relating to alimony; amending s. 61.071, F.S.; requiring the use of specified factors in calculating alimony pendente lite; requiring findings by the court regarding such alimony; specifying that a court may not use certain presumptive alimony guidelines in calculating such alimony; amending s. 61.08, F.S.; providing definitions; requiring a court to make specified findings before ruling on a request for alimony; providing for determination of presumptive alimony range and duration range; providing presumptions concerning alimony awards depending on the duration of marriages; providing for imputation of income in certain circumstances; providing for awards of nominal alimony in certain circumstances; providing for taxability and deductibility of alimony awards; specifying that a combined award of alimony and child support may not constitute more than a specified percentage of a payor's net income; providing that a combined alimony and child support award be adjusted to reduce the combined award if it exceeds such specified percentage; providing for security of awards through specified means; providing for modification, termination, and payment of awards; providing for participation in alimony depository; amending s. 61.14, F.S.; prohibiting a court from changing the

duration of an alimony award; providing that a party may pursue an immediate modification of alimony in certain circumstances; revising factors to be considered in determining whether an existing award of alimony should be reduced or terminated because of an alleged supportive relationship; providing for the effective date of a reduction or termination of an alimony award based on the existence of a supportive relationship; providing that the remarriage of an alimony obligor is not a substantial change in circumstance; providing that the financial information of a subsequent spouse of a party paying or receiving alimony is inadmissible and undiscoverable; providing an exception; providing for modification or termination of an award based on a party's retirement; providing for a temporary reduction or suspension of an obligor's payment of alimony while his or her petition for modification or termination based on retirement is pending; providing for an award of attorney fees and costs for unreasonably pursuing or defending a modification of an award; establishing a rebuttable presumption that the modification of an alimony award is retroactive; providing applicability; providing an effective date.

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

Section 1. Section 61.071, Florida Statutes, is amended to read:

61.071 Alimony pendente lite; suit money.—In every proceeding for dissolution of the marriage, a party may claim alimony and suit money in the petition or by motion, and if the petition is well founded, the court shall allow a reasonable sum therefor. If a party in any proceeding for dissolution of marriage claims alimony or suit money in his or her answer or by motion, and the answer or motion is well founded, the court shall allow a reasonable sum therefor. After determining that there is a need for alimony and that there is an ability to pay alimony, the court shall consider the alimony factors in s. 61.08(4)(b)1.-14. and make specific written findings of fact regarding the relevant factors that justify an award of alimony under this section. The court may not use the presumptive alimony guidelines in s. 61.08 to calculate alimony under this section.

Section 2. Section 61.08, Florida Statutes, is amended to read:

61.08 Alimony.—

(Substantial rewording of section. See s. 61.08, F.S., for present text.)

(1) DEFINITIONS.—As used in this section, unless the context otherwise requires, the term:

(a)1. "Gross income" means recurring income from any

source and includes, but is not limited to:

a. Income from salaries.

b. Wages, including tips declared by the individual for purposes of reporting to the Internal Revenue Service or tips imputed to bring the employee's gross earnings to the minimum wage for the number of hours worked, whichever is greater.

c. Commissions.

d. Payments received as an independent contractor for labor or services, which payments must be considered income from self-employment.

e. Bonuses.

f. Dividends.

g. Severance pay.

h. Pension payments and retirement benefits actually received.

i. Royalties.

j. Rental income, which is gross receipts minus ordinary and necessary expenses required to produce the income.

k. Interest.

l. Trust income and distributions which are regularly received, relied upon, or readily available to the beneficiary.

m. Annuity payments.

n. Capital gains.

o. Any money drawn by a self-employed individual for personal use that is deducted as a business expense, which moneys must be considered income from self-employment.

p. Social security benefits, including social security benefits actually received by a party as a result of the disability of that party.

q. Workers' compensation benefits.

r. Unemployment insurance benefits.

s. Disability insurance benefits.

t. Funds payable from any health, accident, disability, or casualty insurance to the extent that such insurance replaces wages or provides income in lieu of wages.

u. Continuing monetary gifts.

v. Income from general partnerships, limited partnerships, closely held corporations, or limited liability companies; except that if a party is a passive investor, has a minority interest in the company, and does not have any managerial duties or input, the income to be recognized may be limited to actual cash distributions received.

w. Expense reimbursements or in-kind payments or benefits received by a party in the course of employment, self-employment, or operation of a business which reduces personal living expenses.

x. Overtime pay.

y. Income from royalties, trusts, or estates.

z. Spousal support received from a previous marriage.

aa. Gains derived from dealings in property, unless the gain is nonrecurring.

2. "Gross income" does not include:

a. Child support payments received.

b. Benefits received from public assistance programs.

c. Social security benefits received by a parent on behalf of a minor child as a result of the death or disability of a parent or stepparent.

d. Earnings or gains on retirement accounts, including individual retirement accounts; except that such earnings or gains shall be included as income if a party takes a distribution from the account. If a party is able to take a distribution from the account without being subject to a federal tax penalty for early distribution and the party chooses not to take such a distribution, the court may consider the distribution that could have been taken in determining the party's gross income.

3.a. For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, the term "gross income" equals gross receipts minus ordinary and necessary expenses, as defined in sub-subparagraph b., which are required to produce such income.

b. "Ordinary and necessary expenses," as used in sub-subparagraph a., does not include amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses or investment tax credits or any other business expenses determined by the court to be inappropriate for determining gross income for purposes of calculating

alimony.

(b) "Potential income" means income which could be earned by a party using his or her best efforts and includes potential income from employment and potential income from the investment of assets or use of property. Potential income from employment is the income which a party could reasonably expect to earn by working at a locally available, full-time job commensurate with his or her education, training, and experience. Potential income from the investment of assets or use of property is the income which a party could reasonably expect to earn from the investment of his or her assets or the use of his or her property in a financially prudent manner.

(c)1. "Underemployed" means a party is not working full-time in a position which is appropriate, based upon his or her educational training and experience, and available in the geographical area of his or her residence.

2. A party is not considered "underemployed" if he or she is enrolled in an educational program that can be reasonably expected to result in a degree or certification within a reasonable period, so long as the educational program is:

a. Expected to result in higher income within the foreseeable future.

b. A good faith educational choice based upon the previous education, training, skills, and experience of the party and the availability of immediate employment based upon the educational program being pursued.

(d) "Years of marriage" means the number of whole years, beginning from the date of the parties' marriage until the date of the filing of the action for dissolution of marriage.

(2) INITIAL FINDINGS.—When a party has requested alimony in a dissolution of marriage proceeding, before granting or denying an award of alimony, the court shall make initial written findings as to:

(a) The amount of each party's monthly gross income, including, but not limited to, the actual or potential income, and also including actual or potential income from nonmarital or marital property distributed to each party.

(b) The years of marriage as determined from the date of marriage through the date of the filing of the action for dissolution of marriage.

(3) ALIMONY GUIDELINES.—After making the initial findings described in subsection (2), the court shall calculate the presumptive alimony amount range and the presumptive alimony duration range. The court shall make written findings as to the presumptive alimony amount range and presumptive alimony duration range.

(a) Presumptive alimony amount range.—The low end of the presumptive alimony amount range shall be calculated by using the following formula:

(0.015 x the years of marriage) x the difference between the monthly gross incomes of the parties

The high end of the presumptive alimony amount range shall be calculated by using the following formula:

(0.020 x the years of marriage) x the difference between the monthly gross incomes of the parties

For purposes of calculating the presumptive alimony amount range, 20 years of marriage shall be used in calculating the low end and high end for marriages of 20 years or more. In calculating the difference between the parties' monthly gross income, the income of the party seeking alimony shall be subtracted from the income of the other party. If the application of the formulas to establish a guideline range results in a negative number, the presumptive alimony amount shall be $0. If a court establishes the duration of the alimony award at 50 percent or less of the length of the marriage, the court shall use the actual years of the marriage, up to a maximum of 25 years, to calculate the high end of the presumptive alimony amount range.

(b) Presumptive alimony duration range.—The low end of the presumptive alimony duration range shall be calculated by using the following formula:

0.25 x the years of marriage

The high end of the presumptive alimony duration range shall be calculated by using the following formula:

0.75 x the years of marriage

(4) ALIMONY AWARD.—

(a) Marriages of 2 years or less.—For marriages of 2 years or less, there is a rebuttable presumption that no alimony shall be awarded. The court may award alimony for a marriage with a duration of 2 years or less only if the court makes written findings that there is clear and convincing need for alimony, there is an ability to pay alimony, and that the failure to award alimony would be inequitable. The court shall then establish the alimony award in accordance with paragraph (b).

(b) Marriages of more than 2 years.—Absent an agreement of the parties, alimony shall presumptively be awarded in an amount within the alimony amount range calculated in paragraph (3)(a). Absent an agreement of the parties, alimony shall presumptively be awarded for a duration within the alimony duration range calculated in paragraph (3)(b). In determining the amount and duration of the alimony award, the court shall consider all of the following factors upon which evidence was presented:

1. The financial resources of the recipient spouse, including the actual or potential income from nonmarital or marital property or any other source and the ability of the recipient spouse to meet his or her reasonable needs

independently.

2. The financial resources of the payor spouse, including the actual or potential income from nonmarital or marital property or any other source and the ability of the payor spouse to meet his or her reasonable needs while paying alimony.

3. The standard of living of the parties during the marriage with consideration that there will be two households to maintain after the dissolution of the marriage and that neither party may be able to maintain the same standard of living after the dissolution of the marriage.

4. The equitable distribution of marital property, including whether an unequal distribution of marital property was made to reduce or alleviate the need for alimony.

5. Both parties' income, employment, and employability, obtainable through reasonable diligence and additional training or education, if necessary, and any necessary reduction in employment due to the needs of an unemancipated child of the marriage or the circumstances of the parties.

6. Whether a party could become better able to support himself or herself and reduce the need for ongoing alimony by pursuing additional educational or vocational training along with all of the details of such educational or vocational plan, including, but not limited to, the length of time required and the anticipated costs of such educational or vocational plan.

7. Whether one party has historically earned higher or lower income than the income reflected at the time of trial and

the duration and consistency of income from overtime or secondary employment.

8. Whether either party has foregone or postponed economic, educational, or employment opportunities during the course of the marriage.

9. Whether either party has caused the unreasonable depletion or dissipation of marital assets.

10. The amount of temporary alimony and the number of months that temporary alimony was paid to the recipient spouse.

11. The age, health, and physical and mental condition of the parties, including consideration of significant health care needs or uninsured or unreimbursed health care expenses.

12. Significant economic or noneconomic contributions to the marriage or to the economic, educational, or occupational advancement of a party, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party, payment by one spouse of the other spouse's separate debts, or enhancement of the other spouse's personal or real property.

13. The tax consequence of the alimony award.

14. Any other factor necessary to do equity and justice between the parties.

(c) Deviation from guidelines.—The court may establish an award of alimony that is outside the presumptive alimony amount or alimony duration ranges only if the court considers all of the factors in paragraph (b) and makes specific written findings

concerning the relevant factors that justify that the application of the presumptive alimony amount or alimony duration ranges, as applicable, is inappropriate or inequitable.

(d) Order establishing alimony award.—After consideration of the presumptive alimony amount and duration ranges in accordance with paragraphs (3)(a) and (b), and the factors upon which evidence was presented in accordance with paragraph (b), the court may establish an alimony award. An order establishing an alimony award must clearly set forth both the amount and the duration of the award. The court shall also make a written finding that the payor has the financial ability to pay the award.

(5) IMPUTATION OF INCOME.—If a party is voluntarily unemployed or underemployed, alimony shall be calculated based on a determination of potential income unless the court makes specific written findings regarding the circumstances that make it inequitable to impute income.

(6) NOMINAL ALIMONY.—Notwithstanding subsections (1), (3), and (4), the court may make an award of nominal alimony in the amount of $1 per year if, at the time of trial, a party who has traditionally provided the primary source of financial support to the family temporarily lacks the ability to pay support but is reasonably anticipated to have the ability to pay support in the future. The court may also award nominal alimony for an alimony recipient that is presently able to work but for whom a medical condition with a reasonable degree of medical certainty

may inhibit or prevent his or her ability to work during the duration of the alimony period. The duration of the nominal alimony shall be established within the presumptive durational range based upon the length of the marriage subject to the alimony factors in paragraph (4)(b). Before the expiration of the durational period, nominal alimony may be modified in accordance with s. 61.14 as to amount to a full alimony award using the alimony guidelines and factors in this section.

(7) TAXABILITY AND DEDUCTIBILITY OF ALIMONY.—

(a) Unless otherwise stated in the judgment or order for alimony or in an agreement incorporated thereby, alimony shall be deductible from income by the payor under s. 215 of the Internal Revenue Code and includable in the income of the payee under s. 71 of the Internal Revenue Code.

(b) When making a judgment or order for alimony, the court may, in its discretion after weighing the equities and tax efficiencies, order alimony be nondeductible from income by the payor and nonincludable in the income of the payee.

(c) The parties may, in a marital settlement agreement, separation agreement, or related agreement, specifically agree in writing that alimony be nondeductible from income by the payor and nonincludable in the income of the payee.

(8) MAXIMUM COMBINED AWARD.—In no event shall a combined award of alimony and child support constitute more than 55 percent of the payor's net income, calculated without any consideration of alimony or child support obligations. If the

combined award exceeds the maximum percentage of the payor's net income, the court shall adjust the award of child support to ensure that the 55-percent cap is not exceeded.

(9) SECURITY OF AWARD.—To the extent necessary to protect an award of alimony, the court may order any party who is ordered to pay alimony to purchase or maintain a decreasing term life insurance policy or a bond, or to otherwise secure such alimony award with any other assets that may be suitable for that purpose, in an amount adequate to secure the alimony award. Any such security may be awarded only upon a showing of special circumstances. If the court finds special circumstances and awards such security, the court must make specific evidentiary findings regarding the availability, cost, and financial impact on the obligated party. Any security may be modifiable in the event that the underlying alimony award is modified and shall be reduced in an amount commensurate with any reduction in the alimony award.

(10) MODIFICATION OF AWARD.—A court may subsequently modify or terminate the amount of an award of alimony initially established under this section in accordance with s. 61.14. However, a court may not modify the duration of an award of alimony initially established under this section.

(11) TERMINATION OF AWARD.—An alimony award shall terminate upon the death of either party or the remarriage of the obligee.

(12)(a) PAYMENT OF AWARD.—With respect to an order

requiring the payment of alimony entered on or after January 1, 1985, unless paragraph (c) or paragraph (d) applies, the court shall direct in the order that the payments of alimony be made through the appropriate depository as provided in s. 61.181.

(b) With respect to an order requiring the payment of alimony entered before January 1, 1985, upon the subsequent appearance, on or after that date, of one or both parties before the court having jurisdiction for the purpose of modifying or enforcing the order or in any other proceeding related to the order, or upon the application of either party, unless paragraph (c) or paragraph (d) applies, the court shall modify the terms of the order as necessary to direct that payments of alimony be made through the appropriate depository as provided in s. 61.181.

(c) If there is no minor child, alimony payments need not be directed through the depository.

(d)1. If there is a minor child of the parties and both parties so request, the court may order that alimony payments need not be directed through the depository. In this case, the order of support shall provide, or be deemed to provide, that either party may subsequently apply to the depository to require that payments be made through the depository. The court shall provide a copy of the order to the depository.

2. If subparagraph 1. applies, either party may subsequently file with the clerk of the court a verified motion alleging a default or arrearages in payment stating that the

party wishes to initiate participation in the depository program. The moving party shall provide a copy of the motion to the other party. No later than 15 days after filing the motion, the court shall conduct an evidentiary hearing establishing the default and arrearages, if any, and issue an order directing the clerk of the circuit court to establish, or amend an existing, family law case history account, and further advising the parties that future payments shall thereafter be directed through the depository.

3. In IV-D cases, the Title IV-D agency shall have the same rights as the obligee in requesting that payments be made through the depository.

Section 3. Subsection (1) of section 61.14, Florida Statutes, is amended to read:

61.14 Enforcement and modification of support, maintenance, or alimony agreements or orders.—

(1)(a) When the parties enter into an agreement for payments for, or instead of, support, maintenance, or alimony, whether in connection with a proceeding for dissolution or separate maintenance or with any voluntary property settlement, or when a party is required by court order to make any payments, and the circumstances or the financial ability of either party changes or the child who is a beneficiary of an agreement or court order as described herein reaches majority after the execution of the agreement or the rendition of the order, either party may apply to the circuit court of the circuit in which the

parties, or either of them, resided at the date of the execution of the agreement or reside at the date of the application, or in which the agreement was executed or in which the order was rendered, for an order decreasing or increasing the amount of support, maintenance, or alimony, and the court has jurisdiction to make orders as equity requires, with due regard to the changed circumstances or the financial ability of the parties or the child, decreasing, increasing, or confirming the amount of separate support, maintenance, or alimony provided for in the agreement or order. However, a court may not decrease or increase the duration of alimony provided for in the agreement or order. A party is entitled to pursue an immediate modification of alimony if the actual income earned by the other party exceeds, by at least 10 percent, the amount imputed to that party at the time the existing alimony award was determined and such circumstance shall constitute a substantial change in circumstances sufficient to support a modification of alimony. However, an increase in an alimony obligor's income alone does not constitute a basis for a modification to increase alimony unless at the time the alimony award was established it was determined that the obligor was underemployed or unemployed and the court did not impute income to that party at his or her maximum potential income. If an alimony obligor becomes involuntarily underemployed or unemployed for a period of 6 months following the entry of the last order requiring the payment of alimony, the obligor is entitled to pursue an

immediate modification of his or her existing alimony obligations and such circumstance shall constitute a substantial change in circumstance sufficient to support a modification of alimony. A finding that medical insurance is reasonably available or the child support guidelines schedule in s. 61.30 may constitute changed circumstances. Except as otherwise provided in s. 61.30(11)(c), the court may modify an order of support, maintenance, or alimony by increasing or decreasing the support, maintenance, or alimony retroactively to the date of the filing of the action or supplemental action for modification as equity requires, giving due regard to the changed circumstances or the financial ability of the parties or the child.

(b)1. The court may reduce or terminate an award of alimony upon specific written findings by the court that since the granting of a divorce and the award of alimony a supportive relationship exists or has existed within the previous year before the date of the filing of the petition for modification or termination between the obligee and another ~~a~~ person ~~with whom the obligee resides~~. ~~On the issue of whether alimony should be reduced or terminated under this paragraph, the burden is on the obligor to prove by a preponderance of the evidence that a supportive relationship exists.~~

2. In determining whether an existing award of alimony should be reduced or terminated because of an alleged supportive relationship between an obligee and a person who is not related

by consanguinity or affinity ~~and with whom the obligee resides~~, the court shall elicit the nature and extent of the relationship in question. The court shall give consideration, without limitation, to circumstances, including, but not limited to, the following, in determining the relationship of an obligee to another person:

a. The extent to which the obligee and the other person have held themselves out as a married couple by engaging in conduct such as using the same last name, using a common mailing address, referring to each other in terms such as "my spouse" ~~"my husband" or "my wife,"~~ or otherwise conducting themselves in a manner that evidences a permanent supportive relationship.

b. The period of time that the obligee has resided with the other person in a permanent place of abode.

c. The extent to which the obligee and the other person have pooled their assets or income or otherwise exhibited financial interdependence.

d. The extent to which the obligee or the other person has supported the other, in whole or in part.

e. The extent to which the obligee or the other person has performed valuable services for the other.

f. The extent to which the obligee or the other person has performed valuable services for the other's company or employer.

g. Whether the obligee and the other person have worked together to create or enhance anything of value.

h. Whether the obligee and the other person have jointly

contributed to the purchase of any real or personal property.

i. Evidence in support of a claim that the obligee and the other person have an express agreement regarding property sharing or support.

j. Evidence in support of a claim that the obligee and the other person have an implied agreement regarding property sharing or support.

k. Whether the obligee and the other person have provided support to the children of one another, regardless of any legal duty to do so.

1. Whether the obligor's failure, in whole or in part, to comply with all court-ordered financial obligations to the obligee constituted a significant factor in the establishment of the supportive relationship.

3. In any proceeding to modify an alimony award based upon a supportive relationship, the obligor has the burden of proof to establish, by a preponderance of the evidence, that a supportive relationship exists or has existed within the previous year before the date of the filing of the petition for modification or termination. The obligor is not required to prove cohabitation of the obligee and the third party.

4. Notwithstanding paragraph (f), if a reduction or termination is granted under this paragraph, the reduction or termination is retroactive to the date of filing of the petition for reduction or termination.

5.~~3.~~ This paragraph does not abrogate the requirement that

every marriage in this state be solemnized under a license, does not recognize a common law marriage as valid, and does not recognize a de facto marriage. This paragraph recognizes only that relationships do exist that provide economic support equivalent to a marriage and that alimony terminable on remarriage may be reduced or terminated upon the establishment of equivalent equitable circumstances as described in this paragraph. The existence of a conjugal relationship, though it may be relevant to the nature and extent of the relationship, is not necessary for the application of the provisions of this paragraph.

(c)1. For purposes of this section, the remarriage of an alimony obligor does not constitute a substantial change in circumstance or a basis for a modification of alimony.

2. The financial information, including, but not limited to, information related to assets and income, of a subsequent spouse of a party paying or receiving alimony is inadmissible and may not be considered as a part of any modification action unless a party is claiming that his or her income has decreased since the marriage. If a party makes such a claim, the financial information of the subsequent spouse is discoverable and admissible only to the extent necessary to establish whether the party claiming that his or her income has decreased is diverting income or assets to the subsequent spouse that might otherwise be available for the payment of alimony. However, this subparagraph may not be used to prevent the discovery of or

admissibility in evidence of the income or assets of a party when those assets are held jointly with a subsequent spouse. This subparagraph is not intended to prohibit the discovery or admissibility of a joint tax return filed by a party and his or her subsequent spouse in connection with a modification of alimony.

(d)1. An obligor may file a petition for modification or termination of an alimony award based upon his or her actual retirement.

a. A substantial change in circumstance is deemed to exist if:

(I) The obligor has reached the age for eligibility to receive full retirement benefits under s. 216 of the Social Security Act, 42 U.S.C. s. 416 and has retired; or

(II) The obligor has reached the customary retirement age for his or her occupation and has retired from that occupation. An obligor may file an action within 1 year of his or her anticipated retirement date and the court shall determine the customary retirement date for the obligor's profession. However, a determination of the customary retirement age is not an adjudication of a petition for a modification of an alimony award.

b. If an obligor voluntarily retires before reaching any of the ages described in sub-subparagraph a., the court shall determine whether the obligor's retirement is reasonable upon consideration of the obligor's age, health, and motivation for

retirement and the financial impact on the obligee. A finding of reasonableness by the court shall constitute a substantial change in circumstance.

2. Upon a finding of a substantial change in circumstance, there is a rebuttable presumption that an obligor's existing alimony obligation shall be modified or terminated. The court shall modify or terminate the alimony obligation, or make a determination regarding whether the rebuttable presumption has been overcome, based upon the following factors applied to the current circumstances of the obligor and obligee:

a. The age of the parties.

b. The health of the parties.

c. The assets and liabilities of the parties.

d. The earned or imputed income of the parties as provided in s. 61.08(1)(a) and (5).

e. The ability of the parties to maintain part-time or full-time employment.

f. Any other factor deemed relevant by the court.

3. The court may temporarily reduce or suspend the obligor's payment of alimony while his or her petition for modification or termination under this paragraph is pending.

(e) A party who unreasonably pursues or defends an action for modification of alimony shall be required to pay the reasonable attorney fees and costs of the prevailing party. Further, a party obligated to pay prevailing party attorney fees and costs in connection with unreasonably pursuing or defending

an action for modification is not entitled to an award of attorney fees and cost in accordance with s. 61.16.

(f) There is a rebuttable presumption that a modification or termination of an alimony award is retroactive to the date of the filing of the petition, unless the obligee demonstrates that the result is inequitable.

(g) ~~(e)~~ For each support order reviewed by the department as required by s. 409.2564(11), if the amount of the child support award under the order differs by at least 10 percent but not less than $25 from the amount that would be awarded under s. 61.30, the department shall seek to have the order modified and any modification shall be made without a requirement for proof or showing of a change in circumstances.

(h) ~~(d)~~ The department may ~~shall have authority to~~ adopt rules to implement this section.

Section 4. The amendments made by this act to chapter 61, Florida Statutes, apply to all initial determinations of alimony and all alimony modification actions that are pending on October 1, 2016, or that are brought on or after October 1, 2016. The changes to the law made by this act do not constitute a substantial change in circumstances and may not serve as the sole basis to seek a modification of an alimony award made before the effective date of this act.

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	_____

Committee/Subcommittee hearing bill: Judiciary Committee
Representative Burton offered the following:

Amendment

Remove lines 476-477 and insert:

support or~~,~~ maintenance~~, or alimony~~ by increasing or decreasing the support or~~,~~ maintenance~~, or alimony~~ retroactively to the date of

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 549 Offenses Concerning Racketeering and Illegal Debts
SPONSOR(S): Burton
TIED BILLS: None **IDEN./SIM. BILLS:** SB 850

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 0 N	Malcolm	Bond
2) Justice Appropriations Subcommittee	11 Y, 0 N	McAuliffe	Lloyd
3) Judiciary Committee		Malcolm	Havlicak RH

SUMMARY ANALYSIS

The Florida RICO (Racketeer Influenced and Corrupt Organization) Act imposes criminal and civil liability on any person who engages in racketeering or the collection of unlawful debt to acquire real property or establish or operate any enterprise or be associated with such an enterprise. Any property that is used in the course of or derived from the illegal conduct is subject to forfeiture to the state. The bill makes a number of changes to the civil enforcement provisions of the RICO Act:

- If property subject to forfeiture is diminished in value, an investigative agency may pursue an action in circuit court to recover fair market value of the property.
- Investigative agencies may recover fair market value of any property that is diminished in value or made unavailable for forfeiture regardless of when the property is diminished in value or rendered unavailable for forfeiture.
- A court may order the forfeiture of any other property of the defendant up to the value of any property that is unavailable or is diminished in value.
- Civil penalties of up to $100,000 for a natural person and up to $1 million for any other person may be imposed for violations of the RICO Act.
- All investigatory subpoenas issued pursuant to the RICO Act are confidential for 120 days after the date of its issuance.
- Any party to a RICO Act civil action may petition the court for entry of a consent decree or for approval of a settlement agreement.
- The court is required to order distribution of forfeiture proceeds to the victims of the racketeering activity.

The bill appears to have an indeterminate positive fiscal impact on state revenues. The bill does not appear to have a fiscal impact on local government.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Florida RICO Act

The Florida RICO (Racketeer Influenced and Corrupt Organization) Act[1] makes it a first-degree felony for any person to engage in, or conspire to engage in, racketeering activity or the collection of unlawful debt to establish or operate an enterprise or to be associated with such an enterprise.[2] The term "racketeering activity" encompasses a broad range of state and federal criminal offenses identified in current law.[3]

In addition to criminal penalties, the RICO Act imposes civil liability for violations of the Act, including forfeiture to the state of all property, including money, "used in the course of, intended for use in the course of, derived from, or realized through conduct" in violation of the Act.[4]

The bill makes a number of changes to the RICO Act:

Property Rendered Unavailable for Forfeiture

Current law, s. 895.05(2), F.S., provides that if property subject to forfeiture is conveyed, alienated, disposed of, or otherwise rendered unavailable for forfeiture after the filing of a RICO lien notice[5] or after the filing of a civil or criminal proceeding pursuant to the Act, the investigative agency[6] may institute an action to recover an amount equal to the fair market value of the property along with investigative costs and attorney's fees incurred by the investigative agency.

The bill amends s. 895.05(2), F.S., to include property subject to forfeiture that is diminished in value among the conditions sufficient for an investigative agency to pursue an action in circuit court to recover fair market value of the property. The bill also repeals that portion of s. 895.05(2), F.S., which provided investigative agencies the authority to pursue an action to recover fair market value of the unavailable property only if the property became unavailable "after the filing of a RICO lien notice or after the filing of a civil proceeding or criminal proceeding." Consequently, the bill gives investigative agencies the authority to pursue an action to recover fair market value of the unavailable property regardless of when the property is conveyed, alienated, disposed of, diminished in value, or rendered unavailable for forfeiture.

In addition to recovering the fair market value of the property of the unavailable or diminished property, the bill allows a court to order the forfeiture of any other property of the defendant up to the value of the unavailable property.

Civil Proceedings by Investigative Agencies and the Department of Legal Affairs

The bill restates and reorganizes current law provisions in s. 895.05, F.S., that provide for the filing of RICO Act civil proceedings by an investigative agency and the Department of Legal Affairs.

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[1] ch. 895, F.S.
[2] ss. 895.03 and 895.04, F.S.
[3] s. 895.02(1)(a), F.S.
[4] s. 895.05(2)(a), F.S.
[5] An investigative agency may file a RICO lien notice in the county records when it initiates a civil proceeding. The RICO lien notice creates a lien in favor of the state on the real property or beneficial interest situated in the county where the lien is filed. s. 895.07, F.S.
[6] "Investigative agency" means the Department of Legal Affairs, the Office of Statewide Prosecution, or the office of a state attorney." s. 895.02(7), F.S.

An investigative agency may institute a civil proceeding for forfeiture in the judicial circuit in which the defendant's real or personal tangible property is located and may institute a civil proceeding for forfeiture in any circuit court in the state regarding the defendant's intangible property.

The Department of Legal Affairs may bring an action to obtain injunctive relief, attorney fees, and costs incurred in the investigation and prosecution under the RICO Act. Money recovered by the Department of Legal Affairs for attorney fees and costs must be deposited in the Legal Affairs Revolving Trust Fund.

The Department of Legal Affairs may also bring an action for newly created civil penalties. Any natural person who violates the RICO Act is subject to a civil penalty of up to $100,000, any other person is subject to a civil penalty of up to $1 million.[7] Money recovered for civil penalties must be deposited into the General Revenue Fund.

Court Approval of Consent Decrees and Settlement Agreements

Current law does not address consent decrees or settlement agreements in civil actions for RICO Act violations brought by the Department of Legal Affairs. The bill provides that any party to such a civil action may petition the court for entry of a consent decree or for approval of a settlement agreement. The proposed decree or settlement must specify the alleged violations, the future obligations of the parties, the agreed upon relief, and the reasons for entering into the decree or settlement.

Confidentiality of Subpoenas

During the course of a civil enforcement investigation, an investigating agency may subpoena witnesses or material.[8] Generally, investigatory subpoenas are used to obtain information from third-parties through the production of documents, files, and records or through testimony. Section 895.06, F.S., authorizes investigative agencies to apply ex parte to a circuit court for an order directing a person or entity who has been subpoenaed to not disclose the existence of the subpoena to anyone except the subpoenaed person's attorney for a period of 90 days. The court may only grant an order for nondisclosure if the agency shows:

- sufficient factual grounds to reasonably indicate a violation of the RICO Act;
- that the documents or testimony sought appear reasonably calculated to lead to the discovery of admissible evidence; and
- facts which reasonably indicate that disclosure of the subpoena would hamper or impede the investigation or would result in a flight from prosecution.[9]

The 90-day non-disclosure time limit may be extended by the court for good cause shown by the investigative agency.

The bill amends s. 895.06, F.S., to remove the requirement that an investigative agency seek court authorization for non-disclosable subpoenas and provides that all subpoenas issued pursuant to the RICO Act are automatically confidential for 120 days. The subpoenaed person or entity may only disclose the existence of the subpoena to his or her attorney during the 120-day period. The subpoena must include a reference to the confidentiality of the subpoena and a notice to the recipient that disclosure of the existence of the subpoena to anyone except the subpoenaed person's or entity's attorney is prohibited. The investigative agency may apply for an extension of the confidentiality period for good cause.

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[7] A "natural person" is a human being, and "any other person" includes such things as corporations, partnerships, or other types of business entities or organizations.
[8] s. 895.06(2), F.S.
[9] s. 895.06(3), F.S.

The bill also provides that an investigative agency may stipulate to protective orders with respect to documents and information submitted in response to a subpoena.

Restitution for Victims of RICO Act Violations

Current law requires a court to direct the distribution of the proceeds from a forfeiture in the following priority: the clerk of the court to cover statutory fees; claims by people whose interests in the property are preserved (known as "innocent persons"); and claims by the Board of Trustees of the Internal Improvement Trust Fund.[10] Remaining funds are split between four government funds. However, current law does not authorize restitution to the victims of RICO Act violations.

The bill amends s. 895.09(1), F.S., to require a court to direct the distribution of the proceeds from a forfeiture to claims for restitution for victims of the racketeering activity after the proceeds have been distributed to the clerk, innocent persons, and claims of the Board of Trustees. If the forfeiture action was brought by the Department of Legal Affairs, the restitution must be distributed through the Legal Affairs Revolving Trust Fund; otherwise, the restitution will be distributed by the clerk of the court.

Other Effects of the Bill

The bill deletes duplicative definitions, updates cross-references, and makes conforming changes.

The bill reenacts a trust fund in current law for the purpose of incorporating changes made to s. 895.05, F.S.

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

B. SECTION DIRECTORY:

Section 1 amends s. 895.02, F.S., related to definitions.

Section 2 amends s. 895.05, F.S., related to civil remedies.

Section 3 amends s. 895.06, F.S., related to civil investigative subpoenas.

Section 4 amends s. 895.09, F.S., related to the disposition of funds obtained through forfeiture.

Section 5 amends s. 16.56, F.S., related to the Office of Statewide Prosecution.

Section 6 amends s. 905.34, F.S., related to the powers and duties of a statewide grand jury; law applicable.

Section 7 reenacts s. 16.53, F.S., for the purpose of incorporating the amendment by the bill to s. 895.05, F.S. Section 7 also corrects a cross-reference.

Section 8 reenacts s. 27.345, F.S., for the purpose of incorporating the amendment by the bill to s. 895.05, F.S.

Section 9 reenacts s. 92.142, F.S., for the purpose of incorporating the amendment by the bill to s. 895.05, F.S.

Section 10 provides an effective date of July 1, 2016.

[10] s. 859.09(1), F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The civil penalties of up to $100,000 for a natural person and up to $1 million for any other person for RICO Act violations created by the bill may have an indeterminate positive revenue impact on the General Revenue Fund. The bill also authorizes the Department of Legal Affairs to recover attorney's fees and costs for certain civil actions which will have a positive impact on the Legal Affairs Revolving Trust Fund.

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

None.

A bill to be entitled

An act relating to offenses concerning racketeering and illegal debts; reordering and amending s. 895.02, F.S.; specifying the earliest date that incidents constituting a pattern of racketeering activity may have occurred; conforming a cross-reference; amending s. 895.05, F.S.; authorizing an investigative agency to institute a civil proceeding for forfeiture in a circuit court in certain circumstances; adding diminution in value as a ground for an action under certain circumstances; removing certain grounds for an action; authorizing a court to order the forfeiture of other property of the defendant up to the value of unavailable property in certain circumstances; authorizing the Department of Legal Affairs to bring an action for certain violations to obtain specified relief, fees, and costs for certain purposes; providing for civil penalties for natural persons and other persons who commit certain violations; providing for deposit of moneys received for certain violations; authorizing a party to a specific civil action to petition the court for entry of a consent decree or for approval of a settlement agreement; providing requirements for such decrees or agreements; amending s. 895.06, F.S.; deleting the definition of "investigative agency" for purposes of provisions

relating to civil investigative subpoenas; providing that a subpoena must be confidential for a specified time; restricting to whom the subpoenaed person or entity may disclose the existence of the subpoena; requiring certain information be included in the subpoena; authorizing the investigative agency to apply for an order extending the amount of time the subpoena remains confidential rather than having it extended by the court for a specified period; providing that the investigative agency has the authority to stipulate to protective orders with respect to documents and information submitted in response to a subpoena; amending s. 895.09, F.S.; conforming a cross-reference; providing for distribution of forfeiture proceeds to victims; amending ss. 16.56 and 905.34, F.S.; conforming cross-references; reenacting and amending s. 16.53, F.S., relating to the Department of Legal Affairs Trust Fund, to incorporate the amendment made by the act to s. 895.05, F.S., in references thereto; conforming a cross-reference; reenacting ss. 27.345(1) and 92.142(3), F.S., relating to the State Attorney RICO Trust Fund and witness pay, respectively, to incorporate the amendment made by the act to s. 895.05, F.S., in references thereto; providing an effective date.

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

Section 1. Section 895.02, Florida Statutes, is reordered and amended to read:

895.02 Definitions.—As used in ss. 895.01-895.08, the term:

(1)~~(8)~~ "Beneficial interest" means any of the following:

(a) The interest of a person as a beneficiary under a trust established pursuant to s. 689.07 or s. 689.071 in which the trustee for the trust holds legal or record title to real property;

(b) The interest of a person as a beneficiary under any other trust arrangement pursuant to which a trustee holds legal or record title to real property for the benefit of such person; or

(c) The interest of a person under any other form of express fiduciary arrangement pursuant to which any other person holds legal or record title to real property for the benefit of such person.

The term "beneficial interest" does not include the interest of a stockholder in a corporation or the interest of a partner in either a general partnership or a limited partnership. A beneficial interest shall be deemed to be located where the real property owned by the trustee is located.

(2)~~(12)~~ "Civil proceeding" means any civil proceeding commenced by an investigative agency under s. 895.05 or any other provision of the Florida RICO Act.

(3)~~(11)~~ "Criminal proceeding" means any criminal proceeding commenced by an investigative agency under s. 895.03 or any other provision of the Florida RICO Act.

(4)~~(5)~~ "Documentary material" means any book, paper, document, writing, drawing, graph, chart, photograph, phonorecord, magnetic tape, computer printout, other data compilation from which information can be obtained or from which information can be translated into usable form, or other tangible item.

(5)~~(3)~~ "Enterprise" means any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental, as well as other, entities. A criminal gang, as defined in s. 874.03, constitutes an enterprise.

(6)~~(7)~~ "Investigative agency" means the Department of Legal Affairs, the Office of Statewide Prosecution, or the office of a state attorney.

(7)~~(4)~~ "Pattern of racketeering activity" means engaging in at least two incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or

methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after October 1, 1977, ~~the effective date of this act~~ and that the last of such incidents occurred within 5 years after a prior incident of racketeering conduct.

(8)~~(1)~~ "Racketeering activity" means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit:

(a) Any crime that is chargeable by petition, indictment, or information under the following provisions of the Florida Statutes:

1. Section 210.18, relating to evasion of payment of cigarette taxes.

2. Section 316.1935, relating to fleeing or attempting to elude a law enforcement officer and aggravated fleeing or eluding.

3. Section 403.727(3)(b), relating to environmental control.

4. Section 409.920 or s. 409.9201, relating to Medicaid fraud.

5. Section 414.39, relating to public assistance fraud.

6. Section 440.105 or s. 440.106, relating to workers' compensation.

7. Section 443.071(4), relating to creation of a fictitious employer scheme to commit reemployment assistance

fraud.

8. Section 465.0161, relating to distribution of medicinal drugs without a permit as an Internet pharmacy.

9. Section 499.0051, relating to crimes involving contraband and adulterated drugs.

10. Part IV of chapter 501, relating to telemarketing.

11. Chapter 517, relating to sale of securities and investor protection.

12. Section 550.235 or s. 550.3551, relating to dogracing and horseracing.

13. Chapter 550, relating to jai alai frontons.

14. Section 551.109, relating to slot machine gaming.

15. Chapter 552, relating to the manufacture, distribution, and use of explosives.

16. Chapter 560, relating to money transmitters, if the violation is punishable as a felony.

17. Chapter 562, relating to beverage law enforcement.

18. Section 624.401, relating to transacting insurance without a certificate of authority, s. 624.437(4)(c)1., relating to operating an unauthorized multiple-employer welfare arrangement, or s. 626.902(1)(b), relating to representing or aiding an unauthorized insurer.

19. Section 655.50, relating to reports of currency transactions, when such violation is punishable as a felony.

20. Chapter 687, relating to interest and usurious practices.

21. Section 721.08, s. 721.09, or s. 721.13, relating to real estate timeshare plans.

22. Section 775.13(5)(b), relating to registration of persons found to have committed any offense for the purpose of benefiting, promoting, or furthering the interests of a criminal gang.

23. Section 777.03, relating to commission of crimes by accessories after the fact.

24. Chapter 782, relating to homicide.

25. Chapter 784, relating to assault and battery.

26. Chapter 787, relating to kidnapping or human trafficking.

27. Chapter 790, relating to weapons and firearms.

28. Chapter 794, relating to sexual battery, but only if such crime was committed with the intent to benefit, promote, or further the interests of a criminal gang, or for the purpose of increasing a criminal gang member's own standing or position within a criminal gang.

29. Former s. 796.03, former s. 796.035, s. 796.04, s. 796.05, or s. 796.07, relating to prostitution.

30. Chapter 806, relating to arson and criminal mischief.

31. Chapter 810, relating to burglary and trespass.

32. Chapter 812, relating to theft, robbery, and related crimes.

33. Chapter 815, relating to computer-related crimes.

34. Chapter 817, relating to fraudulent practices, false

pretenses, fraud generally, and credit card crimes.

35. Chapter 825, relating to abuse, neglect, or exploitation of an elderly person or disabled adult.

36. Section 827.071, relating to commercial sexual exploitation of children.

37. Section 828.122, relating to fighting or baiting animals.

38. Chapter 831, relating to forgery and counterfeiting.

39. Chapter 832, relating to issuance of worthless checks and drafts.

40. Section 836.05, relating to extortion.

41. Chapter 837, relating to perjury.

42. Chapter 838, relating to bribery and misuse of public office.

43. Chapter 843, relating to obstruction of justice.

44. Section 847.011, s. 847.012, s. 847.013, s. 847.06, or s. 847.07, relating to obscene literature and profanity.

45. Chapter 849, relating to gambling, lottery, gambling or gaming devices, slot machines, or any of the provisions within that chapter.

46. Chapter 874, relating to criminal gangs.

47. Chapter 893, relating to drug abuse prevention and control.

48. Chapter 896, relating to offenses related to financial transactions.

49. Sections 914.22 and 914.23, relating to tampering with

or harassing a witness, victim, or informant, and retaliation against a witness, victim, or informant.

50. Sections 918.12 and 918.13, relating to tampering with jurors and evidence.

(b) Any conduct defined as "racketeering activity" under 18 U.S.C. s. 1961(1).

(9) "Real property" means any real property or any interest in such real property, including, but not limited to, any lease of or mortgage upon such real property.

(10) ~~(6)~~ "RICO lien notice" means the notice described in s. 895.05(13) ~~895.05(12)~~ or in s. 895.07.

(11) ~~(10)~~ "Trustee" means any of the following:

(a) Any person acting as trustee pursuant to a trust established under s. 689.07 or s. 689.071 in which the trustee holds legal or record title to real property.

(b) Any person who holds legal or record title to real property in which any other person has a beneficial interest.

(c) Any successor trustee or trustees to any or all of the foregoing persons.

However, the term "trustee" does not include any person appointed or acting as a personal representative as defined in s. 731.201 or appointed or acting as a trustee of any testamentary trust or as a trustee of any indenture of trust under which any bonds have been or are to be issued.

(12) ~~(2)~~ "Unlawful debt" means any money or other thing of

value constituting principal or interest of a debt that is legally unenforceable in this state in whole or in part because the debt was incurred or contracted:

(a) In violation of any one of the following provisions of law:

1. Section 550.235 or s. 550.3551, relating to dogracing and horseracing.

2. Chapter 550, relating to jai alai frontons.

3. Section 551.109, relating to slot machine gaming.

4. Chapter 687, relating to interest and usury.

5. Section 849.09, s. 849.14, s. 849.15, s. 849.23, or s. 849.25, relating to gambling.

(b) In gambling activity in violation of federal law or in the business of lending money at a rate usurious under state or federal law.

Section 2. Subsections (9) through (12) of section 895.05, Florida Statutes, are renumbered as subsections (10) through (13), respectively, subsection (2) and present subsections (9) through (12) are amended, and a new subsection (9) is added to that section, to read:

895.05 Civil remedies.—

(2)(a) All property, real or personal, including money, used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of ~~a provision of~~ ss. 895.01-895.05 is subject to civil forfeiture to the state.

(b) An investigative agency may, on behalf of the state, institute a civil proceeding for forfeiture in the circuit court for the judicial circuit in which real or personal tangible property, as described in paragraph (a) is located. An investigative agency may, on behalf of the state, institute a civil proceeding for forfeiture in a circuit court in the state regarding intangible property as described in paragraph (a).

(c) Upon the entry of a final judgment of forfeiture in favor of the state, the title of the state to the forfeited property shall relate back:

1. In the case of real property or a beneficial interest, to the date of filing of the RICO lien notice in the official records of the county where the real property or beneficial trust is located; if no RICO lien notice is filed, then to the date of the filing of any notice of lis pendens under s. 895.07(5)(a) in the official records of the county where the real property or beneficial interest is located; and if no RICO lien notice or notice of lis pendens is filed, then to the date of recording of the final judgment of forfeiture in the official records of the county where the real property or beneficial interest is located.

2. In the case of personal property, to the date the personal property was seized by the investigating agency.

(d) If property subject to forfeiture is conveyed, alienated, disposed of, diminished in value, or otherwise rendered unavailable for forfeiture ~~after the filing of a RICO~~

~~lien notice or after the filing of a civil proceeding or criminal proceeding, whichever is earlier~~, the investigative agency may, on behalf of the state, institute an action in any circuit court against the person named in the RICO lien notice or the defendant in the civil proceeding or criminal proceeding, and the court shall enter final judgment against the person named in the RICO lien notice or the defendant in the civil proceeding or criminal proceeding in an amount equal to the fair market value of the property, together with investigative costs and attorney ~~attorney's~~ fees incurred by the investigative agency in the action. In the alternative, the court may order the forfeiture of any other property of the defendant up to the value of the property subject to forfeiture. If a civil proceeding is pending, such action shall be filed only in the court where the civil proceeding is pending.

(e)~~(c)~~ The state shall dispose of all forfeited property as soon as commercially feasible. If property is not exercisable or transferable for value by the state, it shall expire. All forfeitures or dispositions under this section shall be made with due provision for the rights of innocent persons. The proceeds realized from such forfeiture and disposition shall be promptly distributed in accordance with the provisions of s. 895.09.

(9) The Department of Legal Affairs may bring an action for a violation of s. 895.03 to obtain injunctive relief, civil penalties as provided in this subsection, attorney fees, and

costs incurred in the investigation and prosecution of any action under this chapter.

(a) A natural person who violates s. 895.03 is subject to a civil penalty of up to $100,000. Any other person who violates s. 895.03 is subject to a civil penalty of up to $1 million. Moneys recovered for civil penalties under this paragraph shall be deposited into the General Revenue Fund.

(b) Moneys recovered by the Department of Legal Affairs for attorney fees and costs under this subsection shall be deposited into the Legal Affairs Revolving Trust Fund, which may be used to investigate and enforce this chapter.

(c) In a civil action brought under this subsection by the Department of Legal Affairs, any party to such action may petition the court for entry of a consent decree or for approval of a settlement agreement. The proposed decree or settlement shall specify the alleged violations, the future obligations of the parties, the relief agreed upon, and the reasons for entering into the consent decree or settlement agreement.

(10) ~~(9)~~ The Department of Legal Affairs may, upon timely application, intervene in any civil action or proceeding brought under subsection (6) or subsection (7) if it certifies that, in its opinion, the action or proceeding is of general public importance. In such action or proceeding, the state shall be entitled to the same relief as if the Department of Legal Affairs had instituted the action or proceeding.

(11) ~~(10)~~ Notwithstanding any other provision of law, a

criminal or civil action or proceeding under this chapter ~~act~~ may be commenced at any time within 5 years after the conduct in violation of ~~a provision of~~ this chapter ~~act~~ terminates or the cause of action accrues. If a criminal prosecution or civil action or other proceeding is brought, or intervened in, to punish, prevent, or restrain any violation of ~~the provisions of~~ this chapter ~~act~~, the running of the period of limitations prescribed by this section with respect to any cause of action arising under subsection (6), ~~or~~ subsection (7), or subsection (9) which is based in whole or in part upon any matter complained of in any such prosecution, action, or proceeding shall be suspended during the pendency of such prosecution, action, or proceeding and for 2 years following its termination.

(12) ~~(11)~~ The application of one civil remedy under any provision of this chapter ~~act~~ does not preclude the application of any other remedy, civil or criminal, under this chapter ~~act~~ or any other provision of law. Civil remedies under this chapter ~~act~~ are supplemental, and not mutually exclusive.

(13) ~~(12)~~ (a) In addition to the authority to file a RICO lien notice set forth in s. 895.07(1), the Department of Legal Affairs, the Office of Statewide Prosecution, or the office of a state attorney may apply ex parte to a criminal division of a circuit court and, upon petition supported by sworn affidavit, obtain an order authorizing the filing of a RICO lien notice against real property upon a showing of probable cause to believe that the property was used in the course of, intended

for use in the course of, derived from, or realized through conduct in violation of ~~a provision of~~ ss. 895.01-895.05. If the lien notice authorization is granted, the department shall, after filing the lien notice, forthwith provide notice to the owner of the property by one of the following methods:

1. By serving the notice in the manner provided by law for the service of process.

2. By mailing the notice, postage prepaid, by ~~registered or~~ certified mail to the person to be served at his or her last known address and evidence of the delivery.

3. If neither of the foregoing can be accomplished, by posting the notice on the premises.

(b) The owner of the property may move the court to discharge the lien, and such motion shall be set for hearing at the earliest possible time.

(c) The court shall discharge the lien if it finds that there is no probable cause to believe that the property was used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of ~~a provision of~~ ss. 895.01-895.05 or if it finds that the owner of the property neither knew nor reasonably should have known that the property was used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of ~~a provision of~~ ss. 895.01-895.05.

(d) No testimony presented by the owner of the property at the hearing is admissible against him or her in any criminal

proceeding except in a criminal prosecution for perjury or false statement, nor shall such testimony constitute a waiver of the owner's constitutional right against self-incrimination.

(e) A lien notice secured under ~~the provisions of~~ this subsection is valid for a period of 90 days from the date the court granted authorization, which period may be extended for an additional 90 days by the court for good cause shown, unless a civil proceeding is instituted under this section and a lien notice is filed under s. 895.07, in which event the term of the lien notice is governed by s. 895.08.

(f) The filing of a lien notice, whether or not subsequently discharged or otherwise lifted, shall constitute notice to the owner and knowledge by the owner that the property was used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of ~~a provision of~~ ss. 895.01-895.05, such that lack of such notice and knowledge shall not be a defense in any subsequent civil or criminal proceeding under this chapter.

Section 3. Section 895.06, Florida Statutes, is amended to read:

895.06 Civil investigative subpoenas; public records exemption.—

~~(1) As used in this section, the term "investigative agency" means the Department of Legal Affairs, the Office of Statewide Prosecution, or the office of a state attorney.~~

(1)~~(2)~~ If, pursuant to the civil enforcement provisions of

s. 895.05, an investigative agency has reason to believe that a person or other enterprise has engaged in, or is engaging in, activity in violation of this chapter ~~act~~, the investigative agency may administer oaths or affirmations, subpoena witnesses or material, and collect evidence.

(2)~~(3)~~ A subpoena issued pursuant to this chapter is confidential for 120 days after the date of its issuance. The subpoenaed person or entity may not disclose the existence of the subpoena to any person or entity other than his or her attorney during the 120-day period. The subpoena must include a reference to the confidentiality of the subpoena and a notice to the recipient of the subpoena that disclosure of the existence of the subpoena to any other person or entity except the subpoenaed person's or entity's attorney is prohibited. The investigative agency may apply ex parte to the circuit court for the circuit in which a subpoenaed person or entity resides, is found, or transacts business for an order directing that the subpoenaed person or entity not disclose the existence of the subpoena to any other person or entity except the subpoenaed person's attorney for an additional ~~a~~ period of time ~~90 days, which time may be extended by the court~~ for good cause shown by the investigative agency. The order shall be served on the subpoenaed person or entity with the subpoena, and the subpoena must ~~shall~~ include a reference to the order and a notice to the recipient of the subpoena that disclosure of the existence of the subpoena to any other person or entity in violation of the

order may subject the subpoenaed person or entity to punishment for contempt of court. Such an order may be granted by the court only upon a showing:

(a) Of sufficient factual grounds to reasonably indicate a violation of ss. 895.01-895.06;

(b) That the documents or testimony sought appear reasonably calculated to lead to the discovery of admissible evidence; and

(c) Of facts that ~~which~~ reasonably indicate that disclosure of the subpoena would hamper or impede the investigation or would result in a flight from prosecution.

(3)~~(4)~~ If matter that the investigative agency seeks to obtain by the subpoena is located outside the state, the person or enterprise subpoenaed may make such matter available to the investigative agency or its representative for examination at the place where such matter is located. The investigative agency may designate representatives, including officials of the jurisdiction in which the matter is located, to inspect the matter on its behalf and may respond to similar requests from officials of other jurisdictions.

(4)~~(5)~~ Upon failure of a person or enterprise, without lawful excuse, to obey a subpoena issued under this section or a subpoena issued in the course of a civil proceeding instituted pursuant to s. 895.05, and after reasonable notice to such person or enterprise, the investigative agency may apply to the circuit court in which such civil proceeding is pending or, if

no civil proceeding is pending, to the circuit court for the judicial circuit in which such person or enterprise resides, is found, or transacts business for an order compelling compliance. Except in a prosecution for perjury, an individual who complies with a court order to provide testimony or material after asserting a privilege against self-incrimination to which the individual is entitled by law shall not have the testimony or material so provided, or evidence derived therefrom, received against him or her in any criminal investigation or proceeding.

(5)~~(6)~~ A person who fails to obey a court order entered pursuant to this section may be punished for contempt of court.

(6) The investigative agency may stipulate to protective orders with respect to documents and information submitted in response to a subpoena issued under this section.

(7)(a) Information held by an investigative agency pursuant to an investigation of a violation of s. 895.03 is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

(b) Information made confidential and exempt under paragraph (a) may be disclosed by the investigative agency to:

1. A government entity in the performance of its official duties.

2. A court or tribunal.

(c) Information made confidential and exempt under paragraph (a) is no longer confidential and exempt once all investigations to which the information pertains are completed,

unless the information is otherwise protected by law.

(d) For purposes of this subsection, an investigation is considered complete once the investigative agency either files an action or closes its investigation without filing an action.

(e) This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2020, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 4. Paragraph (b) of subsection (1) of section 895.09, Florida Statutes, is amended, and paragraph (d) is added to that subsection, to read:

895.09 Disposition of funds obtained through forfeiture proceedings.—

(1) A court entering a judgment of forfeiture in a proceeding brought pursuant to s. 895.05 shall retain jurisdiction to direct the distribution of any cash or of any cash proceeds realized from the forfeiture and disposition of the property. The court shall direct the distribution of the funds in the following order of priority:

(b) Any claims against the property by persons who have previously been judicially determined to be innocent persons, pursuant to s. 895.05(2)(e) ~~the provisions of s. 895.05(2)(c)~~, and whose interests are preserved from forfeiture by the court and not otherwise satisfied. Such claims may include any claim by a person appointed by the court as receiver pending litigation.

(d) Any claims for restitution by victims of the racketeering activity. Where the forfeiture action was brought by the Department of Legal Affairs, the restitution shall be distributed though the Legal Affairs Revolving Trust Fund; otherwise, the restitution shall be distributed by the clerk of the court.

Section 5. Paragraph (a) of subsection (1) of section 16.56, Florida Statutes, is amended to read:

16.56 Office of Statewide Prosecution.—

(1) There is created in the Department of Legal Affairs an Office of Statewide Prosecution. The office shall be a separate "budget entity" as that term is defined in chapter 216. The office may:

(a) Investigate and prosecute the offenses of:

1. Bribery, burglary, criminal usury, extortion, gambling, kidnapping, larceny, murder, prostitution, perjury, robbery, carjacking, and home-invasion robbery;

2. Any crime involving narcotic or other dangerous drugs;

3. Any violation of the Florida RICO (Racketeer Influenced and Corrupt Organization) Act, including any offense listed in the definition of racketeering activity in s. 895.02(8)(a) ~~895.02(1)(a)~~, providing such listed offense is investigated in connection with a violation of s. 895.03 and is charged in a separate count of an information or indictment containing a count charging a violation of s. 895.03, the prosecution of which listed offense may continue independently if the

prosecution of the violation of s. 895.03 is terminated for any reason;

4. Any violation of the Florida Anti-Fencing Act;

5. Any violation of the Florida Antitrust Act of 1980, as amended;

6. Any crime involving, or resulting in, fraud or deceit upon any person;

7. Any violation of s. 847.0135, relating to computer pornography and child exploitation prevention, or any offense related to a violation of s. 847.0135 or any violation of chapter 827 where the crime is facilitated by or connected to the use of the Internet or any device capable of electronic data storage or transmission;

8. Any violation of chapter 815;

9. Any criminal violation of part I of chapter 499;

10. Any violation of the Florida Motor Fuel Tax Relief Act of 2004;

11. Any criminal violation of s. 409.920 or s. 409.9201;

12. Any crime involving voter registration, voting, or candidate or issue petition activities;

13. Any criminal violation of the Florida Money Laundering Act;

14. Any criminal violation of the Florida Securities and Investor Protection Act; or

15. Any violation of chapter 787, as well as any and all offenses related to a violation of chapter 787;

or any attempt, solicitation, or conspiracy to commit any of the crimes specifically enumerated above. The office shall have such power only when any such offense is occurring, or has occurred, in two or more judicial circuits as part of a related transaction, or when any such offense is connected with an organized criminal conspiracy affecting two or more judicial circuits. Informations or indictments charging such offenses shall contain general allegations stating the judicial circuits and counties in which crimes are alleged to have occurred or the judicial circuits and counties in which crimes affecting such circuits or counties are alleged to have been connected with an organized criminal conspiracy.

Section 6. Subsection (3) of section 905.34, Florida Statutes, is amended to read:

905.34 Powers and duties; law applicable.—The jurisdiction of a statewide grand jury impaneled under this chapter shall extend throughout the state. The subject matter jurisdiction of the statewide grand jury shall be limited to the offenses of:

(3) Any violation of the provisions of the Florida RICO (Racketeer Influenced and Corrupt Organization) Act, including any offense listed in the definition of racketeering activity in s. 895.02(8)(a) ~~895.02(1)(a)~~, providing such listed offense is investigated in connection with a violation of s. 895.03 and is charged in a separate count of an information or indictment containing a count charging a violation of s. 895.03, the

prosecution of which listed offense may continue independently if the prosecution of the violation of s. 895.03 is terminated for any reason;

or any attempt, solicitation, or conspiracy to commit any violation of the crimes specifically enumerated above, when any such offense is occurring, or has occurred, in two or more judicial circuits as part of a related transaction or when any such offense is connected with an organized criminal conspiracy affecting two or more judicial circuits. The statewide grand jury may return indictments and presentments irrespective of the county or judicial circuit where the offense is committed or triable. If an indictment is returned, it shall be certified and transferred for trial to the county where the offense was committed. The powers and duties of, and law applicable to, county grand juries shall apply to a statewide grand jury except when such powers, duties, and law are inconsistent with the provisions of ss. 905.31-905.40.

Section 7. For the purpose of incorporating the amendment made by this act to section 895.05, Florida Statutes, in a reference thereto, subsection (4) and paragraph (a) of subsection (5) of section 16.53, Florida Statutes, are reenacted, and subsection (6) of that section is amended, to read:

16.53 Legal Affairs Revolving Trust Fund.—

(4) Subject to the provisions of s. 895.09, when the

Attorney General files an action pursuant to s. 895.05, funds provided to the Department of Legal Affairs pursuant to s. 895.09(2)(a) or, alternatively, attorneys' fees and costs, whichever is greater, shall be deposited in the fund.

(5)(a) In the case of a forfeiture action pursuant to s. 895.05, the remainder of the moneys recovered shall be distributed as set forth in s. 895.09.

(6) "Moneys recovered" means damages or penalties or any other monetary payment, including monetary proceeds from property forfeited to the state pursuant to s. 895.05 remaining after satisfaction of any valid claims made pursuant to s. 895.09(1)(a)-(d) ~~895.09(1)(a)-(c)~~, which damages, penalties, or other monetary payment is made by any defendant by reason of any decree or settlement in any Racketeer Influenced and Corrupt Organization Act or state or federal antitrust action prosecuted by the Attorney General, but excludes attorney ~~attorneys'~~ fees and costs.

Section 8. For the purpose of incorporating the amendment made by this act to section 895.05, Florida Statutes, in a reference thereto, subsection (1) of section 27.345, Florida Statutes, is reenacted to read:

27.345 State Attorney RICO Trust Fund; authorized use of funds; reporting.—

(1) Subject to the provisions of s. 895.09, when a state attorney files an action pursuant to s. 895.05, funds provided to the state attorney pursuant to s. 895.09(2)(a) or,

alternatively, attorneys' fees and costs, whichever is greater, shall be deposited in the State Attorney RICO Trust Fund.

Section 9. For the purpose of incorporating the amendment made by this act to section 895.05, Florida Statutes, in a reference thereto, subsection (3) of section 92.142, Florida Statutes, is reenacted to read:

92.142 Witnesses; pay.—

(3) Any witness subpoenaed to testify on behalf of the state in any action brought pursuant to s. 895.05 or chapter 542 who is required to travel outside his or her county of residence and more than 50 miles from his or her residence, or who is required to travel from out of state, shall be entitled to per diem and travel expenses at the same rate provided for state employees under s. 112.061 in lieu of any state witness fee.

Section 10. This act shall take effect July 1, 2016.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 967 Family Law
SPONSOR(S): Stevenson
TIED BILLS: None **IDEN./SIM. BILLS:** SB 972

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	11 Y, 0 N	Robinson	Bond
2) Judiciary Committee		Robinson	Havlicak

SUMMARY ANALYSIS

Collaborative law is a non-adversarial alternative dispute resolution concept that, similar to mediation, promotes problem-solving and solutions in lieu of litigation. The process employs collaborative attorneys, mental health professionals, and financial specialists to help adversarial parties reach a consensus on disputed issues. Collaborative law is entirely voluntary, and counsel retained for the purpose of collaborative law may only be used in the collaborative law process. Collaborative law requires extensive confidentiality and privileges to be created by statute, while courts must develop rules of practice and procedure to conform.

The Uniform Collaborative Law Rules/Act (UCLR/A), promulgated by the Uniform Law Commission (ULC) in 2009 and subsequently amended in 2010, standardizes the most important features of collaborative law practice, remaining mindful of ethical considerations and questions of evidentiary privilege. The UCLR/A has been adopted in 12 states as well as the District of Columbia and approved by three sections of the American Bar Association.

The bill creates the Collaborative Law Process Act based upon the UCLR/A for use in dissolution of marriage and paternity actions. The bill provides the grounds for beginning, concluding, and terminating a collaborative law process and provides the necessary statutory privileges and confidentiality of communications required for the collaborative law process.

The framework created by the bill will become effective should the Florida Supreme Court adopt rules to enact a collaborative law process in Florida.

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:

Background

Collaborative law is a non-adversarial alternative dispute resolution concept that, similar to mediation, promotes problem-solving and solutions in lieu of litigation. The process employs collaborative attorneys, mental health professionals, and financial specialists to help adversarial parties reach a consensus on disputed issues. Collaborative law is entirely voluntary, and counsel retained for the purpose of collaborative law may only be used in the collaborative law process. Should litigation ensue because the collaborative law process partially or completely failed to resolve the disputed issues, the adversarial parties are required to retain different attorneys for litigation. Collaborative law requires extensive confidentiality and privileges to be created by statute, while courts must develop rules of practice and procedure to conform. [1]

The collaborative process purportedly hastens resolution of disputed issues and the total expenses of the parties are less than the parties would incur in traditional litigation. The International Academy of Collaborative Professionals (IACP) studied 933 divorce cases within the United States and Canada in which the parties agreed to the collaborative process. The IACP found that:

- 80% of all collaborative cases were resolved within 1 year;
- 86% of the cases studied were resolved with a formal agreement and no court appearances; and
- The average fees for all professionals totaled $24,185.[2]

History of Collaborative Law in the United States

The collaborative law movement started in 1990, but significantly expanded after 2000.[3] Today, collaborative law professionals are assisting disputing parties in every state of the United States, in every English-speaking country, as well as in a host of other foreign jurisdictions.[4] At least 30,000 attorneys and family professionals in the United States have been trained in the collaborative process.[5]

In 2009, the Uniform Law Commission[6] promulgated the Uniform Collaborative Law Rules/Act (amended in 2010), which regulates the use of collaborative law. According to the UCLR/A:

> At its core Collaborative Law is a voluntary dispute-resolution process in which clients agree that, with respect to a particular matter in dispute, their named counsel will represent them solely for purposes of negotiation, and, if the matter is not settled out of court that new counsel will be retained for purposes of litigation. The parties and their lawyers work together to find an equitable resolution of a dispute, retaining experts as

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[1] See the Uniform Law Commission Collaborative Law Summary website for more information at http://www.uniformlaws.org/ActSummary.aspx?title=Collaborative Law Act (last visited Jan. 21, 2016).
[2] Glen L. Rabenn, Marc R. Bertone, and Paul J. Toohey, *Collaborative Divorce – A Follow Up*, 55-APR Orange County Law 32, 36 (Apr. 2013), *available at* http://www.ocbar.org/AllNews/NewsView/tabid/66/ArticleId/1039/April-2013-Collaborative-Divorce-A-Follow-Up.aspx.
[3] John Lande and Forrest S. Mosten, *Family Lawyering: Past, Present, and Future*, 51 FAM. CT. REV. 20, 22 (Jan. 2013), *available at* http://www.mostenmediation.com/books/articles/Family_Lawyering_Past_Present_Future.pdf.
[4] Rabenn, *supra* note 2.
[5] John Lande, *The Revolution in Family Law Dispute Resolution*, 24 J. AM. ACAD. MATRIM. LAW. 411, 430 (2012), *available at* http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1254&context=facpubs.
[6] The Uniform Law Commission (ULC) develops model statutes that are designed to be consistent from state to state to create uniformity in the law between jurisdictions. Florida's commissioners to the ULC are appointed to 4-year terms by the Governor and confirmed by the Senate.

> necessary. The process is intended to promote full and open disclosure, and, as is the case in mediation, information disclosed in a collaborative process is privileged against use in any subsequent litigation . . . Collaborative Law is governed by a patchwork of state laws, state Supreme Court rules, local rules, and ethic opinions. The Uniform Collaborative Law Rules/Act ("UCLR/A") is intended to create a uniform national framework for the use of Collaborative Law—one which includes important consumer protections and enforceable privilege provisions.[7]

An essential component of the UCLR/A is the mandatory disqualification of collaborative attorneys if the parties fail to reach an agreement or intend to engage in contested litigation. Once a collaborative attorney is disqualified from further representation, the parties must start again with new counsel. "The disqualification provision thus creates incentives for parties and collaborative lawyers to settle."[8]

Twelve states[9] plus Washington, D.C., have enacted the UCLR/A, and a bill regarding its adoption is pending this year in the Massachusetts Legislature. At least three sections of the American Bar Association have also approved the UCLR/A—the Section of Dispute Resolution, the Section of Individual Rights & Responsibilities, and the Family Law Section.[10]

History of Collaborative Law in Florida

In the 1990s, the Florida court system began to move towards establishing family law divisions and support services to accommodate families in conflict. In 2001, the Florida Supreme Court adopted the Model Family Court Initiative. This action by the Court combined all family cases, including dependency, adoption, paternity, dissolution of marriage, and child custody into the jurisdiction of a specially designated family court. The Court noted the need for these cases to have a "system that provide[s] nonadversarial alternatives and flexibility of alternatives; a system that preserve[s] rather than destroy[s] family relationships; ... and a system that facilitate[s] the process chosen by the parties."[11] The court also noted the need to fully staff a mediation program, anticipating that mediation can resolve a high percentage of disputes.[12]

In 2012, the Florida Family Law Rules committee proposed to the Florida Supreme Court a new rule 12.745, to be known as the Collaborative Process Rule.[13] In declining to adopt the rule, the court explained:

> Given the possibility of legislative action addressing the use of the collaborative law process and the fact that certain foundations, such as training or certification of attorneys for participation in the process, have not yet been laid, we conclude that the adoption of a court rule on the subject at this time would be premature.[14]

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[7] Uniform Law Commission, *Uniform Collaborative Law Rules/Act Short Summary*. http://www.uniformlaws.org/Shared/Docs/Collaborative_Law/UCLA%20Short%20Summary.pdf (last viewed January 15, 2016).

[8] Lande, *supra* note 5 at 429; Members of the ABA who objected to the UCLR/A have stated that the disqualification provision unfairly enables one party to disqualify the other party's attorney simply by terminating the collaborative process or initiating litigation. *See* Andrew J. Meyer, *The Uniform Collaborative Law Act: Statutory Framework and the Struggle for Approval by the American Bar Association*, 4 Y.B. ON ARB. & MEDIATION 212, 216 (2012).

[9] Alabama, Arizona, Hawaii, Maryland, Michigan, Montana, Nevada, New Jersey, Ohio, Texas, Utah, and Washington.

[10] New Jersey Law Revision Commission, *Final Report Relating to New Jersey Family Collaborative Law Act*, 5 (Jul. 23, 2013), http://www.lawrev.state.nj.us/ucla/njfclaFR0723131500.pdf.

[11] *In re Report of Family Court Steering Committee*, 794 So. 2d 518, 523 (Fla. 2001).

[12] *Id.* at 520.

[13] *In Re: Amendments to the Florida Family Law Rules of Procedure*, 84 So. 3d 257 (Fla. 2012).

[14] *Id.*

Although the Florida Supreme Court has not adopted rules on collaborative law, at least four judicial circuits in Florida-the 9th, 11th, 13th, and 18th-have adopted local court rules on collaborative law.[15] Each administrative order includes the requirement that an attorney disqualify himself or herself if the collaborative process is unsuccessful. Other circuits have recognized the collaborative process in the absence of issuing a formal administrative order.

Effect of the Proposed Changes

The bill creates Part III of ch. 61, F.S., consisting of ss. 61.55-61.58, F.S., the "Collaborative Law Process Act (Act)." The Act establishes a basic framework for the collaborative law process based upon the UCLR/A for use in dissolution of marriage and paternity actions.

Legislative Declarations and Purpose (Sections 3-4)

The bill creates s. 61.55, F.S., to provide for the applicability and purpose of the collaborative law process. The authority for the collaborative process is limited to issues governed by ch. 61, F.S. (Dissolution of Marriage; Support; Time-sharing) and ch. 742, F.S. (Determination of Parentage). More specifically, the following issues are subject to resolution through the collaborative law process:

- Marriage, divorce, dissolution, annulment, and marital property distribution;
- Child custody, visitation, parenting plans, and parenting time;
- Alimony, maintenance, child support;
- Parental relocation with a child;
- Premarital, marital, and postmarital agreements; and
- Paternity.

Definitions (Section 5)

The bill creates s. 61.56, F.S., to provide definitions applicable to the Act.

Beginning, Concluding, and Terminating a Collaborative Law Process (Section 6)

The bill creates s. 61.57, F.S., to provide conditions upon which a collaborative law process begins, concludes, and terminates. The bill provides that a tribunal may not order a party to participate in a collaborative law process over that party's objection and a party may terminate the collaborative law process with or without cause. The process begins when the parties enter into a collaborative participation agreement. If a legal proceeding is pending, the proceeding is put on hold while the collaborative law process is ongoing.

A collaborative law process is concluded in one of four ways. First, the parties may provide for a method by agreement. Second, the parties may sign a record providing a resolution of the matter. Third, the parties may sign a record indicating resolution of certain matters while leaving other matters unresolved. Fourth, the process is concluded by a termination of the process, evidenced when a party:

- Gives notice to other parties that the process is ended;
- Begins a legal proceeding related to a collaborative law matter without the agreement of all the parties;
- Initiates a pleading, motion, order to show cause, or request for a conference with a tribunal in a pending proceeding related to the matter;

[15] Order Authorizing Collaborative Process Dispute Resolution Model in the Ninth Judicial Circuit of Florida, Fla. Admin. Order No. 2008-06 (Mar. 28, 2008); In re: Authorizing the Collaborative Process Dispute Resolution Model in the Eleventh Judicial Circuit of Florida, Fla. Admin Order No. 07-08 (Oct. 2007); Collaborative Family Law Practice, Fla. Admin. Order No. S-2012-041 (Jul. 31, 2012); In re: Domestic Relations—Collaborative Conflict Resolution in Dissolution of Marriage Cases, Fla. Admin. Order No. 14-04 Amended (Feb. 23, 2014) (on file with the Civil Justice Subcommittee).

- Requests that the proceeding be put on the tribunal's active calendar in a pending proceeding related to the matter or takes a similar action requiring notice to be sent to the parties; or
- Discharges a collaborative lawyer or a collaborative lawyer withdraws.

A party's collaborative lawyer must give prompt notice to all other parties in a record of a discharge or withdrawal.

A collaborative law process may survive the discharge or withdrawal of a collaborative lawyer under the following conditions:

- The unrepresented party engages a successor collaborative lawyer;
- The parties consent in a signed record to continue the process;
- The agreement is amended to identify the successor collaborative lawyer; and
- The successor collaborative lawyer confirms the representation in a signed record.

Confidentiality of Collaborative Law Communication (Section 7)

The bill creates s. 61.58, F.S., to provide that a collaborative law communication is confidential to the extent agreed upon by the parties in a signed record or as otherwise provided by law, with limitations as discussed below.

Privilege against Disclosure for Collaborative Law Communications

The bill creates s. 61.58(1), F.S., to provide a privilege against disclosure for collaborative law communications, within limits provided in the bill. A collaborative law communication is not subject to discovery or admissible in evidence in a proceeding before a tribunal. Each party (including a party's attorney during the collaborative law process) has a privilege to refuse to disclose a collaborative law communication, and to prevent any other person from disclosing a communication. A nonparty to the collaborative law process (which is any person other than the party or the party's attorney, in this context) may also refuse to disclose any communication or may prevent any other person from disclosing the nonparty's communication. Therefore, a party has an absolute privilege as to all communications, while the nonparty has a privilege for his or her own communications. However, evidence that would otherwise be admissible does not become inadmissible or protected from discovery solely because it may have been a communication during a collaborative law process. The privilege does not apply if the parties agree in advance in a signed record or if all parties agree in a proceeding that all or part of a collaborative law process is not privileged, as long as the parties had actual notice before the communication was made.

Waiver and Preclusion of Privilege

The bill creates s. 61.58(2), F.S., to provide that a privilege may be expressly waived either orally or in writing during a proceeding if all the parties agree. If a nonparty has a privilege, the nonparty must also agree to waive the privilege. However, if a person makes a disclosure or representation about a collaborative law communication that prejudices another person during a proceeding before a tribunal, that person may not assert a privilege to the extent that it is necessary for the prejudiced person to respond.

Limits of Privilege

The bill creates s. 61.58(3), F.S., to provide that a privilege does not apply to a collaborative law communication that is:

- Available to the public under Florida's Public Records statutes in ch. 119, F.S.;
- Made during a collaborative law session that is open to the public or required by law to be open to the public;

- A threat or statement of a plan to inflict bodily injury or commit a crime of violence;
- Intentionally used to plan or commit a crime, or conceal an ongoing crime or ongoing criminal activity; or
- In an agreement resulting from the collaborative process if there is a record memorializing the agreement, signed by all of the parties.

A privilege does not apply to the extent that the communication is sought or offered to prove or disprove:

- A claim or complaint of professional misconduct or malpractice arising from or related to a collaborative law process; or
- Abuse, neglect, abandonment, or exploitation of a child or adult, unless the Florida Department of Children and Families is a party or otherwise participates in the collaborative law process.

Only the portion of the communication needed for proof or disproof may be disclosed or admitted.

There are other limited circumstances where a privilege does not apply that requires the approval of the court. A party seeking discovery or a proponent of certain evidence may show that the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the communication is either in a court proceeding involving a felony or a proceeding seeking rescission or reformation of a contract arising out of the collaborative law process or where a defense is asserted to avoid liability on the contract. Only the portion of the communication needed for evidence may be disclosed or admitted.

Effective Date (Section 8)

The framework created by the bill will become effective 30 days after the Florida Supreme Court adopts rules of procedure and professional responsibility consistent with the collaborative law process. The Legislature may not create rules or procedures relating to litigation, as this would violate the separation of powers and the Supreme Court's exclusive right to "adopt rules for the practice and procedure in all courts . . ."[16] See the *Constitutional Issues* section below for a more detailed discussion.

B. SECTION DIRECTORY:

Section 1 provides a short title.

Section 2 directs the Division of Law Revision and Information to create part III of ch. 61, Florida Statutes, entitled the "Collaborative Law Process Act."

Section 3 provides legislative declarations as to the purpose of the Act.

Section 4 creates s. 61.55, F.S., relating to the purpose of the Act.

Section 5 creates s. 61.56, F.S., relating to definitions.

Section 6 creates s. 61.57, F.S., relating to beginning, concluding, and terminating a collaborative law process.

Section 7 creates s. 61.58, F.S., relating to confidentiality of a collaborative law communication.

Section 8 directs that the Act is not effective until 30 days after the adoption of rules of procedure and professional responsibility by the Florida Supreme Court.

[16] Art. V, s. 2, FLA. CONST.

Section 9 contains an effective date of July 1, 2016, except as otherwise expressly provided in the Act.

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 Office of the State Courts Administrator (OSCA) indicates that the bill could potentially decrease judicial workload due to fewer filings, hearings, and contested issues. Increased judicial workload, however, could result from *in camera* hearings regarding privilege determinations. Due to the unavailability of data needed to quantifiably establish the impact on judicial or court workload, fiscal impact is indeterminate.[17]

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:

Although some family law attorneys currently practice collaborative law in the state, the bill could theoretically expand the use of collaborative law as an alternative to traditional litigation in dissolution of marriage and paternity actions. To the extent that collaborative law reduces costs of litigation, parties in such actions may benefit financially from electing to proceed in a collaborative manner.

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:

   Article V, s. 2 of the Florida Constitution provides the Supreme Court with exclusive rulemaking authority for practice and procedure in all courts. This bill appears to present the Court with the opportunity to make rules to carry out the purpose of the bill. However, the bill does not direct the Court to make rules.

[17] Office of the State Courts Administrator, Agency Analysis of 2016 Senate Bill 972, p. 2 (December 21, 2015)(on file with the Civil Justice Subcommittee).

B. RULE-MAKING AUTHORITY:

See discussion in *Constitutional Issues* section of this analysis.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Although the bill conforms to the UCLR/A and existing local rules in most respects, the bill does not provide for mandatory disqualification of collaborative attorneys if the process does not result in a settlement. The absence of a mandatory disqualification provision is a significant departure from the UCLR/A and local court rules. The Supreme Court could include the disqualification requirement in its implementing rules.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

A bill to be entitled

An act relating to family law; providing a short title; providing a directive to the Division of Law Revision and Information; providing legislative findings; creating s. 61.55, F.S.; providing a purpose; creating s. 61.56, F.S.; defining terms; creating s. 61.57, F.S.; providing that a collaborative law process begins when the parties enter into a collaborative law participation agreement; prohibiting a tribunal from ordering a party to participate in a collaborative law process over the party's objection; providing the conditions under which a collaborative law process concludes, terminates, or continues; creating s. 61.58, F.S.; providing for confidentiality of communications made during the collaborative law process; providing exceptions; providing that specified provisions do not take effect until 30 days after the Florida Supreme Court adopts rules of procedure and professional responsibility; providing a contingent effective date; providing effective dates.

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

Section 1. This act may be cited as the "Collaborative Law Process Act."

Section 2. The Division of Law Revision and Information is directed to create part III of chapter 61, Florida Statutes, consisting of ss. 61.55-61.58, Florida Statutes, to be entitled the "Collaborative Law Process Act."

Section 3. The Legislature finds and declares that the purpose of part III of chapter 61, Florida Statutes, is to:

(1) Create a uniform system of practice for a collaborative law process for proceedings under chapters 61 and 742, Florida Statutes.

(2) Encourage the peaceful resolution of disputes and the early settlement of pending litigation through voluntary settlement procedures.

(3) Preserve the working relationship between parties to a dispute through a nonadversarial method that reduces the emotional and financial toll of litigation.

Section 4. Section 61.55, Florida Statutes, is created to read:

61.55 Purpose.—The purpose of this part is to create a uniform system of practice for the collaborative law process in this state. It is the policy of this state to encourage the peaceful resolution of disputes and the early resolution of pending litigation through a voluntary settlement process. The collaborative law process is a unique nonadversarial process that preserves a working relationship between the parties and reduces the emotional and financial toll of litigation.

Section 5. Section 61.56, Florida Statutes, is created to

read:

61.56 Definitions.—As used in this part, the term:

(1) "Collaborative attorney" means an attorney who represents a party in a collaborative law process.

(2) "Collaborative law communication" means an oral or written statement, including a statement made in a record, or nonverbal conduct that:

(a) Is made in the conduct of or in the course of participating in, continuing, or reconvening for a collaborative law process; and

(b) Occurs after the parties sign a collaborative law participation agreement and before the collaborative law process is concluded or terminated.

(3) "Collaborative law participation agreement" means an agreement between persons to participate in a collaborative law process.

(4) "Collaborative law process" means a process intended to resolve a collaborative matter without intervention by a tribunal and in which persons sign a collaborative law participation agreement and are represented by collaborative attorneys.

(5) "Collaborative matter" means a dispute, a transaction, a claim, a problem, or an issue for resolution, including a dispute, a claim, or an issue in a proceeding which is described in a collaborative law participation agreement and arises under chapter 61 or chapter 742, including, but not limited to:

(a) Marriage, divorce, dissolution, annulment, and marital property distribution.

(b) Child custody, visitation, parenting plan, and parenting time.

(c) Alimony, maintenance, and child support.

(d) Parental relocation with a child.

(e) Parentage and paternity.

(f) Premarital, marital, and postmarital agreements.

(6) "Law firm" means:

(a) One or more attorneys who practice law in a partnership, professional corporation, sole proprietorship, limited liability company, or association; or

(b) One or more attorneys employed in a legal services organization, the legal department of a corporation or other organization, or the legal department of a governmental entity, subdivision, agency, or instrumentality.

(7) "Nonparty participant" means a person, other than a party and the party's collaborative attorney, who participates in a collaborative law process.

(8) "Party" means a person who signs a collaborative law participation agreement and whose consent is necessary to resolve a collaborative matter.

(9) "Person" means an individual; a corporation; a business trust; an estate; a trust; a partnership; a limited liability company; an association; a joint venture; a public corporation; a government or governmental subdivision, agency,

or instrumentality; or any other legal or commercial entity.

(10) "Proceeding" means a judicial, an administrative, an arbitral, or any other adjudicative process before a tribunal, including related prehearing and posthearing motions, conferences, and discovery.

(11) "Prospective party" means a person who discusses with a prospective collaborative attorney the possibility of signing a collaborative law participation agreement.

(12) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) "Related to a collaborative matter" means involving the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter.

(14) "Sign" means, with present intent to authenticate or adopt a record, to:

(a) Execute or adopt a tangible symbol; or

(b) Attach to or logically associate with the record an electronic symbol, sound, or process.

(15) "Tribunal" means a court, an arbitrator, an administrative agency, or other body acting in an adjudicative capacity which, after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party's interests in a matter.

Section 6. Section 61.57, Florida Statutes, is created to

read:

61.57 Beginning, concluding, and terminating a collaborative law process.—

(1) The collaborative law process begins, regardless of whether a legal proceeding is pending, when the parties enter into a collaborative law participation agreement.

(2) A tribunal may not order a party to participate in a collaborative law process over that party's objection.

(3) A collaborative law process is concluded by any of the following:

(a) Resolution of a collaborative matter as evidenced by a signed record;

(b) Resolution of a part of the collaborative matter, evidenced by a signed record, in which the parties agree that the remaining parts of the collaborative matter will not be resolved in the collaborative law process; or

(c) Termination of the collaborative law process.

(4) A collaborative law process terminates when a party:

(a) Gives notice to the other parties in a record that the collaborative law process is concluded;

(b) Begins a proceeding related to a collaborative matter without the consent of all parties;

(c) Initiates a pleading, a motion, an order to show cause, or a request for a conference with a tribunal in a pending proceeding related to a collaborative matter;

(d) Requests that the proceeding be put on the tribunal's

active calendar in a pending proceeding related to a collaborative matter;

(e) Takes similar action requiring notice to be sent to the parties in a pending proceeding related to a collaborative matter; or

(f) Discharges a collaborative attorney or a collaborative attorney withdraws from further representation of a party, except as otherwise provided in subsection (7).

(5) A party's collaborative attorney shall give prompt notice to all other parties in a record of a discharge or withdrawal.

(6) A party may terminate a collaborative law process with or without cause.

(7) Notwithstanding the discharge or withdrawal of a collaborative attorney, the collaborative law process continues if, not later than 30 days after the date that the notice of the discharge or withdrawal of a collaborative attorney required by subsection (5) is sent to the parties:

(a) The unrepresented party engages a successor collaborative attorney;

(b) The parties consent to continue the collaborative law process by reaffirming the collaborative law participation agreement in a signed record;

(c) The collaborative law participation agreement is amended to identify the successor collaborative attorney in a signed record; and

(d) The successor collaborative attorney confirms his or her representation of a party in the collaborative law participation agreement in a signed record.

(8) A collaborative law process does not conclude if, with the consent of the parties, a party requests a tribunal to approve a resolution of a collaborative matter or any part thereof as evidenced by a signed record.

(9) A collaborative law participation agreement may provide additional methods for concluding a collaborative law process.

Section 7. Section 61.58, Florida Statutes, is created to read:

61.58 Confidentiality of a collaborative law communication.—Except as provided in this section, a collaborative law communication is confidential to the extent agreed by the parties in a signed record or as otherwise provided by law.

(1) PRIVILEGE AGAINST DISCLOSURE FOR COLLABORATIVE LAW COMMUNICATION; ADMISSIBILITY; DISCOVERY.—

(a) Subject to subsections (2) and (3), a collaborative law communication is privileged as provided under paragraph (b), is not subject to discovery, and is not admissible into evidence.

(b) In a proceeding, the following privileges apply:

1. A party may refuse to disclose, and may prevent another person from disclosing, a collaborative law communication.

2. A nonparty participant may refuse to disclose, and may prevent another person from disclosing, a collaborative law communication of a nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely because of its disclosure or use in a collaborative law process.

(2) WAIVER AND PRECLUSION OF PRIVILEGE.—

(a) A privilege under subsection (1) may be waived orally or in a record during a proceeding if it is expressly waived by all parties and, in the case of the privilege of a nonparty participant, if it is expressly waived by the nonparty participant.

(b) A person who makes a disclosure or representation about a collaborative law communication that prejudices another person in a proceeding may not assert a privilege under subsection (1). This preclusion applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

(3) LIMITS OF PRIVILEGE.—

(a) A privilege under subsection (1) does not apply to a collaborative law communication that is:

1. Available to the public under chapter 119 or made during a session of a collaborative law process that is open, or is required by law to be open, to the public;

2. A threat, or statement of a plan, to inflict bodily

injury or commit a crime of violence;

3. Intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity; or

4. In an agreement resulting from the collaborative law process, as evidenced by a record signed by all parties to the agreement.

(b) The privilege under subsection (1) for a collaborative law communication does not apply to the extent that such collaborative law communication is:

1. Sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or relating to a collaborative law process; or

2. Sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child or an adult unless the Department of Children and Families is a party to or otherwise participates in the process.

(c) A privilege under subsection (1) does not apply if a tribunal finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the collaborative law communication is sought or offered in:

1. A proceeding involving a felony; or

2. A proceeding seeking rescission or reformation of a

contract arising out of the collaborative law process or in which a defense is asserted to avoid liability on the contract.

(d) If a collaborative law communication is subject to an exception under paragraph (b) or paragraph (c), only the part of the collaborative law communication necessary for the application of the exception may be disclosed or admitted.

(e) Disclosure or admission of evidence excepted from the privilege under paragraph (b) or paragraph (c) does not make the evidence or any other collaborative law communication discoverable or admissible for any other purpose.

(f) The privilege under subsection (1) does not apply if the parties agree in advance in a signed record, or if a record of a proceeding reflects agreement by the parties, that all or part of a collaborative law process is not privileged. This paragraph does not apply to a collaborative law communication made by a person who did not receive actual notice of the collaborative law participation agreement before the communication was made.

Section 8. Sections 61.55-61.58, Florida Statutes, as created by this act, shall not take effect until 30 days after the Florida Supreme Court adopts rules of procedure and professional responsibility consistent with this act.

Section 9. Except as otherwise expressly provided in this act, this act shall take effect July 1, 2016.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 4009 Slungshot
SPONSOR(S): Combee and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 612

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 0 N	White	White
2) Judiciary Committee		White	Havlicak

SUMMARY ANALYSIS

Florida law defines a "slungshot" as a small mass of metal, stone, sand, or similar material fixed on a flexible handle, strap, or the like, used as a weapon. The term is currently included in the definition of "concealed weapon." As such, a person who is licensed to carry a concealed weapon may carry a slungshot in a concealed manner. A person may also openly carry a slungshot, even without a concealed carry license.

Two provisions in ch. 790, F.S., currently criminalize certain acts with respect to a slungshot:

- Section 790.09, F.S., makes it a second degree misdemeanor for a person to manufacture, cause to be manufactured, sell, or expose for sale a slungshot or metallic knuckles.
- Section 790.18, F.S., makes it a second degree felony for a dealer in arms to sell or transfer a slungshot to a minor.

The bill amends s. 790.001, F.S., to remove "slungshot" from the definition of "concealed weapon." As a result, a person will be able to carry a slungshot concealed without a permit. The bill also amends ss. 790.09 and 790.18, F.S., to remove references to "slungshot." This will make it lawful for:

- A person to manufacture, cause to be manufactured, sell, or expose for sale a slungshot; and
- A dealer in arms to sell or transfer a slungshot to a minor.

On October 28, 2015, the Criminal Justice Impact Conference considered this bill and determined that it would have a negative, insignificant prison bed impact, i.e., a decrease of 10 prison beds or fewer, on the Department of Corrections because it limits the application of a second degree felony offense. The bill may also have a negative jail bed impact on local governments because it limits the application of two misdemeanor offenses.

The bill is effective upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Florida law defines a "slungshot," shown below, as a small mass of metal, stone, sand, or similar material fixed on a flexible handle, strap, or the like, used as a weapon.[1] The term is currently included in the definition of "concealed weapon."[2] As such, a person who is licensed to carry a concealed weapon may carry a slungshot in a concealed manner.[3] A person may also openly carry a slungshot without a concealed carry license.[4]

Two provisions in ch. 790, F.S., currently criminalize certain acts with respect to a slungshot:

- Section 790.09, F.S., makes it a second degree misdemeanor[5] for a person to manufacture, cause to be manufactured, sell, or expose for sale a slungshot or metallic knuckles.
- Section 790.18, F.S., makes it a second degree felony[6] for a dealer in arms to sell or transfer a slungshot to a minor.[7]

Effect of the Bill

The bill amends s. 790.001, F.S., to remove "slungshot" from the definition of "concealed weapon." As a result, a person will be able to carry a slungshot concealed without a permit. The bill also amends ss. 790.09 and 790.18, F.S., to remove references to "slungshot." This will make it lawful for:

- A person to manufacture, cause to be manufactured, sell, or expose for sale a slungshot; and
- A dealer in arms to sell or transfer a slungshot to a minor.[8]

B. SECTION DIRECTORY:

Section 1. Amends s. 790.09, F.S., relating to manufacturing or selling slungshot.

Section 2. Amends s. 790.001, F.S., relating to definitions.

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[1] s. 790.001(12), F.S. Slungshots were originally used as a maritime tool on sailing ships to cast line from one location to another. http://www.wordplays.com/definition/slungshot (last visited on September 30, 2015).

[2] Section 790.001(3)(a), F.S., defines the term "concealed weapon" as "any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon carried on or about a person in such a manner as to conceal the weapon from the ordinary sight of another person."

[3] Section 790.01, F.S., makes it a first degree misdemeanor for a person to carry a concealed weapon (e.g., a slungshot) on or about his or her person. However, the penalty does not apply to a person licensed to carry a concealed weapon pursuant to s. 790.06, F.S.

[4] Section 790.053, F.S., prohibits a person from openly carrying a firearm or an electric weapon or device – not a slungshot or metallic knuckles.

[5] 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.

[6] 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.

[7] The statute also includes the sale or transfer of a firearm, pistol, Springfield rifle or other repeating rifle, bowie knife or dirk knife, brass knuckles, or electric weapon or device. s. 790.18, F.S.

[8] The statute also includes the sale or transfer of a firearm, pistol, Springfield rifle or other repeating rifle, bowie knife or dirk knife, brass knuckles, or electric weapon or device. s. 790.18, F.S.

Section 3. Amends s. 790.18, F.S., relating to sale or transfer of arms to minors by dealers.

Section 4. Provides 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:

   On October 28, 2015, the Criminal Justice Impact Conference considered this bill and determined that it would have a negative, insignificant prison bed impact, i.e., a decrease of 10 prison beds or fewer, on the Department of Corrections because it limits the application of a second degree felony offense.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

   Section 790.09, F.S., makes it a second degree misdemeanor for a person to manufacture, sell, etc., a slungshot or metallic knuckles. Additionally, s. 790.01, F.S., makes it a first degree misdemeanor for a person to carry a concealed weapon (e.g., a slungshot) on or about his or her person. The bill makes it lawful for a person to manufacture, sell, etc., a slungshot, and allows a person to carry a slungshot concealed. These changes may have a negative jail bed impact.

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 a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

A bill to be entitled

An act relating to slungshot; amending s. 790.09, F.S.; deleting provisions prohibiting the manufacture or sale of any instrument or weapon usually known as slungshot; amending s. 790.001, F.S.; revising the definition of the term "concealed weapon" to delete the inclusion of a slungshot; amending s. 790.18, F.S.; deleting a provision prohibiting a dealer in arms from selling or transferring a slungshot to a minor; providing an effective date.

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

Section 1. Section 790.09, Florida Statutes, is amended to read:

790.09 Manufacturing or selling metallic knuckles ~~slungshot~~.—Whoever manufactures or causes to be manufactured~~,~~ or sells or exposes for sale any instrument or weapon of the kind usually known as ~~slungshot, or~~ metallic knuckles commits~~, shall be guilty of~~ a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Section 2. Paragraph (a) of subsection (3) of section 790.001, Florida Statutes, is amended to read:

790.001 Definitions.—As used in this chapter, except where the context otherwise requires:

(3)(a) "Concealed weapon" means any dirk, metallic

knuckles, ~~slungshot,~~ billie, tear gas gun, chemical weapon or device, or other deadly weapon carried on or about a person in such a manner as to conceal the weapon from the ordinary sight of another person.

Section 3. Section 790.18, Florida Statutes, is amended to read:

790.18 Sale or transfer of arms to minors by dealers.—It is unlawful for any dealer in arms to sell or transfer to a minor any firearm, pistol, Springfield rifle or other repeating rifle, bowie knife or dirk knife, brass knuckles, ~~slungshot,~~ or electric weapon or device. A person who violates this section commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 4. This act shall take effect upon becoming a law.