

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 7027 Sexual Offenses
SPONSOR(S): Judiciary Committee
TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/CS/SB 526

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|----------------------------------|--------|------------|--|
| Orig. Comm.: Judiciary Committee | | Cunningham | Havlicak |

SUMMARY ANALYSIS

The bill contains a variety of provisions relating to sexual offenses. Specifically, the bill:

- Authorizes the court to enter orders protecting persons who were under the age of 16 when they were the victim of or a witness to a sexual offense from severe emotional or mental harm while testifying;
- Eliminates the statute of limitations for violations of lewd or lascivious battery or molestation involving a victim under the age of 16 at the time of the offense;
- Increases the penalties for specified sexual battery and lewd or lascivious offenses against children;
- Increases the minimum mandatory sentence for dangerous sexual felony offenders to 50 years;
- Broadens the definition of the term "sexual activity" for purposes of s. 794.05, F.S., (prohibiting a person 24 years of age or older from engaging in sexual activity with a person 16 or 17 years of age);
- Broadens the voyeurism statute to specify that voyeurism may occur when a person, with lewd or lascivious intent, secretly observes another person's intimate areas in which the person has a reasonable expectation of privacy, when the other person is located a public or private dwelling, structure, or conveyance;
- Creates a new sentencing multiplier for specified adult-on-minor sexual offenses;
- Prohibits the Department of Corrections (DOC) from granting incentive gain-time to inmates sentenced for specified sexual offenses;
- Requires the court to impose a split sentence in which an offender convicted of specified sexual offenses is sentenced to 2 years of community supervision after serving his or her term of imprisonment;
- Tolls the community supervision period of offenders sentenced to a split sentence who are transferred to DCF's custody pursuant to the Ryce Act. The supervision period is tolled until the offender is no longer in DCF's custody; and
- Prohibits persons subject to sex offender supervision from possessing obscene, pornographic or sexually stimulating material, regardless of the material's content.

The Criminal Justice Impact Conference (CJIC) met January 30, 2014, to determine the prison bed and community corrections impact of HB 7027. CJIC determined the quantifiable impact of HB 7027 for Fiscal Year 2014-2015 through Fiscal Year 2015-2016 will be \$173,082. However, the significant fiscal impact of the bill will occur in later years since this bill increases maximum sentences that affect offenders with typically high incarceration rates and substantial sentences. The cumulative impact is projected to be \$41.7 million fixed capital outlay cost (514 beds) and a cumulative \$21.9 million operating cost after seven years for the incentive gain-time prohibition and the sentence point multiplier. Total costs (FY 2014-15 to FY 2020-21): \$63.7 million. Further, there are several provisions of the bill that have an indeterminate or insignificant impact.

CJIC has not considered this PCS, which includes a provision tolling supervision while civilly committed and eliminates the provisions relating to exposure of sexual organs. However, CJIC did consider HB 7017, which contained the tolling provisions, and determined that the bill would not have a prison bed impact (DOC also reported that it would not have a fiscal impact on the department).

The bill is effective October 1, 2014.

FULL ANALYSIS

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: pcs7027.JDC

DATE: 2/27/2014

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Special Protections during Court Proceedings

Section 92.55, F.S., authorizes the court to enter orders to protect victims and witnesses who are under the age of 16 or who have an intellectual disability from severe emotional or mental harm while testifying when the defendant is present. Such orders may limit the number of times a victim or witness may be interviewed, prohibit depositions, require submission of questions prior to examination, set the place and conditions for conducting proceedings, and permit or prohibit a person's attendance at a proceeding.¹ When deciding whether to enter such an order, the court must consider certain factors, such as the victim's or witness's age, nature of the offense, and the degree of emotional trauma that will result as a consequence of the defendant's presence.²

The court may also allow the use of a service or therapy animal when taking the testimony of a child in a proceeding involving a sexual offense.³ When making this decision, the court must consider the age and interests of the child, the rights of the parties to the litigation, and any other relevant factor that would facilitate testimony by the child.⁴

Effect of the Bill

The bill broadens the application of s. 92.55, F.S., by applying its provisions to "sexual offense victims or witnesses," which is defined as a person who was under the age of 16 when he or she was the victim of or a witness to a sexual offense.⁵

Lewd or Lascivious Offenses – Penalties

Section 800.04, F.S., provides criminal penalties for the following lewd or lascivious offenses committed upon or in the presence of a person less than 16 years of age.⁶

Lewd or Lascivious Battery

Lewd or lascivious battery, a second degree felony,⁷ occurs when a person:

- Engages in sexual activity⁸ with a person 12 years of age or older but less than 16; or
- Encourages, forces, or entices any person less than 16 years of age to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity.⁹

Lewd or Lascivious Molestation

A person who intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person less than 16 years of age, or forces or entices a person under 16 years of age to so touch the perpetrator, commits lewd or lascivious molestation.¹⁰

¹ Section 92.55(3), F.S.

² Section 92.55(2), F.S.

³ Section 92.55(4), F.S.

⁴ *Id.*

⁵ A sexual offense includes any offense listed in ss. 775.21(4)(a)1. or 943.0435(1)(a)1.a.(I), F.S.

⁶ Neither the victim's lack of chastity nor the victim's consent is a defense. Section 800.04(2), F.S.

⁷ A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

⁸ Section 800.04(1)(a), F.S., defines the term "sexual activity" as the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose.

⁹ Section 800.04(4), F.S.

¹⁰ Section 800.04(5), F.S.

The penalties for lewd or lascivious molestation are as follows:

- An offender 18 years of age or older who commits lewd or lascivious molestation against a victim less than 12 years of age commits a life felony.¹¹
- An offender less than 18 years of age who commits lewd or lascivious molestation against a victim less than 12 years of age commits a second degree felony.
- An offender 18 years of age or older who commits lewd or lascivious molestation against a victim 12 years of age or older but less than 16 years of age commits a second degree felony.
- An offender less than 18 years of age who commits lewd or lascivious molestation against a victim 12 years of age or older but less than 16 years of age commits a third degree felony.¹²

Effect of the Bill

The bill increases the penalty for lewd or lascivious battery to a first degree felony¹³ if the offender is 18 years of age or older and has previously been convicted of a violation of:

- Section 787.01(2), F.S.,¹⁴ if the violation involved a victim who was a minor and, in the course of committing the violation, the defendant committed a sexual battery under ch. 794, F.S., or a lewd act under ss. 800.04 or 847.0135(5), F.S., against the minor;
- Section 787.02(2), F.S.,¹⁵ if the violation involved a victim who was a minor and, in the course of committing the violation, the defendant committed a sexual battery under ch. 794, F.S., or a lewd act under ss. 800.04 or 847.0135(5), F.S., against the minor;
- Section 787.01(3)(a)2. or 3., F.S.;
- Section 787.02(3)(a)2. or 3., F.S.;
- Chapter 794, F.S.¹⁶ (excluding s. 794.011(10), F.S.);
- Section 800.04, F.S.;
- Section 825.1025, F.S.;¹⁷ or
- Section 847.0135(5),¹⁸ F.S.

The bill increases the penalty for lewd or lascivious molestation to a first degree felony if the offender is 18 years of age or older, the victim is 12 years of age or older but less than 16, and the offender has previously been convicted of one of the above-listed offenses.

The bill amends the offense severity ranking chart¹⁹ to modify statutory references and descriptive language.

Lewd or Lascivious Offenses – Statute of Limitations

Section 775.15, F.S., sets forth statutes of limitation for commencing criminal prosecutions. For example:

- For a capital felony,²⁰ a life felony, or a felony resulting in death, there is no time limitation;

¹¹ A life felony committed on or after September 1, 2005, which is a violation of s. 800.04(5)(b), F.S., is punishable by a term of imprisonment for life; or a split sentence that is a term of not less than 25 years' imprisonment and not exceeding life imprisonment, followed by probation or community control for the remainder of the person's natural life, as provided in s. 948.012(4), F.S. For a life felony committed on or after July 1, 2008, which is a person's second or subsequent violation of s. 800.04(5)(b), F.S., by a term of imprisonment for life. Section 775.082(3)(a)4., F.S.

¹² 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.

¹³ A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

¹⁴ Relating to kidnapping.

¹⁵ Relating to false imprisonment.

¹⁶ Relating to sexual battery.

¹⁷ Relating to lewd or lascivious offenses committed upon or in the presence of an elderly person or disabled person.

¹⁸ Relating to lewd or lascivious exhibition using a computer.

¹⁹ The Criminal Punishment Code applies to sentencing for felony offenses committed on or after October 1, 1998. Criminal offenses are ranked in the "offense severity ranking chart" from level one (least severe) to level ten (most severe) and are assigned points based on the severity of the offense as determined by the Legislature. If an offense is not listed in the ranking chart, it defaults to a ranking based on the degree of the felony. 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. The points are added in order to determine the "lowest permissible sentence" for the offense. Sections 921.0022 and 921.0024, F.S.

- For a first degree felony, there is a four-year limitation; and
- For any other felony, there is a three-year limitation.

With one exception,²¹ the statute of limitation for the criminal prosecution of lewd or lascivious battery or molestation is 3 years. However, these limitations may be extended or their onset delayed in specified circumstances. For example:

- A prosecution for a lewd or lascivious battery or molestation committed between July 1, 2004, and June 30, 2006, may be commenced within 1 year after the date on which the identity of the accused is established, or should have been established by the exercise of due diligence, through the analysis of DNA evidence, if a sufficient portion of the evidence collected at the time of the original investigation and tested for DNA is preserved and available for testing by the accused.²²
- A prosecution for a lewd or lascivious battery or molestation committed on or after July 1, 2006, may be commenced at any time after the date on which the identity of the accused is established, or should have been established by the exercise of due diligence, through the analysis of DNA evidence, if a sufficient portion of the evidence collected at the time of the original investigation and tested for DNA is preserved and available for testing by the accused.²³

It should also be noted that for violations of lewd or lascivious battery or molestation, the applicable period of limitation does not begin to run until the victim has reached the age of 18 or the violation is reported to a law enforcement agency or other governmental agency, whichever occurs earlier (generally, the time for prosecution of a criminal case starts to run on the day after the offense is committed).²⁴

Effect of the Bill

The bill amends s. 775.15, F.S., to eliminate the statute of limitation for the criminal prosecution of lewd or lascivious battery or molestation involving a victim under the age of 16 at the time of the offense. This provision does not apply if the offender was under the age of 18 and no more than 4 years older than the victim at the time of the offense (in such instances, the statute of limitation remains 3 years). The bill applies to offenses committed on or after October 1, 2014.

Sexual Battery

It is currently a first degree felony ranked in Level 9 of the offense severity ranking chart for a person to commit sexual battery upon a person 12 years of age or older without that person's consent under any of the following circumstances:

- The victim is physically helpless to resist;
- The offender coerces the victim to submit by threatening to use force or violence likely to cause serious personal injury on the victim, and the victim reasonably believes that the offender has the present ability to execute the threat;
- The offender coerces the victim to submit by threatening to retaliate against the victim, or any other person, and the victim reasonably believes that the offender has the ability to execute the threat in the future;
- The offender, without the prior knowledge or consent of the victim, administers or has knowledge of someone else administering to the victim any narcotic, anesthetic, or other intoxicating substance that mentally or physically incapacitates the victim;
- The victim is mentally defective, and the offender has reason to believe this or has actual knowledge of this fact;
- The victim is physically incapacitated; or

²⁰ A person convicted of a capital felony must be punished by death if the proceeding held to determine sentence according to s. 921.141 results in findings by the court that such person must be punished by death, otherwise such person shall be punished by life imprisonment and is ineligible for parole. Section 775.082(1), F.S.

²¹ Lewd or lascivious molestation by an offender 18 years of age or older against a victim less than 12 years is a life felony, which has no statute of limitations.

²² Section 775.15(15), F.S.

²³ Section 775.15(16), F.S.

²⁴ Section 775.15(13)(a), F.S.

- The offender is a certified law enforcement officer, correctional officer, or correctional probation officer or is an elected official exempt from such certification by virtue of s. 943.253, F.S., or any other person in a position of control or authority in a probation, community control, controlled release, detention, custodial, or similar setting, and the officer, official, or person is acting in such a manner as to lead the victim to reasonably believe that the offender is in a position of control or authority as an agent or employee of government.²⁵

It is also a first degree felony ranked in Level 9 for a person who is in a position of familial or custodial authority to a person less than 18 years of age to engage in any act with that person while the person is 12 years of age or older but less than 18 years of age which constitutes sexual battery.²⁶

It is a second degree felony ranked in Level 8 for a person to commit sexual battery upon a person 12 years of age or older, without that person's consent if, in the process of committing the sexual battery, the offender does not use physical force and violence likely to cause serious personal injury.²⁷

Effect of the Bill

The bill increases the felony degree of several sexual battery offenses. Specifically, the bill increases from a first degree felony (up to 30 years imprisonment) to a first degree felony punishable by up to life imprisonment the following offenses:

- Sexual battery of a minor by a person who has familial or custodial authority over the minor;
- Sexual battery by an adult on a person 12-17 years of age, without consent, when the sexual battery involves one of the specified circumstances described above (such as the victim being physically helpless to resist); and
- Sexual battery on a person 12 years of age or older, without consent, when the sexual battery involves one of the specified circumstances described above and the offender has previously been convicted of a specified sexual battery or lewd felony.²⁸

The bill further amends s. 794.011, F.S., to increase the following offenses from a second degree felony (up to 15 years imprisonment) to a first degree felony (up to 30 years imprisonment):

- Sexual battery by an adult on a person 12–17 years of age, without consent, when the sexual battery does not involve violence likely to cause serious physical injury; and
- Sexual battery on a person 12 years of age or older, without consent, when the sexual battery does not involve violence likely to cause serious physical injury and the offender has previously been convicted of a specified sexual battery or lewd felony.²⁹

The bill amends the offense severity ranking chart to modify statutory references and descriptive language.

Dangerous Sexual Felony Offenders

Section 794.0115, F.S., provides that a person is a “dangerous sexual felony offender” if they are convicted of a violation of ss. 787.025(2)(c),³⁰ 794.011(2), (3), (4), (5), or (8);³¹ 800.04(4) or (5);³² 825.1025(2) or (3);³³ 827.071(2), (3), or (4);³⁴ or 847.0145, F.S.;³⁵ or of any similar offense under a

²⁵ Section 794.011(4), F.S.

²⁶ Section 794.011(8)(b), F.S.

²⁷ Section 794.011(5), F.S.

²⁸ The offenses include kidnapping and false imprisonment (ss. 787.01 and 787.02, F.S.) where the violation involved a victim who was a minor and, in the course of committing the violation, the defendant committed a sexual battery under ch. 794, F.S., or a lewd act under ss. 800.04 or 847.0135(5), F.S., against the minor; sexual battery offenses (ch. 794, F.S., excluding s. 794.011(10), F.S.); lewd acts against a child (ss. 800.04 and 847.0135(5), F.S.); and lewd acts against an elderly person or disabled person (s. 825.1025, F.S.).

²⁹ *Id.*

³⁰ Relating to luring or enticing a child.

³¹ Relating to sexual battery.

³² Relating to lewd or lascivious battery and lewd or lascivious molestation committed upon or in the presence of persons less than 16 years of age.

³³ Relating to lewd or lascivious battery and lewd or lascivious molestation committed upon or in the presence of an elderly or disabled person.

³⁴ Relating to sexual performance by a child.

former designation, which offense the person committed when he or she was 18 years of age or older, and the person:

- Caused serious personal injury to the victim as a result of the commission of the offense;
- Used or threatened to use a deadly weapon during the commission of the offense;
- Victimized more than one person during the course of the criminal episode applicable to the offense;
- Committed the offense while under the jurisdiction of a court for a felony offense under the laws of this state, for an offense that is a felony in another jurisdiction, or for an offense that would be a felony if that offense were committed in this state; or
- Has previously been convicted of a violation of ss. 787.025(2)(c); 794.011(2), (3), (4), (5), or (8); 800.04(4) or (5); 825.1025(2) or (3); 827.071(2), (3), or (4); or 847.0145, F.S.; or any offense under a former statutory designation which is similar in elements to an offense described in this paragraph; or of any offense that is a felony in another jurisdiction, or would be a felony if that offense were committed in this state, and which is similar in elements to an offense described in this paragraph.

Dangerous sexual felony offenders must be sentenced to a mandatory minimum term of 25 years imprisonment up to, and including, life imprisonment.

Effect of the Bill

The bill increases the minimum mandatory sentence for dangerous sexual felony offenders to 50 years.

Unlawful Activity with Certain Minors

Section 794.05, F.S., makes it a second degree felony for a person 24 years of age or older to engage in sexual activity with a person 16 or 17 years of age.³⁵ The term “sexual activity” is defined as oral, anal, or vaginal penetration by, or union with, the sexual organ of another, and does not include an act done for a bona fide medical purpose.

Effect of the Bill

The bill amends the definition of the term “sexual activity” to include anal or vaginal penetration of another by any other object. This mirrors the definition of “sexual battery” found in s. 794.011, F.S.

Voyeurism

A person commits the offense of voyeurism when he or she, with lewd, lascivious, or indecent intent, secretly observes another person when the other person is located in a dwelling, structure, or conveyance and such location provides a reasonable expectation of privacy.³⁷ Voyeurism is a first degree misdemeanor for a first violation, and a third degree felony for second or subsequent violations.

State attorneys have reported problems prosecuting persons under the voyeurism statute when the facts of the case involve voyeurism in arguably public places. For example, in 2007, a defendant in Escambia County successfully argued that he was not in a location that afforded a reasonable expectation of privacy when he used a mirror to look up the skirt of a patron at a bookstore.³⁸

Effect of the Bill

The bill amends the voyeurism statute to specify that voyeurism occurs when a person, with lewd or lascivious intent, secretly observes another person’s intimate areas in which the person has a reasonable expectation of privacy, when the other person is located a public or private dwelling, structure, or conveyance. The bill defines “intimate area” as any portion of a person’s body or undergarments that is covered by clothing and intended to be protected from public view.

³⁵ Relating to selling or buying of minors.

³⁶ The provisions of this section do not apply to a person 16 or 17 years of age who has had the disabilities of nonage removed under ch. 743, F.S.

³⁷ Section 810.14, F.S.

³⁸ Letter from Assistant State Attorney Adrienne Emerson, dated September 11, 2013 (on file with Criminal Justice Subcommittee).

Sentencing Multiplier

The Criminal Punishment Code (Code)³⁹ is Florida's framework for determining permissible sentencing ranges for noncapital felonies. Noncapital felonies sentenced under the Code are ranked in the "offense severity ranking chart" from level one (least severe) to level ten (most severe) and are assigned points based on the severity of the offense.⁴⁰ Points are also assigned and accrue based upon any additional offenses, victim injury, sexual contact, prior offenses, legal status violations, community sanction violations, possession of a firearm, and prior serious felonies.⁴¹ Points accrued for any of these factors are added to determine one's sentencing score subtotal.

A person's sentencing score subtotal may be multiplied if authorized by statute. Sentencing multipliers essentially operate to increase one's total sentencing score, and generally result in longer sentences.

Currently, s. 921.0024, F.S., authorizes sentencing "multipliers" for the following:

- Violations of the Law Enforcement Protection Act (LEPA);⁴²
- Violations of specified drug trafficking offenses;
- Repeat motor vehicle theft;
- Criminal gang-related offenses; or
- Offenses involving domestic violence in the presence of a child.

Total sentence points are derived from the subtotal sentence points. If no multiplier applies, the subtotal sentence points are the total sentence points. If a multiplier applies, the total sentence points are the subtotal sentence points as multiplied by the multiplier.

If total sentence points are less than or equal to 44 points, the lowest permissible sentence is any non-state prison sanction (e.g., probation). The maximum penalty depends on the felony degree of the primary offense.⁴³ For example, the maximum penalty for a third degree felony is 5 years in state prison.

If total sentence points are greater than 44 points, one must subtract 28 points from the total sentence points and decrease the remaining total by 25 percent.⁴⁴ This resulting figure is the lowest permissible sentence in prison months.⁴⁵ Again, the maximum penalty depends on the felony degree of the primary offense.⁴⁶

Effect of the Bill

The bill creates a new sentencing multiplier for adult-on-minor sexual offenses. The multiplier specifies that if the offender was 18 years of age or older and the victim was younger than 18 years of age at the time the offender committed the primary offense, and if the primary offense was an offense committed on or after October 1, 2014, and is a violation of any of the following, the subtotal sentence points are multiplied by 2.0.

³⁹ Sections 921.002-921.0027, F.S.

⁴⁰ Section 921.0022, F.S.

⁴¹ Section 921.0024, F.S.

⁴² LEPA provides increased penalties for persons convicted of a violent offense against any law enforcement officer, correctional officer, state attorney, assistant state attorney, and justice or judge of a court, which offense arises out of or in the scope of the officer's duty as a law enforcement or correctional officer, the state attorney's or assistant state attorney's duty as a prosecutor or investigator, or the justice's or judge's duty as a judicial officer, Section 775.0823, F.S.

⁴³ The maximum penalty for the felony degree is generally prescribed in s. 775.082, F.S. An exception is when the scored lowest permissible sentence exceeds the maximum penalty prescribed in s. 775.082, F.S. In this case, the scored lowest permissible sentence for the primary offense becomes both the minimum and maximum penalty for the primary offense.

⁴⁴ For example, if an offender's primary offense is a second degree felony and his or her total sentence points are 80 points, 28 is subtracted from 80, which equals 52 points. The 52 points are then multiplied by 0.75, which equals 39 months in prison. In this example, absent mitigation, the sentencing range is 39 months in state prison up to 15 years in state prison (the maximum penalty for a second degree felony).

⁴⁵ Mandatory minimum terms are an exception to general sentencing under the Code. "If the lowest permissible sentence is less than the mandatory minimum sentence, the mandatory minimum sentence takes precedence. If the lowest permissible sentence exceeds the mandatory sentence, the requirements of the ... Code and any mandatory minimum penalties apply." Rule 3.704(d)(26), Florida Rules of Criminal Procedure.

⁴⁶ The maximum penalty for the felony degree is generally prescribed in s. 775.082, F.S. An exception is when the scored lowest permissible sentence exceeds the maximum penalty prescribed in s. 775.082, F.S. In this case, the scored lowest permissible sentence for the primary offense becomes both the minimum and maximum penalty for the primary offense.

- Section 787.01(2), F.S.,⁴⁷ if the violation involved a victim who was a minor and, in the course of committing the violation, the defendant committed a sexual battery under ch. 794, F.S., or a lewd act under ss. 800.04 or 847.0135(5), F.S., against the minor;
- Section 787.02(2), F.S.,⁴⁸ if the violation involved a victim who was a minor and, in the course of committing the violation, the defendant committed a sexual battery under ch. 794, F.S., or a lewd act under ss. 800.04 or 847.0135(5), F.S., against the minor;
- Section 787.01(3)(a)2. or 3., F.S.,⁴⁹
- Section 787.02(3)(a)2. or 3., F.S.,⁵⁰
- Section 794.011, F.S.⁵¹ (excluding s. 794.011(10), F.S.);
- Section 800.04, F.S.,⁵² or
- Section 847.0135(5),⁵³ F.S.

If applying the multiplier results in the lowest permissible sentence exceeding the statutory maximum sentence for the primary offense, the court may not apply the multiplier and must sentence the defendant to the statutory maximum sentence.

Gain Time

Currently, the Department of Corrections (DOC) may grant inmates incentive gain-time for each month in which an inmate works diligently, participates in training, uses time constructively, or otherwise engages in positive activities.⁵⁴ Inmates earn incentive gain-time at the rate that was in effect on the date the inmate committed the offense which resulted in his or her incarceration.⁵⁵ For offenses committed on or after October 1, 1995, DOC may grant up to 10 days per month of incentive gain-time, but the total amount of incentive gain-time cannot result in release of an inmate before he or she serves a minimum of 85 percent of his or her sentence.⁵⁶ Inmates sentenced to life imprisonment or sentenced pursuant to certain statutes⁵⁷ are not entitled to gain-time.⁵⁸ When an inmate is found guilty of a violation of the laws of the state or DOC rules, gain-time may be forfeited.⁵⁹

⁴⁷ Relating to kidnapping.

⁴⁸ Relating to false imprisonment.

⁴⁹ Relating to kidnapping of a child under the age of 13 and, in the course of committing the offense, committing sexual battery or a lewd and lascivious offense.

⁵⁰ Relating to false imprisonment of a child under the age of 13 and, in the course of committing the offense, committing sexual battery or a lewd and lascivious offense.

⁵¹ Relating to sexual battery.

⁵² Relating to lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age.

⁵³ Relating to lewd or lascivious exhibition using a computer.

⁵⁴ Section 944.275(4)(b), F.S.

⁵⁵ *Id.*

⁵⁶ Section 944.275(4)(b)3., F.S.

⁵⁷ For example, inmates sentenced to a mandatory minimum term of imprisonment as a dangerous sexual felony offender are not eligible to receive gain-time. Section 794.0115(7), F.S.

⁵⁸ Section 944.275(4)(b)3., F.S.

⁵⁹ Section 944.275(5), F.S.

Effect of the Bill

The bill prohibits DOC from granting incentive gain-time to inmates sentenced for any of the following offenses committed on or after October 1, 2014:

- Section 782.04(1)(a)2.c., F.S.,⁶⁰
- Section 787.01(3)(a)2. or 3., F.S.,⁶¹
- Section 787.02(3)(a)2. or 3., F.S.,⁶²
- Section 794.011, F.S.,⁶³ excluding s. 794.011(10), F.S.;
- Section 800.04, F.S.,⁶⁴
- Section 825.1025, F.S.,⁶⁵ or
- Section 847.0135(5), F.S.⁶⁶

Split Sentences

Section 948.012, F.S., *authorizes* the court, at time of sentencing, to impose a split sentence whereby the defendant is placed on probation or community control upon completing a period of imprisonment.

Effect of the Bill

The bill amends s. 948.012, F.S., to *require* the court to impose a split sentence if the court imposes a term of years which is less than the maximum sentence for the offense, and the person is convicted of any of the following offenses that were committed on or after October 1, 2014:

- Murder while engaged in sexual battery (s. 782.04(1)(a)2.c., F.S.);
- Kidnapping a child under the age of 13 and, in the course of that offense, committing sexual battery or a lewd act against the child (s. 787.01(3)(a)2. and 3., F.S.);
- False imprisonment of a child under the age of 13 and, in the course of that offense, committing sexual battery or a lewd act against the child (s. 787.02(3)(a)2. and 3., F.S.);
- Sexual battery (s. 794.011, F.S.), excluding s. 794.011(10), F.S.;
- Lewd acts against a child (s. 800.04, F.S., or s. 847.0135(5), F.S.); or
- Lewd acts against an elderly person or disabled person (s. 825.1025, F.S.).

The probation or community control portion of the split sentence must extend for at least 2 years. However, if the term of years imposed by the court extends to within 2 years of the maximum sentence for the offense, the probation or community control portion of the split sentence must extend for the remainder of the maximum sentence.

Tolling Supervision While Civilly Committed

A sexually violent predator is a person who has been convicted of a sexually violent offense⁶⁷ and has a mental abnormality or personality disorder that makes them likely to engage in future acts of sexual violence if not confined to a secure facility for long-term control, care, and treatment.⁶⁸

⁶⁰ Relating to murder when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, sexual battery.

⁶¹ Relating to kidnapping of a child under the age of 13 and, in the course of committing the offense, commits sexual battery or a lewd and lascivious offense.

⁶² Relating to false imprisonment of a child under the age of 13 and, in the course of committing the offense, commits sexual battery or a lewd and lascivious offense.

⁶³ Relating to sexual battery.

⁶⁴ Relating to lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age.

⁶⁵ Relating to lewd or lascivious offenses committed upon or in the presence of an elderly person or disabled person.

⁶⁶ Relating to lewd or lascivious exhibition using a computer.

⁶⁷ Section 394.912(9), F.S., defines the term “sexually violent offense” as:

- Murder of a human being while engaged in sexual battery in violation of s. 782.04(1)(a)2., F.S.;
- Kidnapping or false imprisonment of a child under the age of 13 and, in the course of that offense, committing sexual battery or a lewd, lascivious, or indecent assault or act upon or in the presence of the child.
- Sexual battery in violation of s. 794.011, F.S.;
- Lewd, lascivious, or indecent assault or act upon or in presence of the child in violation of ss. 800.04 or 847.0135(5), F.S.;
- An attempt, criminal solicitation, or conspiracy, in violation of s. 777.04, F.S., of a sexually violent offense;
- Any conviction for a felony offense in effect at any time before October 1, 1998, which is comparable to a sexually violent offense listed above or any federal conviction or conviction in another state for a felony offense that in this state would be a sexually violent offense; or

To address the treatment needs of these offenders, the 1998 Legislature enacted the Involuntary Civil Commitment of Sexually Violent Predators Act,⁶⁹ also known as the Ryce Act.⁷⁰ The Ryce Act creates a civil commitment process for sexually violent predators that is similar to the Baker Act (used to involuntarily commit and treat mentally ill persons).⁷¹ Under the Ryce Act, offenders convicted of specified sex offenses who are nearing the end of their criminal sentence are referred to the Department of Children and Families (DCF) and assessed by a multidisciplinary team to determine whether the offender meets the clinical definition of a sexually violent predator. After assessment, DCF provides a recommendation to the state attorney.⁷²

Following receipt of DCF's recommendation and supporting information, the state attorney determines whether to file a petition with the circuit court alleging that the offender is a sexually violent predator. If the judge determines probable cause exists, the offender is detained at the Florida Civil Commitment Center (FCCC)⁷³ until a trial is conducted. At trial, a judge or jury must determine by clear and convincing evidence that an offender meets the definition of a sexually violent predator.⁷⁴

Those civilly committed as sexually violent predators are housed for treatment at FCCC. The treatment program consists of four levels of sex offender-specific cognitive behavior treatment, which takes approximately six years to complete.⁷⁵ However, persons committed to the state under the Ryce Act must be confined until the court determines that they are no longer a threat to public safety.⁷⁶

In many instances, an offender convicted of a sexually violent offense will receive a split sentence, whereby he or she is sentenced to serve a specified number of years incarcerated at a Department of Corrections (DOC) institution followed by a specified number of years of community supervision (e.g., probation, community control, conditional release, etc.).⁷⁷ Upon completing the incarcerative portion of their sentence, these offenders are transferred to DCF's custody for civil commitment proceedings. Despite being in DCF's custody, the offender's community supervision period begins to run immediately upon release from DOC – it is not tolled.⁷⁸ As such, many offenders who receive a split sentence and who are transferred to DCF's custody complete their entire community supervision period while confined at FCCC.

According to DOC, as of December, 2013, there were 182 offenders confined at FCCC on community supervision.⁷⁹ Of the 59 offenders released from FCCC in 2013, 17 were still on community supervision when released, and 6 had their community supervision period end prior to their release.⁸⁰

Effect of the Bill

The bill amends ss. 947.1405 and 948.012, F.S., to toll the community supervision period of offenders sentenced to a split sentence who are transferred to DCF's custody pursuant to the Ryce Act. The supervision period is tolled until the offender is no longer in DCF's custody.

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- Any criminal act that, either at the time of sentencing for the offense or subsequently during civil commitment proceedings has been determined beyond a reasonable doubt to have been sexually motivated.

⁶⁸ Section 394.912(10), F.S.

⁶⁹ Part V of ch. 394, F.S.

⁷⁰ *Conditional Release of Sexually Violent Predators through Stipulated Agreements*, Office of Program Policy Analysis and Government Accountability (OPPAGA) Research Memorandum, October 21, 2011. On file with Criminal Justice Subcommittee staff.

⁷¹ *Id.*

⁷² *Id.*

⁷³ FCCC is a 720-bed, physically secure facility located in Arcadia, FL, and operated by the GEO Group. *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Section 394.918, F.S.

⁷⁷ Section 948.012, F.S.

⁷⁸ Section 948.012(1), F.S. *Also see, Parole Com'n v. Smith*, 896 So.2d 966 (Fla. 2nd DCA 2005); *David v. Meadows*, 881 So.2d 653 (Fla. 1st DCA 2004); and *State v. Harris*, 881 So.2d 1079 (Fla. 2004).

⁷⁹ E-mail dated January 13, 2014, from David Ensley, DOC's Research and Data Analysis Bureau Chief (on file with the Criminal Justice Subcommittee).

⁸⁰ *Id.*

Conditions of Sex Offender Probation

Probation is a form of community supervision requiring specified contacts with parole and probation officers, compliance with standard statutory terms and conditions, and compliance with any specific terms and conditions required by the sentencing court.⁸¹ Community control is a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, administered by probation officers with restricted caseloads.⁸² Conditional release, administered by the Florida Parole Commission (Commission), is a mandatory postrelease supervision required for certain violent inmates.⁸³ DOC supervises all probationers, community controllees, and conditional releasees sentenced in circuit court.⁸⁴

Courts are required to impose the conditions of supervision found in s. 948.03, F.S., on probationers and community controllees.⁸⁵ Similarly, the Commission is required to impose the conditions of supervision found in s. 947.1405, F.S., on conditional releasees.⁸⁶ In addition to these standard conditions of supervision, the court/Commission may add special conditions of supervision that it deems proper.⁸⁷

In addition to the standard conditions of supervision described above, ss. 948.30 and 947.1405, F.S., require the court/Commission to impose additional conditions of supervision for probationers, community controllees, and conditional releasees convicted of specified sexual offenses. For example, these offenders are subject to a curfew, residency restrictions, employment restrictions, and sex offender treatment.

Conditions of Sex Offender Supervision - Pornography

Currently, ss. 948.30(1)(g), and 947.1405(7)(a)7., F.S., require the court/Commission to impose a condition prohibiting an offender convicted of a specified sexual offense⁸⁸ from viewing, accessing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material⁸⁹ that is relevant to the offender's deviant behavior pattern (unless otherwise indicated in a treatment plan proscribed in the sexual offender treatment program).⁹⁰

Conditions of Sex Offender Supervision – Sex Offender Treatment

Since 1995, there has been a condition of probation requiring sexual offenders convicted of specified offenses to successfully complete sexual offender treatment.⁹¹ Currently, this condition of probation, found in s. 948.30(1)(c), F.S., is a standard condition of probation and applies to probationers whose crime was committed on or after October 1, 1995, and who are placed under supervision for violation of ch. 794, F.S., s. 800.04, s. 827.071, s. 847.0135(5), or s. 847.0145, F.S.

⁸¹ Section 948.001(8), F.S.

⁸² Section 948.001(3), F.S.

⁸³ Section 947.1405, F.S., requires conditional release for an inmate who:

- Is convicted or a crime committed on or after October 1, 1988, and before January 1, 1994, and any inmate who is convicted of a crime committed on or after January 1, 1994, which crime is or was contained in category 1, category 2, category 3, or category 4 of Rule 3.701 and Rule 3.988, Florida Rules of Criminal Procedure (1993), and who has served at least one prior felony commitment at a state or federal correctional institution;
- Is sentenced as a habitual or violent habitual offender or a violent career criminal pursuant to s. 775.084, F.S.; or
- Is found to be a sexual predator under s. 775.21, F.S., or former s. 775.23, F.S.

⁸⁴ Sections 948.001(1) and 947.1405, F.S.

⁸⁵ Sections 948.001(8) and 948.03, F.S. These conditions require offenders to comply with a variety of requirements (e.g., report to probation supervisors as directed, permit probation supervisors to visit at home or elsewhere, work faithfully at suitable employment, make restitution, not associate with persons engaged in criminal activities, etc.).

⁸⁶ Section 947.1405(2), F.S.

⁸⁷ Sections 948.03(2) and 947.1405(6), F.S.

⁸⁸ These offenses include violations of ch. 794, F.S., relating to sexual battery; s. 800.04, F.S., relating to lewd or lascivious offenses; s. 827.071, F.S., relating to sexual performance by a child; s. 847.0135(5), F.S., relating to certain computer transmissions of pornography; and s. 847.0145, F.S., relating to buying and selling minors.

⁸⁹ This material includes telephone, electronic media, computer programs, or computer services.

⁹⁰ The condition applies to offenders whose crime was committed on or after October 1, 1995.

⁹¹ Chapter 1995-283, L.O.F.

In addition to the standard condition of probation, s. 948.31, F.S., mandates that courts require an evaluation by a qualified practitioner to determine the need of a probationer for treatment. If the court determines that such a need is established by the evaluation process, the court must require sex offender treatment as a term or condition of probation for any person who is required to register as a sexual predator or sexual offender. The court is required to impose a restriction against contact with minors if sexual offender treatment is recommended.⁹² This section of statute applies to all sexual offenders on probation – not just those convicted of specified offenses.

Effect of the Bill

Conditions of Sex Offender Supervision - Pornography

The bill amends ss. 948.30 and 947.1405, F.S., to require the court/Commission to impose a condition prohibiting probationers, community controllees, and conditional releasees from viewing, accessing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material, *regardless of its content* (unless otherwise indicated in the treatment plan provided by a qualified practitioner in the sexual offender treatment program). Visual or auditory material includes, but is not limited to, telephone, electronic media, computer programs, and computer services.

The condition applies to offenders whose crime was committed on or after October 1, 2014, and who are placed on probation, community control, or conditional release for a violation of ch. 794, F.S. (sexual battery); s. 800.04, F.S. (lewd or lascivious offenses); s. 827.071, F.S. (sexual performance by a child); s. 847.0135(5), F.S. (computer transmissions of pornography); and s. 847.0145, F.S. (buying and selling minors).

As a result, these offenders will be prohibited from possessing obscene, pornographic or sexually stimulating material, regardless of its content.

Conditions of Sex Offender Supervision – Sex Offender Treatment

The bill amends s. 948.31, F.S., to authorize (rather than mandate) a court to require probationers who are required to register as a sexual offender to undergo an evaluation by a qualified practitioner to determine whether the offender needs sex offender treatment. If the practitioner recommends treatment, the offender must successfully complete and pay for such treatment, which must be provided by a qualified practitioner.

The bill also amends s. 948.31, F.S., to remove the requirement that the court impose a restriction against contact with minors if sexual offender treatment is recommended. This prohibition is not needed in s. 948.31, F.S., as there is already a standard condition of supervision in s. 948.30(1)(e), F.S., prohibiting specified sexual offenders from having contact with minors.

B. SECTION DIRECTORY:

Section 1. Amends s. 92.55, F.S., relating to judicial or other proceedings involving victim or witness under the age of 16 or person who has an intellectual disability; special protections; use of registered service or therapy animals.

Section 2. Amends s. 775.15, F.S., relating to time limitations; general time limitations; exceptions.

Section 3. Amends s. 794.011, F.S., relating to sexual battery.

Section 4. Amends s. 794.0115, F.S., relating to dangerous sexual felony offenders; mandatory sentencing.

Section 5. Amends s. 794.05, F.S., relating to unlawful sexual activity with certain minors.

⁹² Section 948.30, F.S., currently contains standard conditions of probation that require sex offender treatment for certain offenders and that prohibit certain sex offenders from having contact with minors if the victim of the offender's offense was under 18. The bill requires courts to impose a restriction against contact with minors regardless of whether the offender's victim was a minor.

Section 6. Amends s. 800.04, F.S., relating to lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age.

Section 7. Amends s. 810.14, F.S., relating to voyeurism prohibited; penalties.

Section 8. Amends s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity ranking chart.

Section 9. Amends s. 921.0024, F.S., relating to Criminal Punishment Code; worksheet computations; scoresheets.

Section 10. Amends s. 944.275, F.S., relating to gain-time.

Section 11. Amends s. 947.1405, F.S., relating to conditional release program.

Section 12. Amends s. 948.012, F.S., relating to split sentence of probation or community control and imprisonment.

Section 13. Amends s. 948.30, F.S., relating to additional terms and conditions of probation or community control for certain sex offenses.

Section 14. Amends s. 948.31, F.S., relating to evaluation and treatment of sexual predators and offenders on probation or community control.

Section 15. Provides a severability clause.

Section 16. Provides an effective date of October 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

The Criminal Justice Impact Conference (CJIC) provides the final, official estimate of the prison bed impact, if any, of criminal legislation. CJIC projects the operational costs as well as the fixed capital costs to house the projected increase (or decrease) in prison admissions. CJIC met January 30, 2014 to determine the prison bed and community corrections impact of this bill.

Sentencing Multiplier

The bill increases minimum sentence length of adult-on-minor sex offenses sentenced under the Criminal Punishment Code by creating a new sentence point multiplier. Since these offenders tend to have high incarceration rates and receive long sentences, the significant impact of this bill will occur in later years. CJIC projects an operational impact for Fiscal Years 2014-15 through 2015-16 to be \$154,845. The cumulative impact is projected to be \$27.4 million fixed capital outlay cost (317 beds) and a cumulative \$14.2 million operational cost after seven years. Total costs (FY 2014-15 to FY 2020-21): \$41.6 million.

| a | b | c | d | | | | e | f | g |
|--------------|---|--|------------------------|-----------------------------------|--|--|---------------------|------------------------|---|
| Fiscal Year | Projected Cumulative Prison Beds Required | Projected Additional Annual Prison Beds Required | FUNDS REQUIRED | | | | TOTAL Annual Funds | TOTAL Cumulative Funds | |
| | | | Annual Operating Costs | Annual Fixed Capital Outlay Costs | | | | | |
| 2014-2015 | 1 | 1 | \$8,949 | \$914,865 | | | \$923,814 | \$923,814 | |
| 2015-2016 | 15 | 14 | \$145,896 | \$2,396,432 | | | \$2,542,328 | \$3,466,142 | |
| 2016-2017 | 53 | 38 | \$631,822 | \$3,260,400 | | | \$3,892,222 | \$7,358,364 | |
| 2017-2018 | 103 | 50 | \$1,478,490 | \$4,093,039 | | | \$5,571,529 | \$12,929,893 | |
| 2018-2019 | 164 | 61 | \$2,581,089 | \$4,594,592 | | | \$7,175,681 | \$20,105,574 | |
| 2019-2020 | 231 | 67 | \$3,894,898 | \$6,015,442 | | | \$9,910,340 | \$30,015,913 | |
| 2020-2021 | 317 | 86 | \$5,516,990 | \$6,129,736 | | | \$11,646,726 | \$41,662,639 | |
| Total | 317 | 317 | \$14,258,133 | \$27,404,506 | | | \$41,662,639 | \$41,662,639 | |

Gain-Time

The bill prohibits incentive gain-time for offenders convicted of certain sexual offenses. Since this is adding prison time to the end of a likely lengthy prison sentence, the significant impact of this bill will occur in later years. CJIC projects an operational impact for Fiscal Years 2014-15 through 2015-16 to be \$63,830. The cumulative impact is projected to be \$19.9 million fixed capital outlay cost (233 beds) and a cumulative \$9.8 million operational cost after 7 years. Total costs (FY 2014-15 to FY 2020-21): \$29.7 million.

| a | b | c | d | | | | e | f | g |
|--------------|---|--|------------------------|-----------------------------------|--|--|---------------------|------------------------|---|
| Fiscal Year | Projected Cumulative Prison Beds Required | Projected Additional Annual Prison Beds Required | FUNDS REQUIRED | | | | TOTAL Annual Funds | TOTAL Cumulative Funds | |
| | | | Annual Operating Costs | Annual Fixed Capital Outlay Costs | | | | | |
| 2014-2015 | 0 | 0 | \$0 | \$426,937 | | | \$426,937 | \$426,937 | |
| 2015-2016 | 7 | 7 | \$63,830 | \$1,324,344 | | | \$1,388,174 | \$1,815,111 | |
| 2016-2017 | 28 | 21 | \$325,203 | \$2,151,864 | | | \$2,477,067 | \$4,292,177 | |
| 2017-2018 | 61 | 33 | \$843,498 | \$3,556,247 | | | \$4,399,745 | \$8,691,922 | |
| 2018-2019 | 114 | 53 | \$1,691,725 | \$4,114,560 | | | \$5,806,285 | \$14,498,207 | |
| 2019-2020 | 174 | 60 | \$2,839,824 | \$4,126,873 | | | \$6,966,697 | \$21,464,904 | |
| 2020-2021 | 233 | 59 | \$4,097,473 | \$4,205,284 | | | \$8,302,757 | \$29,767,660 | |
| Total | 233 | 233 | \$9,861,551 | \$19,906,109 | | | \$29,767,660 | \$29,767,660 | |

Combined Sentence Point Multiplier and Incentive Gain-Time Prohibition

CJIC projects an operational impact for Fiscal Years 2014-15 through 2015-16 to be \$173,082. The cumulative impact is projected to be \$41.7 million fixed capital outlay cost (514 beds) and a cumulative \$21.9 million operating cost after seven years for the incentive gain-time prohibition and the sentence point multiplier. Total costs (FY 2014-15 to FY 2020-21): \$63.7 million.

| a | b | c | d | e | f | g |
|--------------|---|--|------------------------|-----------------------------------|---------------------|------------------------|
| Fiscal Year | Projected Cumulative Prison Beds Required | Projected Additional Annual Prison Beds Required | FUNDS REQUIRED | | | |
| | | | Annual Operating Costs | Annual Fixed Capital Outlay Costs | TOTAL Annual Funds | TOTAL Cumulative Funds |
| 2014-2015 | 1 | 1 | \$8,949 | \$1,036,847 | \$1,045,796 | \$1,045,796 |
| 2015-2016 | 17 | 16 | \$164,133 | \$3,216,264 | \$3,380,397 | \$4,426,193 |
| 2016-2017 | 68 | 51 | \$789,778 | \$5,151,432 | \$5,941,210 | \$10,367,402 |
| 2017-2018 | 147 | 79 | \$2,037,663 | \$7,045,395 | \$9,083,058 | \$19,450,460 |
| 2018-2019 | 252 | 105 | \$3,857,133 | \$8,366,272 | \$12,223,405 | \$31,673,865 |
| 2019-2020 | 374 | 122 | \$6,172,673 | \$9,792,580 | \$15,965,253 | \$47,639,118 |
| 2020-2021 | 514 | 140 | \$8,939,940 | \$7,127,600 | \$16,067,540 | \$63,706,658 |
| Total | 514 | 514 | \$21,970,268 | \$41,736,390 | \$63,706,658 | \$63,706,658 |

Increased Penalties – Sexual Battery

The bill increases the penalties for specified sexual battery against children. CJIC determined that this provision will have an insignificant impact on prison beds due to the low volume of offenses (43 imprisoned in FY 2012-13).

The bill also increases penalties for sexual battery when the offender does not use physical force. CJIC determined that this provision will have an indeterminate impact on prison beds since the age of the victim could not be determined.

Familial or Custodial Authority

The bill enhances the felony degree of sexual battery if the offender is a familial or custodial authority. CJIC determined that this provision will have an insignificant impact on prison beds since it only changes the maximum sentence and these offenders typically receive long sentences and have a high incarceration rate.

Increased Penalties – Lewd or Lascivious Offenses

The bill increases the penalties for specified lewd or lascivious offenses against children. CJIC determined that this provision will have an indeterminate impact on prison beds since the prior convictions could not be determined.

Minimum Mandatory Sentence

The bill increases the minimum mandatory sentence for dangerous sexual felony offenders to 50 years. CJIC determined that this provision will have an insignificant impact on prison beds since it only changes the maximum sentence and is a low volume sentence (14 offenders sentenced).

Mandatory Split Sentence

The bill requires the court to impose a split sentence in which an offender convicted of specified sexual offenses is sentenced to two years of community supervision after serving his or her term of imprisonment.

DOC states that the mandatory minimum two years of post-prison supervision will have limited impact.⁹³ In FY 2012-13, there were approximately 1,300 sex offenders released (based on offenses specified in the bill). Of those inmates, 900 had supervision to follow (either a split sentence or conditional release). The remaining 400 inmates had an average time between offense and prison release of 11 years. Therefore, since the bill would apply only to future offenses, DOC expects that the mandatory split provision would not be a significant increase in supervision population during the first years of implementation. DOC notes that the average time between offense and prison release will only increase because of the other provisions of the bill that encourage longer sentences and prohibit gain time for these inmates.⁹⁴

The Office of Economic and Demographic Research estimates that the impact of this provision will be minimal. The projected increase in community supervision probationers is projected to be only 20 by Fiscal Year 2016 – 2017, and 118 by Fiscal Year 2018 – 2019.

Tolling Supervision while Civilly Committed

The Criminal Justice Impact Conference met on January 30, 2014, and determined HB 7017 (sections 11 and 12 of the PCS), which tolled the supervision of offenders civilly committed pursuant to the Ryce Act, will have no impact on state prison beds. DOC reported that the bill will have no fiscal impact on community corrections because of the low volume of offenders distributed throughout the state. Further, any impact would occur years after the effective date of this act as offenders are released from DCF custody and that impact is expected to be insignificant.

Statutes of Limitation – Lewd or Lascivious Offenses

CJIC determined that the impact of this provision of the bill is indeterminate. The bill may have a negative prison bed impact in that it allows prosecutions for violations lewd or lascivious battery or molestation where the victim was under the age of 16 at the time of the offense to be commenced at any time.

Conditions of Sex Offender Probation

The bill prohibits certain offenders from having obscene, pornographic or sexually stimulating material, regardless of whether the material is relevant to the offender's deviant behavior pattern. CJIC determined that this provision will have an indeterminate impact on prison beds since it cannot be determined how many would violate this provision, however, this could result in more violations of supervision, which could have a negative prison bed impact.

Unlawful Activity with Certain Minors

The bill broadens the definition of the term "sexual activity" for purposes of s. 794.05, F.S., (prohibiting a person 24 years of age or older from engaging in sexual activity with a person 16 or 17 years of age). Because this offense is a second degree felony, this could have a negative prison bed impact.

Voyeurism

The bill broadens the application of the voyeurism statute, which is a third degree felony for second or subsequent violations. While CJIC did not review this provision, it is likely insignificant since the second or subsequent violation is an unranked third degree felony.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

⁹³ Senate Bill Analysis of SB 526, dated January 9, 2014 (citing an e-mail from Will Kendrick, Legislative Affairs Director for DOC (January 8, 2014) (on file with the Criminal Justice Subcommittee).

⁹⁴ *Id.*

1. Revenues:

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

2. Expenditures:

Conditions of Sex Offender Probation

The bill prohibits certain offenders from having obscene, pornographic or sexually stimulating material, regardless of whether the material is relevant to the offender's deviant behavior pattern. This could result in more violations of supervision, which could have a negative jail bed impact.

Voyeurism

The bill broadens the application of the voyeurism statute, which is a first degree misdemeanor for first offenses. This could 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:

Conditions of Sex Offender Probation

Vagueness

A statute or ordinance is void for vagueness when, because of its imprecision, it fails to give an adequate notice of what conduct is prohibited. Thus, it invites arbitrary and discriminatory enforcement.⁹⁵

Courts throughout the country are split as to whether a general ban on pornographic materials is unconstitutionally vague. For example, in *McVey v. State*, the court found that the condition prohibiting possession of pornographic or sexually explicit materials was unconstitutionally vague because it failed to clearly inform the offender what conduct was prohibited.⁹⁶ Whereas in *Wilfong v. Commonwealth*, the court determined that a commonsense reading of "sexually arousing materials" does not render the phrase unconstitutionally vague.⁹⁷

The bill prohibits persons subject to sex offender supervision from possessing obscene, pornographic or sexually stimulating material, regardless of its content. This language could be challenged as being unconstitutionally vague.

Probationer Rights

The Florida Supreme Court has found that "constitutional rights of probationers are limited by conditions of probation which are desirable for purposes of rehabilitation."⁹⁸ In other words, trial

⁹⁵ *Sult v. State*, 906 So.2d 1013 (Fla. 2005).

⁹⁶ *McVey v. State*, 863 N.E.2d 434, 447 (Ind. Ct. App. 2007). Also see *State v. Bahl*, 193 P.3d 678, 688 (Wash. 2008).

⁹⁷ *Wilfong v. Commonwealth*, 175 S.W.3d 84, 99 (Ky. Ct. App. 2004). See also *Belt v. State*, 127 S.W.3d 277, 281-82 (Tex. Ct. App. 2004) (condition prohibiting possession of "'sexually stimulating' or 'sexually oriented'" material was not unconstitutionally vague); *Commonwealth v. Perreault*, 930 A.2d 553, 560 (Pa. Super. Ct. 2007) (a condition is not unconstitutionally vague when statutes provide definitions of the terms).

⁹⁸ *Biller v. State*, 618 So.2d 734 (Fla. 1993).

courts have broad discretion to impose various conditions of probation, but cannot impose a condition of probation that is not reasonably related to rehabilitation.⁹⁹ In determining whether a condition of probation is reasonably related to rehabilitation, courts look to whether the condition:

- Has a relationship to the crime of which the offender was convicted;
- Relates to conduct which is not in itself criminal; and
- Requires or forbids conduct which is not reasonably related to future criminality.¹⁰⁰

The bill prohibits persons subject to sex offender supervision from possessing obscene, pornographic or sexually stimulating material, regardless of its content. This could be challenged as not being reasonably related to rehabilitation.

First Amendment

The First Amendment to the United States Constitution and Article I, Section 4, of the Florida Constitution protect the rights of individuals to express themselves in a variety of ways. The constitutions protect not only speech and the written word, but also conduct intended to communicate. When lawmakers attempt to restrict or burden fundamental and basic rights such as these, the laws must not only be directed toward a legitimate public purpose, but they must be drawn as narrowly as possible. As the United States Supreme Court has noted, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."¹⁰¹

In *Miller v. California*, the Supreme Court of the United States found that obscene materials are not protected by the First Amendment.¹⁰² However, materials not considered to be obscene do receive First Amendment protections.

The bill prohibits persons subject to sex offender supervision from possessing pornographic or sexually stimulating material. While offenders have diminished constitutional rights by virtue of being on supervision, this provision could be challenged as violating an offender's First Amendment rights.

Tolling Supervision while Civilly Committed

Florida courts have held that community supervision is not tolled while in DCF's custody pursuant to the Ryce Act.¹⁰³ In doing so, they have not held that the constitution prohibits tolling, but have instead pointed to the applicable criminal and civil statutes and noted that nowhere do the statutes require tolling.¹⁰⁴

The bill amends ss. 947.1405 and 948.012, F.S., to specify that one's community supervision is tolled while in DCF's custody pursuant to the Ryce Act. While there is no case law directly addressing the constitutionality of this concept, the idea that a person should not be on probation while confined is not unique. In 2007, Florida 5th District Court of Appeal stated:

It is well settled that a defendant cannot serve a prison term and be on probation simultaneously. *Porter v. State*, 585 So.2d 399, 400 (Fla. 1st DCA 1991). To hold otherwise would be inconsistent with the rehabilitative concept of probation which presupposes that the probationer is not in prison confinement. Any term of probation presumed to run when the defendant cannot be supervised would be a nullity. As this court explained in *State v. Savage*, 589 So.2d 1016, 1018 (Fla. 5th DCA 1991):

Simple logic would seem to dictate that, where a defendant is incarcerated ..., a probationary period from an unrelated sentence would be tolled since a probationary

⁹⁹ *Nank v. State*, 646 So.2d 762 (Fla. 2d DCA 1994).

¹⁰⁰ *Biller v. State*, 618 So.2d 734 (Fla. 1993).

¹⁰¹ *NAACP v. Button*, 371 U.S. 415, 433 (1963).

¹⁰² 413 U.S. 15 (1973).

¹⁰³ *See, e.g., Parole Com'n v. Smith*, 896 So.2d 966 (Fla. 2d DCA 2005); *David v. Meadows*, 881 So.2d 653 (Fla. 1st DCA 2004); and *State v. Harris*, 881 So.2d 1079 (Fla. 2004).

¹⁰⁴ *David v. Meadows*, 881 So.2d 653, 654 (Fla. 1st DCA 2004).

term should not be allowed to expire simply because a defendant has decided to incur new prison time as a result of a separate and distinct offense.¹⁰⁵

Because persons detained by and committed to DCF pursuant to the Ryce Act are essentially confined, the 5th DCA's argument in favor of tolling supervision would appear to apply. However, confinement pursuant to the Ryce Act is the result of a civil proceeding – not a criminal proceeding, which is factually a different scenario than that addressed by the 5th DCA. As such, the bill could be challenged as violating double jeopardy¹⁰⁶ principles or one's due process rights,¹⁰⁷

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

¹⁰⁵ *Jones v. State*, 964 So.2d 167 (Fla 5th DCA 2007).

¹⁰⁶ The double jeopardy clause (found in the Fifth Amendment of the United States Constitution and Article I, Section 9 of the Florida Constitution) protects against the imposition of multiple criminal penalties for the same offense.

¹⁰⁷ The due process clause (found in the Fifth Amendment of the United States Constitution and applied to states through the Fourteenth Amendment, and in Article I, Section 9 of the Florida Constitution) require a state to provide due process of law before depriving any person of life, liberty or property.