# Justice Council

**Monday, April 10, 2006**
**1:00 PM – 3:00 PM**
**404 House Office Building**

# Meeting Packet

**Allan G. Bense**
**Speaker**

**Bruce Kyle**
**Chair**

# Council Meeting Notice

## HOUSE OF REPRESENTATIVES

**Speaker Allan G. Bense**

### Justice Council

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| **Start Date and Time:** | Monday, April 10, 2006 01:00 pm |
| **End Date and Time:** | Monday, April 10, 2006 03:00 pm |
| **Location:** | 404 HOB |
| **Duration:** | 2.00 hrs |

**Consideration of the following bill(s):**

HB 23 CS Bicycle Safety by Jordan
HB 55 Restoration of Civil Rights by Smith
HB 221 CS Paternity by Richardson
HB 283 CS Correctional Probation Officers by Kreegel
HB 519 CS Internet Screening in Public Libraries by Kravitz
HB 585 CS Inmate Litigation Costs by Hukill
HB 761 Trespass on the Property of a Certified Domestic Violence Center by Carroll
HB 809 CS Assault or Battery on Homeless Persons by Taylor
HB 871 CS Telephone Calling Records by Ryan
HB 1291 CS Weapons by Poppell
HB 1325 CS Controlled Substances by Culp
HB 1341 Fiduciary Lawyer-Client Privilege by Joyner
HB 1495 Marriage Licenses by Arza
HB 1527 CS Parental Notification of Termination of a Minor's Pregnancy by Stargel
HB 1621 Coastal Properties Disclosure Statements by Mayfield
HR 1627 Unanimity of Jury Recommendations in Death Penalty Cases by Kyle
HB 7091 Real Property Electronic Recording by Civil Justice Committee
HJR 7143 Rules of Construction by Judiciary Committee
HB 7151 Adoption by Civil Justice Committee
HB 7169 Juvenile Justice Pilot Program by Juvenile Justice Committee
HB 7177 Time Limitations for Criminal Prosecutions by Criminal Justice Committee
HB 7259 Class Action Lawsuits by Judiciary Committee

**NOTICE FINALIZED on 04/06/2006 16:28 by COCHRAN.MARGARET**

# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 23 CS Bicycle Safety
**SPONSOR(S):** Jordan and others
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 188

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Criminal Justice Committee | 7 Y, 0 N, w/CS | Kramer | Kramer |
| 2) Transportation Committee | 15 Y, 0 N | Thompson | Miller |
| 3) Justice Council | | | |
| 4) | | | |
| 5) | | | |

## SUMMARY ANALYSIS

Under current law bicycle riders or passengers less than sixteen years of age are required to wear a bicycle helmet that meets certain standards. HB 23 will require that bicycle helmets comply with federal safety standards. The use of helmets purchased before October 1, 2006 that comply with current standards will be permitted until January 1, 2010.

Currently every bicycle that is in use between sunset and sunrise must be equipped with a white light visible from at least 500 feet from the front and a lamp and reflector exhibiting a red light visible from 600 feet from the rear. Current law does not specifically allow a law enforcement officer the option of issuing a bicycle safety brochure and a verbal warning to a bicycle rider who violates these lighting provisions. Mirroring the current law relating to bicycle helmets, this bill specifically authorizes verbal warnings and the issuance of safety brochures for violations of bicycle lighting equipment requirements and requires the court to dismiss the charge against a bicycle rider for a first violation relating to bicycle lighting equipment if proof is provided that proper lighting equipment has been installed.

There could be an economic impact on the private sector to the extent that some bicycle riders or passengers may have to replace helmets to comply with the proposed regulation. Passage of this bill may increase the number of warnings issued for bicycle violations concerning reflectors and headlamps, thereby reducing the number of traffic citations issued. To the extent that this occurs, there could be a reduction in revenue collected by the state and local government.

This bill takes effect October 1, 2006.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government – The bill will require that bicycle helmets worn by riders and passengers under the age of 16 comply with federal standards.

Promote Personal Responsibility—The bill allows law enforcement officers to issue a bicycle safety brochure and a verbal warning to a bicycle rider who violates s. 316.2065(8) F.S. The court must dismiss the charge against a bicycle rider for a first violation upon proof of purchase and installation of proper lighting equipment.

B. EFFECT OF PROPOSED CHANGES:

Bicycle Helmet Standards

Under current law, a bicycle rider or passenger who is less than 16 years of age must wear a bicycle helmet that is properly fitted and is fastened securely upon the passenger's head by a strap.[1] The helmet must meet the standards of the American National Standards Institute (ANSI Z 90.4 Bicycle Helmet Standards), the standards of the Snell Memorial Foundation (1984 Standard for Protective Headgear for Use in Bicycling), or any other nationally recognized standards for bicycle helmets adopted by the Department of Highway Safety and Motor Vehicles. The term "passenger" includes a child who is riding in a trailer or semitrailer attached to a bicycle.

A law enforcement officer or school crossing guard is specifically authorized to issue a bicycle safety brochure and a verbal warning to a rider or passenger who violates the helmet law.[2] A law enforcement officer is authorized to issue a citation and assess a $15 fine[3], plus applicable court costs and fees.[4] The minimum fine is $40.50. Optional additions to the base can equal up to $24, causing the maximum amount paid for a bicycle infraction to be $64.50 in some counties. An officer may issue a traffic citation for a violation of this provision only if the violation occurs on a bicycle path or road.[5] A court is required to dismiss the charge against a bicycle rider or passenger for a first violation of the provision upon proof of purchase of a bicycle helmet that complies with the law.[6] Further, a court is authorized to waive, reduce or suspend payment of any fine imposed for a violation of the helmet law.[7]

This bill amends bicycle helmet regulations effective October 1, 2006, to require compliance with the federal safety standard for bicycle helmets, contained in 16 C.F.R., part 1203. Helmets purchased prior to October 1, 2006, that meet the current statutory standards may continue to be worn by riders or passengers until January 1, 2010.

Bicycle Lighting

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[1] s. 316.2065(3)(d) F.S.
[2] s. 316.2065(3)(e), F.S.
[3] s. 318.18(1)(b) F.S.
[4] s. 316.2065(3)(e) F.S.
[5] s. 316.2065(20), F.S. A citation may not be issued to a person on private property except any part that is open to the use of the public for purposes of vehicular traffic.
[6] *Id.*
[7] s. 316.2065(17), F.S.

Currently every bicycle in use between sunset and sunrise must be equipped with a lamp on the front exhibiting a white light visible from a distance of at least 500 feet to the front and a lamp and reflector on the rear each exhibiting a red light visible from a distance of 600 feet to the rear.[8] A bicycle or its rider may be equipped with lights or reflectors in addition to those required by law. Violation of bicycle lighting requirements is a non-criminal traffic infraction punishable as a pedestrian violation[9] by a $15 fine, plus applicable court costs and fees.[10] The minimum fine is $40.50. Optional additions to the base fine can equal up to $24, causing the maximum amount paid for a bicycle infraction to be $64.50 in some counties.

In conformity with the helmet law discussed above, this bill would allow law enforcement officers to issue bicycle safety brochures and verbal warnings to bicycle riders who violate bicycle lighting equipment standards. Alternatively, at the discretion of the law enforcement officer a bicycle rider who violates the bicycle lighting equipment standards may be issued a citation and assessed a fine as described above. Also, the bill requires the court to dismiss the charge against a bicycle rider for a first violation of this offense upon proof of purchase and installation of the proper lighting equipment.

C. SECTION DIRECTORY:

Section 1. Amends s. 316.2065, F.S.; revising safety standard requirements for bicycle helmets that must be worn by certain riders and passengers; providing for enforcement of certain bicycle lighting equipment requirements; providing penalties for violations; providing for dismissal of a first offense.

Section 2. This act takes effect October 1, 2006.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   See fiscal comments.

2. Expenditures:

   See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   See fiscal comments.

2. Expenditures:

   See fiscal comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See fiscal comments.

D. FISCAL COMMENTS:

[8] s. 316.2065(8) F.S.
[9] s. 316.2065(20), F.S.
[10] s. 318.18(1)(b) F.S.

According to information obtained from the Florida Department of Highway Safety and Motor Vehicles, in 2004 there were 10,947 citations issued for violations of s. 316.2065 F.S., which contains the current bicycle regulations. Passage of this bill may increase the number of warnings issued for bicycle violations concerning reflectors and headlamps, thereby reducing the number of traffic citations issued. To the extent that this occurs, there could be a reduction in revenue collected by the state and local government.

The bill will require that by January 1, 2010, all bicycle helmets worn by riders and passengers meet the federal safety standard in addition to the current safety standards. There could be an economic impact on the private sector to the extent that some bicycle riders or passengers may have to replace helmets to comply with the proposed regulation.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Criminal Justice Committee adopted two amendments to the bill. As filed, the bill provided that helmets purchased prior to October 1, *2005* and meeting current standards, may continue to be worn for a certain length of time. The provision was presumably intended to correspond to the effective date of the bill – October 1, *2006*. The first amendment adopted by the committee corrected this error. The second amendment removed reference to traffic infraction enforcement officers from the bill. Current law already gives these personnel the authority to issue traffic citations. As a result, the reference in the bill was unnecessary.

CHAMBER ACTION

The Criminal Justice Committee recommends the following:

**Council/Committee Substitute**

Remove the entire bill and insert:

A bill to be entitled

An act relating to bicycle safety; amending s. 316.2065, F.S.; revising safety standard requirements for bicycle helmets that must be worn by certain riders and passengers; providing for enforcement of certain bicycle equipment requirements; providing penalties for violations; providing for dismissal of a first offense; providing an effective date.

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

Section 1. Paragraph (d) of subsection (3) and subsection (8) of section 316.2065, Florida Statutes, are amended to read:

316.2065 Bicycle regulations.--

(3)

(d) A bicycle rider or passenger who is under 16 years of age must wear a bicycle helmet that is properly fitted and is fastened securely upon the passenger's head by a strap, and that meets the federal safety standard for bicycle helmets, final

rule, 16 C.F.R. part 1203. Helmets purchased prior to October 1, 2006, and meeting standards of the American National Standards Institute (ANSI Z 90.4 Bicycle Helmet Standards), the standards of the Snell Memorial Foundation (1984 Standard for Protective Headgear for Use in Bicycling), or any other nationally recognized standards for bicycle helmets adopted by the department may continue to be worn by riders or passengers until January 1, 2010. As used in this subsection, the term "passenger" includes a child who is riding in a trailer or semitrailer attached to a bicycle.

(8) Every bicycle in use between sunset and sunrise shall be equipped with a lamp on the front exhibiting a white light visible from a distance of at least 500 feet to the front and a lamp and reflector on the rear each exhibiting a red light visible from a distance of 600 feet to the rear. A bicycle or its rider may be equipped with lights or reflectors in addition to those required by this section. Law enforcement officers may issue a bicycle safety brochure and a verbal warning to a bicycle rider who violates this subsection. A bicycle rider who violates this subsection may be issued a citation by a law enforcement officer and assessed a fine for a pedestrian violation, as provided in s. 318.18. The court shall dismiss the charge against a bicycle rider for a first violation of this subsection upon proof of purchase and installation of the proper lighting equipment.

Section 2. This act shall take effect October 1, 2006.

**HB 55**

# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 55 Restoration of Civil Rights
**SPONSOR(S):** Smith and others
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 432

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Criminal Justice Committee | 7 Y, 0 N | Kramer | Kramer |
| 2) Criminal Justice Appropriations Committee | 4 Y, 0 N | Sneed | DeBeaugrine |
| 3) Justice Council | | | |
| 4) | | | |
| 5) | | | |

## SUMMARY ANALYSIS

There is no statutory requirement for county jails to provide county jail prisoners with information regarding civil rights restoration. Any information that is currently provided is initiated locally. This bill would require the administrator of a county detention facility to provide an application form obtained from the Parole Commission relating to restoration of civil rights to a prisoner who has been convicted of a felony at least two weeks before discharge, if possible. It would then be the prisoner's responsibility to fill out the form.

The bill provides that the administrator of the county detention facility may allow volunteers to help the prisoners complete their application.

There will be some fiscal impact to counties to implement the provisions of this bill. The specific cost in each county is indeterminate, but expected to be insignificant.

**FULL ANALYSIS**

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: The bill requires county jail administrators to provide forms relating to restoration of civil rights to inmates prior to release.

B. EFFECT OF PROPOSED CHANGES:

The civil rights of a convicted felon such are the right to vote, the right to serve on a jury and the right to hold public office are suspended until restored by pardon or restoration of civil rights.[1] Restoration of civil rights is a form of executive clemency – a power granted by the Florida Constitution to the Governor with the consent of at least two members of the Cabinet. Art. IV, s. 8(a), Fla. Const. In this situation, the Governor and Cabinet are known as the Clemency Board. Convicted felons are eligible for restoration of civil rights (except the right to own, possess, or use firearms) without a hearing upon completion of sentence or supervision if they meet certain criteria set forth in the Rules of the Clemency Board. If not eligible for restoration of civil rights without a hearing, the felon may apply for a hearing to determine whether his or her civil rights will be restored. In certain cases, convicted felons must request a waiver of clemency rules to be eligible for consideration.

The Florida Parole Commission acts as the agent of the Clemency Board in determining whether offenders and inmates are eligible for restoration of rights without a hearing, investigating applications and conducting hearings when required, and making recommendations to the Board. The Department of Corrections' participation in the process is required by the following two statutes:

- s. 940.061, F.S., requires the department to inform and educate inmates and offenders on community supervision about the restoration of civil rights and to assist eligible inmates and offenders on community supervision with completion of the application for restoration of civil rights.

- s. 944.293, F.S., requires the department to assist offenders under supervision in completing the application and necessary forms and to ensure that the application and other necessary information is forwarded to the Governor before the offender is released from supervision.

A person seeking restoration of civil rights can initiate the process by applying online, by telephone, in person, or in writing.

In recent years, the department and the Parole Commission have reportedly coordinated efforts in order to make restoration of civil rights less difficult for incarcerated felons who will be eligible for restoration without a hearing upon release. The department provides the commission with a computerized list of all eligible inmates who are being released from prison or supervision. If the commission determines that the individual is eligible for restoration of civil rights without a hearing, the individual's name is submitted to the Clemency Board and if no objection is received from two or more board members, the individual's rights are restored. If the commission determines that the individual is ineligible for restoration of civil rights without a hearing or two or more board members object, the commission send the individual an application for restoration of civil rights with a hearing.

There is no statutory requirement for county jails to provide county jail prisoners with education or assistance regarding civil rights restoration. Any education or assistance that is currently provided is initiated locally.

[1] Art. VI, section 4 of the Florida Constitution. See also, s. 40.013, F.S.

This bill would require the administrator of a county detention facility to provide an application form obtained from the Parole Commission relating to restoration of civil rights to a prisoner who has been convicted of a felony at least two weeks before discharge, if possible. It would then be the prisoner's responsibility to fill out the form.

The bill provides that the administrator of the county detention facility may allow volunteers to help the prisoners complete their applications.

The proposed legislation does not apply to prisoners who are released to the custody of the Department of Corrections. Those prisoners are exempted from this legislation because their restoration of civil rights process would be covered by the Department of Corrections as discussed above. Also, by implication this bill would only apply to those inmates who have in fact lost their civil rights by reason of commission of a felony.

C. SECTION DIRECTORY:

Section 1. Requires administrator of county detention facility to provide application form for restoration of civil rights to a prisoner in certain circumstances.

Section 2. Provides effective date of July 1, 2006.

## 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:

   There will be some costs to the counties in implementing the provisions of the bill. The specific amount is not determinable but expected to be insignificant. The impact will be dependent upon the number of eligible prisoners in a particular county. According to data supplied by the Department of Corrections, it is estimated that approximately 43,000 felons were sentenced to county detention facilities between July 1, 2003, and June 30, 2004.

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 requires the administrator of a county detention facility to provide certain prisoners with an application form for civil rights restoration. It is anticipated that any fiscal impact on local counties will be insignificant and it therefore appears that the provision of the bill is exempt from Article VII, Section 18 of the Florida Constitution which prohibits unfunded mandates.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

This bill would require the administrator of a county jail to provide a restoration of civil rights application to all inmates who have been convicted of a felony prior to their release. The bill excludes inmates subsequently sent to the Department of Corrections. However, the bill would apparently require that the application form be provided to prisoners who are being released from jail but have a term of probation to follow despite the fact that these inmates would be ineligible to have their civil rights restored before the probationary term is completed.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

A bill to be entitled

An act relating to the restoration of civil rights; requiring that the administrator of a county detention facility provide an application form for the restoration of civil rights to a prisoner who has been convicted of a felony and is serving a sentence in that facility; authorizing the use of volunteers to assist the prisoner in completing the application; providing that this act shall not apply to prisoners who are transferred to the Department of Corrections; providing an effective date.

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

Section 1. Procedure for requesting restoration of civil rights of county prisoners convicted of felonies.--

(1) With respect to a person who has been convicted of a felony and is serving a sentence in a county detention facility, the administrator of the county detention facility:

(a) Shall provide to the prisoner, at least 2 weeks before discharge, if possible, an application form obtained from the Parole Commission which the prisoner must complete in order to begin the process of having his or her civil rights restored.

(b) May allow volunteers to be used to assist the prisoner in completing the application.

(2) This section shall not apply to prisoners who are discharged from a county detention facility to the custody or control of the Department of Corrections.

Section 2. This act shall take effect July 1, 2006.

# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 221 CS Paternity
**SPONSOR(S):** Richardson; Kendrick
**TIED BILLS:** None. **IDEN./SIM. BILLS:** SB 438

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Civil Justice Committee | 6 Y, 0 N | Shaddock | Bond |
| 2) Future of Florida's Families Committee | 7 Y, 0 N, w/CS | Preston | Collins |
| 3) Justice Council | | | |
| 4) | | | |
| 5) | | | |

## SUMMARY ANALYSIS

Paternity is the state or condition of being a father to a child. A child born during a valid marriage is presumed to be the legitimate and legal child of the husband and wife, whereas paternity must be established for children born out of wedlock. Current law does not provide a means for challenging a judgment of paternity, but a general court rule applicable to all civil actions effectively prohibits a father from challenging a paternity determination later than one year after entry of the judgment.

This bill provides that a father may challenge a paternity judgment at any time until the child's 18th birthday, provided that DNA testing shows he is not the biological father and other specified conditions are met. If the father prevails, his future child support obligations will terminate.

This bill may have an unknown but negative recurring fiscal impact on state government revenues. This bill does not appear to have a fiscal impact on local governments.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

**Promote personal responsibility** -- This bill may allow a father to, years after the entry of a paternity judgment, set the judgment aside and stop paying child support. This may result in mothers and their children losing court ordered support, and force them into seeking public assistance until the actual father can be found (if he can be).

**Empower families** -- This bill allows a man required to pay child support as the father of a child to petition to set aside the determination of paternity upon meeting certain conditions. This may have the effect of affecting relationships between family members and may decrease family stability.

B. EFFECT OF PROPOSED CHANGES:

**Establishment of Paternity**

A child born during a valid marriage is presumed to be the legitimate and legal child of the husband and wife.[1] Paternity is defined as "the state or condition of being a father."[2] In order to establish paternity for children born out of wedlock, s. 742.10, F.S., sets forth the criteria. A determination of paternity must be established by clear and convincing evidence.[3] In any proceeding to establish paternity, the court may on its own motion require the child, the mother, and the alleged father to submit to scientific tests generally relied upon for establishing paternity.[4] A woman who is pregnant or who has a child, any man who has reason to believe he is the father of a child, or any child may bring a proceeding to determine the paternity of the child when the paternity has not otherwise been established.[5]

A male can acknowledge paternity by a notarized voluntary acknowledgement or a voluntary acknowledgement signed under penalty of perjury in the presence of two witnesses. These acknowledgements create a rebuttable presumption of paternity, subject to the right of rescission within 60 days of the date of signing the acknowledgement.[6] After the expiration of the 60-day period, the signed voluntary acknowledgement of paternity constitutes an establishment of paternity and is only subject to challenge in court on the basis of fraud, duress, or material mistake of fact.[7] However, the challenger to the determination of paternity is still responsible for his legal responsibilities, including child support, during the pendency of the challenge, except upon a finding of good cause by the court.[8]

Currently, there is no statute authorizing a male who has been determined to be the father of a child to challenge that determination and be discharged from making child support payments. In order for a man determined to be the father of a child to be relieved of his child support obligation, he must bring an action pursuant to Florida Rules of Civil Procedure 12.540[9] and 1.540. Rule 1.540(b), entitled "Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.," states in pertinent part that a party may file a motion for relief:

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[1] Section 382.013(2)(a), F.S.; *Dep't of Revenue v. Cummings*, 871 So. 2d 1055, 1059 (Fla. 2d DCA 2004) (citations omitted).
[2] Black's Law Dictionary, 1163 (rev. 8th ed. 2004)
[3] Section 742.031, F.S.; *T.J. v. Dep't of Children & Families*, 860 So. 2d 517, 518 (Fla. 4th DCA 2003).
[4] Section 742.12(1), F.S.
[5] Section 742.011, F.S.
[6] Section 742.10(1), F.S.
[7] Section 742.10(4), F.S.
[8] *Id.*
[9] Rule 12.540 provides that Rule 1.540 "shall govern general provisions concerning relief from judgment, decrees, or orders, except that there shall be no time limit for motions based on fraudulent financial affidavits in marital or paternity cases."

> from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party . . . *The motion shall be filed within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order, or proceeding was entered or taken.* A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court. *[emphasis in italics not in original]*

Once paternity has been adjudicated, unless there is a showing of fraud upon the court, "a paternity order is res judicata on the issue of paternity, and relitigation of the paternity issues is unauthorized in connection with any subsequently-filed motion for contempt for failure to pay court-ordered child support."[10] A final judgment of dissolution of marriage that establishes a child support obligation for a former husband is a final determination of paternity, and any subsequent paternity challenge must be brought pursuant to rule 1.540.[11]

In other words, the key section of the above rule under which a petitioner may seek relief from an order of paternity is Rule 1.540(b)(3) (the fraud provision). A petition would be required to demonstrate fraud, either extrinsic or intrinsic, within the one year time limitation imposed by the rule.

Extrinsic fraud "occurs where a defendant has somehow been prevented from participating in a cause."[12] [13] One may seek relief from extrinsic fraud by filing an independent action in equity attacking the final judgment.[14] Nevertheless, due to the constraints of the definition, extrinsic fraud generally is not available as an avenue for relief for a petitioner seeking relief from an adverse paternity finding.

Intrinsic fraud, on the other hand, is fraudulent conduct that arises within a proceeding and pertains to the issues in the case that have been tried or could have been tried.[15] The Florida Supreme Court has expressly found, consistent with the general rule, "that false testimony given in a proceeding is intrinsic fraud."[16] Florida Rule of Civil Procedure 1.540(b) authorizes an action for relief from a final judgment which was obtained through intrinsic fraud, among other grounds, but within a one-year time limitation.[17] Failure to act within that one year will preclude the court from hearing any additional evidence concerning paternity and will act as a procedural bar to a petitioner's relief.

In a non-marital paternity dispute, the Second District Court of Appeal has determined that a man who was informed by the mother that he was the father of her child, and who was named as the biological father in a final judgment of paternity, could not have the judgment of paternity vacated six years later

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[10] *Dep't of Revenue v. Clark*, 866 So. 2d 129 (Fla. 4th DCA 2004)(quoting *Dep't of Revenue v. Gouldbourne*, 648 So. 2d 856 (Fla. 4th DCA 1995)).
[11] *D.F. v. Dep't of Revenue*, 823 So. 2d 97, 100 (Fla. 2002).
[12] *DeClaire v. Yohanon*, 453 So. 2d 375, 377 (Fla. 1984).
[13] The Florida Supreme Court, in *DeClaire*, pointed to the United States Supreme Court's definition of extrinsic fraud as authoritative. *Declaire*, 453 So.2d at 377. That definition, from *United States v. Throckmorton*, 98 U.S. 61, 65-66 (1878), provides: Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side--these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. (Citations omitted.)
[14] *DeClaire*, 453 So. 2d at 378.
[15] *DeClaire*, 453 So. 2d at 379.
[16] *Id.*
[17] *DeClaire*, 453 So. 2d at 377.

absent a showing that the mother had committed a fraud on the court at the time of the original paternity action.[18] Any subsequent blood testing of the alleged father, mother, and child would not change the alleged father's monetary obligations to the child in the absence of proof of fraud on the court.[19] The fact that, six years later, the mother submitted an affidavit expressing her belief that the man paying child support was not the biological father, did not constitute evidence of fraud on the court.[20]

Furthermore, the Fifth District Court of Appeal on December 2, 2005, held that a trial court erred in setting aside a judgment of paternity to which father stipulated in 1991, and in reducing child support arrearages to zero, on ground that DNA test results showed zero percent probability of paternity.[21] The judgment could not be vacated under Rule 1.540(b)(3), since the motion was not timely filed within one year.[22] Additionally, the motion was premised on intrinsic fraud, it concerned allegations of perjury or misrepresentation, and the court could not properly vacate judgment under Rule 1.540(b)(5), which provides that court may relieve party from final judgment if it is no longer equitable that the judgment should have prospective application. Equity "is not available to deprive a child of parental support based on facts that could have been determined prior to entry of the stipulated judgment of paternity."[23] Therefore, the "judgment [was] entitled to res judicata effect."[24]

Finally, in an opinion released on November 30, 2005, the Fourth District Court of Appeal, was confronted with a situation in which a male and female were married when a child was born.[25] The female represented to the male that he was the biological father of the child. Three years later the couple was divorced and the male was obligated to pay child support. After the child's fifth birthday the former husband filed an action maintaining that he was not the child's biological father and DNA testing excluded him as such.[26] The former husband's petition was dismissed by the trial court and that decision was affirmed by the appellate court. The court grappled with what it termed a "fundamental choice" in a case such as the one before them "between the interests of the legal father on the one hand and the child on the other."[27] The main issue, according to the court, "affecting the child in a disestablishment suit is the psychological devastation that the child will undoubtedly experience from losing the only father he or she has ever known."[28] On the other hand, the former husband "may feel victimized,"[29] however, an adult is best able to "absorb the pain of betrayal rather than inflict additional betrayal on the involved children."[30] The court concluded, "the issue of paternity misrepresentation in marital dissolution proceedings is a matter of intrinsic fraud. It is not extrinsic fraud, or a fraud upon the court, that can form the basis for relief from judgment more than a year later. Any relevant policy considerations that would compel a different result are best addressed by the legislature."[31]

**Effect of Bill**

This bill provides an avenue for a male, in any action where he has been required to pay child support as the father of a child, to file a petition to set aside a determination of paternity. The petition to set aside may be filed at any time, up to the child's eighteenth (18th) birthday.

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[18] *State, Dep't of Revenue v. Pough*, 723 So. 2d 303, 306 (Fla. 2d DCA 1998).
[19] *Id.*
[20] *Id.*
[21] *Dep't of Revenue v. Boswell*, 915 So. 2d 717 (Fla. 5th DCA 2005).
[22] *Boswell*, 915 So. 2d at 723.
[23] *Boswell*, 915 So. 2d at 723.
[24] *Id.*
[25] *Parker v. Parker*, 2005 WL 3179971 (Fla. 4th DCA Nov. 30, 2005).
[26] *Id.*
[27] *Parker*, 2005 WL 3179971, *5.
[28] *Id.*
[29] *Parker*, 2005 WL 3179971, *6.
[30] *Parker*, 2005 WL 3179971, *6 (citation omitted).
[31] *Parker*, 2005 WL 3179971, *6.

A petition to set aside a determination of paternity must be filed in the circuit court and served on the mother or other legal guardian or custodian. If the support order was established administratively, the petition must also be served on the Department of Revenue. The petition must include:

- An affidavit from the petitioner affirming that newly discovered evidence relating to the paternity of a child has come to his knowledge since the entry of judgment;
- The results of scientific testing, generally accepted within the scientific community for showing a probability of paternity, administered within 90 days prior to the filing of such a petition, indicating that the male ordered to pay child support cannot be the father of the child for whom he is required to pay support or an affidavit from the petitioner stating he did not have access to the child to have the testing done; and
- An affidavit executed by the petitioner stating that he is current on all child support payments for the child whose paternity is in question or that he is substantially in compliance, with any delinquency being the result of an inability to pay.

The trial court must grant relief on a petition that complies with the above requirements if the court finds that all of the following have been met:

- Newly discovered evidence has come to the petitioner's knowledge since the initial paternity determination;
- The genetic test was properly conducted;
- The male is current on all child support payments for the child, or any delinquency in payments is the result of an inability to pay;
- The male ordered to pay child support has not adopted the child;
- The child was not conceived by artificial insemination while the child's mother and the male who is ordered to pay child support were married; and
- The male ordered to pay child support did not prevent the biological father of the child from asserting parental rights over the child.

The court shall not set aside the paternity determination or child support order if the male engaged in the following conduct after learning that he is not the biological father of the child:

- Married the child's mother and voluntarily assumed a parental obligation and duty to pay support;
- Acknowledged paternity of the child in a sworn statement;
- Consented to be named as the child's biological father on the child's birth certificate;
- Voluntarily promised in writing to support the child and was required to support the child based on that promise;
- Received and disregarded a written notice from any state agency or court instructing him to submit to genetic testing; or
- Signed a voluntary acknowledgement of paternity pursuant to section 742.10(4), Florida Statutes.

If the petitioner fails to make the showing required by this section, the court must deny the petition.

If the trial court grants relief, it must be limited to the issues of prospective child support payments and termination of parental rights, custody, and visitation rights. This section does not create a cause of action for the recovery of previously paid child support.

While the petition is pending, the duty to pay child support and other legal obligations for the child remain in effect and may not be suspended unless good cause is shown. The court may order child support payments to be held in the court registry until the final determination of paternity has been made.

If the genetic testing results are provided solely by the male ordered to pay child support, the court may, on its own motion, and must, on the motion of any party, order the child and the male to submit to genetic tests. This genetic testing must occur within 30 days of an order by the trial court.

Should the child's mother or the male ordered to pay child support willfully refuse to submit to genetic testing, or if either party, as custodian of the child, willfully fails to submit the child for testing, the court must issue an order granting relief on the petition against the party failing to submit to genetic testing. If a party shows good cause for failing to submit to genetic testing, the failure will not be considered willful.

The party requesting genetic testing must pay any fees charged for the tests. If the child's custodian receives services from an administrative agency providing enforcement of child support orders, the agency must pay the costs of genetic testing if it requests the test, and the agency may seek reimbursement for the fees from the person against whom the court assesses the costs of the action.

The bill provides a process for issuing a new birth certificate if relief is granted on a filed petition. Granting a petition does not affect the legitimacy of a child born during a lawful marriage.

If relief is not granted on a petition filed in accordance with this section, the court must assess costs and attorney's fees against the petitioner.

C. SECTION DIRECTORY:

**Section 1.** Creates an unnumbered section establishing grounds by which a man required to pay child support as the father of a child may petition to set aside a determination of paternity. The bill may fit within Chapter 742, Determination of Parentage, Chapter 39, Proceedings Relating to Children, or another provision of Florida Statutes.

**Section 2.** Provides an effective date of July 1, 2006.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   Unknown, but it appears that this bill may have a negative recurring fiscal impact on state revenues. See Fiscal Comments.

2. Expenditures:

   Unknown, but it appears that this bill may have some impact on state government. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may relieve a financial burden on men ordered to pay child support for children who are not their biological children. Additionally, this bill authorizes setting aside of paternity determinations and stopping prospective child support payments and the cessation of these payments will undoubtedly impact the child(ren) and the mothers. Finally, a child who is legally considered to be the "child" of a male is entitled to inheritance rights that would also be eliminated should a paternity judgment be set aside.

D. FISCAL COMMENTS:

This bill may have a fiscal impact on the Department of Revenue, as the department would no longer be able to seek reimbursement for services provided to the mother from the male formerly determined to be the father. This bill may have a fiscal impact on the Department of Revenue, as the department would expend resources to locate the "new" father if there is a judicial determination on a petition to set aside a paternity that the original male who was required to pay child support payments is not the "father" of the child(ren). Also, loss of child support payments to a mother and her child(ren) may result in that family having to receive public assistance.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

   **Separation of Powers**

   This bill might raise a separation of powers issue, because it allows for a petition to set aside a determination of paternity to be brought "at any time," although the procedural rules established by the Supreme Court restrict challenges to final orders and judgments to one year from entry of the judgment or order, except in cases of fraud upon the court. This bill could raise a constitutional concern if it were considered a procedural rather than a substantive law, although it can be argued that this bill constitutes substantive law.[32]

   With respect to the separation of powers issue, several Supreme Court justices and appellate court judges have urged the Legislature to address paternity issues, although the courts' concern seems to focus on the paternity of children whose mothers are married to men who are not the biological fathers of their children.[33]

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[32] Altenbernd, Quasi-Marital Children, 26 Fla. St. U. L. Rev. at 260-61 (noting that in a due process challenge, the Supreme Court has upheld a statute's conclusive presumption of fatherhood as a substantive rule of law supported by social policy concerns) (citing *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)).

[33] *Anderson v. Anderson*, 845 So. 2d 870, 872-874 (2003)(Pariente, J., dissenting); *D.F.*, 823 So. 2d at 101-03 (Pariente, J., concurring); *Fla. Dep't of Revenue v. M.L.S.*, 756 So. 2d 125, 127-33 (Altenbernd, J., dissenting); *Lefler*, 722 So. 2d at 942-44 (Klein, J., specially concurring).

In *Anderson*, the Florida Supreme Court noted that "this is another case requiring the Court to define the law regarding a child support obligation of a husband who is not the biological father of the child."[34] The supreme court upheld the trial court's determination that the father had not proven "'by a preponderance of the evidence that he had been defrauded into believing that the minor child was his.'"[35] Justice Pariente dissented, stating that:

> Cathy Anderson's unequivocal, affirmative response to Michael Anderson that the child was his constituted a misrepresentation under Florida Rule of Civil Procedure 1.540(b)(3) . . . . In light of this affirmative misrepresentation, it was error to refuse to set aside the final judgment of dissolution in this case based on his timely filed postjudgment motion.
>
> . . . a father should be able to rely on the unequivocal, affirmative representations of his wife that he is the father of her child, and should not be obligated to request DNA testing during the divorce action to disprove this presumed fact.[36]

In *D.F.*, where the supreme court held that a final judgment of dissolution of marriage establishing a child support obligation for a former husband is a final determination of paternity, subject to challenge only through rule 1.540, Justice Pariente concurred, stating:

> I write separately to urge the Legislature to address the difficult issues raised in cases such as this one. Cases involving the rights and responsibilities of biological and non-biological parents are no doubt fraught with difficult social issues that translate into complicated legal issues. The legal problems that arise are not limited to the area of child support, but also may arise in the area of probate, wrongful death, adoption, and actions to terminate parental rights.[37]

Finally, as mentioned above the Fourth District Court of Appeal, in *Parker*, stated, "the issue of paternity misrepresentation in marital dissolution proceedings is a matter of intrinsic fraud. It is not extrinsic fraud, or a fraud upon the court, that can form the basis for relief from judgment more than a year later. Any relevant policy considerations that would compel a different result are best addressed by the legislature."[38]

**Due Process**

The bill may infringe upon the child's due process rights by failing to provide the child with representation in a process which will significantly affect the child's legal rights and may leave him or her without a father and without financial support. A child has a constitutional due process right to retain his or her legitimacy if doing so is in the child's best interest.[39] The child has a strong interest in maintaining legitimacy and stability,[40] and the legal recognition of a biological father other than the legal father will affect the heretofore legal father's rights to the care, custody, and control of the child.[41] Because the law does not recognize "dual fathership,"[42] the entry of a judgment of paternity and,

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[34] *Anderson*, 845 So. 2d at 870.
[35] *Id.* at 871.
[36] *Id.* at 872-73.
[37] *D.F.*, 823 So. 2d at 101.
[38] *Parker*, 2005 WL 3179971, *6.
[39] *Dep't of Health & Rehab. Servs. v. Privette*, 716 So. 2d 305, 307 (Fla. 1993).
[40] *R.H.B. v. J.B.W.*, 826 So. 2d 346, 350 n.5 (Fla. 2d DCA 2002) (citation omitted).
[41] *Dep't of Revenue v. Cummings*, 871 So. 2d 1055, 1060 (Fla. 2d DCA 2004).
[42] *G.F.C. v. S.G.*, 686 So. 2d 1382, 1386 (Fla. 5th DCA 1997).

presumably, the entry of an order rescinding a determination of paternity, affects the legal rights of both the father and the child.[43]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

There is no provision in the bill for considering the best interests of the child, nor is there any requirement that the court consider appointing a guardian ad litem for the child.

Lines 99-101 use the term "disregarded" without providing a specific definition for the term or incorporating a timeframe which could be utilized to assist in defining the term.

Line 42 uses the term "cannot," in reference to results of paternity testing, yet it would appear that DNA testing is measured in terms of probability rather than such finite terms.

Lines 137-139 state that "Nothing shall prevent the child from reestablishing paternity under s. 742.10, Florida Statutes." Children do not establish paternity; alleged fathers establish paternity for a child.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On February 22, 2006, the Future of Florida's Families Committee adopted a strike-all amendment to the bill. The amendment:

- Reflects the fact that some child support obligations are established administratively and requires that the Department of Revenue be noticed when petitions are filed in those cases;
- Relaxes the standard requiring the petitioner to be current in his child support to allow for substantial compliance with any delinquency being the result of the inability to pay;
- Removes the requirement that the mother of a child undergo genetic testing;
- Provides a process for issuing a new birth certificate if relief is granted under a petition;
- Provides that granting relief under a petition does not affect the legitimacy of a child born during a lawful marriage; and
- Provides that nothing precludes an individual from seeking relief from a final judgment, decree, or order of proceeding pursuant to Rule 1.540, Florida Rules of Civil Procedure, or from challenging a paternity determination pursuant to s. 742.10(4), Florida Statutes.

As amended, the bill was reported favorably as a committee substitute.

[43] See Cummings, 871 So. 2d at 1060.

CHAMBER ACTION

The Future of Florida's Families Committee recommends the following:

**Council/Committee Substitute**

Remove the entire bill and insert:

A bill to be entitled

An act relating to paternity; permitting a petition to set aside a determination of paternity or terminate a child support obligation; specifying contents of the petition; providing standards upon which relief shall be granted; providing remedies; providing that child support obligations shall not be suspended while a petition is pending; providing for scientific testing; providing for the amendment of the child's birth certificate; providing for assessment of costs and attorney's fees; providing an effective date.

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

Section 1. (1) This section establishes circumstances under which a male may disestablish paternity or terminate a child support obligation when the male is not the biological father of the child. To disestablish paternity or terminate a

child support obligation, the male must file a petition in the court with continuing jurisdiction over the child support obligation. The petition must also be served on the mother or other legal guardian or custodian of the child. If the child support obligation was determined administratively and has not been ratified by a court, then the petition must be filed in the circuit court where the mother or legal guardian or custodian of the child resides. Such a petition must be served on the Department of Revenue and on the mother or other legal guardian or custodian. The petition must include:

(a) An affidavit executed by the petitioner that newly discovered evidence relating to the paternity of the child has come to the petitioner's knowledge since the initial paternity determination or establishment of a child support obligation.

(b) The results of scientific tests that are generally acceptable within the scientific community to show a probability of paternity, administered within 90 days prior to the filing of such petition, which results indicate that the male ordered to pay such child support cannot be the father of the child for whom support is required or an affidavit executed by the petitioner stating that he did not have access to the child to have scientific testing performed prior to the filing of the petition. A male who suspects he is not the father but does not have access to the child to have scientific testing performed may file a petition requesting the court to order the child to be tested.

(c) An affidavit executed by the petitioner stating that the petitioner is current on all child support payments for the

child for whom relief is sought or that he has substantially complied with his child support obligation for the applicable child and that any delinquency in his child support obligation for that child arose from his inability for just cause to pay the delinquent child support when the delinquent child support became due.

(2) The court shall grant relief on a petition filed in accordance with subsection (1) upon a finding by the court of all of the following:

(a) Newly discovered evidence relating to the paternity of the child has come to the petitioner's knowledge since the initial paternity determination or establishment of a child support obligation.

(b) The scientific test required in paragraph (1)(b) was properly conducted.

(c) The male ordered to pay child support is current on all child support payments for the applicable child or that the male ordered to pay child support has substantially complied with his child support obligation for the applicable child and that any delinquency in his child support obligation for that child arose from his inability for just cause to pay the delinquent child support when the delinquent child support became due.

(d) The male ordered to pay child support has not adopted the child.

(e) The child was not conceived by artificial insemination while the male ordered to pay child support and the child's mother were in wedlock.

(f) The male ordered to pay child support did not act to prevent the biological father of the child from asserting his paternal rights with respect to the child.

(g) The child had not yet reached his or her 18th birthday when the petition was filed.

(3) Notwithstanding subsection (2), a court shall not set aside the paternity determination or child support order if the male engaged in the following conduct after learning that he is not the biological father of the child:

(a) Married the mother of the child while known as the putative father in accordance with s. 742.091, Florida Statutes, and voluntarily assumed the parental obligation and duty to pay child support;

(b) Acknowledged his paternity of the child in a sworn statement;

(c) Consented to be named as the child's biological father on the child's birth certificate;

(d) Voluntarily promised in writing to support the child and was required to support the child based on that promise;

(e) Received and disregarded written notice from any state agency or any court directing him to submit to scientific testing; or

(f) Signed a voluntary acknowledgment of paternity as provided in s. 742.10(4), Florida Statutes.

(4) In the event the petitioner fails to make the requisite showing required by this section, the court shall deny the petition.

(5) In the event relief is granted pursuant to this section, relief shall be limited to the issues of prospective child support payments and termination of parental rights, custody, and visitation rights. The male's previous status as father continues to be in existence until the order granting relief is rendered. All previous lawful actions taken based on reliance on that status are confirmed retroactively but not prospectively. This section shall not be construed to create a cause of action to recover child support that was previously paid.

(6) The duty to pay child support and other legal obligations for the child shall not be suspended while the petition is pending except for good cause shown. However, the court may order the child support to be held in the registry of the court until final determination of paternity has been made.

(7)(a) In an action brought pursuant to this section, if the scientific test results submitted in accordance with paragraph (1)(b) are provided solely by the male ordered to pay child support, the court on its own motion may, and on the petition of any party shall, order the child and the male ordered to pay child support to submit to applicable scientific tests. The court shall provide that such scientific testing be done no more than 30 days after the court issues its order.

(b) If the male ordered to pay child support willfully fails to submit to scientific testing or if the mother or legal guardian or custodian of the child willfully fails to submit the child for testing, the court shall issue an order determining the relief on the petition against the party so failing to

submit to scientific testing. If a party shows good cause for failing to submit to testing, such failure shall not be considered willful. Nothing in this paragraph shall prevent the child from reestablishing paternity under s. 742.10, Florida Statutes.

(c) The party requesting applicable scientific testing shall pay any fees charged for the testing. If the custodian of the child is receiving services from an administrative agency in its role as an agency providing enforcement of child support orders, that agency shall pay the cost of the testing if it requests the testing and may seek reimbursement for the fees from the person against whom the court assesses the costs of the action.

(8) If relief on a petition filed in accordance with this section is granted, the clerk of the court shall, within 30 days following final disposition, forward to the Office of Vital Statistics of the Department of Health a certified copy of the court order or a report of the proceedings upon a form to be furnished by the department, together with sufficient information to identify the original birth certificate and to enable the department to prepare a new birth certificate. Upon receipt of the certified copy or the report, the department shall prepare and file a new birth certificate that deletes the name of the male ordered to pay child support as the father of the child. The certificate shall bear the same file number as the original birth certificate. All other items not affected by the order setting aside a determination of paternity shall be copied as on the original certificate, including the date of

registration and filing. If the child was born in a state other than Florida, the clerk shall send a copy of the report or decree to the appropriate birth registration authority of the state where the child was born. If the relief on a petition filed in accordance with this section is granted and the mother or legal guardian or custodian requests that the court change the child's surname, the court may change the child's surname. If the child is a minor, the court shall consider whether it is in the child's best interests to grant the request to change the child's surname.

(9) The rendition of an order granting a petition filed pursuant to this section shall not affect the legitimacy of a child born during a lawful marriage.

(10) If relief on a petition filed in accordance with this section is not granted, the court shall assess the costs of the action and attorney's fees against the petitioner.

(11) Nothing in this section precludes an individual from seeking relief from a final judgment, decree, or order of proceeding pursuant to Rule 1.540, Florida Rules of Civil Procedure, or from challenging a paternity determination pursuant to s. 742.10(4), Florida Statutes.

Section 2. This act shall take effect July 1, 2006.

# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 283 CS Correctional Probation Officers
**SPONSOR(S):** Kreegel
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 690

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Criminal Justice Committee | 6 Y, 0 N | Cunningham | Kramer |
| 2) Criminal Justice Appropriations Committee | 6 Y, 0 N, w/CS | Sneed | DeBeaugrine |
| 3) Justice Council | | | |
| 4) | | | |
| 5) | | | |

## SUMMARY ANALYSIS

Currently, if a correctional probation officer elects to carry a firearm while on duty, he or she is responsible for the cost of the firearm.

This bill requires that the Department of Corrections provide probation officers who elect to carry a firearm a standardized semi-automatic firearm and standardized ammunition for such firearm. This bill gives the department the authority to adopt rules pursuant to ss. 120.536(1) and 120.54, F.S., to implement the bill's provisions.

A non-recurring appropriation of $1 million from the General Revenue Fund is provided to the Department of Corrections to implement the provisions of this bill.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

**Provide Limited Government** – This bill requires the Department of Corrections to provide standardized firearms and ammunition to probation officers who elect to carry a firearm. This bill also gives the Department of Corrections the authority to adopt rules.

**Maintain Public Security** - This bill requires the Department of Corrections to provide standardized firearms and ammunition to probation officers who elect to carry a firearm.

B. EFFECT OF PROPOSED CHANGES:

The Department of Corrections (department) employs over 2,700 correctional probation officers (CPOs) whose primary responsibilities are the supervised custody, surveillance, and control of assigned offenders.[1] Currently, CPOs who have received authorization[2] from the department may elect to carry department-approved firearms, ammunition, and reloading devices while on duty.[3] Although the department currently provides standardized ammunition to its CPOs, the department's rules require that CPOs purchase their own firearm.[4]

This bill requires that the department provide CPOs who elect to carry a firearm a standardized semi-automatic firearm and standardized ammunition for such firearm. Requiring standard weapons and ammunition will promote cost effective procurement by the state and enable the department to provide consistent and uniform firearms training. If the CPO decides to not carry a firearm or is no longer employed by the department, this bill provides that the CPO must return the firearm and any unused ammunition to the department. This bill gives the department the authority to adopt rules pursuant to ss. 120.536(1) and 120.54, F.S., to implement its provisions.

Based on an informal survey recently administered by the department, it is estimated that approximately 1,800 CPOs will choose to carry a firearm. This bill provides a non-recurring general revenue appropriation of $1 million to the department for the purchase of the firearms and ammunition.

C. SECTION DIRECTORY:

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[1] Section 943.10(3), F.S., defines "correctional probation officer" as a "full time state employees whose primary responsibilities are the supervised custody, surveillance, and control of assigned inmates, probationers, parolees, or community controllees within institutions of the Department of Corrections or within the community." *See also* Department of Corrections Procedure 302.313.

[2] CPOs requesting authorization to carry a firearm while on duty must submit a written request to the Department containing documentation that they have complied with the required training and qualification requirements of the Criminal Justice Standards and Training Commission and the Department. The Department must then review the request, review documentation of the officer's training and qualifications, and complete a Florida Crime Information Center/National Crime Information Center check on the officer and the firearm the officer intends to use. If approved, the Department issues the CPO a weapon card, which establishes that the CPO is authorized to carry a specific firearm while on duty. *See* Rule 33-302.104, F.A.C.

[3] Department of Corrections' Procedure 302.313 authorizes CPOs to carry one of the following firearms:

- On or after July 13, 2005,
  - Smith and Wesson five or six shot revolver of .38 or .357 caliber, with a barrel length of two-four inches
  - one of the following semi-automatic pistols with a barrel length not to exceed five inches and a magazine with fifteen round law enforcement capacity:
    - Smith and Wesson 9 millimeter,
    - Beretta 9 millimeter, 92 series , or
    - Glock 9 millimeter.
- Prior to July 13, 2005, if an officer purchased an approved firearm not specified above, the officer will be allowed to qualify or maintain qualification with that firearm and will be allowed to continue with annual qualification with that specific firearm.

[4] Rule 33-302.104(11), F.A.C.

**Section 1.** Creates s. 943.17001, F.S.; requiring the Department of Corrections to provide a standardized semi-automatic firearm and standardized ammunition to probation officers who choose to carry a firearm; requiring probation officers to return firearms and ammunition to the Department of Corrections if the officer no longer elects to carry a firearm or is no longer employed by the Department of Corrections; granting the Department of Corrections the authority to adopt rules pursuant to ss. 120.536(1) and 120.54, F.S.

**Section 2.** Provides a non-recurring appropriation of $1,000,000 from the General Revenue Fund to the department for the 2006-2007 fiscal year for expenses for the purpose of providing a standardized firearm and ammunition to its correctional probation officers.

**Section 3.** This act takes effect July 1, 2006.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   A non-recurring appropriation of $1 million from the General Revenue Fund is provided to the department to carry out the provisions of the bill. This provides for $500 for a standard issue .9mm handgun and ammunition to approximately 1,800 officers the department predicts would wish to carry a firearm. The Department of Corrections has stated that it will cost $1,825,389 to carry out the provisions of the bill. The cost estimate provided by the department includes the cost of providing uniform firearms training and other gear associated with carrying a firearm (handcuffs, bullet-proof vest, holster, chemical agents, targets, gun storage locker, etc.) for each CPO. The department would be responsible for absorbing the cost of additional firearms, ammunition and associated gear for any of the remaining 900 CPOs if they later elect to carry a firearm.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

This bill provides a general grant of rulemaking power to the Department of Corrections to implement the bill's provisions. The bill specifically provides rule-making authority to the department to designate a standardized semi-automatic firearm and standardized ammunition. The bill appears to give sufficient rule making authority that is appropriately limited.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 21, 2006, the Criminal Justice Appropriations Committee adopted two amendments to the bill as originally drafted.

**Amendment #1** by Representative Adams, provides a non-recurring appropriation of $1,000,000 from the General Revenue Fund to the Department of Corrections to enable the agency to provide a semi-automatic firearm and ammunition to those correctional probation officers who choose to carry a firearm.

**Amendment #2** by Representative Kreegel, the bill sponsor, removes discretion on the part of CPOs to carry personal firearms or weapons of choice, requiring each officer to carry a standard department-issued firearm

CHAMBER ACTION

The Criminal Justice Appropriations Committee recommends the following:

**Council/Committee Substitute**

Remove the entire bill and insert:

A bill to be entitled

An act relating to correctional probation officers; creating s. 943.17001, F.S.; requiring the Department of Corrections to provide a standardized firearm and ammunition to correctional probation officers; providing rulemaking authority of the department; providing an appropriation; providing an effective date.

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

Section 1. Section 943.17001, Florida Statutes, is created to read:

943.17001 Correctional probation officers; provision of standardized firearm and ammunition.--Upon completion of training, certification, and approval as a correctional probation officer, the Department of Corrections shall provide to any correctional probation officer who chooses to carry a

firearm a standardized semiautomatic firearm as designated by department rule, and, for the duration of the correctional probation officer's employment, standardized ammunition as designated by department rule for the semiautomatic firearm issued to the correctional probation officer. If a correctional probation officer elects to no longer carry a firearm or is no longer employed by the department, he or she must return the firearm and any unused ammunition issued by the department. The department has the authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this section.

Section 2. The sum of $1 million in nonrecurring funds is appropriated from the General Revenue Fund to the Department of Corrections for the 2006-2007 fiscal year for expenses for the purpose of providing a standardized firearm and ammunition to correctional probation officers.

Section 3. This act shall take effect July 1, 2006.

# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 519 CS Internet Screening in Public Libraries
**SPONSOR(S):** Kravitz
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 960

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Civil Justice Committee | 5 Y, 1 N, w/CS | Shaddock | Bond |
| 2) Transportation & Economic Development Appropriations Committee | 17 Y, 1 N | McAuliffe | Gordon |
| 3) Justice Council | | | |
| 4) | | | |
| 5) | | | |

## SUMMARY ANALYSIS

This bill addresses the access by adults and children to internet pornography in public libraries. The bill requires public libraries to adopt an internet safety policy and install technology protection measures on all public computers. The protection measures are to prevent adults from using the libraries computers to access child pornography or obscene visual depictions, and to prevent minors from accessing child pornography and visual depictions that are obscene or harmful to minors. The protection measures can be disabled upon an adult's request to use the computer for bona fide research or other lawful purposes. Libraries are precluded from maintaining a record of the adults who request this disablement.

The bill authorizes the Division of Library and Information Services to adopt rules requiring the head of each administrative unit to give an annual written statement, under penalty of perjury, that all public library locations within the unit are in compliance with this section, as a condition of receiving state funds.

This bill appears to have a minimal negative fiscal impact on local governments. This bill does not appear to have a fiscal impact on state government.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill creates additional responsibilities for public libraries and their administrative units. The bill establishes rule-making authority in the Department of State, Division of Library and Information Services.

Empower Families -- This bill seeks to benefit families by decreasing the possibility of children and adults being exposed to pornography at public libraries.

B. EFFECT OF PROPOSED CHANGES:

**Background**

Federal Law

In 2000, Congress enacted the Children's Internet Protection Act ("CIPA"), which requires public libraries participating in certain internet technology programs to certify that they are using computer filtering software to prevent the on-screen depiction of obscenity, child pornography, or other material harmful to minors.[1] The Supreme Court upheld CIPA in *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003), determining the law did not violate the First Amendment's free speech clause nor did it impose an unconstitutional condition on public libraries. CIPA does not impose any penalties on libraries that choose not to install filtering software; however, libraries that choose to offer unfiltered internet access will not receive federal funding for acquiring educational internet resources.[2]

State Law

Currently, state law does not contain any requirements that public libraries place internet filters on the public computers. Nevertheless, there are a number of statutes that prohibit the display of obscene materials to minors and child pornography.

"Obscenity" is defined in s. 847.001(10), F.S., as:

> the status of material which:
>
> (a) The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
>
> (b) Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and
>
> (c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

This definition of obscenity is taken directly from the Supreme Court's definition in *Miller v. California*, 413 U.S. 15 (1973).[3]

"Harmful to minors" is defined in s. 847.001(6), F.S., as:

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[1] National Conference of State Legislatures, *Children and the Internet: Laws Relating to Filtering, Blocking and Usage Policies in Schools and Libraries*, Feb. 17, 2005.
[2] *U.S. v. Am. Libraries Ass'n*, 539 U.S. 194, 212 (2003)(plurality opinion).
[3] *Haggerty v. State*, 531 So. 2d 364, 365 (Fla. 1st DCA 1988).

> [A]ny reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:
>
> (a) Predominantly appeals to the prurient, shameful, or morbid interests of minors;
>
> (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
>
> (c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

Section 847.0133, F.S., prohibits any person from knowingly selling, renting, loaning, giving away, distributing, transmitting, or showing any obscene material to a minor.[4] [5] Section 847.0137, F.S., prohibits the transmission of any image, data, or information, constituting child pornography through the internet or any other medium. Section 847.0138, F.S., prohibits the transmission of material harmful to minors to a minor by means of electronic device or equipment. Section 847.0139, F.S., provides immunity from civil liability for anyone reporting to a law enforcement officer what the person reasonably believes to be child pornography or the transmission to a minor of child pornography or any information, image, or data that is harmful to minors. Section 847.03, F.S., requires any officer arresting a person charged with an offense under s. 847.011, F.S., relating to acts relating to lewd or obscene materials, to seize such materials at the time of the arrest.

Current Library Internet Policies

The Department of State, Division of Library and Information Services, conducted a survey of Florida's public libraries to ascertain their internet use policies and filtering practices.[6] Out of 149 county and municipal libraries in Florida's 67 counties, 139 libraries responded to the survey. All of the libraries who answered the survey had locally adopted internet use policies, and 138 of the libraries prohibited the display of obscene or offensive images.[7] Of the libraries responding to the survey, 110 currently had filtering software or technology on their computers, and twenty-three did not filter.[8] Fourteen counties have one or more libraries that do not have filters, another four libraries only filter computers in the children's or youth section of the library, and three of the counties that did not have filters indicated that they would be installing filters soon or were in the process of negotiating with vendors.[9]

Three libraries reported that they were not CIPA compliant, twenty-nine libraries stated that CIPA did not apply to them, and the other 107 libraries indicated that they were CIPA compliant.[10]

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[4] Obscene materials means "any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing paper, card, picture, drawing, photograph, motion picture film, figure, image, videotape, videocassette, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose." Section 847.0133, F.S.

[5] The term "obscene" has the same meaning in s. 847.0133, F.S as it has in s. 847.001, F.S.

[6] Department of State, Division of Library and Information Services, *Internet Policies & Filtering in Florida's Public Libraries Report*, March 21, 2005 (hereinafter "*Internet Policies*").

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

**Effect of Bill**

Definitions

The bill creates a new section, s. 257.44, F.S., requiring internet screening in public libraries. A number of terms that are crucial to an understanding of the requirements and prohibitions provided for in the bill are detailed below. The bill defines "public library" as "any library that is open to the public and that is established or maintained by a county, municipality, consolidated city-county government, special district, or special tax district, or any combination thereof."[11] Excluded from this definition are libraries open to the public that are maintained or established by a community college or state university. A "public computer" is any computer made available to the public and that has internet access.[12]

This bill requires a public library to enforce an internet safety policy providing for:

- Installation and operation of a protection measure on all public computers in the library that restricts access by adults to visual depictions that are obscene or constitute child pornography and that restricts access by minors to visual depictions that are obscene, constitute child pornography, or are harmful to minors, and

- Disablement of the protection measure when an adult requests to use the computer for bona fide research or other lawful purpose.

A "technology protection measure" is software or equivalent technology that blocks or filters internet access to the visual depictions that are obscene, contain child pornography, or that are harmful to minors.[13]

The definition of child pornography is the same definition that appears in s. 847.001, F.S. For the purposes of this bill, harmful to minors is defined as:

> [A]ny picture, image, graphic image file, or other visual depiction that:
>
> 1. Taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;
>
> 2. Depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals; and
>
> 3. Taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.[14]

"Obscene" is defined as it is currently in s. 847.001, F.S.[15] "Administrative unit" is defined as "the entity designated by a local government body as responsible for administering all public libraries established or maintained by that local government body."[16]

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[11] Section 257.44(1)(g).
[12] Section 257.44(1)(f).
[13] Section 257.44(1)(i).
[14] Section 257.44(1)(c).
[15] Section 257.44(1)(e).
[16] Section 257.44(1)(a).

Internet Policy

Each public library is required to post a conspicuous notice informing library patrons of the internet safety policy and indicating that the policy is available for review.[17] Libraries must disable the protection measure upon the request of any adult who wishes to use the computer for bona fide research or other lawful purpose,[18] and the library may not maintain a record containing the names of any adult who has requested the protection measure be disabled.[19]

Rule-Making Authority

The Division of Library and Information Services must adopt administrative rules requiring the head of each administrative unit to annually attest in writing, under penalty of perjury, that all libraries within the administrative unit are in compliance with the internet safety policy as a condition of the receipt of any state funds being distributed under ch. 257, F.S.[20]

C. SECTION DIRECTORY:

Section 1 creates s. 257.44, F.S., requiring internet screening in public libraries.

Section 2 provides a legislative finding that the installation and operation of technology protection measures in public libraries to protect against adult access to obscene visual depictions or child pornography, or access by minors to obscene visual depictions, child pornography, or images that are harmful to minors, fulfills an important state interest.

Section 3 provides an effective date of October 1, 2006.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The fiscal analysis provided by the Department of State states that there is no fiscal impact to the Department. However, this bill would appear to have a minimal but unknown fiscal impact on state government. The Department of State is required to promulgate rules concerning annual compliance by libraries, and the Department is required to collect and maintain those annual attestations.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   The Department of State estimates that this bill will require recurring expenditures of $108,240 annually for libraries not currently using filtering software. The department estimates that the total recurring cost to all libraries regulated by this bill for filtering software is $666,600.

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[17] Section 257.44(2)(b).
[18] Section 257.44(2)(a)(2).
[19] Section257.44(2)(c).
[20] Section 257.44(4).

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Although the bill requires counties and municipalities to spend funds or take an action requiring the expenditure of funds, the impact is less than $1.8 million and is insignificant. The bill is therefore exempt from the provisions of Article VII, Section 18(b), Florida Constitution.

2. Other:

Access by Minors

This bill may raise First Amendment concerns since the statute creates a new definition of "harmful to minors" that extends beyond the current definition found in s. 847.001(10), F.S., which is similar to the Supreme Court's definition of obscenity. Although obscenity is not a protected category of speech, "'[s]exual expression which is indecent but not obscene is protected by the First Amendment."[21] In other words, obscene material is unprotected by the Constitution but indecent material is constitutionally protected. Hence, the new definition should be reviewed to determine whether it would infringe upon Constitutional protected speech.

For the purposes of this bill, harmful to minors is defined as:

> [A]ny picture, image, graphic image file, or other visual depiction that:
>
> 1. Taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;
>
> 2. Depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals; and
>
> 3. Taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.[22]

This "harmful to minors" standard is a content-based regulation of speech[23], which must be narrowly tailored to promote a compelling government interest.[24] However, internet access in a public library is

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[21] *Simmons v. State*, 886 So. 2d 399, 492-03 (Fla. 1st DCA 2004) (quoting *Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

[22] Section 257.44(1)(c).

[23] According to 16A Am. Jur. 2d, Constitutional Law s. 460:

> [t]he most exacting scrutiny test is applied to regulations that suppress, disadvantage, or impose different burdens upon speech on the basis of its content, and to laws that compel speakers to utter or distribute speech bearing a particular message, but regulations that are unrelated to content are subject to an intermediate level of scrutiny reflecting the less substantial risk of excising ideas or viewpoints from public dialogue.... Regulations of speech that are regarded as content-neutral receive an intermediate rather than a strict scrutiny under the First Amendment; this includes regulations that restrict the time, place, and

not a traditional or designated public forum,[25] and a library "does not acquire internet terminals in order to create a public forum for Web publishers to express themselves."[26]

The protection of children from harmful material is a compelling state interest, as "common sense dictates that a minor's rights are not absolute," and the legislature has the right to protect minors from the conduct of others.[27] The legislature has the responsibility and authority to protect all of the children in the state, and the state "has the prerogative to safeguard its citizens, particularly children, from potential harm when such harm outweighs the interests of the individual."[28]

"A library's need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material; it is no less entitled to play that role when it collects material from the internet than when it collects material from any other source."[29] Thus, internet access in public libraries is not afforded the broadest level of free speech protection, and the government is free to regulate the content of speech and to determine which topics are appropriate for discussion, although to the extent that internet access might be considered a limited public forum, it is treated as a public forum for its topics of discussion.[30] A government-run public forum requires that content-based prohibitions be narrowly drawn to effectuate a compelling state interest.[31]

"The state has a compelling interest in protecting the physical and psychological well-being of children, which extends to shielding minors from material that is not obscene by adult standards, but the means must be carefully tailored to achieve that end so as not to unnecessarily deny adults access to material which is indecent (constitutionally protected), but not obscene (unprotected)."[32]

The Supreme Court has "repeatedly" recognized that the government has an interest in protecting children from harmful materials.[33] As with CIPA, any internet materials that are suitable for adults but not for children may be accessed by an adult simply by asking a librarian to unblock or disable the filter provided that the adult desires to access the material for "bona fide research or other lawful purposes."[34]

Request for Unblocking

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manner of expression in order to ameliorate the undesirable secondary effects of sexually explicit expression. Therefore, as a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content-based and subject to strict scrutiny under the First Amendment, while laws that confer benefits or impose burdens on speech without reference to ideas or views expressed are in most instances content-neutral. Regulations which permit the government to discriminate on the basis of the content of a speaker's message ordinarily cannot be tolerated under the First Amendment.

[24] *Simmons v. State*, 886 So. 2d at 403 (internal citations omitted).

[25] Whether or not a place is designated a traditional or designated public form can be significant. The following quotation from 16A Am. Jur. 2d, Constitutional Law, s. 518 is particularly enlightening:

> Even protected speech is not equally permissible in all places and at all times; nothing in the Constitution requires the government freely to grant access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property or to the disruption that might be caused by a speaker's activities. The right to communicate is not limitless; even peaceful picketing may be prohibited when it interferes with the operation of vital governmental facilities. Thus, the government's ownership of property does not automatically open that property to the public for First Amendment purposes. However, the Constitution forbids a state from enforcing certain exclusions from a forum generally open to the public, even if the state is not required to create the forum in the first place.

[26] *Am. Library Ass'n*, 539 U.S. at 205-06.

[27] *B.B. v. State*, 659 So. 2d 256, 259 (Fla. 1995)(citing *In re T.W.*, 551 So.2d 1186 (Fla.1989).

[28] *Simmons*, 886 So. 2d at 405 (citing *Jones v. State*, 640 So. 2d 1084, 1085-87 (Fla. 1994)).

[29] *Am. Library Ass'n.* 539 U.S at 208.

[30] *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

[31] *Id.* at 46.

[32] *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004).

[33] *Id.* (citing *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978); *Morris v. State*, 789 So. 2d 1032, 1036 (Fla. 1st DCA 2001)).

[34] *Am. Library Ass'n*, 539 U.S. at 209.

CIPA provides for the disabling of the filtering software upon request. Specifically, CIPA provides: "[a]n administrator, supervisor, or other authority *may disable* a technology protection measure under paragraph (1) to enable access for a bona fide research or other lawful purpose." 20 U.S.C. s. 9134(f)(3) (emphasis added). The bill provides that "each public library shall enforce an Internet safety policy that provides for:" "[d]isablement of the technology protection measure by an employee of the public library upon an adult's request to use the computer for bona fide research or other lawful purpose."[35] In discussing CIPA's express requirement that the filtering software be disabled for bona fide research or other lawful purposes the Supreme Court stated that even if there is embarrassment by a person requesting the lifting of the software, "the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment."[36]

Access by Adults

The constitutional standards regarding adult access to indecent materials are different from those applicable to minors. It is possible that a court might find that an adult's constitutional right to access such material is hindered by the inherent time delay required to stop the filtering software for the adult patrons benefit. There is no definitive line for determining when an extended delay in granting an adult's request to unblock the software might be considered an unreasonable infringement upon an adult's right to conduct bona fide research and pursue other lawful uses of the internet. For as Justice Kennedy opined in his concurrence in the plurality opinion in *Am. Library Ass'n*:

> If, on the request of an adult user, a librarian will unblock filtered material or disable the internet software filter without significant delay, there is little to this case. The Government represents this is indeed the fact.
>
> ****
>
> If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge, not the facial challenge made in this case.
>
> ****
>
> There are, of course, substantial Government interests at stake here. The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree. Given this interest, and the failure to show that the ability of adult library users to have access to the material is burdened in any significant degree, the statute is not unconstitutional on its face.[37]

B. RULE-MAKING AUTHORITY:

This bill requires the Department of State, Division of Library and Information Services, to adopt rules pursuant to s. 120.536(1), F.S., and s. 120.54, F.S., requiring the head of each administrative unit to annually attest in writing, under penalty of perjury, that all public library locations within the administrative unit are in compliance with s. 257.44(2), which requires each public library to enforce an internet safety policy.

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[35] Section 257.44(2)(a).
[36] *Am. Library Ass'n*, 539 U.S. at 209.
[37] *Am. Library Ass'n*, 539 U.S. at 214-15 (Kennedy, J., concurring).

C. DRAFTING ISSUES OR OTHER COMMENTS:

Filtering Difficulties

The following is an enlightening quote from Justice Stevens' dissent in *Am. Library Ass'n*,

> Due to the reliance on automated text analysis and the absence of image recognition technology, a Web page with sexually explicit images and no text cannot be harvested using a search engine. This problem is complicated by the fact that Web site publishers may use image files rather than text to represent words, i.e., they may use a file that computers understand to be a picture, like a photograph of a printed word, rather than regular text, making automated review of their textual content impossible. For example, if the Playboy Web site displays its name using a logo rather than regular text, a search engine would not see or recognize this Playboy name in that logo.[38]

Harmful to Minors

Section 847.001(6), F.S., provides a definition for "harmful to minors." The instant bill seeks to establish a new definition for "harmful to minors" for the purposes of this bill. It is unclear why a different definition of "harmful to minors" is included in the bill.

Visual Depictions

Section 257.44(1)(i), F.S., defines technology protection measure as "software or equivalent technology that blocks or filters internet access to the visual depiction that are proscribed under subsection (2) [the internet safety policy]". This definition would seem not to include audio depictions. The CIPA provides additional protection against other materials that may be prohibited by providing: "(2) Access to other materials[:] Nothing in this subsection shall be construed to prohibit a library from limiting internet access to or otherwise protecting against materials other than those referenced in subclauses (I), (II), and (III) of paragraph (1)(A)(i) [items that are obscene, child pornography, or harmful to minors]" 20 U.S.C. s. 9134.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On February 8, 2006, the Civil Justice Committee adopted one amendment to the bill. The amendment removed the civil action provision from the bill. The bill was then reported favorably with a committee substitute.

[38] *Am. Library Ass'n*, 539 U.S. at 221 (Stevens, J., dissenting).

CHAMBER ACTION

The Civil Justice Committee recommends the following:

**Council/Committee Substitute**

Remove the entire bill and insert:

A bill to be entitled

An act relating to Internet screening in public libraries; creating s. 257.44, F.S.; defining terms; requiring public libraries to provide technology that protects against Internet access to specified proscribed visual depictions; allowing adults to request disablement of the technology for specified purposes; prohibiting a public library from maintaining a record of adults who request such disablement; requiring a public library to post notice of its Internet safety policy; directing the Division of Library and Information Services within the Department of State to adopt rules requiring a written attestation of compliance as a condition of state funding; providing a cause of action is not authorized for a violation by a public library; providing a finding of important state interest; providing an effective date.

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

Section 1. Section 257.44, Florida Statutes, is created to read:

257.44 Internet screening in public libraries.--

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

(a) "Administrative unit" means the entity designated by a local government body as responsible for administering all public libraries established or maintained by that local government body.

(b) "Child pornography" has the same meaning as in s. 847.001.

(c) "Harmful to minors" means any picture, image, graphic image file, or other visual depiction that:

1. Taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;

2. Depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals; and

3. Taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

(d) "Minor" means an individual who is younger than 18 years of age.

(e) "Obscene" has the same meaning as in s. 847.001.

(f) "Public computer" means a computer that is made available to the public and that has Internet access.

(g) "Public library" means any library that is open to the public and that is established or maintained by a county,

municipality, consolidated city-county government, special district, or special tax district, or any combination thereof. The term does not include a library that is open to the public and that is established or maintained by a community college or state university.

(h) "Reasonable efforts" means the public library, in implementing the policy required by subsection (2), in its ordinary course of business:

1. Posts its Internet safety policy;

2. Uses a technology protection measure on all public computers; and

3. Disables the technology protection measure upon an adult's request to use the computer for bona fide research or other lawful purpose.

(i) "Technology protection measure" means software or equivalent technology that blocks or filters Internet access to the visual depictions that are proscribed under subsection (2).

(2)(a) Each public library shall enforce an Internet safety policy that provides for:

1. Installation and operation of a technology protection measure on all public computers in the public library which protects against access through such computers by adults to visual depictions that are obscene or constitute child pornography and by minors to visual depictions that are obscene, constitute child pornography, or are harmful to minors; and

2. Disablement of the technology protection measure by an employee of the public library upon an adult's request to use the computer for bona fide research or other lawful purpose.

(b) Each public library shall post a notice in a conspicuous area of the public library which indicates that an Internet safety policy has been adopted and informs the public that the Internet safety policy is available for review at each public library.

(c) A public library may not maintain a record of names of adults who request that the technology protection measure be disabled under this subsection.

(3) The Division of Library and Information Services within the Department of State shall adopt rules pursuant to ss. 120.536(1) and 120.54 that require the head of each administrative unit to annually attest in writing, under penalty of perjury, that all public library locations for which the administrative unit is responsible are in compliance with subsection (2) as a condition of the receipt of any state funds distributed under this chapter.

(4) This section does not authorize a cause of action in favor of any person due to a public library's failure to comply with subsection (2).

Section 2. In accordance with s. 18, Art. VII of the State Constitution, the Legislature finds that the installation and operation by public libraries of technology protection measures that protect against access by adults to visual depictions that are obscene or constitute child pornography and by minors to visual depictions that are obscene, constitute child pornography, or are harmful to minors fulfills an important state interest.

Section 3. This act shall take effect October 1, 2006.

# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 585 CS Inmate Litigation Costs
**SPONSOR(S):** Hukill
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1622

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Criminal Justice Committee | 6 Y, 0 N, w/CS | Cunningham | Kramer |
| 2) Criminal Justice Appropriations Committee | 6 Y, 0 N | Sneed | DeBeaugrine |
| 3) Justice Council | | | |
| 4) | | | |
| 5) | | | |

## SUMMARY ANALYSIS

Rule 33-210.102, F.A.C., entitled "Legal Documents and Legal Mail," requires the Department of Corrections to furnish postage for mail to courts and attorneys and for pleadings to be served upon each of the parties to a lawsuit for those inmates who have insufficient funds to cover the cost.

Rule 33-501.302, F.A.C., entitled "Copying Services for Inmates," outlines how photocopying will be conducted in prison institutions. Currently, section (4) of the rule states that the Department of Corrections may charge $.15 per page for copies, while section (5) authorizes the Department of Corrections to collect the cost of providing copies from an inmate's trust fund account. In 2004, the First District Court of Appeal held that the above sections of Rule 33-501.302, F.A.C., were invalid because they were not supported by a specific grant of legislative authority.

This bill creates a specific grant of legislative authority for the Department of Corrections to charge inmates for certain services (copying and postage), to place liens on an inmate's trust fund account to collect the cost of such services, and to adopt rules relative thereto. This bill would likely negate the effect of the First District Court of Appeals' decision.

See "Fiscal" section for fiscal impact.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Increase personal responsibility → This bill requires inmates to pay costs of certain services provided on their behalf.

B. EFFECT OF PROPOSED CHANGES:

Currently, the Department of Corrections (Department) has statutory authority to accept and administer as a trust any money or other property received for the personal use or benefit of any inmate.[1] These "inmate trust fund accounts" are generally used by inmates for canteen purchases and other expenses. The Department, as trustee, is also entitled to use (i.e. withdraw, deposit, invest, commingle, etc...) funds contained in an inmate's trust fund account in certain circumstances.[2]

**Postage**

Currently, the Department has the authority to adopt rules relating to mail to and from inmates, including rules specifying the circumstances under which an inmate must pay for the cost of postage for mail that the inmate sends.[3] The department may not adopt a rule that requires an inmate to pay any postage costs that the state is constitutionally required to pay.[4] In 1976, the Department promulgated rule 33-210.102, F.A.C., which provides:

> The institution shall furnish postage for mail to courts and attorneys and for pleadings to be served upon each of the parties to a lawsuit for those inmates who have insufficient funds to cover the cost of mailing the documents at the time the mail is submitted to the mailroom, but not to exceed payment for the original and two copies except when additional copies are legally required.

Although the above rule provides that the Department is required to pay for postage for legal mail for inmates who have insufficient funds, the rule does not specify that the Department may charge an inmate for such service nor does it authorize the Department to place a lien upon the inmate's trust fund account for postage costs.

**Copying Costs**

In 1983, in response to federal court decisions involving an inmate's federal constitutional right of access to the courts, rule 33-501.302, F.A.C., entitled "Copying Services for Inmates", was promulgated.[5] The rule currently contains seven sections that outline how photocopying will be conducted in prison institutions.[6] Pertinent to the proposed legislation is section (4), which states that "inmates will be charged $0.15 per page for standard legal or letter size copies, or if special equipment or paper is required, the institution is authorized to charge up to the estimated actual cost of making the copies."[7] Additionally, section (5) provides that:

> "Inmates who are without funds shall not be denied copying services for documents and accompanying evidentiary materials needed to initiate a legal or

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[1] s. 944.516, F.S.
[2] *Id.*
[3] s. 944.09, F.S.
[4] *Id.*
[5] *Smith v. Fl. Dept. of Corrections*, 30 Fla. L. Weekly D1299 (Fla. 1st DCA May 23, 2005).
[6] *See* Rule 33-501.302, F.A.C.
[7] *Id.*

administrative action or which must be filed or served in a pending action that challenges convictions and sentences or prison conditions, or are required to be filed or served per order of the court or administrative body. However, the cost of providing copies for documents to be filed or served is a debt owed by the inmate that shall be collected as follows: At the time the inmate submits his request for copies, the department shall place a hold on the inmate's account for the estimated cost of providing the copies. The cost of providing the copies shall be collected from any existing balance in the inmate's bank trust fund account. If the account balance is insufficient to cover the cost, the account shall be reduced to zero. If costs remain unpaid, a hold will be placed on the inmate's account and all subsequent deposits to the inmate's account will be applied against the unpaid costs until the debt has been paid."[8]

In past years, the Department of Corrections has used the above authority to charge inmates for copying costs related to litigation. However, in 2004, a Department inmate filed an appeal with Florida's First District Court of Appeal seeking to have the above sections of Rule 33-501.302, F.A.C., declared invalid.[9] Specifically, the inmate alleged that the portions of the rule establishing the amount to be charged prison inmates for photocopying services and authorizing deductions from and liens imposed upon inmate trust accounts to cover incurred costs for photocopying services were invalid because they exceeded the Legislature's grant of rulemaking authority to the Department.[10] The Department argued that ss. 20.315[11], 945.04[12], and 944.09[13] F.S., provided statutory authority for the rule.[14] The court held that because none of the statutes cited by the Department contained a specific grant of legislative authority authorizing the Department to charge for copies and to place liens in inmate accounts,[15] those portions of the rule exceeded the legislature's grant of rulemaking authority to the Department and were thus invalid.[16]

This bill requires the Department to charge an inmate for:

- costs of duplication of documents and accompanying evidentiary materials needed to *initiate* proceedings in judicial or administrative forums,
- costs of duplication of documents and accompanying evidentiary materials which must be filed or served in a *pending* judicial or administrative proceeding,
- postage and any special delivery charges, if required by law or rule, for mail to courts, attorneys, parties, and other persons required to be served.

The bill authorizes the following copying fees:

- up to $.15 per one-sided copy for documents no bigger than 14 x 8 ½ inches,
- for all other copies, the actual cost of duplication.

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[8] *Id.*
[9] *See Smith* at 1.
[10] *Id.*
[11] s. 20.315, F.S., creates the Department of Corrections and defines its organizational structure and purpose. Among the listed goals of the Department is the duty to ensure that inmates work while they are incarcerated and that the Department make every effort to collect restitution and other monetary assessments from inmates while they are incarcerated or under supervision.
[12] s. 945.04, F.S., sets forth the general functions of the Department. In 2004, the Department amended rule 33-501.302, F.A.C., deleting the reference to s. 945.04, F.S., as statutory authority for the rule, and replaced it with a citation to s. 944.09, F.S.
[13] s. 944.09, F.S., sets forth the general rulemaking authority of the Department with regard to, among other things, the rights of inmates, the operation and management of the correctional institution or facility and its personnel and functions, visiting hours and privileges, and the determination of restitution.
[14] *See Smith* at 3.
[15] Section 120.52, F.S., provides standards to be used when determining whether a particular rule constitutes an invalid exercise of legislative authority. The court in *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So.2d 594 (Fla. 1st DCA 2000) interpreted these standards and held that the question is "whether the statute contains a specific grant of legislative authority for the rule."
[16] *See Smith* at 4-5. A petition for review is currently pending before the Florida Supreme Court.

The bill also requires the Department to place a lien on the inmate's trust fund account if the inmate does not have sufficient funds at the time the charges are imposed and to adopt rules to implement the bill's provisions.

By creating a statute that specifically requires the Department to charge inmates for copies and postage, place liens upon an inmate's trust fund account, and adopt rules to implement these functions, this bill would likely negate the effect of the decision in the *Smith* case.

C. SECTION DIRECTORY:

**Section 1.** Creates s. 945.6038, F.S., requiring the Department of Corrections to charge inmates for specified costs relating to inmate litigation and to place liens on inmate trust fund accounts; requiring the Department to adopt rules.

**Section 2.** This act takes effect July 1, 2006.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

Prior to the 1st DCA's ruling, the Department collected approximately $150,000 annually for legal copies and postage. Since the 1st DCA's ruling, the Department does not have the authority to make these collections. This bill would give the Department the authority to make such collections.

The Department states that they have accumulated nearly $800,000 in liens against inmates over a six-year period. Since the 1st DCA's ruling, the Department does not have the authority to collect these funds. This bill would give the Department the authority to collect these funds.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

In its analysis of this bill, the Department states that the photocopying rule helped in preventing inmate's from filing frivolous lawsuits. Now that the 1st DCA has deemed the rule invalid, the Department anticipates that more frivolous lawsuits will be filed. This bill would authorize the Department to effectively reinstate the photocopying rule, thus helping prevent the filing of frivolous lawsuits.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

Prisoner's Right of Access to the Courts

The federal constitution does not contain a specific clause providing an inmate a right of access to courts. Nonetheless, the United States Supreme Court has held that there is such a right arising from several constitutional provisions including the First Amendment, the Due Process Clause, and the Equal Protection Clause.[17] In reaching this conclusion, the Supreme Court stated, in dicta, that "[i]t is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents[,] with notarial services to authenticate them, and with stamps to mail them."[18] Inmates nationwide used this dicta to argue that that the federal constitutional right of access to the courts required the provision of free and unlimited photocopies for purposes of litigation.[19] Federal courts disagree and have held that although the right of access to courts requires that an inmate be provided access to photocopying services, inmates may be charged a fee for such services.[20]

Florida's constitution specifically guarantees a citizen's access to courts.[21] As such, the Florida constitution grants inmates a right of access to the courts that is broader than the federal constitution.[22] Florida courts have recognized this difference, but nevertheless have held that it is "unlikely that inmate access to photocopying services would need to be greater that that required by the federal right in order to conform to the broader state constitutional right of access to the courts."[23]

The bill requires the Department to charge inmates for photocopying services and postage and to place liens on inmate accounts. The bill does not deny indigent inmates photocopying services or postage. Given the above, it does not appear that the bill would violate an inmate's federal or state constitutional right of access to courts.

B. RULE-MAKING AUTHORITY:

This bill provides a general grant of rulemaking power to the Department of Corrections to implement the bill's provisions (lines 24-25). The bill appears to give sufficient rule making authority that is appropriately limited.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

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[17] *See Bounds v. Smith,* 430 U.S. 817, 825 (1977) ("It is now established beyond doubt that prisoners have a constitutional right of access to the courts.").
[18] *Id.*
[19] *See Smith* at 1.
[20] *See, e.g., Allen v. Sakai*, 48 F.3d 1082 (9th Cir. 1995); *see also Johnson v. Moore*, 948 F.2d 517 (9th Cir. 1991).
[21] *See* Art. I, s. 21, Fla. Const.
[22] *See Henderson v. Crosby*, 883 So.2d 847, 850-854 (Fla. 1st DCA 2004).
[23] *Smith* at 5; *see also Henderson* at 857, ("We cannot conceive that the access-to-courts provision was intended to require the state to provide inmates with mechanical equipment to facilitate their research and preparation of legal papers.").

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On February 22, 2006, the Criminal Justice Committee adopted one amendment to the bill and reported the bill favorably with committee substitute. The amendment *requires* (instead of *authorizes*) the Department of Corrections to charge inmates for specified costs relating to inmate litigation, place liens on inmate trust fund accounts, and adopt rules relating thereto. Additionally, the amendment authorizes specific copying costs and provides that the Department must charge inmates for postage costs to courts, attorneys, parties, and other persons required to be served.

CHAMBER ACTION

The Criminal Justice Committee recommends the following:

**Council/Committee Substitute**

Remove the entire bill and insert:

A bill to be entitled

An act relating to inmate litigation costs; creating s. 945.6038, F.S.; requiring the Department of Corrections to charge inmates for specified costs relating to inmate litigation; authorizing liens on inmate trust funds; requiring rulemaking; providing intent; providing an effective date.

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

Section 1. Section 945.6038, Florida Statutes, is created to read:

945.6038 Inmate litigation costs.--

(1) The department shall charge an inmate for the following and place a lien on the inmate's trust fund account if the inmate has insufficient funds at the time the charges are imposed:

(a) Costs of duplication of documents and accompanying evidentiary materials needed to initiate proceedings in judicial

or administrative forums or that must be filed or served in a pending proceeding. The following costs are authorized:

1. Up to 15 cents per one-sided copy for duplicated copies of not more than 14 inches by 8 1/2 inches; or

2. For all other copies, the actual cost of duplication.

(b) Postage and any special delivery charges, if required by law or rule, for mail to courts, attorneys, parties, and other persons required to be served.

(2) The department shall adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this section.

(3) This section is not intended to create any legal rights or obligations that do not otherwise exist. This section is not intended to limit or preclude the department from charging for duplication of its records as allowed under chapter 119, nor is it intended to create a right to substitute a lien in lieu of payment for public records.

Section 2. This act shall take effect July 1, 2006.

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 761 Trespass on the Property of a Certified Domestic Violence Center
**SPONSOR(S):** Carroll
**TIED BILLS:** None. **IDEN./SIM. BILLS:** SB 488

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Criminal Justice Committee | 6 Y, 0 N | Ferguson | Kramer |
| 2) Future of Florida's Families Committee | 7 Y, 0 N | Preston | Collins |
| 3) Criminal Justice Appropriations Committee | 6 Y, 0 N | Sneed | DeBeaugrine |
| 4) Justice Council | | | |
| 5) | | | |

## SUMMARY ANALYSIS

Trespass is the unauthorized entry onto the property of another. In prosecuting trespass, the state must prove that the offender knew, or should have known, that entry onto the property is unauthorized.

The bill amends section 810.09, F.S., to increase criminal penalties for trespassing upon a domestic violence center from a first degree misdemeanor to a third degree felony.

The Criminal Justice Impact Conference reviewed this bill on February 28, 2006, and determined that it would have an insignificant fiscal impact.

The effective date of this bill is July 1, 2006.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

**Promote personal responsibility** – This bill increases criminal penalties for trespassing upon a domestic violence center from a first degree misdemeanor to a third degree felony.

B. EFFECT OF PROPOSED CHANGES:

**Background**

According to the Florida Department of Children and Families, "domestic violence is a pattern of behaviors that adults or adolescents use against their intimate partners or former partners to establish power and control. It may include physical abuse, sexual abuse, emotional abuse, and economic abuse. It may also include threats, isolation, pet abuse, using children and a variety of other behaviors used to maintain fear, intimidation and power over one's partner. Domestic violence knows no boundaries. It occurs in intimate relationships, regardless of race, religion, culture or socioeconomic status."[1]

**Domestic violence centers**

In 1998, "the Legislature recognize[d] that certain persons who assault, batter, or otherwise abuse their spouses and the persons subject to such domestic violence are in need of treatment and rehabilitation. It is the intent of the Legislature to assist in the development of domestic violence centers for the victims of domestic violence and to provide a place where the parties involved may be separated until they can be properly assisted."[2]

A domestic violence center is defined as an agency that provides services to victims of domestic violence, as its primary mission.[3]

Section 741.28, F.S., defines "domestic violence" as any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member.

Section 741.28, F.S., defines "family or household member" to mean spouses, former spouses, persons related by blood or marriage, persons who are presently residing together as if a family or who have resided together in the past as if a family, and persons who are parents of a child in common regardless of whether they have been married. With the exception of persons who have a child in common, the family or household members must be currently residing or have in the past resided together in the same single dwelling unit.

**Effect of bill**

Section 810.09, F.S., currently provides that it is a first degree misdemeanor to commit trespass on lands.[4] The offense level is increased to a third degree felony in certain circumstances. For example, it is a third degree felony if the offender is armed during the trespass; if the property trespassed is a posted construction site; if the property is posted as commercial property designated for horticultural products; if the property trespassed is posted as a designated agricultural site for testing or research

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[1] Information found at http://www.dcf.state.fl.us/domesticviolence/whatisdv.shtml
[2] See section 39.901, F.S.
[3] *See* section 39.902(2), F.S.
[4] Trespass in a dwelling, structure or conveyance is considered a more serious offense.

purposes; or if a person knowingly propels any potentially lethal projectile over or across private land without authorization while taking, killing, or endangering specified animals.[5]

HB 761 amends section 810.09, F.S., to increase criminal penalties from a first degree misdemeanor to a third degree felony for trespassing upon a domestic violence center.[6] In order for the felony penalties to apply, the domestic violence center must be certified under section 39.905, F.S. and must be legally posted and identified in substantially the following manner: THIS AREA IS A DESIGNATED RESTRICTED SITE AND ANYONE WHO TRESPASSES ON THIS PROPERTY COMMITS A FELONY.

C. SECTION DIRECTORY:

**Section 1.** Amends section 810.09, F.S., to provide criminal penalties for trespassing on a domestic violence center.

**Section 2.** Provides an effective date of July 1, 2006

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The Criminal Justice Impact Conference met on February 28, 2006 to consider the prison bed impact of this bill. The conference determined that it would have an insignificant prison bed impact.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

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[5] See s. 810.09(2)(a)-(g), F.S.

[6] As a result, the maximum penalty for the offense will be increased from one year in county jail to five years in prison. See section 775.082, F.S.

1. Applicability of Municipality/County Mandates Provision:

   The bill does not appear to require municipalities or counties to expend funds or take action requiring the expenditure of funds and there are no provisions in the bill affecting state shared tax revenues. Therefore, the provisions of Article VII, section 18 of the state constitution do not apply.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

   None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

   None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

A bill to be entitled

An act relating to trespass on the property of a certified domestic violence center; amending s. 810.09, F.S.; providing that a person commits a felony of the third degree if he or she trespasses on the property of a certified domestic violence center; providing a penalty; providing an effective date.

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

Section 1. Subsection (2) of section 810.09, Florida Statutes, is amended to read:

810.09 Trespass on property other than structure or conveyance.--

(2)(a) Except as provided in this subsection, trespass on property other than a structure or conveyance is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(b) If the offender defies an order to leave, personally communicated to the offender by the owner of the premises or by an authorized person, or if the offender willfully opens any door, fence, or gate or does any act that exposes animals, crops, or other property to waste, destruction, or freedom; unlawfully dumps litter on property; or trespasses on property other than a structure or conveyance, the offender commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(c) If the offender is armed with a firearm or other

dangerous weapon during the commission of the offense of trespass on property other than a structure or conveyance, he or she is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Any owner or person authorized by the owner may, for prosecution purposes, take into custody and detain, in a reasonable manner, for a reasonable length of time, any person when he or she reasonably believes that a violation of this paragraph has been or is being committed, and that the person to be taken into custody and detained has committed or is committing the ~~such~~ violation. If ~~In the event~~ a person is taken into custody, a law enforcement officer shall be called as soon as is practicable after the person has been taken into custody. The taking into custody and detention in compliance with the requirements of this paragraph does not result in criminal or civil liability for false arrest, false imprisonment, or unlawful detention.

(d) The offender commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property trespassed is a construction site that is legally posted and identified in substantially the following manner: "THIS AREA IS A DESIGNATED CONSTRUCTION SITE, AND ANYONE WHO TRESPASSES ON THIS PROPERTY COMMITS A FELONY."

(e) The offender commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property trespassed upon is commercial horticulture property and the property is legally posted and identified in substantially the following manner: "THIS AREA IS DESIGNATED COMMERCIAL PROPERTY FOR HORTICULTURE PRODUCTS, AND ANYONE WHO

TRESPASSES ON THIS PROPERTY COMMITS A FELONY."

(f) The offender commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property trespassed upon is an agricultural site for testing or research purposes that is legally posted and identified in substantially the following manner: "THIS AREA IS A DESIGNATED AGRICULTURAL SITE FOR TESTING OR RESEARCH PURPOSES, AND ANYONE WHO TRESPASSES ON THIS PROPERTY COMMITS A FELONY."

(g) The offender commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property trespassed upon is a domestic violence center certified under s. 39.905 which is legally posted and identified in substantially the following manner: "THIS AREA IS A DESIGNATED RESTRICTED SITE AND ANYONE WHO TRESPASSES ON THIS PROPERTY COMMITS A FELONY."

(h) ~~(g)~~ Any person who in taking or attempting to take any animal described in s. 372.001(10) or (11), or in killing, attempting to kill, or endangering any animal described in s. 585.01(13) knowingly propels or causes to be propelled any potentially lethal projectile over or across private land without authorization commits trespass, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. For purposes of this paragraph, the term "potentially lethal projectile" includes any projectile launched from any firearm, bow, crossbow, or similar tensile device. This section does ~~shall~~ not apply to any governmental agent or employee acting within the scope of his or her official duties.

Section 2. This act shall take effect July 1, 2006.

# HB 809

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 809 CS Assault or Battery on Homeless Persons
**SPONSOR(S):** Taylor and others
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1992

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Criminal Justice Committee | 7 Y, 0 N | Kramer | Kramer |
| 2) Criminal Justice Appropriations Committee | 6 Y, 0 N, w/CS | Sneed | DeBeaugrine |
| 3) Justice Council | | Kramer | De La Paz |
| 4) | | | |
| 5) | | | |

### SUMMARY ANALYSIS

Currently, section 775.085, F.S. provides that the penalty for any felony or misdemeanor must be reclassified if the commission of the offense evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, mental or physical disability or advanced age of the victim. This is commonly known as the "hate crime" statute. HB 809, referred to as the "Norris Act", amends this statute to include offenses evidencing prejudice based on the homeless status of the victim.

The bill also creates a new section of statute which reclassifies assault or battery offenses that are committed upon a homeless person as follows:

- In the case of assault, from a misdemeanor of the second degree to a misdemeanor of the first degree.
- In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.
- In the case of aggravated assault, from a felony of the third degree to a felony of the second degree.
- In the case of aggravated battery, from a felony of the second degree to a felony of the first degree.

Under the newly created statute, the offense would be reclassified regardless of whether the offender knew or had reason to know the housing status of the victim. The offense would be reclassified regardless of whether the offender was also homeless. Reclassifying an offense has the effect of increasing the maximum sentence that can be imposed for an offense. The bill also requires the imposition of a three-year minimum mandatory sentence upon a person who is convicted of aggravated assault or aggravated battery upon a homeless person. In addition, the bill authorizes the judge to impose a fine of up to $10,000 and to order the defendant to perform up to 500 hours of community service.

The Criminal Justice Impact Conference met on March 21, 2006 and determined that this bill would have an indeterminate, but minimal, fiscal impact on the prison bed population in the Department of Corrections.

This bill takes effect October 1, 2006.

**FULL ANALYSIS**

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility: HB 809 will have the effect of increasing the maximum sentence which may be imposed for assault or battery offenses committed against a homeless person.

Provide limited government: The bill increases the maximum sanctions for offenses committed against a homeless person and will require the imposition of minimum mandatory sentences in certain circumstances.

B. EFFECT OF PROPOSED CHANGES:

**Background**

*Hate Crime Statute:* Currently, section 775.085, F.S. provides that the penalty for any felony or misdemeanor must be reclassified if the commission of the offense evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, mental or physical disability or advanced age of the victim. This is commonly referred to as a "hate crime" statute. Offenses 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.

There is currently no section of statute that specifically applies to criminal offenses committed against a homeless person.

*Assault or Battery on Victim Age 65 or Older:* Currently, section 784.08 provides that when a person is charged with committing assault[1], aggravated assault[2], battery[3] or aggravated battery[4] against a victim age 65 or older, the assault of battery offense is reclassified as follows:

- In the case of assault, from a misdemeanor of the second degree to a misdemeanor of the first degree.
- In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.
- In the case of aggravated assault, from a felony of the third degree to a felony of the second degree.
- In the case of aggravated battery, from a felony of the second degree to a felony of the first degree.

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[1] An assault is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent. § 784.011, F.S.
[2] An aggravated assault is an assault with a deadly weapon without intent to kill or with an intent to commit a felony. § 784.021, F.S.
[3] A battery occurs when a person actually and intentionally touches or strikes another person against the will of the other or intentionally causes bodily harm to another person. § 784.03, F.S
[4] An aggravated battery occurs when a person in committing battery intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or uses a deadly weapon. Aggravated battery also occurs if the victim of the battery was pregnant at the time of the offense and the offender knew or should have known that the victim was pregnant. § 784.045, F.S.

The section also requires the imposition of a three year minimum mandatory sentence[5] against an offender who has been convicted of aggravated assault or aggravated battery against an elderly person.

There are a number of other sections of statute that reclassify assault or battery offenses if they are committed against specified types of victims.[6]

**Effect of HB 809**

HB 809 provides that the act may be cited as the "Norris Act".

*Hate crime statute:* HB 809 amends section 775.085, F.S. to reclassify the felony or misdemeanor degree of an offense if the commission of the offense evidences prejudice based on the *homeless status* of the victim.

*Newly created section:* HB 809 creates a new section of statute which reclassifies assault or battery offenses that are committed upon a homeless person in the same manner as assault or battery offenses committed on a victim age 65 or older, discussed above. The offense will be reclassified regardless of whether the offender knew or had reason to know the housing status of the victim. The offense would be reclassified regardless of the housing status of the offender.

As a result of the bill, assault will be reclassified from a second degree misdemeanor to a first degree misdemeanor; battery will be reclassified from a first degree misdemeanor and a third degree felony; aggravated assault will be reclassified from a third degree felony to a second degree felony and aggravated battery will be reclassified from a second degree felony to a first degree felony if the offense is committed on a homeless person. The bill requires the imposition of a three-year minimum mandatory sentence upon a person who is convicted of aggravated assault or aggravated battery upon a homeless person. The bill also authorizes the judge to impose a fine of up to $10,000 and to order the defendant to perform up to 500 hours of community service. The bill provides that adjudication of guilt or imposition of sentence may not be suspended, deferred or withheld.

Reclassifying an offense has the effect of increasing the maximum sentence that can be imposed for an offense. The maximum sentence that can be imposed for a criminal offense is generally based on the degree of the misdemeanor or felony. The maximum sentence for a second degree misdemeanor is sixty days incarceration; for a first degree misdemeanor is one year of incarceration; for a third degree felony is five years imprisonment; for a second degree felony is fifteen years imprisonment and for a first degree felony is thirty years imprisonment.[7]

The bill defines the term "homeless" in conformity with s. 420.621, F.S. which contains the following definition:

> "Homeless" refers to an individual who lacks a fixed, regular, and adequate nighttime residence or an individual who has a primary nighttime residence that is:
> (a) A supervised publicly or privately operated shelter designed to provide temporary living accommodations, including welfare hotels, congregate shelters, and transitional housing for the mentally ill;
> (b) An institution that provides a temporary residence for individuals intended to be institutionalized; or
> (c) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

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[5] s. 784.08(1), F.S.

[6] Section 784.07(2), F.S. reclassifies assault and battery offenses committed against a list of people such as law enforcement officers, firefighters, emergency medical care providers and public transit employees and requires the imposition of a three year minimum mandatory sentence for aggravated assault of a law enforcement officer and a five year minimum mandatory sentence for aggravated battery of a law enforcement officer. See also, ss. 784.074, 784.081, 784.082, 784.083, F.S.

[7] s. 775.082, F.S.

The term does not refer to any individual imprisoned or otherwise detained pursuant to state or federal law.

C. SECTION DIRECTORY:

Section 1. Amends s. 775.085, F.S., to include a definition for "homeless status" and creates s. 784.0815, F.S. relating to assault or battery on homeless persons.

Section 2. Provides effective date of October 1, 2006.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The Criminal Justice Impact Conference met on March 21, 2006 and determined that this bill would have an indeterminate, but minimal, fiscal impact on the Department of Corrections prison bed population. Although it is estimated that there are approximately 68,000 to 75,000 homeless persons in the state, the number of reported cases of assault or battery offenses committed on homeless persons has been minimal.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

See above.

## 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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill amends the "hate crime" statute to provide for the reclassification of a criminal offense if the commission of the offense evidences prejudice based on the homeless status of the victim. The bill also creates a new section of statute which reclassifies the felony or misdemeanor degree of an assault or battery offense if it is committed on a homeless person. The section also provides for the imposition of a three year minimum mandatory sentence for aggravated assault or aggravated battery committed against a homeless person. This section applies regardless of whether the offender knew that the victim was homeless and regardless of whether the offender was also homeless. For the offenses of assault or battery against a homeless person, it appears likely that an offender would be charged under the newly created section of statute rather than the hate crime statute so that the state would not have to prove that the act evidenced prejudice based on the homeless status of the victim or that the offender knew that the victim was homeless. Also, if the offender was charged under the newly created section of statute with aggravated battery or aggravated assault against a homeless person, the three year minimum mandatory provision would apply.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 24, 2006, the Criminal Justice Appropriations Committee adopted an amendment by Representative Taylor, the bill sponsor, which amended the hate crime statute to include offenses committed against homeless victims. The amendment also names the act the "Norris Act".

CHAMBER ACTION

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The Criminal Justice Appropriations Committee recommends the following:

**Council/Committee Substitute**

Remove the entire bill and insert:

A bill to be entitled

An act relating to assault or battery on homeless persons; creating the "Norris Act"; amending s. 775.085, F.S.; reclassifying offenses evidencing prejudice based on the homeless status of the victim; creating s. 784.0815, F.S.; providing a definition; providing a minimum sentence for a person convicted of an aggravated assault or aggravated battery upon a homeless person; providing for reclassification of certain offenses when committed against homeless persons; providing an effective date.

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

Section 1. This act may be cited as the "Norris Act."

Section 2. Subsection (1) of section 775.085, Florida Statutes, is 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.

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

3. "Homeless status" means that the victim is homeless as the term is defined in s. 420.621.

Section 3. Section 784.0815, Florida Statutes, is created to read:

784.0815 Assault or battery on homeless persons.--

(1) For purposes of this section, the term "homeless" shall have the same meaning as provided in s. 420.621.

(2) A person who is convicted of an aggravated assault or aggravated battery upon a homeless person shall be sentenced to a minimum term of imprisonment of 3 years and fined not more than $10,000 and shall also be ordered by the sentencing judge to make restitution to the victim of the offense and to perform up to 500 hours of community service work. Restitution and community service work shall be in addition to any fine or sentence that may be imposed and shall not be in lieu thereof.

(3) Whenever a person is charged with committing an assault or aggravated assault or a battery or aggravated battery upon a homeless person, regardless of whether he or she knows or has reason to know the housing status of the victim, the offense for which the person is charged shall be reclassified as follows:

(a) In the case of aggravated battery, from a felony of the second degree to a felony of the first degree.

(b) In the case of aggravated assault, from a felony of the third degree to a felony of the second degree.

(c) In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.

(d) In the case of assault, from a misdemeanor of the second degree to a misdemeanor of the first degree.

(4) Notwithstanding the provisions of s. 948.01, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld.

Section 4. This act shall take effect October 1, 2006.

# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 871 CS Telephone Calling Records
**SPONSOR(S):** Ryan and others
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1488

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Criminal Justice Committee | 6 Y, 0 N, w/CS | Kramer | Kramer |
| 2) Utilities & Telecommunications Committee | 12 Y, 0 N | Cater | Holt |
| 3) Justice Council | | | |
| 4) | | | |
| 5) | | | |

## SUMMARY ANALYSIS

There are a number of companies which offer telephone calling records for sale. Numerous websites offer to obtain detailed information regarding the numbers that have been called from a particular telephone number.

The bill makes it a first degree misdemeanor to:

- Obtain or attempt to obtain the calling record of another person without the permission of that person by:
  - Making a false, fictitious, or fraudulent statement or representation to an officer, employee or agent of a telecommunications company;
  - Making a false, fictitious or fraudulent statement or representation to a customer of a telecommunications company; or
  - Providing any document to an officer, employee or agent of a telecommunications company, knowing that the document is forged, is counterfeit, was lost or stolen, was fraudulently obtained, or contains a false, fictitious or fraudulent statement or representation.
- Ask another person to obtain a calling record, knowing that the other person will obtain, or attempt to obtain, the calling record from the telecommunications company in a manner described above.
- Sell or offer to sell a calling records obtained in any manner described above.

The bill contains exceptions to this prohibition. A second or subsequent violation of this section will be a third degree felony.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: The bill creates a new criminal offense.

Promote personal responsibility: The bill makes it a crime to obtain a telephone calling record of another person by using fraudulent means.

B. EFFECT OF PROPOSED CHANGES:

There are a number of businesses which offer telephone calling records for sale. Numerous websites offer to obtain detailed information regarding the numbers that have been called by a particular telephone number. According to the Federal Trade Commission (FTC), records are obtained by "pretexting" – a practice where a person calls a telephone company pretending to be the account holder in order to gain access to the records from the company. Calling records are also illicitly obtained by unauthorized access of accounts via the internet. [1] According to the FTC, "[a]lthough the acquisition of telephone records does not present the opportunity for immediate financial harm as the acquisition of financial records does, it nonetheless is a serious intrusion into consumers' privacy and could result in stalking, harassment and embarrassment."[2]

Federal legislation has been filed entitled the "Consumer Telephone Records Protection Act of 2006".[3] This bill prohibits obtaining confidential phone records information from a telecommunications carrier without authorization from the customer by knowingly and intentionally: making false or fraudulent statements or representations to an employee or customer of a telecommunications carrier; providing false documentation to a telecommunications carrier knowing that the document is false; or accessing customer accounts of a telecommunications carrier via the internet. Each occurrence would be punishable by up to five years in prison. The bill also prohibits any person from knowingly selling confidential phone records from a telecommunications carrier without authorization from the customer.

Currently, section 817.568, F.S. makes it a third degree felony for any person to willfully and without authorization fraudulently use or possess with intent to use, personal identification information concerning an individual without first obtaining that individual's consent.

Part II of Chapter 501, Florida Statutes is known as the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). Section 501.204, F.S. provides that "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Willful violations occur when the person knew or should have known that his or her conduct was unfair or deceptive.[4] A person willfully violating the provisions of the FDUTPA is liable for a civil penalty of not more than $10,000 per violation. This penalty is increased to $15,000 for each violation if the willful violation victimizes or attempts to victimize senior citizens or handicapped persons. Individuals aggrieved by a violation of the act can seek a declaratory judgment that an act or practice violates the act and to enjoin a person from continuing the deceptive or unfair act. An individual harmed by a person who has violated the act may also seek actual damages from that person, plus attorney's fees and court costs.[5] The state attorneys and the Department of Legal Affairs

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[1] *Prepared Statement of the Federal Trade Commission before the Committee on Commerce, Science and Transportation, Subcommitee on Consumer Affairs, Product Safety and Insurance, U.S. Senate on Protecting Consumers' Phone Records, February 8, 2006.* http://www.ftc.gov/os/2006/02/commissiontestimonypretexting060208.pdf

[2] *Id. at 7.*

[3] See S. 2178, sponsored by Senate Schumer.

[4] See s. 501.2075, F.S.

[5] See s. 501.211(1) and (2), F.S.

are the enforcing authorities for the FDUTPA. Section 501.207, F.S., specifies the actions that the enforcing authority may bring.

In January 2006, the Attorney General's office filed suit against a Florida corporation claiming that its actions in using personal identification information of a consumer without the consumer's consent in order to obtain calling records (which the company then sold) violated section 817.568, F.S. and was therefore a per se violation of FDUTPA.[6] According to the Attorney General's office, the company's website has since been shut down.

HB 871 makes it a first degree misdemeanor to:

1. Obtain or attempt to obtain the calling record of another person without the permission of that person by:
    a. Making a false, fictitious, or fraudulent statement or representation to an officer, employee or agent of a telecommunications company;
    b. Making a false, fictitious or fraudulent statement or representation to a customer of a telecommunications company; or
    c. Providing any document to an officer, employee or agent of a telecommunications company, knowing that the document is forged, is counterfeit, was lost or stolen, was fraudulently obtained, or contains a false, fictitious or fraudulent statement or representation.
2. Ask another person to obtain a calling record, knowing that the other person will obtain, or attempt to obtain, the calling record from the telecommunications company in a manner described above.
3. Sell or offer to sell a calling records obtained in any manner described above.

A second or subsequent violation is a third degree felony. The bill defines the term "calling record" to mean a record held by a telecommunications company[7] of the telephone calls made or text messages sent or received by a customer[8] of that company.

The bill provides that it is not a violation of this section for:

1. A law enforcement agency[9] to obtain a calling record in connection with the performance of the official duties of that agency in accordance with other applicable laws.
2. A telecommunications company, or an officer, employee, or agent of the telecommunications company, to obtain a calling record of that company in the course of:
    a. Testing the security procedures or systems of the telecommunications company for maintaining the confidentiality of customer information;
    b. Investigating an allegation of misconduct or negligence on the part of an officer, employee, or agent of the telecommunications company; or
    c. Recovering a calling record that was obtained or received by another person in a fraudulent manner, described above.

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[6] http://myfloridalegal.com/webfiles.nsf/WF/MRAY-6L8KGC/$file/1stSource_Complaint.pdf

[7] The bill defines the term "telecommunications company" in conformity with s. 364.02, F.S. which defines the term as follow:
"Telecommunications company" includes every corporation, partnership, and person and their lessees, trustees, or receivers appointed by any court whatsoever, and every political subdivision in the state, offering two-way telecommunications service to the public for hire within this state by the use of a telecommunications facility. The term "telecommunications company" does not include:
(a) An entity which provides a telecommunications facility exclusively to a certificated telecommunications company;
(b) An entity which provides a telecommunications facility exclusively to a company which is excluded from the definition of a telecommunications company under this subsection;
(c) A commercial mobile radio service provider;
(d) A facsimile transmission service;
(e) A private computer data network company not offering service to the public for hire;
(f) A cable television company providing cable service as defined in 47 U.S.C. s. 522; or
(g) An intrastate interexchange telecommunications company.
The bill also provides that the term includes providers of "VoIP service" (an acronym for voice-over-the internet-protocol) and commercial mobile radio service.

[8] The bill defines the term "customer" to mean a person who has received telephone service from a telecommunications company.

[9] The bill references the definition of the term "law enforcement agency" in s. 23.1225(1)(d), F.S.

C. SECTION DIRECTORY:

Section 1. Prohibits obtaining calling records of another person.

Section 2. Provides effective date of July 1, 2006.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference has determined that this bill will have an insignificant prison bed impact on the Department of Corrections.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill would criminalize selling telephone calling records that are obtained through fraudulent means.

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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Criminal Justice Committee adopted a strike-all amendment which:

- Included commercial mobile radio service providers within the definition of the term "telecommunications company".
- Included records of text messages sent or received within the definition of the term "calling record".
- Removed exceptions which were contained in the original bill – one involving public records and one involving activities of private investigators.
- Added language to require proof that the phone records were obtained without the consent of the owner of the records.

CHAMBER ACTION

The Criminal Justice Committee recommends the following:

**Council/Committee Substitute**

Remove the entire bill and insert:

A bill to be entitled

An act relating to telephone calling records; providing definitions; prohibiting a person from obtaining or attempting to obtain the calling record of another person by making false or fraudulent statements or providing false or fraudulent documents to a telecommunications company or by selling or offering to sell a calling record that was obtained in a fraudulent manner; providing that it is a first-degree misdemeanor to commit a first violation and a third-degree felony to commit a second or subsequent violation; providing penalties; providing that it is not a violation of the act for a law enforcement agency or telecommunications company to obtain calling records for specified purposes; providing an effective date.

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

Section 1. Obtaining telephone calling records by fraudulent means prohibited.--

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

(a) "Calling record" means a record held by a telecommunications company of the telephone calls made or text messages sent or received by a customer of that company.

(b) "Customer" means a person who has received telephone service from a telecommunications company.

(c) "Law enforcement agency" has the same meaning as in s. 23.1225(1)(d), Florida Statutes.

(d) "Telecommunications company" has the same meaning as in s. 364.02, Florida Statutes, except that the term includes VoIP service and commercial mobile radio service providers.

(2) It is a violation of this section for a person to:

(a) Obtain or attempt to obtain the calling record of another person without the permission of that person by:

1. Making a false, fictitious, or fraudulent statement or representation to an officer, employee, or agent of a telecommunications company;

2. Making a false, fictitious, or fraudulent statement or representation to a customer of a telecommunications company; or

3. Providing any document to an officer, employee, or agent of a telecommunications company, knowing that the document is forged, is counterfeit, was lost or stolen, was fraudulently obtained, or contains a false, fictitious, or fraudulent statement or representation.

(b) Ask another person to obtain a calling record, knowing that the other person will obtain, or attempt to obtain, the

calling record from the telecommunications company in any manner described in paragraph (a).

(c) Sell or offer to sell a calling record obtained in any manner described in paragraph (a) or paragraph (b).

(3) A person who violates this section for the first time commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, Florida Statutes. A second or subsequent violation constitutes a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083, Florida Statutes.

(4) It is not a violation of this section for:

(a) A law enforcement agency to obtain a calling record in connection with the performance of the official duties of that agency in accordance with other applicable laws.

(b) A telecommunications company, or an officer, employee, or agent of a telecommunications company, to obtain a calling record of that company in the course of:

1. Testing the security procedures or systems of the telecommunications company for maintaining the confidentiality of customer information;

2. Investigating an allegation of misconduct or negligence on the part of an officer, employee, or agent of the telecommunications company; or

3. Recovering a calling record that was obtained or received by another person in any manner described in subsection (2).

Section 2. This act shall take effect July 1, 2006.

# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1291 CS Weapons
**SPONSOR(S):** Poppell
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 2438

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Criminal Justice Committee | 8 Y, 0 N, w/CS | Cunningham | Kramer |
| 2) PreK-12 Committee | 10 Y, 0 N | Beagle | Mizereck |
| 3) Justice Council | | | |
| 4) | | | |
| 5) | | | |

## SUMMARY ANALYSIS

Chapter 790 defines the term "weapon" as "any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon *except* a firearm or a common pocketknife." Although not specifically listed, knives have commonly been included in the definition of "weapon."

Currently, Florida school districts are required to adopt a zero tolerance policy that requires the expulsion of students who bring firearms or weapons, as defined by chapter 790, F.S., to school, to any school function, or onto school-sponsored transportation. While chapter 790, F.S. currently excepts "common pocketknives" from its definition of "weapon," other types of knives, such as butter knives and plastic knives, are not currently excepted. As a result, there has been some confusion as to whether students who bring objects such as butter knives onto school grounds must be disciplined.

This bill amends the definition of "weapon" to include the term "knife," and to except from the definition "plastic knives" and "blunt-bladed table knives." The result is that a "knife" would be considered a weapon, while "common pocketknives", "plastic knives", and "blunt-bladed table knives" would not be. The bill also provides in s. 790.115, F.S. (relating to the possession and discharge of weapons at school-sponsored events or on school property), and in s. 810.095, F.S. (relating to trespassing on school property with a weapon), that the term "weapon" is to be defined by s. 790.001(13), F.S. This should help clarify what types of knives are permitted on school grounds.

This bill takes effect July 1, 2006.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Maintain Public Security → This bill revises the definition of "weapon" to include the term "knife" and clarifies provisions relating to the prohibited exhibition and possession of specified weapons at school-sponsored events or on school property.

B. EFFECT OF PROPOSED CHANGES:

Chapter 790 defines the term "weapon" as "any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon *except* a firearm or a common pocketknife."[1] Although the term "knife" is not included in the above definition, courts have interpreted the statute as including certain knives.[2]

Currently, Florida school districts are required to adopt a zero tolerance policy that requires the expulsion of students who bring firearms or weapons, as defined by chapter 790, F.S., to school, to any school function, or onto school-sponsored transportation.[3] Schools also must refer such students to either the criminal or juvenile justice systems.[4] While chapter 790, F.S., currently excepts the "common pocketknife" from its definition of "weapon," other types of knives, such as butter knives and plastic knives, are not currently excepted. As a result, there has been some confusion as to whether students who bring objects such as butter knives onto school grounds must be disciplined.[5]

This bill amends the definition of the term "weapon" to include the term "knife," and to except from the definition "plastic knives" and "blunt-bladed table knives." The result is that a "knife" would be considered a weapon, while "common pocketknives", "plastic knives", and "blunt-bladed table knives" would not be.

The bill clarifies in s. 790.115, F.S. (relating to the possession and discharge of weapons at school-sponsored events or on school property), and in s. 810.095, F.S. (relating to trespassing on school property with a weapon), that the term "weapon" is to be defined by s. 790.001(13), F.S. This should help clarify what types of knives are permitted on school grounds. The bill also specifies in s. 790.115, F.S., that "common pocketknives" are included in the list of items that may not be exhibited in a rude, careless, angry, or threatening manner at a school-sponsored event or on school property.

C. SECTION DIRECTORY:

**Section 1.** Amends s. 790.001, F.S., revising the definition of "weapon."

**Section 2.** Amends s. 790.115, F.S., revising and clarifying provisions related to the prohibited exhibition and possession of specified weapons at school-sponsored events or on school property.

**Section 3.** Amends s. 810.095, F.S., clarifying provisions related to the prohibited trespass on school property with a weapon.

**Section 4.** This act takes effect July 1, 2006.

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[1] s. 790.001(13), F.S.
[2] *See, e.g., State v. Walthour*, 876 So.2d 594 (Fla. 5th DCA 2004); *Garcia v. State*, 789 So.2d 1059 (Fla. 4th DCA 2001), *Evans v. State*, 703 So.2d 1201 (Fla. 1st DCA 1997). *Miller v. State*, 421 So.2d 746 (Fla. 4th DCA 1982);
[3] s. 1006.13, F.S.
[4] *Id.*
[5] *See, e.g.,* http://www.sptimes.com/2005/10/25/Hernando/Girl_arrested_for_but.shtml (An 11-year old girl was arrested and charged with a felony for bringing a butter knife to school)

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The Department of Education does not foresee a fiscal impact.

2. Expenditures:

   The Department of Education does not foresee a fiscal impact.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 22, 2006, the Criminal Justice Committee adopted one amendment to the bill and reported the bill favorably with committee substitute. The amendment makes technical changes and clarifies the definition of the term "weapon."

CHAMBER ACTION

The Criminal Justice Committee recommends the following:

**Council/Committee Substitute**

Remove the entire bill and insert:

A bill to be entitled

An act relating to weapons; amending s. 790.001, F.S.; revising the definition of "weapon"; amending s. 790.115, F.S.; revising and clarifying provisions related to the prohibited exhibition and possession of specified weapons and firearms at a school-sponsored event or on school property; providing penalties; amending s. 810.095, F.S.; clarifying provisions with respect to prohibited trespass on school property with a firearm or other weapon; providing a penalty; providing an effective date.

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

Section 1. Subsection (13) of section 790.001, Florida Statutes, is amended to read:

790.001 Definitions.--As used in this chapter, except where the context otherwise requires:

(13) "Weapon" means any dirk, knife, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon except a firearm or a common pocketknife, plastic knife, or blunt-bladed table knife.

Section 2. Subsection (1) and paragraphs (a) and (b) of subsection (2) of section 790.115, Florida Statutes, are amended to read:

790.115 Possessing or discharging weapons or firearms at a school-sponsored event or on school property prohibited; penalties; exceptions.--

(1) A person who exhibits any sword, sword cane, firearm, electric weapon or device, destructive device, or other weapon as defined in s. 790.001(13), including a razor blade, box cutter, or common pocketknife ~~knife~~, except as authorized in support of school-sanctioned activities, in the presence of one or more persons in a rude, careless, angry, or threatening manner and not in lawful self-defense, at a school-sponsored event or on the grounds or facilities of any school, school bus, or school bus stop, or within 1,000 feet of the real property that comprises a public or private elementary school, middle school, or secondary school, during school hours or during the time of a sanctioned school activity, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. This subsection does not apply to the exhibition of a firearm or weapon on private real property within 1,000 feet of a school by the owner of such property or by a person whose presence on such property has been authorized, licensed, or invited by the owner.

(2)(a) A person shall not possess any firearm, electric weapon or device, destructive device, or other weapon as defined in s. 790.001(13), including a razor blade or~~,~~ box cutter, ~~or knife,~~ except as authorized in support of school-sanctioned activities, at a school-sponsored event or on the property of any school, school bus, or school bus stop; however, a person may carry a firearm:

1. In a case to a firearms program, class or function which has been approved in advance by the principal or chief administrative officer of the school as a program or class to which firearms could be carried;

2. In a case to a career center having a firearms training range; or

3. In a vehicle pursuant to s. 790.25(5); except that school districts may adopt written and published policies that waive the exception in this subparagraph for purposes of student and campus parking privileges.

For the purposes of this section, "school" means any preschool, elementary school, middle school, junior high school, secondary school, career center, or postsecondary school, whether public or nonpublic.

(b) A person who willfully and knowingly possesses any electric weapon or device, destructive device, or other weapon as defined in s. 790.001(13), including a razor blade or~~,~~ box cutter, ~~or knife,~~ except as authorized in support of school-sanctioned activities, in violation of this subsection commits a

felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 3. Subsection (1) of section 810.095, Florida Statutes, is amended to read:

810.095 Trespass on school property with firearm or other weapon prohibited.--

(1) It is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, for a person who is trespassing upon school property to bring onto, or to possess on, such school property~~,~~ any weapon as defined in s. 790.001(13) or any firearm.

Section 4. This act shall take effect July 1, 2006.

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1325 Controlled Substances
**SPONSOR(S):** Culp
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 2356

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Criminal Justice Committee | 8 Y, 0 N | Kramer | Kramer |
| 2) Health Care Appropriations Committee | 9 Y, 0 N | Ekholm | Massengale |
| 3) Justice Council | | | |
| 4) | | | |
| 5) | | | |

## SUMMARY ANALYSIS

Chapter 893, Florida Statutes, sets forth criminal penalties for the illegal sale or manufacture of methamphetamine and other controlled substances.

Section 39.301, F.S. provides that if it is determined that a child is in need of protection and supervision of the court, the Department of Children and Family Services must file a petition for dependency. A petition for dependency must be filed in all cases classified by the department as high-risk. The section sets forth factors that the department may consider in determining whether a case is high-risk. The bill adds the arrest of the parents or legal custodians on charges of manufacturing, processing, disposing of, or storing, either temporarily or permanently, any substances in violation of chapter 893, F.S., to the list of factors which the department may consider.

During the 2005 session, section 893.13, F.S. was amended to provide that if a person violates any provision of chapter 893, F.S., and such violation results in a serious injury to a state, local, or federal law enforcement officer, the person commits a third degree felony. If the injury sustained by the law enforcement officer results in death or great bodily harm, the person commits a second degree felony. House Bill 1325 expands this provision to apply when injury results to a firefighter, emergency medical technician, paramedics or other specified person.

The bill also provides that the Legislature finds that a person who manufactures any substance in violation of chapter 893, F.S., poses a threat of harm to the community and that the factual circumstances of such a crime indicate a disregard for the safety of the community. Further, if the court finds that there is a substantial probability that a defendant charged with manufacturing any substances in violation of chapter 893, F.S., committed such a crime, there are no conditions of release reasonably sufficient to protect the community from the risk of physical harm to persons and therefore the court must order pretrial detention.

The bill provides that no life or health insurer may cancel or nonrenew a life or health insurance policy or certificate of insurance providing coverage to, or refuse to insure a law enforcement officer, firefighter, paramedic, emergency medical technician or other specified official solely based on the fact that the individual has been exposed to toxic chemicals or suffered injury or disease as a result of the individual's lawful duties arising out of the commission of a violation of chapter 893, F.S., by another person.

The bill appears to have no significant fiscal impact.

The bill is effective on July 1, 2006.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

**Provide limited government**—The bill prohibits life or health insurers from canceling, nonrenewing or refusing to insure certain individuals solely based on the fact that the individual has been exposed to toxic chemicals as a result of the individual's lawful duties arising out of a violation of chapter 893, F.S., by another person.

The bill also authorizes the Department of Children and Family Services to consider additional factors in determining whether a child is in need of protection and supervision of the court.

**Safeguard individual liberty**—The bill requires a judge to order the pretrial detention of a defendant in certain circumstances.

**Promote personal responsibility**—The bill creates criminal penalties for injurious behavior.

B. EFFECT OF PROPOSED CHANGES:

***Background information***

*Drug offenses*: Chapter 893, Florida Statutes, is known as the "Florida Comprehensive Drug Abuse Prevention and Control Act." Section 893.03, F.S. divides controlled substances into five categories ranging from Schedule I to Schedule V. The scheduling of a controlled substance is relevant to how it can be prescribed and to the severity of the criminal offense for its illicit possession, sale or purchase.[1]

Section 893.13, F.S., provides penalties for various drug offenses depending on the type and quantity of the controlled substance and whether the controlled substance is sold, manufactured[2] or delivered or is purchased as well as the location of the sale, manufacture or delivery. If the amount of controlled substance sold, manufactured, purchased or delivered is of a sufficient quantity, the offense is considered drug trafficking and the penalties in s. 893.135, F.S., apply. The type and quantity of controlled substance sold, purchased, manufactured or delivered—in other words, trafficked—dictates the penalties that apply.

*Methamphetamine:* Methamphetamine is a Schedule II controlled substance.[3] Methamphetamine is a highly addictive nerve stimulant found in virtually every metropolitan area of the country, according to the U.S. Drug Enforcement Agency (DEA). Commonly called "speed," "crank," "crystal," or "zip," methamphetamine can be smoked, injected, snorted, or taken orally. It produces an initial "high," lasting between 15 and 30 minutes, that is difficult, if not impossible for the user to repeat, leading the

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[1] A drug in Schedule I has a "high potential for abuse and has no currently accepted medical use in treatment in the United States." A drug in Schedule V has a low potential for abuse relative to the substances in Schedule IV and has a currently accepted medical use in treatment in the United States, and abuse of such compound, mixture or preparation may lead to limited physical or psychological dependence relative to the substances in Schedule IV."

[2] Section 893.02(13), F.S. defines the term "manufacture" as follows:

> "Manufacture" means the production, preparation, propagation, compounding, cultivating, growing, conversion, or processing of a controlled substance, either directly or indirectly, by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging of the substance or labeling or relabeling of its container, except that this term does not include the preparation, compounding, packaging, or labeling of a controlled substance by:
>
> 1. A practitioner or pharmacist as an incident to his or her administering or delivering of a controlled substance in the course of his or her professional practice.
>
> 2. A practitioner, or by his or her authorized agent under the practitioner's supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis, and not for sale.

[3] s. 893.03(2)(c), F.S.

user to ingest more and more of the drug and go on longer binges. Methamphetamine's psychological side-effects include paranoia, hallucinations and delusions of insects or parasites crawling under the skin. Long-time use results in a decline in physical health. According to the Office of National Drug Control Policy:[4]

> Methamphetamine can be easily manufactured in clandestine laboratories (meth labs) using ingredients purchased in local stores. Over-the-counter cold medicines containing ephedrine or pseudoephedrine and other materials are "cooked" in meth labs to make methamphetamine.
>
> The manufacture of methamphetamine has a severe impact on the environment. The production of one pound of methamphetamine releases poisonous gas into the atmosphere and creates 5 to 7 pounds of toxic waste. Many laboratory operators dump the toxic waste down household drains, in fields and yards, or on rural roads.
>
> Due to the creation of toxic waste at methamphetamine production sites, many first response personnel incur injury when dealing with the hazardous substances. The most common symptoms suffered by first responders when they raid meth labs are respiratory and eye irritations, headaches, dizziness, nausea, and shortness of breath.
>
> Meth labs can be portable and so are easily dismantled, stored, or moved. This portability helps methamphetamine manufacturers avoid law enforcement authorities. Meth labs have been found in many different types of locations, including apartments, hotel rooms, rented storage spaces, and trucks. Methamphetamine labs have been known to be boobytrapped and lab operators are often well armed.

*2005 Legislation:* During the 2005 session, House Bill 1347[5] was passed by the Legislature and signed by the Governor. The bill made a number of changes to chapter 893, F.S., relating to methamphetamine and other controlled substances including the following:

- The bill limited over the counter sales of any drug containing a sole active ingredient of ephedrine, pseudoephedrine or phenylpropanolamine (commonly contained in cold medication) and required that such drugs be kept behind a checkout counter.
- The bill provided for enhanced penalties for the manufacture of methamphetamine or phenycyclidine if the crime occurs where a children under 16 years of age is present.
- The bill provided for enhanced penalties for trafficking in pseudoephedrine.
- The bill made it unlawful to store anhydrous ammonia (a chemical which can be used in methamphetamine production) in a manner not in accordance with sound engineering, agricultural or commercial practices.

**Effect of House Bill 1325**

*Protective investigations:* Section 39.301, F.S. provides that if it is determined that a child is in need of protection and supervision of the court, the Department of Children and Family Services must file a petition for dependency. A petition for dependency must be filed in all cases classified by the department as high-risk. Factors that the department may consider in determining whether a case is high-risk include, but are not limited to the following:

- The young age of the parents or legal custodians.
- The use of illegal drugs.
- Domestic violence.

The bill adds the arrest of the parents or legal custodians on charges of manufacturing, processing, disposing of, or storing, either temporarily or permanently, any substances in violation of chapter 893, F.S., to the list of factors which the department may consider.

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[4] http://www.whitehousedrugpolicy.gov/publications/factsht/methamph/

[5] Sponsored by Rep. Evers; chapter 2005-128, Laws of Fla.

*Injury to specified official:* The 2005 legislation discussed above amended s. 893.13, F.S., to provide that if a person violates any provision of chapter 893, F.S., and such violation results in a serious injury to a state, local, or federal law enforcement officer, the person commits a third degree felony. If the injury sustained by the law enforcement officer results in death or great bodily harm, the person commits a second degree felony.

House Bill 1325 amends this provision to apply when injury results to any of the following people:

- A state or local law enforcement officer as defined in s. 943.10, F.S.
- A firefighter as defined in s. 633.30, F.S.
- An emergency medical technician as defined in s. 401.23, F.S.
- A paramedic as defined in s. 401.23, F.S.
- An employee of a public utility or an electric utility as defined in s. 366.02, F.S.
- An animal control officer as defined in s. 828.27, F.S.
- A volunteer firefighter engaged by state or local government
- A law enforcement officer employed by the federal government
- Any other local, state or federal employee injured during the court and scope of his or her employment.

*Insurance:* The bill creates s. 627.4107, F.S., which provides that no life or health insurer may cancel or nonrenew[6] a life or health insurance policy or certificate of insurance providing coverage to, or refuse to insure one of the following individuals solely based on the fact that the individual has been exposed to toxic chemicals or suffered injury or disease as a result of the individual's lawful duties arising out of the commission of a violation of chapter 893, F.S., by another person:

- A state or local law enforcement officer as defined in s. 943.10, F.S.
- A firefighter as defined in s. 633.30, F.S.
- An emergency medical technician as defined in s. 401.23, F.S.
- A paramedic as defined in s. 401.23, F.S.
- A volunteer firefighter engaged by state or local government
- A law enforcement officer employed by the Federal government
- Any other local, state or Federal employee injured during the court and scope of his or her employment.

This provision will not apply to any person who commits an offense under chapter 893, F. S.

*Pretrial Release/Detention:* Article I, section 14, of the Florida Constitution provides, with some exceptions, that every person charged with a crime or violation of a municipal or county ordinance is entitled to pretrial release on reasonable conditions.[7] There is a presumption in favor of release on *nonmonetary* conditions[8] for any person who is granted pretrial release unless such person is charged with a dangerous crime.

Section 907.041(4)(c), F.S., specifies that a judge may order pretrial detention based on one of several different grounds. For example, a court may order pretrial detention if the judge finds that the defendant poses a threat of harm to the community. The judge may so conclude if it finds that the defendant is charged with a dangerous crime, that there is a substantial probability that the defendant

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[6] Several other statutes prohibit an insurance company from canceling or nonrenewing a life or health insurance policy for other specified reasons. See for example, s. 627.6265 which provides that no insurer may cancel or nonrenew the health insurance policy of an insured person because of diagnosis or treatment of human immunodeficiency virus infection or acquired immune deficiency syndrome; s. 627.4301(2)(a) provides that in the absence of a diagnosis of a condition related to genetic information, no health insurer may cancel coverage based on such information; s. 627.70161(4) provides that, with certain exceptions, an insurer may not deny, cancel, or refuse to renew a policy for residential property insurance solely on the basis that the policyholder or applicant operates a family day care home.

[7] Conditions of pretrial release are determined at a defendant's first appearance hearing. Rule 3.130, Fla. R. Crim. Proc.

[8] Nonmonetary conditions include releasing defendants on their own recognizance. Rule 3.131(b)(1), Fla. R. Crim. Proc.

committed the crime, that the factual circumstances of the crime indicate a disregard for the safety of the community and there are no conditions of release sufficient to protect the community from the risk of physical harm to others. A court can also order pretrial detention if the defendant was on probation or pretrial release for a dangerous crime at the time the current offense was committed.

The term "dangerous crime" includes the following: arson; aggravated assault; aggravated battery; illegal use of explosives; child abuse or aggravated child abuse; abuse or aggravated abuse of an elderly person or disabled adult; aircraft piracy; kidnapping; homicide; manslaughter; sexual battery; robbery; carjacking; lewd, lascivious, or indecent assault or act upon or in presence of a child under the age of 16 years; sexual activity with a child, who is 12 years of age or older but less than 18 years of age, by or at solicitation of person in familial or custodial authority; burglary of a dwelling; stalking and aggravated stalking; act of domestic violence as defined in s. 741.28, F.S.; home invasion robbery; act of terrorism as defined in s. 775.30, F.S.; and attempting or conspiring to commit any such crime.[9]

House Bill 1325 adds "manufacturing any substances in violation of chapter 893" to the list of dangerous crimes contained in s. 907.041, F.S.

The bill also specifies that the Legislature finds that a person who manufactures any substance in violation of chapter 893, F.S., poses a threat of harm to the community and that the factual circumstances of such a crime indicate a disregard for the safety of the community. Further, the bill provides that if the court finds that there is a substantial probability that a defendant charged with manufacturing any substances in violation of chapter 893 committed such a crime, there are no conditions of release reasonably sufficient to protect the community from the risk of physical harm to persons and therefore the court must order pretrial detention.

C. SECTION DIRECTORY:

Section 1. Amends s. 39.301, F.S., to add to list of factors that DCF may consider in determining whether case being investigated is high-risk relating to initiation of protective investigations

Section 2. Amends s. 893.13, F.S., relating to injury to an officer as a result of violation of chapter 893.

Section 3. Creates s. 627.4107, F.S., to prohibit refusing to insure or cancel insurance policies to certain employees due to exposure to toxic chemicals.

Section 4. Amends s. 907.041, F.S., relating to pretrial release of certain defendants.

Section 5. Provides effective date of July 1, 2006.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   On March 21, 2006, the Criminal Justice Impact Conference determined that this bill would have an insignificant prison bed impact on the Department of Corrections.

   The Department of Children and Family Services determined that the provisions of this bill would not have a significant fiscal impact, since it is likely that cases described in the bill are already considered high risk by the department.

[9] s. 907.041, F.S.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill requires a judge to order pretrial detention if it finds that there is a substantial probability that a defendant charged with manufacturing a substance in violation of chapter 893, F.S., committed such a crime. This may have a jail bed impact on the counties.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill would prohibit a life or health insurer from canceling or nonrenewing a policy to certain individuals solely based on the fact that the individual has been exposed to toxic chemicals or suffered injury as a result of the individual's lawful duties arising out the commission of a violation of chapter 893, F.S.

D. FISCAL COMMENTS:

See above.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

Article I, section 14, of the Florida Constitution provides, with some exceptions, that every person charged with a crime or violation of a municipal or county ordinance is entitled to pretrial release on reasonable conditions This section also provides that if no conditions of release can reasonably protect the community from risk of physical harm, an accused can be retained before trial.

Section 907.041, F.S. authorizes a court to order pretrial detention of a defendant in certain circumstances. There is no statutory *requirement* that the court order pretrial detention. Although the fact that the defendant is charged with a specified crime can be relevant to a judge's decision to order pretrial detention, the fact that the defendant is charged with a certain offense is not sufficient by itself to authorize the court to order pretrial detention. For example, to order pretrial detention of a

defendant charged with trafficking in a controlled substance, the judge has to find that there is a substantial probability that the defendant committed the offense and also must find that no conditions of release will reasonably assure the defendant's appearance at subsequent criminal proceedings.

House Bill 1325 creates legislative findings that a person who manufactures any substance in violation of chapter 893, F.S., poses a threat of harm to the community and that the factual circumstances of such a crime indicate a disregard for the safety of the community. The bill requires the court to order pretrial detention if it finds that there is a substantial probability that a defendant charged with this offense committed the crime. This mandatory provision is unlike any other provided for in statute. This could be challenged as violating a defendant's right to pretrial release on reasonable conditions.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Criminal Justice Committee adopted an amendment which removed the definition of the term "clandestine laboratory" that was in the original bill because the term was not used elsewhere in the bill or in current law. The committee adopted two amendments which removed the references to "cooking" a controlled substance because that term is not used in chapter 893. The term "manufacturing" is used instead.

CHAMBER ACTION

The Criminal Justice Committee recommends the following:

**Council/Committee Substitute**

Remove the entire bill and insert:

A bill to be entitled

An act relating to controlled substances; amending s. 39.301, F.S.; requiring the Department of Children and Family Services to file a petition for dependency for the children of parents involved in certain controlled substance crimes; amending s. 893.13, F.S.; revising provisions relating to criminal penalties for controlled substance violations that result in serious injury to specified individuals; creating s. 627.4107, F.S.; prohibiting refusal to insure or cancellation of life or health insurance policies or certificates of specified local, state, or federal employees due to exposure to toxic chemicals or due to disease or injury incurred in their duties related to controlled substance law violations committed by others; providing penalties; amending s. 907.041, F.S.; revising a definition; revising provisions relating to pretrial release of certain defendants charged with certain controlled substance offenses; providing an effective date.

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

Section 1. Paragraph (b) of subsection (8) of section 39.301, Florida Statutes, is amended to read:

39.301 Initiation of protective investigations.--

(8) The person responsible for the investigation shall make a preliminary determination as to whether the report is complete, consulting with the attorney for the department when necessary. In any case in which the person responsible for the investigation finds that the report is incomplete, he or she shall return it without delay to the person or agency originating the report or having knowledge of the facts, or to the appropriate law enforcement agency having investigative jurisdiction, and request additional information in order to complete the report; however, the confidentiality of any report filed in accordance with this chapter shall not be violated.

(b) If it is determined that the child is in need of the protection and supervision of the court, the department shall file a petition for dependency. A petition for dependency shall be filed in all cases classified by the department as high-risk. Factors that the department may consider in determining whether a case is high-risk include, but are not limited to, the young age of the parents or legal custodians, the use of illegal drugs, the arrest of the parents or legal custodians on charges of manufacturing, processing, disposing of, or storing, either temporarily or permanently, any substances in violation of chapter 893, or domestic violence.

Section 2. Subsection (12) of section 893.13, Florida Statutes, is amended to read:

893.13 Prohibited acts; penalties.--

(12) If a person violates any provision of this chapter and the violation results in a serious injury to a state or local law enforcement officer as defined in s. 943.10, firefighter as defined in s. 633.30, emergency medical technician as defined in s. 401.23, paramedic as defined in s. 401.23, employee of a public utility or an electric utility as defined in s. 366.02, animal control officer as defined in s. 828.27, volunteer firefighter engaged by state or local government, law enforcement officer employed by the Federal Government, or any other local, state, or Federal Government employee injured during the course and scope of his or her employment ~~state, local, or federal law enforcement officer~~, the person commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the injury sustained results in death or great bodily harm, the person commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 3. Section 627.4107, Florida Statutes, is created to read:

627.4107 Government employees exposed to toxic drug chemicals; refusal to insure and cancellation of life or health policy or certificate prohibited.--No life or health insurer may cancel or nonrenew a life or health insurance policy or certificate of insurance providing coverage to, or refuse to insure, a state or local law enforcement officer as defined in

s. 943.10, firefighter as defined in s. 633.30, emergency medical technician as defined in s. 401.23, or paramedic as defined in s. 401.23, a volunteer firefighter engaged by state or local government, a law enforcement officer employed by the Federal Government, or any other local, state, or Federal Government employee solely based on the fact that the individual has been exposed to toxic chemicals or suffered injury or disease as a result of the individual's lawful duties arising out of the commission of a violation of chapter 893 by another person. This section does not apply to any person who commits an offense under chapter 893.

Section 4. Paragraph (a) of subsection (4) of section 907.041, Florida Statutes, is amended, and paragraph (l) is added to that subsection, to read:

907.041 Pretrial detention and release.--

(4) PRETRIAL DETENTION.--

(a) As used in this subsection, "dangerous crime" means any of the following:

1. Arson;

2. Aggravated assault;

3. Aggravated battery;

4. Illegal use of explosives;

5. Child abuse or aggravated child abuse;

6. Abuse of an elderly person or disabled adult, or aggravated abuse of an elderly person or disabled adult;

7. Aircraft piracy;

8. Kidnapping;

9. Homicide;

10. Manslaughter;

11. Sexual battery;

12. Robbery;

13. Carjacking;

14. Lewd, lascivious, or indecent assault or act upon or in presence of a child under the age of 16 years;

15. Sexual activity with a child, who is 12 years of age or older but less than 18 years of age, by or at solicitation of person in familial or custodial authority;

16. Burglary of a dwelling;

17. Stalking and aggravated stalking;

18. Act of domestic violence as defined in s. 741.28;

19. Home invasion robbery;

20. Act of terrorism as defined in s. 775.30; ~~and~~

21. Manufacturing any substance in violation of chapter 893; and

22.~~21.~~ Attempting or conspiring to commit any such crime.

(1) The Legislature finds that a person who manufactures any substance in violation of chapter 893 poses a threat of harm to the community and that the factual circumstances of such a crime indicate a disregard for the safety of the community. If the court finds that there is a substantial probability that a defendant charged with manufacturing any substance in violation of chapter 893 committed such a crime, there are no conditions of release reasonably sufficient to protect the community from the risk of physical harm to persons and therefore the court shall order pretrial detention.

Section 5. This act shall take effect July 1, 2006.

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1341 Fiduciary Lawyer-Client Privilege
**SPONSOR(S):** Joyner
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 2190

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Civil Justice Committee | 7 Y, 0 N | Shaddock | Bond |
| 2) Justice Council | | | |
| 3) | | | |
| 4) | | | |
| 5) | | | |

## SUMMARY ANALYSIS

This bill creates the fiduciary lawyer-client privilege. This privilege provides that when a client acts as a fiduciary any communication between the client and lawyers is privileged and protected from disclosure.

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

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty -- This bill serves the purpose of fostering a confidential relationship between lawyer and client that enables the lawyer to understand and accurately assess the client's situation and render frank and unvarnished advice.

B. EFFECT OF PROPOSED CHANGES:

**Current Law**

The Lawyer-Client Privilege[1]

Florida recognizes a lawyer-client privilege applicable to confidential communications between a lawyer and client.[2] The lawyer-client privilege is the oldest of the privileges for confidential communications known in the common law and existed as part of the common law of Florida until its codification.[3] The privilege was first codified in 1976 and remains so to this day.

A client is defined in the evidence code as "any person, public officer, corporation, association or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer."[4] A person, bank, or trust company who serves as a trustee or personal representative is unquestionably a "client" as that term is defined.[5]

Fiduciary Obligations Owed to Beneficiary

A trustee is charged with a fundamental duty to administer a trust diligently for the benefit of the beneficiaries.[6] A personal representative has a similar duty to administer an estate diligently for the benefit of the beneficiaries and creditors.[7] A trustee has an array of duties owed to a beneficiary in addition to the duties of good faith and loyalty in administering the trust for the benefit of the beneficiaries.[8] Because the fiduciary's efforts must be driven and circumscribed by these duties, courts have come to differing conclusions about whether the lawyer-client privilege overrides the fiduciary's duties to a beneficiary.

The existing statute does not expressly address whether the privilege applies to communications between a client, who is acting as a fiduciary by a written instrument in administering fiduciary property, and an attorney. A few recent cases on this issue are discussed below.

In *Tripp v. Salkovitz*, 919 So. 2d 716 (Fla. 2d DCA 2006) the court ruled that the trial court could not entirely preclude the guardian and the attorney from raising the attorney-client privilege at a deposition.

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[1] The bulk of this analysis is derived from materials graciously supplied by the Real Property Probate & Trust Law Section of the Florida Bar and a Florida Bar Journal article by Jack A. Falk, Jr. entitled *The Fiduciary's Lawyer-Client Privilege: Does It Protect Communications from Discovery by a Beneficiary?*

[2] Section 90.502, F.S.

[3] Jack A. Falk, Jr., *The Fiduciary's Lawyer-Client Privilege: Does It Protect Communications from Discovery by a Beneficiary?*, Florida Bar Journal, Volume LXXVII, No. 3, 18 citing (*Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *American Tobacco Co. v. State*, 697 So. 2d 1249, 1252 (Fla. 4th D.C.A. 1997); s. 2.01, F.S. (1849); *Keir v. State*, 152 Fla. 389, 11 So. 2d 886, 888 (1943)).

[4] Section 90.502(1)(b), F.S.

[5] Falk, *supra*.

[6] Section 737.301, F.S.

[7] Section 733.602, F.S.

[8] Falk, citing (*Griffin v. Griffin*, 463 So. 2d 569 (Fla. 1st D.C.A. 1985); *Van Dusen v. Southeast First Nat'l Bank of Miami*, 478 So. 2d 82, 92 (Fla. 3d D.C.A. 1985) ("The duty of loyalty owed by trustees is of the highest order.")).

Furthermore, *Jacob v. Barton*, 877 So. 2d 935, 937 (Fla. 2d DCA 2004), states that if the beneficiary is the person "who will ultimately benefit from the legal work" the fiduciary has instructed the attorney to perform, the beneficiary may be considered the "real client." When the beneficiary is determined to be the real client, the beneficiary holds the privilege and is entitled to communications between the fiduciary and the attorney.

Other cases have discussed the fiduciary's lawyer-client privilege in administering fiduciary property. The Second District Court of Appeal appeared to embrace an exception to the privilege in *Barnett Banks Trust Co. v. Compson,* 629 So. 2d 849 (Fla. 2d DCA 1993), even though the court refused to permit the beneficiary access to communications between the fiduciary and lawyer. There, the court employed the analysis set forth in the seminal case decided in 1976 in Delaware, *Riggs National Bank v. Zimmer*, 355 A. 2d 709 (Del. Ch. 1976), which held that communications between the fiduciary and lawyer about administering fiduciary property were not privileged. The *Compson* court did not permit the beneficiary to avail herself of the rule in *Riggs* because she sought to deplete, rather than return, trust assets. Her interests in the litigation were found to be antagonistic to the trust, unlike the beneficiary in *Riggs*.

The First District Court of Appeal noted in *First Union Nat'l Bank v. Turney*, 824 So. 2d 172, 185-86 (Fla. 1st DCA 2001), that usually a lawyer retained by a trust represents the trustee, not the beneficiary. *See also Compson*, 629 So. 2d at 851. The court in *In re Estate of Gory*, 570 So. 2d 1381 (Fla. 4th DCA 1990), addressed an alleged conflict involving the personal representative's lawyer and determined that the lawyer did not have a lawyer-client relationship with the beneficiaries.

The court in *First Union Nat'l Bank v. Turney*, 824 So. 2d 172 (Fla. 1st DCA 2001), side-stepped a determination of whether to apply an exception to the fiduciary privilege by instead applying the crime fraud exception to permit discovery. The court therefore did not have to decide whether a "fiduciary exception to the attorney-client privilege existed in Florida." *Turney*, 824 So. 2d at 186.

**Effect of Bill**

The bill provides that communications between a fiduciary, who is acting under a written instrument to administer fiduciary property, and a lawyer, are privileged to the same extent as other clients who seek legal advice.

C. SECTION DIRECTORY:

Section 1 creates s. 90.5021, F.S.

Section 2 provides an effective date of July 1, 2006.

## 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:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

A bill to be entitled

An act relating to the fiduciary lawyer-client privilege; creating s. 90.5021, F.S.; providing that a client acts as a fiduciary when serving in certain positions; providing that a communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure; providing construction in application; providing an effective date.

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

Section 1. Section 90.5021, Florida Statutes, is created to read:

90.5021 Fiduciary lawyer-client privilege.--

(1) For the purpose of this section, a client acts as a fiduciary when serving as a personal representative or a trustee as defined in s. 731.201, an administrator ad litem as described in s. 733.308, a curator as described in s. 733.501, a guardian or guardian ad litem as defined in s. 744.102, a conservator as defined in s. 710.102, or an attorney in fact as described in chapter 709.

(2) A communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under s. 90.502 to the same extent as if the client were not acting as a fiduciary. In applying s. 90.502 to a communication under this section, the person or entity acting as a fiduciary is considered the only, real client of the lawyer.

Section 2. This act shall take effect July 1, 2006.

# HB 1495

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1495 Marriage Licenses
**SPONSOR(S):** Arza
**TIED BILLS:** None. **IDEN./SIM. BILLS:** SB 2536

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Civil Justice Committee | 4 Y, 0 N | Shaddock | Bond |
| 2) Future of Florida's Families Committee | 5 Y, 1 N | Preston | Collins |
| 3) Justice Council | | | |
| 4) | | | |
| 5) | | | |

## SUMMARY ANALYSIS

Current law provides two different avenues for a minor to be granted a marriage license:

- Any minor 16 or 17 years of age may marry with the consent of the minor's parents or legal guardian; or
- Any minor of any age may marry if the female is pregnant or has given birth, the potential groom is the father of the child, and a judge, in his or her discretion, grants permission to marry. This provision does not require notice to, or the consent of, the parents or guardian of the minor.

This bill eliminates the provisions allowing a court to grant a marriage license to a minor, thereby limiting the legal authority of a minor to marry to only those minors 16 or 17 years of age who obtain the consent of the minor's parents or legal guardian.

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

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

**Empower families** – This bill affects the ability of a minor to marry.

**Safeguard individual liberty** – This bill decreases the individual liberty of certain minors to marry without parental consent.

B. EFFECT OF PROPOSED CHANGES:

**Current Law**

Section 741.0405, F.S., provides a method by which minors may obtain a marriage license. If either of the parties seeking to be married is under the age of 18 but at least 16, the issuing authority[1] must issue a marriage license if there is a written consent of the parents or guardian of the minor, acknowledged before some officer authorized by law to take acknowledgments and administer oaths. The license must be issued without parental consent when both parents of the minor are deceased at the time of application or when the minor has been married previously.

Current law authorizes a county judge, in his or her discretion, to issue a marriage license without parental consent in limited circumstances. A county court judge may issue a license to any male or female under 18, when both parties swear under oath that they are the parents of a child. When the pregnancy is verified by the written statement of a physician, the county court judge may issue a marriage license:

- To any male or female under 18 upon a sworn application of both parties that they are the expectant parents; or
- To any female under 18 and male over 18 upon the female's sworn application that she is an expectant parent.

These exceptions too would permit a minor under 16, with or without the consent of the parents, to be issued a marriage license.

**Effect of Bill**

The bill provides that no marriage license will be granted to any person under 16 with or without the parents consent. Further, this bill eliminates the provisions allowing a court to issue a license without parental consent when one or both parties swear under oath that they are parents of a child or when the pregnancy is verified by a physician's statement.

C. SECTION DIRECTORY:

**Section 1.** Amends s. 741.0405, F.S., by deleting provisions authorizing a court to issue a marriage license in certain circumstances.

**Section 2.** Provides for an effective date of July 1, 2006.

[1] The issuing authority is either a county court judge or clerk of the circuit court.

## 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:

It is expected that so few minors under 16 marry that this bill is not expected to have a fiscal impact.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

A bill to be entitled

An act relating to marriage licenses; amending s. 741.0405, F.S.; deleting provisions authorizing the court to issue a marriage license upon the sworn application that both minor applicants are the parents of a child or the expectant parents of a child; deleting provisions authorizing the court to issue a marriage license upon written verification by a physician and sworn application that the minor female applicant is an expectant parent; providing an effective date.

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

Section 1. Section 741.0405, Florida Statutes, is amended to read:

741.0405 When marriage license may be issued to persons under 18 years.--

(1) If either of the parties shall be under the age of 18 years but at least 16 years of age, the county court judge or clerk of the circuit court shall issue a license for the marriage of such party only if there is first presented and filed with him or her the written consent of the parents or guardian of such minor to such marriage, acknowledged before some officer authorized by law to take acknowledgments and administer oaths. However, the license shall be issued without parental consent when both parents of such minor are deceased at the time of making application or when such minor has been married previously.

~~(2) The county court judge of any county in the state may, in the exercise of his or her discretion, issue a license to marry to any male or female under the age of 18 years, upon application of both parties sworn under oath that they are the parents of a child.~~

~~(3) When the fact of pregnancy is verified by the written statement of a licensed physician, the county court judge of any county in the state may, in his or her discretion, issue a license to marry:~~

~~(a) To any male or female under the age of 18 years upon application of both parties sworn under oath that they are the expectant parents of a child; or~~

~~(b) To any female under the age of 18 years and male over the age of 18 years upon the female's application sworn under oath that she is an expectant parent.~~

(2)~~(4)~~ No license to marry shall be granted to any person under the age of 16 years, with or without the consent of the parents~~, except as provided in subsections (2) and (3)~~.

Section 2. This act shall take effect July 1, 2006.

# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1527 CS Parental Notification of Termination of a Minor's Pregnancy
**SPONSOR(S):** Stargel
**TIED BILLS:** None **IDEN./SIM. BILLS:** None

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Civil Justice Committee | 4 Y, 3 N, w/CS | Shaddock | Bond |
| 2) Justice Council | | | |
| 3) | | | |
| 4) | | | |
| 5) | | | |

## SUMMARY ANALYSIS

The Parental Notice of Abortion Act requires the physician performing or inducing the termination of the pregnancy of a minor to give at least 48 hours' actual notice to one parent or the legal guardian of the minor. If actual notice is not possible, the physician may give constructive notice by sending the notice certified mail return receipt requested. The Act permits a minor to seek a judicial waiver of the notice requirement.

This bill increases the notice requirements for a physician prior to performing or inducing the termination of the minor's pregnancy. The bill provides specific factors a court must consider in determining whether to grant a judicial waiver.

The bill increases the evidentiary threshold, to clear and convincing, that the evidence must meet before a court will permit a waiver of the notice requirement for the minor's best interest. The bill also prohibits a court from looking to the financial best interest of the minor, or the potential financial impact on the minor or her family, if she does not terminate her pregnancy in this best interest standard.

Finally, the bill increases the time limits for a court to rule on a request for judicial waiver of the notice requirement.

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

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty -- This bill increases the notice requirements for a physician to provide a pregnant minor's parent or guardian before performing or inducing the termination of the minor's pregnancy.

Empower families -- This bill provides specific factors a court must consider in determining to permit a pregnant minor to avoid notifying her parent or guardian prior to the termination of a minor's pregnancy.

B. EFFECT OF PROPOSED CHANGES:

The Florida Constitution provides in part:

> [T]he Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.[1]

The legislature has codified the requirement for notification in the "Parental Notice of Abortion Act"[2] ("Act"), which requires that a physician that intends on performing or inducing the termination of the pregnancy of a minor give notice to one of the parents of the pregnant minor before performing or inducing the termination. A physician's violation of the notice requirements is grounds for disciplinary action.[3] Alternatively, prior notice is not required in a medical emergency, or where the minor seeks and obtains a judicial waiver of the notice requirement under limited circumstances.

**Actual Notice to a Parent**

Section 390.01114(3), F.S., requires that the physician give at least 48 hours' actual notice to one parent or the legal guardian of the minor. Section 390.01114(2)(a), F.S., defines "actual notice" as notice "that is given directly, in person or by telephone, to a parent or legal guardian of a minor, by a physician, at least 48 hours before the inducement or performance of a termination of pregnancy, and documented in the minor's files."

This bill amends s. 390.01114(3)(a), F.S. to add that, if actual notice is given by telephone, the notice must be confirmed in writing, signed by the physician, and mailed to the last known address of the parent both by regular mail and by certified mail, return receipt requested, delivery restricted.

**Constructive Notice to a Parent**

If actual notice is not possible, the physician may give constructive notice by sending the notice certified mail return receipt requested.[4] Section 390.01114(2)(c), F.S., defines "constructive notice" as "notice that is given in writing, signed by the physician, and mailed at least 72 hours before the inducement or performance of the termination of pregnancy, to the last known address of the parent or legal guardian of the minor, by certified mail, return receipt requested, and delivery restricted to the parent or legal guardian. After the 72 hours have passed, delivery is deemed to have occurred."

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[1] Article X, s. 22, Fla.Const.
[2] Section 390.01114, F.S.
[3] Section 390.01114(3)(c), F.S. The applicable disciplinary provisions are found at ss. 458.331 and 459.015, F.S.
[4] Section 390.01114(3)(a), F.S.

This bill amends the definition of constructive notice in s. 390.01114(2)(c), F.S., to add a requirement that a copy of the written notice also be sent by regular mail.

**Waiver of Notice - Medical Emergency**

Notice is not required if a medical emergency exists and there is insufficient time to comply with the notice requirements. If a medical emergency exists, the physician may terminate the pregnancy but must document the reason for the medical necessity and provide notice after performing the procedure.

"Medical emergency" is defined as "a condition that, on the basis of a physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate termination of her pregnancy to avert her death, or for which a delay in the termination of her pregnancy will create serious risk of substantial and irreversible impairment of a major bodily function."[5]

This bill amends s. 390.01114(3)(b), F.S., to add that, in the event of a medical emergency, the physician must:

- Make reasonable attempts to contact the parent or legal guardian
- Provide notice directly, in person, or by telephone, to the parent or guardian of the minor, detailing the medical emergency and any additional risks to the minor.
- If the physician is unable to contact the parent or guardian within 24 hours after the termination, the physician must sign and mail a notice detailing the medical emergency to the parent or guardian by certified mail and by regular mail, return receipt requested, and delivery restricted to the parent or guardian.

**Waiver of Notice - Prior Waiver by Parent**

Section 390.01114(3)(b)2., F.S., provides that a person entitled to notice may waive the requirement of receiving notice from the physician provided the waiver is in writing.

This bill amends s. 390.01114(3)(b)2., F.S., to add a requirement that any such waiver must be specific, in writing, notarized, and dated not more than 30 days before the termination of the pregnancy.

**Judicial Waiver - Jurisdiction**

The Act allows a minor seeking a judicial waiver to file the petition in any circuit court within the jurisdiction of the District Court of Appeal in which she resides. There are five appellate divisions in the state. The district with the least number of counties contains 2 counties,[6] and the district with the most number of counties contains 32.[7]

This bill amends s. 390.01114(4)(a), F.S., to allow the minor to petition any circuit court in the judicial circuit that she resides in. There are 20 judicial circuits in the state, ranging in size from 1 to 7 counties.

[5] Section 390.01114(2)(d), F.S.
[6] The Third District contains Dade and Monroe counties.
[7] The First District is bounded by Escambia County in the West, Duval County in the East, and Levy County in the South.

**Judicial Waiver - Time Limits**

Section 309.01114(4)(b), F.S., provides that a court must rule on a petition for judicial waiver within 48 hours unless the minor requests an extension of time.[8] If the court does not rule on the petition within the 48 hour period, the petition is granted and the notice requirement is waived.[9]

This bill amends s. 390.01114(4)(b), F.S., to provide that a court must rule on the petition within 5 days unless the minor requests an extension of time. If the court fails to rule in that 5 days and no extension has been granted, the petition is not granted and the notice requirement is not waived.

Additionally, this bill provides, if the court has failed to rule within the 5 days, the minor may immediately petition the chief judge of the circuit for a hearing. The chief judge must ensure that a hearing is held within 48 hours after the receipt of the minor's petition to the chief judge, and that an order granting or denying the waiver is issued with 24 hours after such hearing.

This bill also adds that a court's ruling need not be a final order if the court deems that it needs more information. In such case, the court must enter a final order within 14 days after the petition by the minor has been filed. If the petition is not granted, the minor has a right to an appeal. The appellate court must rule within 7 days after receipt of the appeal, but the appellate court may remand the case with further instructions to the trial court for a ruling within 7 days after the remand.[10] This bill specifies that the standard of review by the appellate court is "abuse of discretion," accordingly the appellate court may not base its opinion on the weight of the evidence.[11]

**Judicial Waiver - Maturity**

Section 309.01114(4)(c), F.S., provides that the court must issue a judicial waiver (allowing termination of the pregnancy without notice to a parent or guardian) if the court finds, by clear and convincing evidence,[12] that the minor is sufficiently mature to make the decision to terminate her pregnancy. At the hearing, the court must hear evidence relating to the emotional development, maturity, intellect, and understanding of the minor, must provide for a written transcript, and must issue written and specific factual findings and legal conclusions.[13]

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[8] Section 390.01114(4)(b), F.S.
[9] Section 390.01114(4)(b), F.S.
[10] In the case of *In re: Doe*, 30 Fla. L. Weekly D2575 (Fla. 2nd DCA 2005), the Second District Court of Appeal concluded that the trial court had not properly prepared a final order detailing the evidence and the court's reasoning. Due to the time constrains within the Act the court ordered the immediate issuance of a judicial waiver rather than remand for a new hearing.
[11] In the case of *In re: Doe*, 31 Fla. L. Weekly D560 (Fla. 1st DCA 2006), Judge Hawkes noted in dissent:

> The majority acknowledges a trial court's findings of fact that are supported by competent, substantial evidence are due great deference. However, most of the majority opinion outweighs the facts found by the trial court to reach a different conclusion. Because appellate courts are not permitted to reweigh the trial court's factual findings, I would affirm.

[12] "Clear and convincing evidence" is described as:

> This intermediate level of proof entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy. [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be 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.

*Inquiry Concerning Davey*, 645 So. 2d 398 (Fla. 1994).
[13] Section 390.01114(4)(e), F.S.

This bill amends s. 309.01114(4)(c), F.S., to specify the factors that a court must consider when making a determination regarding maturity. The factors include: age; overall intelligence; emotional stability; credibility and demeanor as a witness; ability to accept responsibility; ability to assess the future impact of her present choices; and her ability to understand and explain the medical consequences of the abortion and apply that understanding to her decision. The court must also consider whether there has been any undue influence by another on the minor's decision to abort her pregnancy.

**Judicial Waiver - Best Interest Standard**

Section 309.01114(4)(d), F.S., provide that the court must issue a judicial waiver (allowing termination of the pregnancy without notice to a parent or guardian) if the court finds, by a preponderance of the evidence, that there is evidence of child abuse or sexual abuse of the minor by one or more parents or by a guardian. The court must also issue a judicial waiver if the court finds that "notification of a parent or guardian is not in the best interest" of the minor.

This bill amends s. 309.01114(4)(d), F.S., regarding the best interest standard, to require that evidence of the best interest of the minor must be "clear and convincing." The bill also limits the best interest provision to provide that it "must not include financial best interest or considerations, or the potential financial impact on the minor or her family if she does not terminate her pregnancy."[14]

**State Reporting**

Section 309.01114(6), F.S., requires the Supreme Court, through the office of the State Courts Administrator, to report each year by February 1st to the Governor, the President of the Senate, and the Speaker of the House of Representatives on the number of petitions filed for judicial waiver for the prior year, and the timing and manner of disposal of those petitions by each circuit court.

This bill amends the reporting requirement to require that the reason for each waiver granted be included in the report.

**Mandatory Child Abuse Reporting**

Section 39.201, F.S., requires that any person who knows, or has reasonable cause to suspect, that a child is abused, abandoned, or neglected by a parent, legal custodian, caregiver, or other person responsible for the child's welfare, must report such knowledge or suspicion to the Department of Children and Families. Certain professionals must give their name when making the report; that is, they cannot make an anonymous report. Judges are included in the list of such professionals. The Parental Notice of Abortion Act does not currently contain any specific requirement regarding the mandatory reporting of child abuse. The fact that a minor is pregnant will, in some instances, lead to a finding that such pregnancy is a result of abuse that warrants prosecution.

This bill creates subsection (7) in s. 309.01114, F.S., to reaffirm the requirement in current law that any person who knows or has reasonable cause to suspect that a child has been abused must report that information to the Department of Children and Families pursuant to the mandatory reporting requirements of s. 39.201, F.S.

C. SECTION DIRECTORY:

Section 1 amends s. 390.01114, F.S., relating to parental notice of the termination of a minor's pregnancy.

Section 2 provides an effective date of July 1, 2006.

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[14] In the case of *In re: Doe*, 30 Fla. L. Weekly D2575 (2nd DCA 2005), the Second District Court of Appeal reversed a trial court and ordered that a minor be granted a judicial waiver. In part, the minor alleged that it was in her best interest to not notify her parents of the pregnancy because she believed that they would ostracize her from the home, thereby causing her financial harm.

## 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:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

In general, parental notification laws do not violate the United States Constitution.[15]

Florida previously enacted a statutory parental notification law. The Florida Supreme Court ruled that the law violated the right to privacy in the Florida Constitution.[16] In response to the ruling, the 2004 Legislature passed HJR 1, proposing an amendment to the Florida constitution that specifically allows the legislature to enact a statute regarding parental notification. The joint resolution, adopted by the electorate in the November 2004 general election,[17] provides:

> ARTICLE X SECTION 22. Parental notice of termination of a minor's pregnancy.--The legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's

[15] *Ayotte v. Planned Parenthood of Northern New England*, 126 S.Ct. 961 (2006)
[16] *North Florida Women's Health and Counseling Services v. State*, 866 So. 2d 612 (Fla. 2003).
[17] The vote was 64.7% in favor of the amendment. See http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/2/2004&DATAMODE=

pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.

Timeframe for Review

The bill provides that a minor seeking judicial waiver of the notice requirement may petition any circuit court in the judicial circuit in which she resides. Further, the bill provides that a court must rule on the petition within 5 days unless the minor requests an extension of time.

The bill further provides that a court's ruling need not be a final order if the court deems it needs more information, but the court must enter a final order within 14 days after the petition by the minor has been filed. If the petition is not granted, the minor has a right to an appeal. The appellate court must rule within 7 days after receipt of the appeal, but the appellate court may remand the case with further instructions to the trial court for a ruling within 7 days after the remand. The standard of review of the trial court on appeal is an abuse of discretion standard, and the trial court may not be reversed based on the weight of the evidence presented to the circuit court.

The Supreme Court in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) addressed a situation in which 5 days were permitted by the trial court in ruling on a petition for a judicial waiver, and overall the process could have taken 22 days from filing of petition to ruling by an appellate court to resolve. The Court concluded that 22 days was "plainly insufficient to invalidate the statute on its face."[18]

It may be possible under this bill for there to be 28 days from the filing of petition to final ruling by an appellate court.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 22, 2006, the Civil Justice Committee adopted five amendments to the bill. Four of the amendments made editorial changes. The substantive amendment removed a 48 hour limitation on a minor's petition for a hearing with the circuit's chief judge when a ruling has not been entered within five days.

The bill was then reported favorably with a committee substitute.

[18] *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990).

CHAMBER ACTION

The Civil Justice Committee recommends the following:

**Council/Committee Substitute**

Remove the entire bill and insert:

A bill to be entitled

An act relating to parental notification of termination of a minor's pregnancy; amending s. 390.01114, F.S.; amending a definition; providing procedural requirements for actual notice given by telephone; providing procedural requirements for certain waivers of notice; revising the procedures for judicial waiver of notice; revising evidentiary standards for a court determining judicial waiver of notice; providing factors with which a court determines whether a minor is sufficiently mature; revising the best interest standard; requiring the Supreme Court to include in reports reasons for judicial waiver of notice; providing for the application of mandatory child abuse reporting provisions; providing an effective date.

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

Section 1. Section 390.01114, Florida Statutes, is amended to read:

390.01114 Parental Notice of Abortion Act.--

(1) SHORT TITLE.--This section may be cited as the "Parental Notice of Abortion Act."

(2) DEFINITIONS.--As used in this section, the term:

(a) "Actual notice" means notice that is given directly, in person or by telephone, to a parent or legal guardian of a minor, by a physician, at least 48 hours before the inducement or performance of a termination of pregnancy, and documented in the minor's files.

(b) "Child abuse" has the same meaning as s. 39.0015(3).

(c) "Constructive notice" means notice that is given in writing, signed by the physician, and mailed at least 72 hours before the inducement or performance of the termination of pregnancy, to the last known address of the parent or legal guardian of the minor, by regular mail and by certified mail, return receipt requested, and delivery restricted to the parent or legal guardian. After the 72 hours have passed, delivery is deemed to have occurred.

(d) "Medical emergency" means a condition that, on the basis of a physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate termination of her pregnancy to avert her death, or for which a delay in the termination of her pregnancy will create serious risk of substantial and irreversible impairment of a major bodily function.

(e) "Sexual abuse" has the meaning ascribed in s. 39.01.

(f) "Minor" means a person under the age of 18 years.

(3) NOTIFICATION REQUIRED.--

(a) Actual notice shall be provided by the physician performing or inducing the termination of pregnancy before the performance or inducement of the termination of the pregnancy of a minor. The notice may be given by a referring physician. The physician who performs or induces the termination of pregnancy must receive the written statement of the referring physician certifying that the referring physician has given notice. If actual notice is not possible after a reasonable effort has been made, the physician performing or inducing the termination of pregnancy or the referring physician must give constructive notice. Notice given under this subsection by the physician performing or inducing the termination of pregnancy must include the name and address of the facility providing the termination of pregnancy, the name of the physician providing notice. Notice given under this subsection by a referring physician must include the name and address of the facility where he or she is referring the minor and the name of the physician providing notice. If actual notice is provided by telephone, the physician must actually speak with the parent or guardian, and must record in the minor's medical file the name of the parent or guardian provided notice, the phone number dialed, and the date and time of the call. If constructive notice is given, the physician must document that notice by placing copies of any document related to the constructive notice, including, but not limited to, a copy of the letter and the return receipt, in the minor's medical file. Actual notice given by telephone shall be confirmed in writing, signed by the physician, and mailed to the last known address of the parent or legal guardian of the minor,

by regular mail and by certified mail, return receipt requested, and delivery restricted to the parent or legal guardian.

(b) Notice is not required if:

1. In the physician's good faith clinical judgment, a medical emergency exists and there is insufficient time for the attending physician to comply with the notification requirements. If a medical emergency exists, the physician must make reasonable attempts to contact the parent or legal guardian, may proceed but must document reasons for the medical necessity in the patient's medical records, and must provide notice directly, in person, or by telephone, to the parent or legal guardian, with details of the medical emergency and any additional risks to the minor. If the parent or legal guardian has not been notified within 24 hours of the termination of the pregnancy, the physician must provide notice in writing including details of the medical emergency and any additional risks to the minor, signed by the physician, to the last known address of the parent or legal guardian of the minor, by regular mail and by certified mail, return receipt requested, and delivery restricted to the parent or legal guardian;

2. Notice is waived in writing by the person who is entitled to notice and such waiver is notarized, dated not more than 30 days before the termination of pregnancy, and contains a specific waiver of the right of the parent or legal guardian to notice of the minor's termination of pregnancy;

3. Notice is waived by the minor who is or has been married or has had the disability of nonage removed under s. 743.015 or a similar statute of another state;

4. Notice is waived by the patient because the patient has a minor child dependent on her; or

5. Notice is waived under subsection (4).

(c) Violation of this subsection by a physician constitutes grounds for disciplinary action under s. 458.331 or s. 459.015.

(4) PROCEDURE FOR JUDICIAL WAIVER OF NOTICE.--

(a) A minor may petition any circuit court in the ~~a~~ judicial circuit ~~within the jurisdiction of the District Court of Appeal~~ in which she resides for a waiver of the notice requirements of subsection (3) and may participate in proceedings on her own behalf. The petition may be filed under a pseudonym or through the use of initials, as provided by court rule. The petition must include a statement that the petitioner is pregnant and notice has not been waived. The court shall advise the minor that she has a right to court-appointed counsel and shall provide her with counsel upon her request at no cost to the minor.

(b)1. Court proceedings under this subsection must be given precedence over other pending matters to the extent necessary to ensure that the court reaches a decision promptly. The court shall rule, and issue written findings of fact and conclusions of law, within 5 days ~~48 hours~~ after the petition is filed, except that the 5-day ~~48-hour~~ limitation may be extended at the request of the minor. If the court fails to rule within the 5-day ~~48-hour~~ period and an extension has not been requested, the petition is not granted, and the notice requirement is not waived. The minor may then immediately

petition for a hearing upon the expiration of the 5-day period to the chief judge of the circuit, who must ensure a hearing is held within 48 hours after receipt of the minor's petition and an order entered within 24 hours after the hearing.

2. A court's ruling need not be a final order if the court deems it needs more information, but a final order must be entered within 14 days after the petition is filed. If the circuit court does not grant judicial waiver of notice, the minor has the right to appeal. An appellate court must rule within 7 days after receipt of appeal, but a ruling may be remanded with further instruction for a ruling within 7 days after the remand. The reason for overturning a ruling on appeal must be based on abuse of discretion by the circuit court and may not be based on the weight of the evidence presented to the circuit court since the proceeding is a nonadversarial proceeding.

(c) If the court finds, by clear and convincing evidence, that the minor is sufficiently mature to decide whether to terminate her pregnancy, the court shall issue an order authorizing the minor to consent to the performance or inducement of a termination of pregnancy without the notification of a parent or guardian. If the court does not make the finding specified in this paragraph or paragraph (d), it must dismiss the petition. Factors a court shall consider when determining whether a minor is sufficiently mature include, but are not limited to:

1. The minor's:

a. Age.

b. Overall intelligence.

c. Emotional stability.

d. Credibility and demeanor as a witness.

e. Ability to accept responsibility.

f. Ability to assess the future impact of her present choices.

g. Ability to understand and explain the medical consequences of abortion and apply that understanding to her decision.

2. Whether there has been any undue influence by another on the minor's decision to have an abortion.

(d) If the court finds, by a preponderance of the evidence, that there is evidence of child abuse or sexual abuse of the petitioner by one or both of her parents or her guardian, or by clear and convincing evidence that the notification of a parent or guardian is not in the best interest of the petitioner, the court shall issue an order authorizing the minor to consent to the performance or inducement of a termination of pregnancy without the notification of a parent or guardian. The best interest standard must not include financial best interest or considerations, or the potential financial impact on the minor or her family if she does not terminate her pregnancy. If the court finds evidence of child abuse or sexual abuse of the minor petitioner by any person, the court shall report the evidence of child abuse or sexual abuse of the petitioner, as provided in s. 39.201. If the court does not make the finding specified in this paragraph or paragraph (c), it must dismiss the petition.

(e) A court that conducts proceedings under this section shall provide for a written transcript of all testimony and proceedings and issue written and specific factual findings and legal conclusions supporting its decision and shall order that a confidential record be maintained, as required under s. 390.01116. At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect, and understanding of the minor, and all other relevant evidence. All hearings under this section, including appeals, shall remain confidential and closed to the public, as provided by court rule.

(f) An expedited appeal shall be available, as the Supreme Court provides by rule, to any minor to whom the circuit court denies a waiver of notice. An order authorizing a termination of pregnancy without notice is not subject to appeal.

(g) No filing fees or court costs shall be required of any pregnant minor who petitions a court for a waiver of parental notification under this subsection at either the trial or the appellate level.

(h) No county shall be obligated to pay the salaries, costs, or expenses of any counsel appointed by the court under this subsection.

(5) PROCEEDINGS.--The Supreme Court is requested to adopt rules and forms for petitions to ensure that proceedings under subsection (4) are handled expeditiously and in a manner consistent with this act. The Supreme Court is also requested to adopt rules to ensure that the hearings protect the minor's confidentiality and the confidentiality of the proceedings.

(6) REPORT.--The Supreme Court, through the Office of the State Courts Administrator, shall report by February 1 of each year to the Governor, the President of the Senate, and the Speaker of the House of Representatives on the number of petitions filed under subsection (4) for the preceding year, and the timing and manner of disposal of such petitions by each circuit court. For each petition resulting in a waiver of notice, the reason for the waiver shall be reported.

(7) MANDATORY CHILD ABUSE REPORTING.--The requirements of s. 39.201 relating to mandatory reports of child abuse apply to this section.

Section 2. This act shall take effect July 1, 2006.

# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1621 Coastal Properties Disclosure Statements
**SPONSOR(S):** Mayfield
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1948

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Civil Justice Committee | 5 Y, 0 N | Blalock | Bond |
| 2) Agriculture & Environment Appropriations Committee | 11 Y, 0 N | Dixon | Dixon |
| 3) Justice Council | | | |
| 4) | | | |
| 5) | | | |

## SUMMARY ANALYSIS

The Department of Environmental Protection has established coastal construction control lines along the sand beaches of the state fronting on the Atlantic Ocean, Gulf of Mexico, and the Straits of Florida. The purpose of these lines is to define the portions of the beach-dune system that are subject to severe erosion, and to prohibit new construction seaward of this line unless granted a special permit by the Department of Environmental Protection.

This bill requires the seller of property subject to the coastal construction control line to present a prospective purchaser with a specific disclosure statement providing that the property is subject to erosion and to federal, state, or local regulations.

The bill also provides that failure to deliver the disclosure will not effect the enforcement of the sale and purchase contract, create a right of recession, or impair the property's title.

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

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill increases the disclosure requirements that a seller of coastal property must provide to a prospective purchaser.

B. EFFECT OF PROPOSED CHANGES:

**Present Situation**

The Department of Environmental Protection (department) has established coastal construction control lines, as required by statute, on a county basis along the sand beaches of the state fronting on the Atlantic Ocean, Gulf of Mexico, and the Straits of Florida.[1] The purpose of these lines is to define that portion of the beach-dune system that is subject to severe fluctuations based on a 100-year storm surge, storm waves, or other predictable weather conditions.[2] Upon the recording of the survey showing the location of a beach erosion control line, title to all lands seaward of the erosion control line are deemed to be vested in the state by right of its sovereignty.[3] Property seaward of the coastal construction control line can be subject to coastal erosion and to federal, state, or local regulations that govern coastal property, such rigid coastal protection structures[4], beach nourishment, and protection of marine turtles.

Current law requires that a seller of real property located partially or totally seaward of the coastal construction control line provide to the purchaser an affidavit, or a survey, that discloses to the purchaser the location of the coastal control line on the property being conveyed.[5] This disclosure requirement was established by the legislature to ensure that purchasers in coastal areas were aware that such lands are subject to frequent and severe fluctuations due to erosion.[6] Critical erosion affects the value of property a great deal more than is often acknowledged. The amount of depression of coastal property values due to erosion over the next twenty years for properties along the Atlantic coast of the United States has been estimated at between $1.7 and $2.7 billion.[7]

There also exists in the common law a general duty to disclose when a seller is aware of facts materially affecting value or desirability of property, which are not readily observable and are not known to the buyer.[8] Several provisions in current law require the seller to provide specific disclosure statements prior to the sale of real property. A seller must disclose:

- The amount of ad valorem taxes on real property;[9]
- Whether there are homeowners' association covenants;[10]
- Energy performance level for each new residential building[11]; and

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[1] Section 161.053(1)(a), F.S.
[2] Section 161.053(1)(a), F.S.
[3] Section 161.191(1), F.S.
[4] Rigid coastal protection structures are man-made structures or devices in or near the coastal system for the purpose of preventing erosion of the beach or the upland dune system or to protect upland structures from the effects of coastal wave and current activity.
[5] Section 161.57(2), F.S.
[6] Section 161.57(1), F.S.
[7] *Evaluation of Erosion Hazards Summary* A Collaborative Project of The H. John Heinz III Center for Science, Economics and the Environment, (Prepared for the Federal Emergency Management Agency, Contract EMW-97-CO-0375, April 2000) at: http://www.heinzctr.org/NEW_WEB/PDF/erosnsum.pdf#zoom=100 (last visited March 16, 2006).
[8] *Johnson v. Davis*, 449 So.2d 344 (Fla. 3rd DCA 1984)
[9] Section 689.261, F.S.
[10] Section 720.401, F.S.
[11] Section 553.9085, F.S.

- The possibility of increased levels of radon gas.[12]

Contracts for the sale and purchase of a condominium, cooperative, and timeshare interest have several disclosure requirements as well. [13,14,15]

**Effect of Bill**

The bill amends s. 161.57, F.S., pertaining to the "Coastal Properties Disclosure Statement", to require an additional disclosure of a seller of coastal real property that is seaward of the coastal construction control line as defined s. 161.053, F.S. At or prior to closing the seller is required to disclose that:

> The property being purchased may be subject to coastal erosion and certain federal, state, or local regulations that regulate coastal property, including the delineation of the coastal construction control line, rigid coastal protection structures, beach nourishment, and the protection of marine turtles. Additional information can be obtained from the Department of Environmental Protection, including whether there are significant erosion conditions associated with the shore line of the property being purchased.

The disclosure may be set forth in the contract or in a separate writing.

The bill also provides that failure to deliver the disclosure, affidavit, or survey required by s. 161.57, F.S., shall not effect the enforcement of sale and purchase contract by either party, create a right of recession by the purchaser, or impair the property's title.

C. SECTION DIRECTORY:

Section 1 amends s. 161.57, F.S., to provide disclosure requirements for property located seaward of the coastal construction control line.

Section 2 provides an effective date of October 1, 2006.

## 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:

[12] Section 404.056, F.S.
[13] Section 718.503, F.S.
[14] Section 719.503, F.S.
[15] Section 721.06, F.S.

None.

D. FISCAL COMMENTS:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take 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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

A bill to be entitled

An act relating to coastal properties disclosure statements; amending s. 161.57, F.S.; requiring sellers of certain coastal properties to provide a disclosure statement to prospective purchasers; providing language for the disclosure statement; preserving the enforceability of certain contracts and title conveyances; providing an effective date.

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

Section 1. Section 161.57, Florida Statutes, is amended to read:

161.57 Coastal properties disclosure statement.--

(1) The Legislature finds that it is necessary to ensure that the purchasers of interests in real property located in coastal areas partially or totally seaward of the coastal construction control line as defined in s. 161.053 are fully apprised of the character of the regulation of the real property in such coastal areas and, in particular, that such lands are subject to frequent and severe fluctuations.

(2) At or prior to the time a seller and a purchaser both execute a contract for the sale and purchase of any interest in real property located either partially or totally seaward of the coastal construction control line as defined in s. 161.053, the seller shall provide to the prospective purchaser the following disclosure, which may be set forth in the contract or in a separate writing:

The property being purchased may be subject to coastal erosion and to federal, state, or local regulations that govern coastal property, including the delineation of the coastal construction control line, rigid coastal protection structures, beach nourishment, and protection of marine turtles. Additional information can be obtained from the Florida Department of Environmental Protection, including whether there are significant erosion conditions associated with the shoreline of the property being purchased.

(3) ~~(2)~~ Unless otherwise waived in writing by the purchaser, at or prior to the closing of any transaction where an interest in real property located either partially or totally seaward of the coastal construction control line as defined in s. 161.053 is being transferred, the seller shall provide to the purchaser an affidavit, or a survey meeting the requirements of chapter 472, delineating the location of the coastal construction control line on the property being transferred.

(4) A seller's failure to deliver the disclosure, affidavit, or survey required by this section shall not impair the enforceability of the sale and purchase contract by either party, create any right of rescission by the purchaser, or impair the title to any such real property conveyed by the seller to the purchaser.

Section 2. This act shall take effect October 1, 2006.

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HR 1627 Unanimity of Jury Recommendations in Death Penalty Cases
**SPONSOR(S):** Kyle
**TIED BILLS:** **IDEN./SIM. BILLS:**

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Criminal Justice Committee | 6 Y, 0 N | Kramer | Kramer |
| 2) Justice Council | | | |
| 3) | | | |
| 4) | | | |
| 5) | | | |

### SUMMARY ANALYSIS

Currently, in a case where a defendant has been convicted of a capital felony, after the penalty phase is conducted, the jury considers statutory aggravating and mitigating factors and recommends to the judge a sentence of death or life imprisonment. The jury's recommendation of death requires a majority vote of the twelve jurors.

In an opinion released in October 2005, the Florida Supreme Court recommended that the Legislature amend the death penalty statute to require unanimity in the jury's recommendations.

This House resolution contains a number of "whereas" clauses and provides that the "House of Representatives believes that the public policy of this state should be that unanimous jury recommendations not be required in death penalty cases."

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any House principles.

B. EFFECT OF PROPOSED CHANGES:

***The Furman Decision – Historical Perspective***

In *Furman v. Georgia* the U.S. Supreme Court found that then-existing death penalty statutes constituted cruel and unusual punishment under the Eighth Amendment. (*Furman v. Georgia*, 408 U.S. 238 (1972). Since that landmark decision, the Florida Legislature enacted a new capital sentencing scheme in 1972, which provides for a separate sentencing hearing after conviction or adjudication of guilt of a capital offense. The jury acts in an advisory capacity to the judge, who is the ultimate sentencing authority. Evidence is introduced regarding the defendant's character and the nature of the crime. The jury considers statutory aggravating and mitigating factors and advises the judge whether the sentence should be the death penalty or life imprisonment. The judge independently weighs the aggravating and mitigating factors and, considering the jury's recommendation as well, determines the sentence. The judgment of conviction and sentence of death is subject to automatic review by the Supreme Court of Florida. Section 921.141. F.S.

***Proportionality Review***

In the *State v. Dixon* opinion, upholding the death penalty sentencing procedures enacted by the Legislature in response to *Furman*, the Florida Supreme Court indicated that automatic appellate review in death cases, and comparison with other cases in which the death penalty was handed down, could serve to control and channel the discretion in sentencing the *Furman* court struck down. *State v. Dixon*, 283 So.2d 1 (Fla. 1973).

The Florida Supreme Court gleaned two points from the *Furman* decision: 1) the opinion did not abolish capital punishment; and 2) "the mere presence of discretion in the sentencing procedure cannot render the procedure violative of *Furman v. Georgia*; it was rather the quality of discretion and the manner in which it was applied that dictated the rule of law which constitutes *Furman*." (*Id.*at 6) "If the judicial discretion possible and necessary under Fla. Stat. s. 921.141, F.S.A., can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of *Furman v. Georgia* has been met." (*Id.*at 7)

Proportionality review is the comparison of one case in which the defendant was sentenced to death with other death cases. The Florida Supreme Court engages in proportionality review in all death penalty cases. The origin of proportionality review is found in the *Dixon* case.

The *Dixon* court found that the Florida Legislature had provided a death penalty sentencing system whereby aggravating and mitigating factors are defined, and the weighing process is left to the carefully scrutinized judgment of jurors and judges. (*Id.* at 7)

The court explained the five steps between conviction of a defendant in a capital case and imposition of the death penalty:

- The question of punishment is reserved for a post-conviction hearing – relevant evidence, which may not have been heard during the guilt phase, can be heard as to the issue of punishment.
- The jury must make a recommendation (unless waived by the defendant), as a separate and distinct issue from the question of guilt. The question before the jury in the penalty phase is "whether the crime was accompanied by aggravating circumstances sufficient to require death, or whether there were mitigating circumstances which require a lesser penalty." (*Id.* at 8)

- The trial judge decides the sentence – guided by, but not bound by, the jury's recommendation. In the court's view, this was intended as a safeguard against the inflamed emotions of jurors – the appropriate sentence is "viewed in the light of judicial experience." The court must weigh the aggravating and mitigating factors, as the jury did, in handing down the sentence.
- The reasons for the sentence must be set forth in writing by the judge. Although the statute did not require it, in its opinion, the court required that life sentences be set out in writing as well as sentences of death, "to provide the opportunity for meaningful review." (*Id.* at 8)
- Automatic review of the conviction and death sentence by the Florida Supreme Court was viewed by the *Dixon* court as "evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes." (*Id.* at 8)

The court opined that the "most important safeguard" in the sentencing scheme is the aggravating and mitigating circumstances which "must be determinative of the sentence imposed." (*Id.*at 8) When one or more of the aggravating factors is found (beyond a reasonable doubt), death is presumed to be the appropriate sentence, unless the aggravating factor is overcome by one or more mitigating factors.

The court stated: "It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in *Furman v. Georgia, Supra*, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all." (*Id.* at 10)

In *Proffitt v. Florida*, 428 U.S. 242 (1976), the U.S. Supreme Court seemed to rely on the Florida Supreme Court's promise to give each death case a meaningful review, including proportionality review, when the *Proffitt* court upheld Florida's new death penalty sentencing structure. The court stated: "[T]he Florida statute has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases....In fact, it is apparent that the Florida court has undertaken responsibility to perform its function of death sentence review with a maximum of rationality and consistency. For example, it has several times compared the circumstances of a case under review with those of previous cases in which it has assessed the imposition of death sentences (citations omitted)." (*Id.* at 258, 259)

In his article "The Most Aggravated and Least Mitigated Murders: Capital Proportionality Review in Florida," *11 St. Thomas L. Rev. 207* (1999), Ken Driggs makes the following observations: "Jury death recommendations on close votes are more likely to see their death sentences reduced to life by the Florida Supreme Court. The court has often reduced death sentences to life where they were imposed on a 7-5 jury recommendation. Death sentences are more commonly imposed on an 8-4 jury recommendation. A 9-3 jury death recommendation still represents a significant sentiment for life and often comes to the Florida Supreme Court on proportionality review. Not surprisingly, when a jury recommends death by a 10-2, 11-1, or 12-0 vote the sentence is very likely to withstand proportionality review." (*Id.* at 267-270.)

***The Jury's Role in Capital Cases in Florida – A "Hybrid" System***

Florida has what is commonly called a "hybrid" system for sentencing in capital cases. That is, the jury acts in an advisory capacity to the sentencing judge and the judge has the ability to "override" the jury's recommendation of life or death.

In Florida, the jury in a capital case makes a sentencing recommendation – death or life imprisonment – unless the jury is waived. This recommendation is by majority vote, and is based on the weighing of aggravating and mitigating factors, as well as argument presented during the penalty phase of the trial.

The judge must then decide the appropriate sentence, independently weighing the jury's recommendation along with the aggravating and mitigating factors. The sentence, and the reasons for it, must be reduced to writing so that the Florida Supreme Court can engage in a meaningful review. The judge may sentence a defendant in a different manner than the jury recommends – this is known as an "override."

The Florida Supreme Court must review all cases in which the death penalty has been imposed. *Article V, section (3),(b)(1), Florida Constitution.* The Court scrutinizes overrides very carefully. The recommendation of the jury must be given great weight in the trial judge's decision-making process on the sentence handed down.

What is referred to as the Tedder "Great Weight" Standard was announced by the Florida Supreme Court in *Tedder v. State*, 322 So.2d 908 (Fla. 1975). In that case, the Court determined that "[a] jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." (*Id.* at 910). The same consideration by the sentencing judge is expected of a death recommendation as a life recommendation. *Grossman v. State*, 525 So.2d 833, 839, n.1 (Fla. 1988).

It has been reported that the Supreme Court of Florida has vacated "roughly three-fourths of death sentences imposed in the face of contrary jury recommendations." (Matters of Life or Death: The Sentencing Provisions in Capital Punishment Statutes, James R. Acker and Charles S. Lanier, *31 Crim Law Bull 19, at 22* (1995)).

***Jury Votes in Florida Death Penalty Cases, 1990-1999***

The Clerk of the Supreme Court of Florida has compiled data from direct appeals in capital cases disposed of by the Court during the years 1990 through 1999 which reflects the breakdown of the jury votes in those cases. This data is reported as follows:

**Jury Recommendations for Death Sentence**

| Jury Vote | Number of Sentences | Percentage |
|---|---|---|
| 12-0 | 77 | 15.9% |
| 11-1 | 59 | 12.2% |
| 10-2 | 59 | 12.2% |
| 9-3 | 69 | 14.3% |
| 8-4 | 72 | 14.9% |
| 7-5 | 64 | 13.2% |
| 6-6 | 2 | 0.4% |
| 5-7 | 1 | 0.2% |
| 4-8 | 1 | 0.2% |
| vote unknown, life rec. | 30 | 6.2% |
| jury rec. waived by defendant | 19 | 3.9% |
| death sentence imposed by judge on remand | 18 | 3.7% |
| vote not recorded or not available | 13 | 2.7% |
| TOTAL | 484 | 100% |

*Clerk of the Supreme Court of Florida,* correspondence dated November 9, 2000.

The Clerk cautions that the votes could only be determined by doing a manual count from data that was not stored in a computer database. Although the Clerk indicates that there were some "judgment calls" made with regard to how to record the votes, they were minimal and, in the Clerk's opinion, not statistically significant. The total number of jury votes and corresponding sentences (484) exceeds the total number of initial, resentence and retrial cases disposed of by the Court during that time period (467). This reflects multiple death sentences in several cases, with different jury votes on different counts.

***Ring v. Arizona***

On June 24, 2002, the United States Supreme Court handed down its decision in *Ring v. Arizona*, a death penalty case that has had a ripple effect all over the country. In a 7-2 decision, the Court ruled that juries rather than judges acting alone must make crucial factual determinations that subject a convicted murderer to the death penalty. The decision was clear as to its application to the Arizona death penalty sentencing scheme wherein the judge, without any input from the jury beyond the verdict of guilty on the murder charge, made the sentencing decision. The Court found that the Arizona sentencing scheme violated the defendant's 6th Amendment right to a jury trial. *Ring v. Arizona*, 536 U.S. 584 (2002).

The Court was not clear about whether Florida's "hybrid" sentencing scheme was effected by the *Ring* decision. Florida, Alabama, Delaware, and Indiana provided for a recommendation of death or life from the jury, but the judge made the ultimate decision after considering the jury recommendation.

The Florida Supreme Court has not decided the overall applicability of *Ring* to our death penalty sentencing scheme, other than to clearly state that *Ring* does not apply retroactively in Florida.

***State v. Steele***

The Florida Supreme Court issued a ruling on October 12, 2005, in which the court stated: "Finally, we express our considered view, as the court of last resort charged with implementing Florida's capital sentencing scheme, that in light of developments in other states and at the federal level, the Legislature should revisit the statute to require some unanimity in the jury's recommendations." *State v. Steele*, No. SC04-802 (Fla. 2005) [Justice Cantero, writing for the majority; Wells, Lewis, Quince and Bell, JJ., concurring; C.J. Pariente wrote separately to concur in part and dissent in part, Anstead, J. concurring. Both Justices in the minority concurred with Justice Cantero's suggestions to the Legislature.]

The *Steele* case is a product of the post-*Ring* efforts by a trial court, in a death case, to comply with *Ring*. The trial judge imposed two requirements to address concerns with the sentencing scheme in death cases, which were unresolved by the Florida courts at the time of the trial.

The trial court required: 1) the State to provide advance notice of the aggravating factors upon which it would rely at the penalty phase, and 2) an interrogatory verdict form at the penalty phase. The trial court required the jurors to specify each aggravator found and the vote for that aggravator. A majority vote was required to find an aggravator proven.

As to those two issues, the Florida Supreme Court held that:

1. Notice of Aggravating Factors: Because of the expansion of the statutory aggravators (8 additional in the last several years), and because there is no express prohibition on requiring notice, the trial court did not violate an established principle of law. Further, notice does not constitute a miscarriage of justice, nor is the notice requirement inequitable.

2. Special Verdict on Aggravators: *Ring* does not require it; Florida's current sentencing statute only requires a majority of the jury to agree that an aggravator has been proven – not necessarily the same one; therefore the trial court's requirement constituted a departure from the essential requirements of law.

The Court then reached beyond the analysis and holding in the case before it, and included a section in the opinion entitled "The Need for Legislative Action." The court stated:

> Florida is now the only state in the country that allows a jury to decide that aggravators exist *and* to recommend a sentence of death by a mere majority vote. Of the 38 states that retain the death penalty, 35 require, *at least*, a unanimous jury finding of aggravators. Of these, 24 states require by statute *both* that the jury unanimously agree on the existence of aggravators *and* that it unanimously recommend the death penalty. Three states require by statute unanimity only as to the jury's finding of aggravators. Seven more states have judicially imposed a requirement *at least* that the aggravators be determined unanimously. Of these seven states, five ... require that *both* the aggravators *and* the recommendation of death be unanimous. ... Although Missouri law is less clear, it appears that a jury at least must unanimously find the aggravators. ... That leaves Utah and Virginia. In those states, the jury need not find each aggravator unanimously, but the jury must unanimously recommend the death penalty. ... Finally, the federal government, when imposing the death penalty, also requires a unanimous jury." *Id.*

The court stated that "many courts and scholars have recognized the value of unanimous verdicts." The court concludes its discussion as follows:

> The bottom line is that Florida is now the only state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote both whether aggravators exist and whether to recommend the death penalty. Assuming that our system continues to withstand constitutional scrutiny, we ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state.

The opinion did not specifically indicate what constitutional deficiency may arise to cast Florida's death penalty statute into jeopardy.

***Attorney General's Letter***

In a letter written to the Speaker of the House of Representatives following the *Steele* decision, the Attorney General recommended that the Legislature not change its death penalty sentencing scheme. The Attorney General noted that the jury recommendations in several well-known murder cases were not unanimous including Theodore Bundy (10-2 recommendation), Aileen Wuornos (10-2 recommendation) and Joe Nixon (10-2 recommendation).

***House Resolution***

This House resolution contains the following "wheras" clauses:

> WHEREAS, the Florida Supreme Court in its opinion in the case of State of Florida v. Alfredie Steele, SC04-802, issued October 12, 2005, suggested that "in light of developments in other states and at the federal level, the Legislature should revisit the statute to require some unanimity in the jury's recommendations" in death penalty cases, and
>
> WHEREAS, the Florida Supreme Court quoted the view of the Supreme Court of Connecticut, which stated in part "[t]he requirement of a unanimous verdict can only assist the capital sentencing jury in reaching such a reasoned decision," and
>
> WHEREAS, the House of Representatives notes that the State of Connecticut has executed only one person since 1976 and that person was a volunteer, and
>
> WHEREAS, the House of Representatives finds that no majority opinion of the United States Supreme Court has suggested that unanimous agreement of a twelve-member jury was required, recommended, or advisable for the determination of whether a death sentence is an appropriate punishment for the commission of a capital crime, and
>
> WHEREAS, the United States Supreme Court has upheld Florida's existing death penalty statute as constitutional in Proffitt v. Florida, 428 U.S. 242 (1976), and the statute has been repeatedly upheld by state and federal appellate courts against constitutional attacks for the past 29 years, and

WHEREAS, the Florida Supreme Court acknowledges that the question of whether Florida's death penalty should require unanimous agreement of the jury before it can be imposed is a matter of public policy for the Legislature to determine, and

WHEREAS, the House of Representatives finds that a requirement of unanimity among twelve jurors is not the proper mechanism to determine whether a death sentence is an appropriate sentence in individual cases because a requirement of unanimity vests with a single juror the ability to override the reasoned judgment of all other jurors weighing and considering the same facts and circumstances, and

WHEREAS, the House of Representatives finds that some of Florida's most notorious and heinous murderers, including Theodore Bundy and Aileen Wuornos, were sentenced to death and executed when the jury recommendation of death was less than unanimous and that these death sentences were just and appropriate despite the lack of unanimity, NOW, THEREFORE

HR 1627 provides that the "House of Representatives believes that the public policy of this state should be that unanimous jury recommendations not be required in death penalty cases."

C. SECTION DIRECTORY:

A House resolution is not divided into sections.

## 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:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

House Resolution

A resolution declaring the House of Representatives' view of what the public policy of this state regarding unanimity of jury recommendations in death penalty cases should be.

WHEREAS, the Florida Supreme Court in its opinion in the case of State of Florida v. Alfredie Steele, SC04-802, issued October 12, 2005, suggested that "in light of developments in other states and at the federal level, the Legislature should revisit the statute to require some unanimity in the jury's recommendations" in death penalty cases, and

WHEREAS, the Florida Supreme Court quoted the view of the Supreme Court of Connecticut, which stated in part "[t]he requirement of a unanimous verdict can only assist the capital sentencing jury in reaching such a reasoned decision," and

WHEREAS, the House of Representatives notes that the State of Connecticut has executed only one person since 1976 and that person was a volunteer, and

WHEREAS, the House of Representatives finds that no majority opinion of the United States Supreme Court has suggested that unanimous agreement of a twelve-member jury was required, recommended, or advisable for the determination of whether a death sentence is an appropriate punishment for the commission of a capital crime, and

WHEREAS, the United States Supreme Court has upheld Florida's existing death penalty statute as constitutional in Proffitt v. Florida, 428 U.S. 242 (1976), and the statute has

been repeatedly upheld by state and federal appellate courts against constitutional attacks for the past 29 years, and

WHEREAS, the Florida Supreme Court acknowledges that the question of whether Florida's death penalty should require unanimous agreement of the jury before it can be imposed is a matter of public policy for the Legislature to determine, and

WHEREAS, the House of Representatives finds that a requirement of unanimity among twelve jurors is not the proper mechanism to determine whether a death sentence is an appropriate sentence in individual cases because a requirement of unanimity vests with a single juror the ability to override the reasoned judgment of all other jurors weighing and considering the same facts and circumstances, and

WHEREAS, the House of Representatives finds that some of Florida's most notorious and heinous murderers, including Theodore Bundy and Aileen Wuornos, were sentenced to death and executed when the jury recommendation of death was less than unanimous and that these death sentences were just and appropriate despite the lack of unanimity, NOW, THEREFORE,

Be It Resolved by the House of Representatives of the State of Florida:

That House of Representatives believes that the public policy of this state should be that unanimous jury recommendations not be required in death penalty cases.

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 7091 PCB CJ 06-04 Real Property Electronic Recording
**SPONSOR(S):** Civil Justice Committee, Mahon and others
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 2106

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Civil Justice Committee | 6 Y, 0 N | Shaddock | Bond |
| 2) Transportation & Economic Development Appropriations Committee | 15 Y, 0 N | McAuliffe | Gordon |
| 3) Justice Council | | | |
| 4) | | | |
| 5) | | | |

### SUMMARY ANALYSIS

Current law provides for electronic signatures and electronic notarization of documents, but does not clearly provide for electronic recording of documents that affect real property titles. This bill adopts the Uniform Real Property Electronic Recording Act. The act starts the process towards electronic recording of real property documents with county recorders.

This bill provides county recorders the legal authority to prepare for electronic recording of real property instruments, and authorizes county recorders to begin accepting records in electronic form, storing electronic records, and setting up systems for searching for and retrieving these land records. The bill equates electronic documents and electronic signatures to original paper documents and manual signatures, so that any requirement for originality (paper document or manual signature) is satisfied by an electronic document and signature.

The standards and practices for electronic recording will be promulgated by rule by the Secretary of State after consultation with an advisory council made up of five representatives of county recorders, two representatives of title companies, and two representatives of mortgage lenders.

This bill appears to require insignificant recurring expenditures by the Secretary of State. This bill does not appear to have a fiscal impact on local governments.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill creates additional rulemaking power for the Secretary of State. This bill may lead to decreased administrative burdens on government and on individuals regarding the recording of documents affecting land titles.

B. EFFECT OF PROPOSED CHANGES:

**Background**[1]

The National Conference of Commissioners on Uniform State Laws (NCCUSL), now 114 years old, "provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of the law. NCCUSL's work supports the federal system and facilitates the movement of individuals and the business of organizations with rules that are consistent from state to state."[2] In 2004, the conference finalized and approved the Uniform Real Property Electronic Recording Act ("URPERA"). Currently, the act has been enacted in four states and the District of Columbia, and is filed in the legislature of seven more.[3] The NCCUSL provided the following information regarding the proposed act:[4]

As a result of the enactments of the Uniform Electronic Transactions Act ("UETA")[5] in most states, and the Electronic Signatures in Global National Commerce Act ("E-sign") at the federal level, it is now possible to have sale contracts, mortgage instruments, and promissory notes memorialized in electronic form with the electronic signatures of the parties involved in the transaction. However, real estate transactions require another step not addressed by UETA or E-sign. Real estate transaction documents must be recorded on public records in order to protect the current interest in the real estate and clarify who owns title to the property.

Real estate records establish a chain of title which is based upon the originality and authenticity of the paper documents presented for recording. There must be an orderly conversion of recording offices in the United States for implementation of an electronic recording system. The essential starting point for this process is the URPERA.

URPERA modernizes real property law for the 21st Century. It is designed to help state administrative agencies meet the demands of the public for quick identification of title ownership. It should also streamline the real estate transaction at a benefit to consumers and every facet of the real estate industry.

There are currently certain barriers to using electronic communications to carry on real estate transactions. The law of the states of the United States has many "statute of fraud" requirements that inhibit the use of electronic communications. Statute of fraud requirements put total and express reliance upon paper documents and manual signatures to make transactions enforceable. These same

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[1] The bulk of this analysis is specifically derived from "Uniform Real Property Electronic Recording Act" promulgated by the National Conference of Commissioners on Uniform State Laws in 2004, hereinafter referred to as "NCCUSL". The members of the Drafting Committee on the Uniform Real Property Electronic Recording Act were: David D. Biklen, Owen L. Anderson, Patrick C. Guillot, Carl H. Lisman, James J. White, W. Jackson Willoughby, Lee Yeakel, Arthur R. Gaudio, Fred H. Miller, Lani Liu Ewart, Dale Whitman, William H. Henning, and William J. Pierce.

[2] *Uniform Law Commissioners*, (Mar. 6, 2006) < http://www.nccusl.org/Update/>.

[3] *A few facts about the Uniform Real Property Electronic Recording Act*, (Mar. 6, 2006) <http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-urpera.asp>. Florida is not included in this list.

[4] *Summary, Uniform Real Property Electronic Recording Act*, (Mar. 6, 2006) <http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-urpera.asp>.

[5] Section 668.50, F.S.

requirements have also made it more difficult to develop electronic analogues to transactions in paper that are equally enforceable.

The first step to remedy the problem took place in 1999 when the Uniform Law Commissioners promulgated the UETA. This act adjusted statute of fraud provisions to include electronic "records" and "signatures" for the memorialization of all kinds of transactions, including basic transactions in real estate. It is possible to have sale contracts, mortgage instruments (in whatever form a jurisdiction uses) and promissory notes memorialized in electronic form with electronic signatures that will now be treated the equal of the same paper documents with manual signatures. This is the result of the wide-spread enactment of UETA and of the subsequent enactment of E-Sign by Congress.

Real estate transactions, however, require another step not addressed by either UETA or E-Sign. Real estate documents must be recorded on public records to be effective. Recording takes place in most states in a county office devoted to keeping these records. Recording protects current interests in real estate by clarifying who holds those interests. The chain of title leading to the current title-holder, meaning the historic record of documents relating to transactions for a specific piece of real estate, establishes the marketability of that piece of real estate by the current owner of interest in it. The real estate records establish this chain of title. State law governs these local recording offices, and there are requirements in the law of every state relating to the originality and authenticity of paper documents that are presented for recording. These are themselves "statute of fraud" provisions that must be specifically adjusted before electronic recording may take place. Neither UETA nor E-Sign address this issue.

There must be an orderly conversion of every recording office in the United States for electronic recording to become accepted universally. That will be a complex process, but it needs a starting point in the law. The URPERA, promulgated by the Uniform Law Commissioners in 2004, is that essential start.

The URPERA establishes that any requirement for originality, for a paper document or for a writing manually signed before it may be recorded, is satisfied by an electronic document and signature. This is essentially an extension of the principles of UETA and E-Sign to the specific requirements for recording documents relating to real estate transactions in any state. Second, it establishes what standards a recording office must follow and what it must do to make electronic recording effective. Third, URPERA establishes the board that sets state-wide standards and requires it to set uniform standards that must be implemented in every recording office.

**Effect of Bill**

This bill adopts the URPERA, with Florida modifications. The bill defines the following terms:[6]

- "Document" 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; and eligible to be recorded in the land records maintained by a county recorder.[7][8]

- "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

- "Electronic document" means a document that is received by a county recorder in an electronic form.

[6] The Uniform Act includes a definition of "person" that is not included in this bill. The term "person" is defined, applicable to all of the Florida Statutes, at s. 1.01(3), F.S.
[7] Section 695.27(2)(a).
[8] The bill uses the generic term "county recorder" to represent the clerks of the circuit court, who are the county recorder in most of the counties in Florida, and the other officials who are designated as the county recorder in select counties.

- "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document.

- "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

This bill authorizes a clerk to accept and record electronic documents. Therefore, if a law requires, as a condition for recording, that a document be an original, be on paper or another tangible medium, or be in writing, the requirement is satisfied by an electronic document satisfying the requirements of this section. This bill further provides that, if a law requires, as a condition for recording, that a document be signed or notarized, that the requirement is satisfied by an electronic signature or electronic notarization. A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature.

This bill provides that the Secretary of State shall promulgate rules creating standards for electronic recording, and requires county recorders to follow those rules should a county recorder accept documents filed electronically. The county recorder may elect to receive electronic documents. The county recorder may store those electronic documents, or the information contained in them, and create an index of the documents or information. The county recorder may also transmit electronic documents and communications to the recording party or to other parties. The county recorder may archive the electronic documents or the information in them as well as the index in order to preserve and protect them. A county recorder may enter into agreements with other jurisdictions regarding electronic recording.

This bill does not require that persons engaging in real estate transactions use electronic documents in order to have their documents recorded. It merely permits the county recorder to accept electronic documents if they are presented electronically. The county recorder must continue to receive paper documents and include those documents in the same index with the electronic ones.

In promulgating rules, the Department of State must consult with the Electronic Recording Advisory Council created by this bill. The Electronic Recording Advisory Council will consist of nine members. The Secretary of State must provide administrative support to the Electronic Recording Advisory Council. The members of the Electronic Recording Advisory Council are appointed by the Secretary of State, and members of the council are:

- Five clerks of circuit court or county recorders who are members of the Florida Association of Court Clerks & Comptrollers.

- Two persons working in the title insurance industry who are members of the Florida Land Title Association.

- One banker who is a member of the Florida Bankers Association.

- One mortgage broker who is a member of the Florida Association of Mortgage Brokers.

The first meeting of the Electronic Recording Advisory Council must be held on or before July 30, 2006. Thereafter, the council meets at the call of the chair. The members of the Electronic Recording Advisory Council serve without compensation, and cannot claim per diem and travel expenses from the Secretary of State.

To keep the standards, technology and practices of county recorders in this state in harmony with the standards, technology, the Department of State in consultation with the Electronic Recording Advisory Council, in adopting, amending, and repealing standards must consider:

- Standards and practices of other jurisdictions.

- The most recent standards adopted by national standard-setting bodies, such as the Property Records Industry Association.[9]

- The views of interested persons and governmental officials and entities. Among others, these persons should include county clerks and potential users of the electronic recording system such as real estate attorneys, mortgage lenders, representatives from the title and escrow industries, real estate brokers, and notaries public. Also included might be potential suppliers of hardware, software and services for electronic recording systems.

- The needs of counties of varying size, population, and resources. Because most states are quite diverse in the size, population and resources of their recording venues, it is important that the Department of State and the Electronic Recording Advisory Council consider all of their needs. This section recognizes that the standards should promote the overall good of the entire state and not just the good of certain types of recording venues.

- Standards requiring adequate information security protection to ensure that electronic documents are accurate, authentic, adequately preserved, and resistant to tampering. The authenticity of a documents stored in any recording system is of utmost importance. If forged or invalid documents are accepted for recording, landowners and those depending on their titles can be seriously affected. The Department of State and the Electronic Recording Advisory Council is also directed to consider standards for the proper preservation of electronic documents once they are in the electronic recording system.

In applying and construing s. 695.27, created by this bill, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Responding to the specific language of E-sign, this bill is designed to avoid preemption of state law under that federal legislation. This bill modifies, limits, and supersedes E-sign, 15 U.S.C. ss. 7001 et seq.,[10] but this section does not modify, limit, or supersede s. 101(c) of that act,[11] 15 U.S.C. s. 7001(c),[12] or authorize electronic delivery of any of the notices described in s. 103(b) of that act, 15 U.S.C. s. 7003(b).[13]

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[9] The Property Records Industry Association's mission is "to serve the property records industry by facilitating recordation and access to public property records, by formulating and disseminating model standards, systems and procedures while preserving the integrity of those records." *What is PRIA's Mission?*, (last visited Mar. 6, 2006) <http://www.pria.us/index.html>.

[10] The federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. ss. 7001 et seq., was enacted on June 30, 2000. Congress enacted the Act, "to facilitate the use of electronic records and signatures in interstate and foreign commerce by ensuring the validity and legal effect of contracts entered into electronically. Careful to preserve the underlying consumer protection laws governing consumers' rights to receive certain information in writing, Congress imposed special requirements on businesses that want to use electronic records or signatures in consumer transactions. *Executive Summary*, (last visited Mar. 6, 2006) <http://www.ftc.gov/os/2001/06/esign7.htm>.

[11] In the Electronic Signatures in Global and National Commerce Act Congress:

> imposed special requirements on businesses that want to use electronic records or signatures in consumer transactions. Section 101(c)(1) of the Act provides that information required by law to be in writing can be made available electronically to a consumer only if he or she affirmatively consents to receive the information electronically and the business clearly and conspicuously discloses specified information to the consumer before obtaining his or her consent.

*Executive Summary*, (last visited Mar. 6, 2006) <http://www.ftc.gov/os/2001/06/esign7.htm>.

[12] 15 U.S.C. s.7001(c) states that a consumer's consent to receive electronic records is valid only if the consumer has affirmative consented and prior to the consent, he or she was provided a clear and conspicuous statement outlining the consumer's rights.

[13] 15 U.S.C. s.7003(b) excludes from the Electronic Signatures in Global and National Commerce Act "court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection

C. SECTION DIRECTORY:

Section 1 creates s. 695.27, F.S., to adopt the Uniform Real Property Electronic Recording Act, with Florida modifications.

Section 2 provides an effective date of upon becoming law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

There is a minimal fiscal impact on the Secretary of State for rulemaking and the administration of the Electronic Recording Advisory Council.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

Electronic recording of documents may significantly lower costs to government and to the private sector.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None

B. RULE-MAKING AUTHORITY:

This bill creates additional rulemaking authority for the Secretary of State. It is anticipated that the Bureau of Archives would be assigned the responsibility for the rulemaking. An advisory body is created to assist in crafting the rules.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 8, 2006, the Civil Justice Committee adopted one amendment to the bill. The amendment changed the following:

- Specified that the Electronic Recording Advisory Council is created.
- Provided that the chair of the Electronic Recording Advisory Council is appointed by the Secretary of State.

The bill was then reported favorably.

A bill to be entitled

An act relating to real property electronic recording; creating s. 695.27, F.S.; providing a short title; providing definitions; providing for the validity of electronic documents relating to real property; providing for the recording of electronic documents by the county recorder; granting the Department of State rulemaking authority; creating the Electronic Recording Advisory Council; providing for membership and meetings of the council; providing that council members shall serve without compensation and may not claim per diem and travel expenses from the Secretary of State; providing guidelines for the department, in consultation with the council, to consider in adopting, amending, and repealing standards; providing for uniformity of application and construction; specifying the relation to a federal act; providing an effective date.

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

Section 1. Section 695.27, Florida Statutes, is created to read:

695.27 Uniform Real Property Electronic Recording Act.--

(1) SHORT TITLE.--This section may be cited as the "Uniform Real Property Electronic Recording Act."

(2) DEFINITIONS.--As used in this section:

(a) "Document" means information that is:

1. Inscribed on a tangible medium or that is stored in an

electronic or other medium and is retrievable in perceivable form; and

2. Eligible to be recorded in the land records maintained by a county recorder.

(b) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(c) "Electronic document" means a document that is received by a county recorder in an electronic form.

(d) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document.

(e) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(3) VALIDITY OF ELECTRONIC DOCUMENTS.--

(a) If a law requires, as a condition for recording, that a document be an original, be on paper or another tangible medium, or be in writing, the requirement is satisfied by an electronic document satisfying the requirements of this section.

(b) If a law requires, as a condition for recording, that a document be signed, the requirement is satisfied by an electronic signature.

(c) A requirement that a document or a signature associated with a document be notarized, acknowledged, verified, witnessed, or made under oath is satisfied if the electronic

signature of the person authorized to perform that act, and all other information required to be included, is attached to or logically associated with the document or signature. A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature.

(4) RECORDING OF DOCUMENTS.--

(a) In this subsection, the term "paper document" means a document that is received by the county recorder in a form that is not electronic.

(b) A county recorder:

1. Who implements any of the functions listed in this section shall do so in compliance with standards established by rule by the Department of State.

2. May receive, index, store, archive, and transmit electronic documents.

3. May provide for access to, and for search and retrieval of, documents and information by electronic means.

4. Who accepts electronic documents for recording shall continue to accept paper documents as authorized by state law and shall place entries for both types of documents in the same index.

5. May convert paper documents accepted for recording into electronic form.

6. May convert into electronic form information recorded before the county recorder began to record electronic documents.

7. May accept electronically any fee that the county recorder is authorized to collect.

8. May agree with other officials of a state or a

political subdivision thereof, or of the United States, on procedures or processes to facilitate the electronic satisfaction of prior approvals and conditions precedent to recording and the electronic payment of fees.

(5) ADMINISTRATION AND STANDARDS.--

(a) The Department of State, by rule pursuant to ss. 120.536(1) and 120.54, shall prescribe standards to implement this section in consultation with the Electronic Recording Advisory Council, which is hereby created. The Secretary of State shall provide administrative support to the council, appoint the members of the council, and appoint the chair of the council. The council shall consist of nine members, as follows:

1. Five clerks of circuit court or county recorders who are members of the Florida Association of Court Clerks and Comptroller, Inc.

2. Two persons working in the title insurance industry who are members of the Florida Land Title Association.

3. One banker who is a member of the Florida Bankers Association.

4. One mortgage broker who is a member of the Florida Association of Mortgage Brokers.

(b) The first meeting of the council shall be held on or before July 30, 2006. Thereafter, the council shall meet at the call of the chair.

(c) The members of the council shall serve without compensation and shall not claim per diem and travel expenses from the Secretary of State.

(d) To keep the standards and practices of county

recorders in this state in harmony with the standards and practices of recording offices in other jurisdictions that enact substantially this section and to keep the technology used by county recorders in this state compatible with technology used by recording offices in other jurisdictions that enact substantially this section, the Department of State, in consultation with the council, so far as is consistent with the purposes, policies, and provisions of this section, in adopting, amending, and repealing standards, shall consider:

1. Standards and practices of other jurisdictions.

2. The most recent standards adopted by national standard-setting bodies, such as the Property Records Industry Association.

3. The views of interested persons and governmental officials and entities.

4. The needs of counties of varying size, population, and resources.

5. Standards requiring adequate information security protection to ensure that electronic documents are accurate, authentic, adequately preserved, and resistant to tampering.

(6) UNIFORMITY OF APPLICATION AND CONSTRUCTION.--In applying and construing this section, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

(7) RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.--This section modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. ss. 7001 et seq., but this

section does not modify, limit, or supersede s. 101(c) of that act, 15 U.S.C. s. 7001(c), or authorize electronic delivery of any of the notices described in s. 103(b) of that act, 15 U.S.C. s. 7003(b).

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

# HB 7143

# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HJR 7143 PCB JU 06-06 Rules of Construction
**SPONSOR(S):** Judiciary Committee; Simmons
**TIED BILLS:** **IDEN./SIM. BILLS:**

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| Orig. Comm.: Judiciary Committee | 8 Y, 4 N | Hogge | Hogge |
| 1) State Administration Council | 5 Y, 3 N | Hogge | Bussey |
| 2) Justice Council | | | |
| 3) | | | |
| 4) | | | |
| 5) | | | |

## SUMMARY ANALYSIS

This House Joint Resolution proposes to amend Article X, Section 12, of the State Constitution, relating to rules of construction, to prohibit the application of the maxim "expressio unius est exclusio alterius" in interpreting the extent of political power vested in the legislative branch by the people, unless the limitation is absolutely necessary to carry out the purpose of the constitutional provision and without regard to the comprehensiveness of the constitutional provision. This maxim holds that "the expression of one thing is the exclusion of another." As far back as 1905, the Florida Supreme Court stated that the maxim should be applied "with great caution to the provisions of an organic law relating to the legislative department...." This sentiment has been echoed in the courts of other states, although many appear to have permitted its application in various circumstances such as qualifications for election to a constitutional office but not in others such as regulating the taxing power of the Legislature. In a recent case, the Florida Supreme Court disapproved of a decision of the 1st District Court of Appeal by applying this maxim to declare Florida's school voucher program unconstitutional. The North Carolina Supreme Court and the California Court of Appeal appear to be examples of courts that have refused to apply this doctrine when interpreting their constitution if not in all cases, then in all but what appear to be very rare circumstances.

Within our constitutional framework, the people are sovereign and the source of all governmental power. The Florida Constitution (like other state constitutions) is the way in which the people have chosen to allocate and regulate their sovereign governmental power not exclusively granted to the federal government in the United States Constitution. This is accomplished primarily by "vesting" the legislative, executive and judicial powers in certain defined offices and collegial bodies. Most other constitutional provisions serve to direct and/or limit the application of these vested powers. Therefore, the bulk of powers exercised by the three branches of government are vested powers; they do not arise out of specific grants of power. Through the Florida Constitution, the people have vested legislative authority in the Legislature with such exceptions as the people have clearly delineated. The legislative branch looks to the Constitution not for sources of power but for limitations upon power.

In contrast, the federal constitution is a constitution of delegated powers, having only those specific powers given to it in the Constitution and those "necessary and proper" to carry out those powers. All other sovereign governmental powers are reserved to the States.

The Division of Elections within the Department of State estimates that the cost of compliance for a proposal with a ballot summary of 75 words or less would be approximately $50,000.

This is a joint resolution which requires passage by a 3/5 vote of each chamber.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This proposal does not directly implicate the House Principles.

B. EFFECT OF PROPOSED CHANGES:

### Proposed Changes

This House Joint Resolution proposes to amend Article X, Section 12, of the State Constitution, relating to rules of construction, to prohibit the use of the maxim "expressio unius est exclusio alterius" in interpreting the extent of political power vested in the legislative branch by the people, unless the limitation is absolutely necessary to carry out the purpose of the constitutional provision and without regard to the comprehensiveness of the constitutional provision. This maxim holds that "the expression of one thing is the exclusion of another."

### Background

**Constitutional Power and Authority: Contrasting the Federal and State Constitutions**

The federal constitution is a constitution of delegated powers, "having only those specific powers given to it in the Constitution,"[1] and those "necessary and proper" to carry out the enumerated powers. All other powers are reserved to the states.[2]

Within our constitutional framework, the people are sovereign and the source of all governmental power. The Florida Constitution (like other state constitutions) is the way in which the people have chosen to allocate and regulate their sovereign governmental power not exclusively granted to the federal government in the United States Constitution and acts as a limitation on governmental powers. This is accomplished primarily by "vesting" the legislative, executive and judicial powers in certain defined offices and collegial bodies. Most other constitutional provisions serve to direct and/or limit the application of these vested powers. Therefore, the bulk of powers exercised by the three branches of government are vested powers; they do not arise out of specific grants of power.

Through the Florida Constitution, the people have vested legislative authority in the Legislature with such exceptions as the people have clearly delineated.[3] "The legislative branch looks to the Constitution not for sources of power but for limitations upon power."[4] The authority of the legislative branch is "plenary" (i.e., "absolute") in the legislative field.[5] It is limited only by the "express and clearly implied provisions of the federal and state constitutions."[6] "In other words, the Legislature may exercise any lawmaking power that does not either expressly or by necessary implication conflict with any other provision of the State or Federal Constitution."[7]

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[1] John Cooper and Thomas Marks Jr., eds., *Florida Constitutional Law: Cases and Materials, 2d Ed.* (1996), at 3.
[2] U.S. Const. art. X.
[3] Fla. Const. art. III, s. 1.
[4] *State ex. rel. Green v. Pearson*, 14 So.2d 565 (Fla. 1943).
[5] 6 Fla.Jur., s. 119. See also, *County Board of Education of Russell County v. Taxpayers and Citizens of Russell County*, 163 So.2d 629, 634 (Ala. 1964). ("There are no limits to the legislative power of state governments save those written into its constitution. All that the legislature is not forbidden to do by the organic law, state or federal, it has full power to do.")
[6] 6 Fla.Jur., s. 119.
[7] *Id.*

**The Application of the Maxim *"Expressio Unius Est Exclusio Alterius"* in Constitutional Interpretation**

It is a generally accepted principle that interpreting a constitution, as any written document, only becomes necessary when the plain meaning cannot be ascertained and the intent is ambiguous. Further, that in construing a constitution, effect should be given to every part of the document and every word and where possible, conflicting provisions should be harmonized. There are numerous rules of construction utilized by the courts. The Florida Constitution sets forth several of these such as "(t)itles and subtitles shall not be used in construction."[8]

One such rule of construction is *"expressio unius est exclusio alterius;"* that is, "the expression of one thing is the exclusion of another." For example, if the constitution included or "expressed" specific disqualifications for holding elective office, then applying this maxim, the exclusion of any other disqualifications would be implied. The Ohio Supreme Court used the following illustration to describe the way in which the rule operates when applied in this context:

> Thus, when the General Assembly has full power to legislate in a field that has natural subclasses (A, B, C, D, etc.) and a constitutional provision puts restrictions on subclasses A, B, and C, that does not mean (under application of the doctrine of expressio unius est exclusio alterius) that the constitutional provision has removed the power to legislate as to subclass D. Rather, it means the power to legislate as to subclass D is not restricted.[9]

This maxim generally does not apply with the same force to a constitution as to a statute ("it should be used sparingly" in construing the constitution)[10] and particularly in regards to the legislature.[11]

***Florida***

As far back as 1905, the Florida Supreme Court stated that the maxim should be applied "with great caution to the provisions of an organic law relating to the legislative department...."[12] This sentiment has been echoed in the courts of other states.[13]

Although Florida courts, like those of other states, have cautioned against its use, they have not prohibited its outright use in construing provisions of the Florida Constitution.[14] Most recently, the

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[8] Fla. Const. art. X, s. 12(h).

[9] *State ex. rel. Jackman v.Court of Common Pleas of Cuyahoga County*, 224 N.E.2d 906, 910 (Ohio 1967). ("The judiciary must proceed with much caution in applying the...maxim (expressio unius est exclusio alterius) to invalidate legislation."

[10] 6 Fla.Jur., s. 69.

[11] *Id.*

[12] *State ex. rel. Moodie v. Bryant,* 39 So. 929, 956 (Fla. 1905). See also, *Marasso v. Van Pelt*, 81 So. 529, 530 (Fla. 1919) (Per *Marasso*: "Organic limitations upon the authority of the Legislature to exercise the police power of the state...should not be implied by invoking the rule of construction "Expressio unius est exclusion alterius," or otherwise, unless it is necessary to do so in order to effectuate some express provision of the Constitution."); *Pine v. Com.*, 93 S.E.2d 652 (Va. 1917) ("The principle of the maxim...should be applied with great caution to those provisions of the Constitution which relate to the legislative department.")

[13] *State ex. rel. Jackman, supra* note 9, at 910 (Per State ex. rel. Jackman, "The judiciary must proceed with much caution in applying the...maxim (expressio unius est exclusio alterius) to invalidate legislation."); *Earhart v. Frohmiller*, 178 P.2d 436 (Az. 1947) and 16 Am.Jur.2d Constitutional Law s. 69.

[14] The Florida Supreme Court has stated that "the principle is well established that, where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner. Even though the Constitution does not in terms prohibit the doing of a thing in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it....Therefore, when the Constitution prescribes a manner of doing an act, the manner prescribed is exclusive, and it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the constitutional provision. See *Weinberger v. Board of Public Instruction*, 112 So. 253, 256 (Fla. 1927). In *Holmes I, infra* note 15, the 1st DCA distinguished *Weinberger* in that the constitution forbade any action other than that specified in the constitution, and the action by the Legislature defeated the purpose of the constitutional provision....(here the court said) in this case, nothing in (the constitutional provision at issue) prohibits the Legislature from allowing the well-delineated use of public funds for private school

Florida Supreme Court, over sharp dissent, disapproved of a decision of the 1st District Court of Appeal[15] by applying this maxim to declare legislation creating a school voucher program unconstitutional.[16] The Supreme Court read the constitutional provision as a limitation on the power of the Legislature—as an exclusive means for accomplishing a duty contained in the Constitution. The majority defended its use of this maxim, believing the constitutional provision at issue "provides a comprehensive statement of the state's responsibilities regarding the education of its children."[17] In dissent, Justice Bell found the language of the constitutional provision at issue to be "plain and unambiguous" and, therefore, "wholly inappropriate for (the) court to use a statutory maxim such as *expressio unius est exclusio alterius* to imply such a proscription."[18] He believed its use in this case "significantly expands this Court's case law in a way that illustrates the danger of liberally applying this maxim."[19] He wrote:

> In accord with courts across this nation, this Court has long recognized that the *expressio unius* maxim should not be used to imply a limitation on the Legislature's power unless this limitation is absolutely necessary to carry out the purpose of the constitutional provision....We have repeatedly refused to apply this maxim in situations where the statute at issue bore a "real relation to the subject and object" of the constitutional provision.[20]

***Other States***

As mentioned previously, like Florida, virtually all states appear to caution against the use of this maxim in constitutional construction,[21] although many appear to permit its application in various circumstances such as qualifications for election to a constitutional office but not in others such as regulating the taxing power of the Legislature.[22] For example, the Colorado Supreme Court, while accepting the principle that "all power which is not limited by the constitution is vested in the people and may be exercised by them via their elected representatives so long as the constitution contains no prohibition against it," nonetheless applied the maxim as the rationale for the rule that "the fact that the framers of the state constitution chose to specify the qualifications for this office limits, by implication, the legislature's power to impose additional qualifications."[23] The Louisiana Supreme Court has held that

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education...." In *Taylor v. Dorsey*, 19 So.2d 876 (Fla. 1944), the Florida Supreme Court found the principle enunciated in *Weinberger* inapplicable because the statutory provision did not violate the "primary purpose" of the constitutional provision. See *infra*, note 16.

[15] *Bush v. Holmes (Holmes I)*, 767 So.2d 668 (1st DCA 2000).

[16] *Bush v. Holmes,* 919 So.2d 392 (Fla. 2006). The court declared s. 1002.38, F.S. (2005), unconstitutional. The voucher program is entitled the "Opportunity Scholarship Program." In doing so, the majority distinguished the case of *Taylor v. Dorsey*, 19 So.2d 876 (Fla. 1944), cited by Justice Bell in his dissent in opposition to the application of "expressio unius est exclusio alterius" in this case.

[17] *Bush, supra* note 16, at 408.

[18] *Id.*, at 415.

[19] *Id.*, at 420.

[20] *Id.*, at 422. Citing *Marasso v. Van Pelt*, 81 So.529, 530 (Fla. 1919) and *Taylor v. Dorsey*, *supra* note 16.

[21] See *supra* note 13.

[22] *Mercantile Incorporating Co. v. Junkin*, 123 N.W. 1055 (Neb. 1909) ("The maxim...does not apply in the construction of constitutional provisions regulating the taxing power of the Legislature.") See also, *Kramar v. Bon Homme County*, 155 N.W.2d 777 (S.D. 1968);

[23] *Reale v. Board of Real Estate Appraisers*, 880 P.2d 1205, 1208 (Colo. 1994). The court placed great weight on the characterization of the right involved as a "fundamental right reserved to the people—the right to vote for representatives of their choice—(and that the right) would hinge not on constitutional guarantees, but on the General Assembly's willingness to abstain form imposing additional qualifications or holding constitutional offices." Also, in Colorado, the framers of the constitution "did express their intent to permit the legislature to fix additional qualifications for certain offices...." However, the dissent noted that where the constitution strips the General Assembly of power, it does so expressly. The Court sided with the majority of states that had held that "where the Constitution establishes specific eligibility requirements for a particular constitutional office, the constitutional criteria are exclusive.") In this regard, see also *Thomas v.* State, 58 So.2d 173 (Fla. 1952). (Per *Thomas*: "The principle is well established that where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner. Even though the Constitution does not in terms prohibit the doing of a thing in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it. Therefore, when the Constitution prescribes the manner of doing an act, the manner prescribed is exclusive, and it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the constitutional provision.") Regarding the application of the maxim for a different policy area, see *State v. Gilman*, 10 S.E. 283 (W.Va.) in which the West Virginia Supreme Court applied the doctrine in invalidating a statutory law relating to the sale of liquor.

"(i)n construing a Constitution, resort may be had to (the) well-recognized rule of construction contained in the maxim "expressio unius est exclusio alterius...."[24]

In contrast, the North Carolina Supreme Court and the California Supreme Court[25] appear to be examples[26] of courts that have refused to apply this doctrine when interpreting their constitution if not in all cases, then in all but what appear to be very rare circumstances. As stated by the North Carolina Supreme Court in embracing the California rationale:

> This doctrine flies directly in the face of one of the underlying principles of North Carolina constitutional law. As Justice Mitchell himself stated for the Court in (the) *Preston* (case):
>
> > "[I]t is firmly established that our State Constitution is not a grant of power.... All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution....This fundamental concept, that a state constitution acts as a limitation, rather than a grant of power, is certainly not unique to North Carolina. The California Court of Appeal, for example, recently reviewed the basic principles of California constitutional law as set out in previous decisions of the California Supreme Court.[27] The following passage from that opinion could serve just as easily as a primer for North Carolina constitutional law: Unlike the federal Constitution, which is a grant of power to Congress, the California [North Carolina] Constitution is a limitation or restriction on the powers of the Legislature. Thus, the courts do not look to the Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited. Further, "[i]f there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used." Consequently, the express enumeration of legislative powers is not an exclusion of others not named unless accompanied by negative terms. In other words, the doctrine of *expressio unius est exclusio alterius*...is inapplicable."[28]

C. SECTION DIRECTORY:

Not applicable.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

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[24] *Stokes v. Harrison*, 155 So.2d 373 (La. 1959). See also, *Collingsworth County v. Allred*, 40 S.W.2d 13 (Tx. 1931).

[25] *Dean v. Kuchel*, 230 P.2d 811, 813 (Cal. 1951) ("Specifically, the express enumeration of legislative powers is not an exclusion of others not named unless accompanied by negative terms.").

[26] See also, *Eberle v. Nielson*, 306 P.2d 1083, 1086 (Idaho 1957) ("There flows from this fundamental concept, as a matter of logic in its application, the inescapable conclusion that the rule of expressio unius est exclusio alterius has no application to the provisions of our State Constitution."); *Penrod v. Crowley*, 356 P.2d 73, 80 (Idaho 1960) ("The rule...does not apply to provisions of the state constitution."); *State ex. rel. Attorney General v. State Board of Equalization*, 185 P. 708, 711 (Mont. 1919) ("The maxim...cannot be made to serve as a means to restrict the plenary power of the Legislature, nor to control an express provision of the Constitution."); *Earhart v. Frohmiller*, 178 P.2d 436 (Az. 1947) ("(i)t cannot be made to restrict the plenary power of the Legislature."); *State ex. rel. McCormack v. Foley*, 118 N.W.2d 211 (Wis. 1962); *Cathcart v. Meyer*, 2004 WY 49 (Wyo. 2004) (rule is "inapplicable in construing constitutional provisions.")

[27] *County of Fresno v. State*, 268 Cal.Rptr. 266, 270 (Cal. Ct. App. 1990).

[28] *Baker v. Martin*, 410 S.E.2d 887, 891 (N.C. 1991).

2. Expenditures:

Art. XI, s. 5, of the Florida Constitution, requires that each proposed amendment to the Constitution be published in a newspaper of general circulation in each county two times prior to the general election. The Division of Elections within the Department of State estimates that the cost of compliance for a proposal with a ballot summary of 75 words or less would be approximately $50,000.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The mandates provision does not apply to House Joint Resolutions.

2. Other:

Article XI, Section 1 of the State Constitution provides the Legislature with the authority to propose amendments to the State Constitution by joint resolution approved by three-fifths of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office or may be placed at a special election held for that purpose.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Not applicable.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 15, 2006, the Judiciary Committee adopted one amendment and reported the bill favorably as a CS. The CS differs from the original bill in that the CS qualifies the prohibition against court use of the *expressio unius* maxim by permitting it when "absolutely necessary to unless the limitation is absolutely necessary to carry out the purpose of the constitutional provision and without regard to the comprehensiveness of the constitutional provision.

House Joint Resolution

A joint resolution proposing an amendment to Section 12 of Article X of the State Constitution; revising rules of construction to be used when interpreting the extent of political power vested in the legislative branch to provide that the expression of one thing does not imply the exclusion of another, unless the limitation is absolutely necessary to carry out the purpose of the constitutional provision and without regard to the comprehensiveness of the constitutional provision.

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

That the following amendment to Section 12 of Article X of the State Constitution is 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 X

MISCELLANEOUS

SECTION 12. Rules of construction.--Unless qualified in the text the following rules of construction shall apply to this constitution.

(a) "Herein" refers to the entire constitution.

(b) The singular includes the plural.

(c) The masculine includes the feminine.

(d) "Vote of the electors" means the vote of the majority of those voting on the matter in an election, general or

special, in which those participating are limited to the electors of the governmental unit referred to in the text.

(e) Vote or other action of a legislative house or other governmental body means the vote or action of a majority or other specified percentage of those members voting on the matter. "Of the membership" means "of all members thereof."

(f) The terms "judicial office," "justices" and "judges" shall not include judges of courts established solely for the trial of violations of ordinances.

(g) "Special law" means a special or local law.

(h) Titles and subtitles shall not be used in construction.

(i) In interpreting the extent of political power vested in the legislative branch by the people, the expression of one thing does not imply the exclusion of another, unless the limitation is absolutely necessary to carry out the purpose of the constitutional provision and without regard to the comprehensiveness of the constitutional provision.

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

CONSTITUTIONAL AMENDMENT

ARTICLE X, SECTION 12

RULES OF CONSTRUCTION.--Proposing an amendment to the State Constitution to revise the rules of construction to be used when interpreting the State Constitution. The revision provides that, when interpreting the extent of political power vested in the Legislature by the people, the expression of one thing does not imply the exclusion of another, unless the exclusion is

absolutely necessary to carry out the purpose of the constitutional provision and without regard to the comprehensiveness of the constitutional provision. This would preclude application of the general maxim "expressio unius est exclusio alterius," which stands for the proposition that the expression of one thing is the exclusion of another, except when the exclusion is absolutely necessary to carry out the purpose of the constitutional provision and without regard to the comprehensiveness of the constitutional provision.

# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 7151 PCB CJ 06-02 Adoption
**SPONSOR(S):** Civil Justice Committee and Mahon
**TIED BILLS:** None. **IDEN./SIM. BILLS:** SB 408

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| Orig. Comm.: Civil Justice Committee | 7 Y, 0 N | Shaddock | Bond |
| 1) Future of Florida's Families Committee | 7 Y, 0 N | Davis | Collins |
| 2) Justice Council | | | |
| 3) | | | |
| 4) | | | |
| 5) | | | |

## SUMMARY ANALYSIS

The bill provides a mechanism for the Department of Health to receive a notification of the filing of a petition for termination of parental rights. Moreover, the bill corrects the provisions regarding who may execute an irrevocable affidavit of paternity.

The bill also modifies the statute of repose related to adoption by providing that the interest which entitles a person to notice of an adoption must be direct, financial, and immediate and the person must show that he or she will gain or lose by the direct legal operation and effect of the judgment. Absent such a showing a person with indirect interest lacks standing to set aside a judgment of adoption.

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

Please see Effect of Proposed Changes section and Drafting Issues or Other Comments section for Future of Florida's Families Committee's analysis.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

**Empower families:** This bill strengthens families inheritance rights by clarifying that an adopted person has the same rights of inheritance as a blood descendant.

**Provides Limited Government:** The bill amends s. 63.182, F.S., to require that any person seeking to set aside an adoption must have a direct, financial, and immediate reason. It applies this restriction to all adoptions, including those in which a judgment of adoption has already been entered.

B. EFFECT OF PROPOSED CHANGES:

**Present Situation:**

Future of Florida's Families Committee:

**The 2003 Florida Adoption Act:** The 2003 Florida Adoption Act (Chapter 2003-58, L.O.F.), substantially revised the 2001 Florida Adoption Law, with primary focus on the areas of biological fathers' rights, notice and consent, statute of repose and grounds for challenges to termination of parental rights or adoption, statutory forms, venue, adoption fees and costs, and sanctions. A major change involved the creation of a Putative Father Registry within the Department of Health, Office of Vital Statistics, which requires unmarried biological fathers to register with the Putative Registry in order to preserve any right to notice and consent regarding his parental right to a child placed for adoption. The registry replaced existing constructive notice provisions as previously applied to fathers who could not be identified or located. The category of "fathers" for whom notice and consent may be required was revised to incorporate and conform to the new definition of "unmarried biological father."

Specific changes made by the 2003 legislation included:

- Deleting the statutory duty of a mother placing a child up for adoption to identify a potential unmarried biological father.
- Allowing for pre-birth execution of an affidavit of non-paternity.
- Broadening the criteria for abandonment to include evidence of little or no communication or lack of emotional support as basis for termination of parental rights.
- Expanding placement options to permit out-of-state or out-of-the-country adoption of a child.
- Revising venue provisions to include four primary venue options and waiver of venue.
- Revising a number of statutory timeframes including:

    1. Reducing the statute of repose period from two years to one year for any challenge to an adoption or termination of parental rights;
    2. Reducing in half the time period between the date of personal or constructive service and the date of a final hearing;
    3. Extending the time period from seven to 14 days in which to make adoption disclosures to birth and prospective adoptive parents;

4. Extending from 24 hours to seven days in which to forward a judgment terminating parental rights from the clerk of the court to the Department of Children and Families (department or DCF); and
5. Changing the timeframe in which to file a final home investigation from 90 days after the petition is filed to 90 days after placement;

- Revising the statutory forms for consent to adoption, for adoption disclosure, for notice of service of process, for affidavits of non-paternity and for waiver of venue to conform to changes in the bill in those areas.

- Revising provisions relating to adoption fees for adoption entities by increasing recovery of pre-approved fees and allowing for flat fee representation and for birth mothers by expanding recovery of pre-birth and post-birth expenses.

- Deleting requirements that all proceedings for adoption be conducted by the same judge that conducted the termination of parental rights proceedings.

- Allowing private adoption entities to intervene in the adoptions of children in Department of Children and Families' custody.

Civil Justice Committee:

Florida has established a Putative Father Registry ("Registry") to attempt to preserve the rights of unmarried biological fathers in adoption cases. The Registry is established and operated through the Office of Vital Statistics of the Department of Health. If a man is concerned that he may be the father of a child born or about to be born to a woman, and that man wishes to establish parental rights, he must file as a "registrant" with the Registry.[1]

By filing with the Registry, the potential father is claiming paternity for the child and confirms his willingness to support the child. Additionally, he consents to DNA testing, and may ultimately be required to pay child support. A claim of paternity may be filed at any time prior to the child's birth, but a claim of paternity may not be filed after the date a petition is filed for termination of parental rights.[2]

The possible father may change his mind and prior to the birth of the child execute a notarized revocation of the claim of paternity.[3] Once that revocation is received, the claim of paternity is deemed null and void. Plus, if a court determines that a registrant is not the father of a minor, the court will order the man's name removed from the registry.[4]

All hearings and records in adoption proceedings are confidential.[5] Court hearings are held in closed court, and all papers and records pertaining to the adoption, whether part of the permanent record of the court or a file in the office of an adoption entity, are confidential and subject to inspection only upon court order.

Generally, identifying information regarding the birth parents, adoptive parents, and adoptee may not be disclosed unless that person has authorized in writing the release of that information. Yet, a court may, upon petition of an adult adoptee, for good cause shown, appoint an intermediary or a licensed child-placing agency to contact a birth parent who has not registered with the adoption registry and advise them of the availability of the registry.

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[1] Section 63.054 (1), F.S.
[2] *Id.*
[3] Section 63.054 (5), F.S.
[4] *Id.*
[5] Section 63.162, F.S.

The statute of repose provides that an action to set aside a judgment of adoption or a judgment terminating parental rights may not be filed more than one year after the entry of the judgment terminating parental rights.

**Effect of Bill**

In a proceeding to terminate parental rights, the father must provide the Office of Vital Statistics of the Department of Health ("Office") with a copy of that petition. The Office may not record a claim of paternity after the date a petition has been filed.

The bill directs that if a court determines that a registrant is not the father of a child or has no parental rights; the court must order the Department to remove the registrant's name from the registry. Moreover, the bill corrects the provisions regarding who may execute an irrevocable affidavit of paternity.

Finally, the bill makes a change regarding inheritance rights. Except for the specific persons entitled to be given notice of an adoption, the interest which entitles a person to notice of an adoption must be direct, financial, and immediate and the person must show that he or she will gain or lose by the direct legal operation and effect of the judgment. A showing of an indirect, inconsequential, or contingent interest is inadequate and a person with this indirect interest lacks standing to set aside a judgment of adoption. This applies to all adoptions, including those in which a judgment of adoption has already been entered.

C. SECTION DIRECTORY:

**Section 1.** Amends s. 63.054, F.S., to require notification of a filing of a petition for termination of parental rights.

**Section 2.** Amends s. 63.062(4), F.S., relating to an affidavit of non-paternity.

**Section 3.** Amends s. 63.182, F.S., relating to the statute of repose.

**Section 4.** Provides this bill will be effective upon becoming law.

## 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:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The Future of Florida's Families Committee has the following potential Constitutional concerns:

**Case Law History:**

The Florida Supreme Court recently interpreted language in s. 39.806(1)(d), F.S., which is identical to language currently in s. 63.089(4)(b)1, F.S. This language allows incarceration of a parent to be the basis for a finding of abandonment of a child supporting the termination of the parental rights of the incarcerated parent when "the period of time for which the parent is expected to be incarcerated will constitute a **substantial** portion of the period of time before the child will attain the age of 18 years (emphasis added)." In *B.C. vs. DCF*, 887 So.2d 1046 (Fla. 2004), the Court held that: (1) the statutes listing incarceration as a ground for termination of parental rights require the court to evaluate whether the time for which a parent is expected to be incarcerated **in the future** constitutes a substantial portion of the time before the child reaches the age of 18; (2) the father's remaining sentence of four years did not constitute a substantial portion of time before his child reached the age of 18 (the child was four years old at the time of the hearing); (3) for purposes of terminating parental rights on the ground of incarceration, a trial court should measure the time of remaining incarceration and minority from the date the termination petition is filed. The Florida Supreme Court had previously ruled, and this decision reaffirmed, that incarceration alone does not, as a matter of law, authorize termination of parental rights on the basis of abandonment. While the *B.C.* ruling was one of statutory interpretation, the Court based its interpretation on the long-established Constitutional principal that parental rights constitute a fundamental liberty interest. For this reason, at least when termination of parental rights is sought based on this ground in chapter 39, the State (petitioner) must, in order to prevail, establish that the termination is the least restrictive means of protecting the child from serious harm, *id* at 1053-1054.

The fundamental liberty interest in raising one's children has caused both the U.S. Supreme Court and the Florida Supreme Court to rule that when that when termination of parental rights is sought and the parent is indigent, the parent may be entitled to representation by appointed counsel.

In Department of Health and Rehabilitative Services vs. Privette, *617 So.2d 305, 1993,* the court found that there must be clear and compelling reason based primarily on a child's best interest to overcome a presumption of legitimacy even after the legal father is proven not to be the biological father. This is at least the equivalent of a burden of proof that would exist in proceedings to terminate a legal father's parental rights.

Privette, went on to say:

> " This conclusion is especially compelling in light of the fact that we must establish a neutral rule applicable to all cases of this type. While there may be some cases where the child has had little contact with the legal father, other cases will be quite the contrary. It is conceivable that a man who has established a loving, caring relationship of some years' duration with his legal child later will prove not to be the biological father. Where this is so, it seldom will be in the children's best interest to wrench them away from their legal fathers and judicially declare that they now must regard strangers as their fathers."

**Rights of unwed fathers**: The United States Supreme Court has protected a putative father's parental rights when he has established a substantial relationship with his child. A substantial relationship is the existence of a biological link, and the father's commitment to the responsibilities of fatherhood by participating in his child's upbringing.[6] The mere existence of a biological link does not merit constitutional protection.[7] The Florida Supreme Court has similarly held that the failure of an unwed father to grasp the opportunity to develop a parental relationship by accepting some measure of responsibility for the child can result in a loss of constitutional protections.[8]

The bill amends s. 63.182, F.S., to require that any person seeking to set aside an adoption must have a direct, financial, and immediate reason. A showing of an indirect, inconsequential, or contingent interest is wholly inadequate. It applies this restriction to all adoptions, including those in which a judgment of adoption has already been entered.

Case law permits certain persons to intervene in adoption proceedings. Florida Rule of Civil Procedure 1.230 governs intervention in civil actions. The rule provides that anyone with an interest in pending litigation may be permitted to intervene in the action. The Florida Supreme Court has explained when intervention should be permitted in adoption cases:

- Generally, the interest which entitles a person to intervene must be shown to be in the matter in litigation. The interest must be direct and immediate and the intervenor must show that he or she will gain or lose by the direct legal operation and effect of the judgment. A showing of indirect, inconsequential or contingent interest is wholly inadequate.[9]

- Whether intervention is allowed is determined on a case by case basis.[10]

One potential concern is whether the "test" established in this bill of direct, financial and immediate is sufficiently clear enough to establish what is in the child's best interest. Without defining what indirect, inconsequential, or contingent means, courts could inconsistently apply this standard.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 15, 2006, the Civil Justice Committee adopted one amendment to the bill. The amendment changed the following:

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[6] See Lehr v. Robertson, 463 U.S. 248 (1983). In this case, the U.S. Supreme Court held that the state's failure to give a putative father notice of pending adoption proceedings, despite the state's actual notice of his existence and whereabouts, did not deny him due process or equal protection, since he could have guaranteed that he would have received notice by mailing a postcard to the putative father registry.

[7] See Lehr at 261.

[8] See In the Matter of the Adoption of Doe, 543 So.2d 741, 748 (Fla. 1989).

[9] Stefanos v. Rivera-Berrios, 673 So. 2d 12, 13 (Fla. 1996).

[10] See Stefanos, 673 So. 2d at 13-14 (holding that a person who has had parental rights terminated may not intervene in an ongoing adoption proceeding); In re Adoption of a Minor Child, 593 So. 2d 185 (Fla. 1991)(allowing grandparents to intervene); Rickard v. McKesson, 774 So. 2d 838 (Fla. 4th DCA 2000)(allowing potential trust beneficiary to intervene).

- In a proceeding to terminate parental rights, the father must provide the Office of Vital Statistics of the Department of Health ("Office") with a copy of that petition. The Office may not record a claim of paternity after the date a petition has been filed.

- Alters the provisions regarding who may execute an irrevocable affidavit of paternity.

- Directs that if a court determines that a registrant is not the father of a child or has no parental rights; the court must order the Department to remove the registrant's name from the registry.

- Makes a change regarding inheritance rights to clarify that an adopted person has the same rights of inheritance as a blood descendant.

- Removes the provision that would authorize the Department of Health to release an original sealed birth certificate on court order only to the Department of Children and Family Services.

The bill was then reported favorably.

A bill to be entitled

An act relating to adoption; amending s. 63.054, F.S.; requiring a petitioner in a proceeding for termination of parental rights to provide notice to the Office of Vital Statistics of the Department of Health; prohibiting the office from recording a claim of paternity after the date that a termination of parental rights is filed; requiring the department to remove a registrant's name from the Florida Putative Father Registry upon a finding that the registrant has no parental rights; amending s. 63.062, F.S.; modifying consent required for adoption; amending s. 63.182, F.S.; providing that the interest that entitles a person to notice of an adoption must be direct, financial, and immediate; providing an exception; providing that a showing of an indirect, inconsequential, or contingent interest is wholly inadequate; providing construction and applicability; providing an effective date.

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

Section 1. Subsections (1) and (5) of section 63.054, Florida Statutes, are amended to read:

63.054 Actions required by an unmarried biological father to establish parental rights; Florida Putative Father Registry.--

(1) In order to preserve the right to notice and consent to an adoption under this chapter, an unmarried biological father must, as the "registrant," file a notarized claim of

paternity form with the Florida Putative Father Registry maintained by the Office of Vital Statistics of the Department of Health and shall include therein confirmation of his willingness and intent to support the child for whom paternity is claimed in accordance with state law. The claim of paternity may be filed at any time prior to the child's birth, but a claim of paternity may not be filed after the date a petition is filed for termination of parental rights. In each proceeding for termination of parental rights, the petitioner shall submit to the Office of Vital Statistics of the Department of Health a copy of the petition for termination of parental rights. The Office of Vital Statistics of the Department of Health shall not record a claim of paternity after the date that a petition for termination of parental rights is filed.

(5) The registrant may, at any time prior to the birth of the child for whom paternity is claimed, execute a notarized written revocation of the claim of paternity previously filed with the Florida Putative Father Registry, and upon receipt of such revocation, the claim of paternity shall be deemed null and void. If a court determines that a registrant is not the father of the minor or has no parental rights, the court shall order the Department of Health to remove the registrant's name from the registry.

Section 2. Subsection (4) of section 63.062, Florida Statutes, is amended to read:

63.062 Persons required to consent to adoption; affidavit of nonpaternity; waiver of venue.--

(4) Any person whose consent is required under paragraph (1)(b), or any other man, ~~paragraphs (1)(c)-(e)~~ may execute an irrevocable affidavit of nonpaternity in lieu of a consent under this section and by doing so waives notice to all court proceedings after the date of execution. An affidavit of nonpaternity must be executed as provided in s. 63.082. The affidavit of nonpaternity may be executed prior to the birth of the child. The person executing the affidavit must receive disclosure under s. 63.085 prior to signing the affidavit.

Section 3. Section 63.182, Florida Statutes, is amended to read:

63.182 Statute of repose.--

(1) Notwithstanding s. 95.031 or s. 95.11 or any other statute, an action or proceeding of any kind to vacate, set aside, or otherwise nullify a judgment of adoption or an underlying judgment terminating parental rights on any ground may not be filed more than 1 year after entry of the judgment terminating parental rights.

(2)(a) Except for the specific persons expressly entitled to be given notice of an adoption in accordance with this chapter, the interest that entitles a person to notice of an adoption must be direct, financial, and immediate and the person must show that he or she will gain or lose by the direct legal operation and effect of the judgment. A showing of an indirect, inconsequential, or contingent interest is wholly inadequate and a person with this indirect interest lacks standing to set aside a judgment of adoption.

(b) This subsection is remedial and shall apply to all

adoptions, including those in which a judgment of adoption has already been entered.

Section 4. This act shall take effect upon becoming a law.

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 7169 PCB JUVJ 06-02 Judicial Discretion to Select Commitment Programs
**SPONSOR(S):** Juvenile Justice Committee
**TIED BILLS:** **IDEN./SIM. BILLS:**

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| Orig. Comm.: Juvenile Justice Committee | 6 Y, 0 N | White | White |
| 1) Criminal Justice Appropriations Committee | 6 Y, 0 N | DeBeaugrine | DeBeaugrine |
| 2) | | | |
| 3) | | | |
| 4) | | | |
| 5) | | | |

### SUMMARY ANALYSIS

House Bill 7169 implements recommendations made in the House Juvenile Justice Committee's Interim Report entitled, "Judicial Discretion to Select Juvenile Commitment Programs," and during the Committee's workshop on the bill. Specifically, the bill:

- Creates a pilot program in the First, Eleventh, and Thirteenth Judicial Circuits, which authorizes judges to select commitment programs within the restrictiveness level ordered by the court.

- Requires the Department of Juvenile Justice (DJJ) prior to the beginning of the pilot program to:
  - Publish on its Internet website information that identifies and describes each commitment program.
  - Develop procedures, in consultation with judges, to implement the pilot program.

- Requires the DJJ, when requested by the court, to provide a list of commitment programs for which the youth is eligible, along with expected wait periods, and authorizes the court to select a program from the list if the expected wait period is 20 days or less for a maximum-risk program or 30 days or less for a program in the other restrictiveness levels. Alternatively, the court may select a commitment program with a longer wait period or that is not on the list, if the court provides reasons establishing that the youth is eligible for the program and that the program is in the youth's best interest.

- Requires the Office of Program Policy Analysis and Government Accountability (OPPAGA) to evaluate the pilot program and to periodically submit written reports that include:
  - Data on the frequency of court-specified placements and on the impact of such placements on commitment program wait periods, including secure detention stays.
  - Comparisons of successful completion, educational achievement, and recidivism data for court-specified and DJJ-specified placements.
  - Findings by the OPPAGA, DJJ, and delinquency courts regarding the benefits and disadvantages of court-specified placements, and recommendations by these entities for amendments to the statutes addressing commitment.

The DJJ has indicated that the fiscal impact of this bill will be $13,000 for modifications of the Juvenile Juvenile Information System and an indeterminate amount for potential increases in secure detention utilization.

**FULL ANALYSIS**

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

***Disposition and Commitment of Delinquent Youth:*** Under current law, when a youth is found to have committed a delinquent act, the options available to the court for disposition include: (1) withholding adjudication and probation; or (2) adjudication and probation or commitment to the minimum-, low-, moderate-, high-, or maximum-risk restrictiveness levels.[1]

Prior to committing a youth, the court must consider a predisposition report (PDR) that is based upon a multidisciplinary assessment of the youth by the Department of Juvenile Justice (DJJ) and that includes:

- A description of the youth's criminal history, educational background, and needs, and if residential commitment is considered, a comprehensive evaluation of the youth's physical and mental health and of substance abuse, academic, educational, or vocational problems.
- The DJJ's recommendation for a treatment plan and restrictiveness level as determined during a commitment staffing[2] conducted by the DJJ for the youth.[3]

The PDR must be provided to the court at least 48 hours before the disposition hearing.[4] The court may follow the DJJ's recommendation in the PDR, or it may reject the recommendation if it states reasons that establish by a preponderance of the evidence why it is rejecting the recommendation.[5] [6]

If the court orders commitment for the youth, it must specify the restrictiveness level, but it may not select a program within the level.[7] Instead, the DJJ is responsible for placing the youth in a program within the court-ordered restrictiveness level.

***Placement of Committed Youth:*** Once a court has committed a youth to a restrictiveness level, a DJJ commitment manager utilizes the Juvenile Justice Information System (JJIS), which manages the availability of commitment slots, to determine the appropriate program placement. For each committed youth, a DJJ commitment manager enters the following information into the JJIS:

- **The restrictiveness level ordered by the court.**
- **Whether the youth needs any of the following services:** pregnancy services; restitution services; a staff, fence, or hardware secure facility; sex offender treatment; behavior overlay services; residential substance abuse overlay services; intensive mental health services; special needs mental health services; mental health overlay services; developmentally disabled services; social and life skills; vocational training; educational services; residential substance abuse treatment; or specialized mental health services.

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[1] *See* Section 985.03(46), F.S. (defining each restrictiveness level).
[2] According to DJJ representatives, invitees to the commitment staffing include the JPO, a DJJ commitment manager, the youth, the youth's parent(s) or guardian(s), the state attorney, the public defender, school officials, mental health staff, and other parties with information regarding the youth.
[3] Sections 985.229(1) and 985.23(2) and (3)(b), F.S.
[4] Section 985.229(1), F.S.
[5] *See* Section 985.23(3)(c), F.S.
[6] Data provided by the DJJ indicates that judges agreed with DJJ's disposition recommendation approximately 76 percent (n=8500) of the time in Fiscal Year 2004-2005.
[7] *See Department of Juvenile Justice v. J.R.*, 716 So.2d 872 (Fla 1st DCA 1998) and *Department of Juvenile Justice v. E.R., J.R., M.C., and C.A.*, 724 So.2d 129 (Fla 3rd DCA 1998) (holding that the court has no statutory authority to require placement of a committed youth in a particular facility).

- **Whether any of the following disqualifying factors apply to the youth:** documented arson history; extremely aggressive behavior; DSM IV diagnosis; psychotropic medications; IQ below 70; serious habitual offender; intensive residential treatment; asthma; diabetes; heart condition; seizures; sickle cell anemia; cancer; sexually transmitted disease; tuberculosis; or pregnancy.

Based on this information, the JJIS produces a list of programs that will meet the youth's needs and for which the youth has no disqualifying factors. The JJIS also indicates the expected wait list for the listed programs. The commitment manager selects a program from the JJIS list after considering which program best meets the youth's needs and which is closest to the youth's home.

The JJIS does not factor Program Accountability Measures (PAM)[8] and Quality Assurance[9] ratings into the placement process; however, DJJ representatives have stated that the commitment manager may be aware of the ratings and may factor these into his or her final placement choice for a youth.[10]

***Interim Project on Judicial Discretion to Select Commitment Programs:*** During the 2006 Interim, the House Juvenile Justice Committee conducted a project that reviewed the issue of statutorily affording judges the discretion to select particular commitment programs for youth. This issue had been considered by the Legislature in three bills filed during the 2003 and 2005 Regular Sessions.[11]

The interim project report indicates that a survey of Florida's 81 juvenile delinquency judges was conducted to obtain feedback regarding whether they desire judicial discretion. Out of 41 judges responding to the survey, more than half (23 judges or 56 percent) believed that statute should be amended to afford judicial discretion. The judges indicated that judicial discretion would be advantageous because it would assist in insuring that placements are based on youth needs and the most effective programming available, rather than on program availability and budgetary concerns.[12]

The report also notes disadvantages to affording judicial discretion, which were cited by judges responding to the survey and by the DJJ. These disadvantages include that: (a) sufficient information on the content and effectiveness of commitment programs may not be readily available to judges in order for them to make informed placement decisions; (b) DJJ employees, who attend the commitment staffing, are in the best position to know which programs are available and for which the youth meets eligibility requirements; and (c) the time youth spend awaiting commitment placements may increase if judges over utilize the most effective programs.[13] In order to mitigate these disadvantages, the report made recommendations that included the following for the Legislature to consider should it desire to grant judicial discretion in the future:

- To offer juvenile delinquency judges greater information on the content and effectiveness of commitment programs, the Legislature could require the DJJ to annually: (a) provide judges with a publication providing a comprehensive overview of each commitment program, including recidivism rates, and PAM and QA ratings; and (b) training at judicial conferences.

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[8] PAM scores consist of a program recidivism effectiveness measure and a cost effectiveness measure. Recidivism effectiveness is calculated as the standardized difference between the program's expected recidivism and observed recidivism. Cost effectiveness is calculated as the standardized difference between each program's average cost per youth completing the program and the statewide average cost per completion of $34,083. *See The 2005 PAM Report,* Department of Juvenile Justice, December 2004, p. 5.

[9] Quality Assurance ratings are based upon an evaluation of the following three elements in each program: (1) level of performance and quality of services; (2) immediate and long-term outcomes; and (3) cost. *See An Introduction to Florida's Juvenile Justice Quality Assurance System,* Department of Juvenile Justice, May 2004, p. 4.

[10] *Judicial Discretion to Select Juvenile Commitment Programs,* House of Representatives Juvenile Justice Committee, January 2006, pp. 4-6.

[11] *See* HB 1741 and SB 1900 (2003) and HB 1917 (2005).

[12] *Judicial Discretion to Select Juvenile Commitment Programs* at pp. 6, 9, 11.

[13] As discussed in the report, however, this alleged disadvantage might ultimately result in the DJJ either expanding the most effective programs or opening new ones that are equally effective. *Id.* at 9.

- To insure that judges only place youth in commitment programs for which they are eligible, the Legislature could require the DJJ to provide judges, upon request, the list of programs produced by the JJIS for the youth and the wait list for those programs.

- To minimize the risk that judicial placements might result in substantially longer commitment wait lists, the Legislature could provide that such placements must occur within 30 days, rather than within 45 days as specified in the 2005 proposed legislation. For Fiscal Years 2003 through 2005, the average wait list time for placement in a low-, moderate-, or high-risk program was 28 days and in a maximum-risk program was 17.7 days.

- To more fully evaluate the advantages and disadvantages of affording judicial discretion prior to statewide adoption, the Legislature could initially implement such discretion as a pilot program and require the collection of data during the project that includes: (a) the number of youth committed by circuit; (b) the number of youth placed in judicially-specified programs by circuit; (c) the number of times judges deviated from JJIS-listed programs; (d) the average wait list time for judicially- and DJJ-specified program placements; (e) the average time spent by youth in secure detention while awaiting judicially- and DJJ-specified program placements; and (f) a description of any written documents and training provided by the DJJ to judges regarding the content and effectiveness of commitment programs.[14]

*Effect of Bill: The bill implements recommendations made in the House Juvenile Justice Committee's Interim Report entitled, "Judicial Discretion to Select Juvenile Commitment Programs," and during the Committee's workshop on the bill. Under the bill, a pilot program for the time period of September 1, 2006 through July 1, 2010, is created in the First (Escambia, Okaloosa, Santa Rosa, and Walton Counties), Eleventh (Dade County) and Thirteenth (Hillsborough County) Judicial Circuits in order to authorize specification of commitment program placements for youth by delinquency courts in those circuits.*[15]

*The bill requires the DJJ before August 31, 2006, to:*

- *Develop, in consultation with affected delinquency court judges, procedures to implement the pilot program.*

- *Publish on its Internet website, and to continually update as changes occur, information that identifies the name and address of each commitment program and that describes for each identified program: the population of youth served; the maximum capacity; the services offered; the admission criteria; the most recent recidivism rates; and the most recent cost-effectiveness, i.e., PAM, rankings and QA results under s. 985.412, Florida Statutes.*

- *Develop, in consultation with the Office of Program Policy Analysis and Government Accountability (OPPAGA), reporting protocols to collect and maintain data necessary for OPPAGA's required reports on the pilot program.*

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[14] *Id.* at 10-11.

[15] These judicial circuits were selected based upon the number of referrals annually received, the number of commitments annually imposed, and the expressed desire of judges within the circuit to utilize judicial discretion to select commitment programs. The First Judicial Circuit: had the 13th highest number of referrals in the state for Fiscal Years 2000 through 2005; had the third highest number of commitments in the state for Fiscal Years 2000 through 2005; and two out of four judges responding to the interim project survey indicated that the law should be amended to afford judicial discretion. The Eleventh Judicial Circuit had the highest number of referrals in the state for Fiscal Years 2000 through 2005; had the sixth highest number of commitments in the state for Fiscal Years 2000 through 2005; and four out of four judges responding to the interim project survey indicated that the law should be amended to afford judicial discretion. The Thirteenth Judicial Circuit: had the fifth highest number of referrals in the state for Fiscal Years 2000 through 2005; had the eighth highest number of commitments in the state for Fiscal Years 2000 through 2005; and two out of four judges responding to the interim project survey indicated that the law should be amended to afford judicial discretion.

*The bill authorizes delinquency court judges[16] during the pilot program period to require the DJJ to include in a youth's PDR the list of commitment programs produced by the JJIS for the youth, including the wait period for each program. The judge may select a program from the list, which has a wait period of 20 calendar days or less for a maximum-risk program or 30 calendar days or less for another program. If the judge wishes to select a program from the list with a longer wait period, the judge must state reasons on the record establishing by a preponderance of the evidence that the placement is in the youth's best interest. Further, if the judge wishes to place the youth in a commitment program not on the list, the judge must state reasons on the record establishing by a preponderance of the evidence that the youth is eligible for the commitment program and that the commitment program is in the youth's best interest. The bill defines "eligible" as meaning a determination that the youth satisfies admission criteria for the commitment program.*

*The bill provides that youth, who are subject to a judicially-specified placement, shall be placed in the next regularly scheduled opening for the program ordered; i.e., delinquency courts are not authorized to order placement prioritization for youth subject to a judicially-specified placement.*

*The bill also requires the OPPAGA to evaluate the pilot program and to submit a report to the Governor and Legislature on January 1, 2008, and annually thereafter, which identifies, according to judicial circuit and restrictiveness level, the following data, as it becomes available, for the pilot program period:*

- *The number of youth committed to the department by the delinquency court.*
- *The number of youth placed by the delinquency court in a program: on the JJIS list with a wait period of 20 or 30 calendar days or less, as applicable; on the JJIS list with a wait period in excess of 20 or 30 calendar days, as applicable; and that was not on the JJIS list.*
- *The number of youth placed in DJJ-specified commitment programs.*
- *The average wait period for, and the average number of days spent by youth in secure detention while awaiting placement in, delinquency court-specified commitment programs and DJJ-specified commitment programs.*
- *The number of youth who complete, and who are otherwise released from, delinquency court-specified commitment programs and DJJ-specified commitment programs.*
- *Educational achievements made by youth while participating in delinquency court-specified commitment programs and department-specified commitment programs.*
- *The number of youth who recidivate within six-months following completion of delinquency court-specified commitment programs and DJJ-specified commitment programs.[17]*

*Further, the bill requires that the reports submitted by the OPPAGA on January 1, 2009 and January 1, 2010, contain: (a) findings by the OPPAGA, DJJ, and delinquency courts regarding the benefits and disadvantages of authorizing courts to select commitment programs; and (b) recommendations by the OPPAGA, DJJ, and delinquency courts, if found to be warranted, for amendments to current statute addressing commitment.*

*Finally, the bill provides for the repeal of the pilot program on July 1, 2010.*

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[16] Some interested parties have raised concerns about the bill indicating that judges may be unduly influenced by private providers to select certain commitment programs. Judges, however, are governed by the Code of Judicial Conduct, which: (1) requires a judge to disqualify himself or herself in any case where his or her impartiality may be questioned, including where a judge or a family member has anything more than a de minimis interest that could be affected by a proceeding; and (2) prohibits the acceptance of a gifts by a judge if the donor's interests are likely to come before the judge. *See* Canons 3.E. and 5.D. of the Code of Judicial Conduct. Compliance with the Code of Judicial Conduct is enforced by the Judicial Qualifications Commission. *See* Florida Judicial Qualifications Commission Rules.

[17] The bill directs the OPPAGA, in consultation with staff of the appropriate substantive and fiscal committees of the Legislature, to develop common terminology and operational definitions for the measurement of data required to be included in the report.

C. SECTION DIRECTORY:

**Section 1.** Creates a pilot program for the period of September 1, 2006 through July 1, 2010, which authorizes delinquency courts to select commitment programs in the First, Eleventh, and Thirteenth Judicial Circuits; provides definitions; requires the DJJ before August 31, 2006, to develop procedures to implement the pilot program, to publish on its Internet website specified information about commitment programs, and to develop reporting protocols for specified data; specifies requirements applicable to the selection of commitment programs by judges; requires the OPPAGA to submit a report containing specified data to the Governor and Legislature regarding the pilot program on January 1, 2008, and annually thereafter; requires the OPPAGA, the DJJ, and judges to make findings and recommendations; provides that the section repeals on July 1, 2010.

**Section 2.** Provides an effective date of July 1, 2006.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The DJJ funds post-disposition secure detention costs. Under s. 985.215(10)(c) and (d), F.S., any type of detention for which a juvenile scores on his or her risk assessment instrument may be continued until the youth is placed in a high- or maximum-risk commitment program. Accordingly, the bill could increase post-disposition secure detention costs in the First, Eleventh, and Thirteenth Judicial Circuits to the extent that judicial commitment program placements increase wait lists for high- and maximum-risk commitment programs.

   The DJJ has indicated that the fiscal impact of the bill's potential increase in secure detention utilization is indeterminate because the following is unknown: (a) how often judges in the three judicial circuits will place youth is unknown; and (b) whether judicial placements will increase average secure detention stays for high- and maximum-risk programs.

   The DJJ has stated that the bill's data collection requirements in subsection (6) will necessitate modifications of the JJIS at a cost of $13,000. There is no increased appropriation to the Department of Juvenile Justice to accommodate this workload. Therefore, the agency will have to absorb the impact from within existing resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

A bill to be entitled

An act relating to a juvenile justice pilot program; creating a pilot program that authorizes specified courts to select commitment programs for juvenile delinquents; providing definitions; providing program's purpose; requiring the Department of Juvenile Justice to develop implementation procedures and to publish specified information about commitment programs on its website; providing procedures for the selection of commitment programs by courts; requiring evaluation and reports by the Office of Program Policy and Government Accountability; specifying department and court responsibilities relating to the reports; providing for future repeal; providing an effective date.

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

Section 1. Judicial discretion to select commitment programs; pilot program.--

(1) The definitions contained in s. 985.03, Florida Statutes, apply to this section. Additionally, for purposes of this section, the term:

(a) "Available placement" means a commitment program for which the department has determined the youth is eligible.

(b) "Commitment program" means a facility, service, or program operated by the department or by a provider under contract with the department within a restrictiveness level.

(c) "Delinquency court" means a circuit court in the First, Eleventh, or Thirteenth Judicial Circuit.

(d) "Eligible" means a determination that the youth satisfies admission criteria for the commitment program.

(e) "Wait period" means the shortest period of time expected to elapse prior to placement of a youth in a commitment program, as determined by the department based upon anticipated release dates for youth currently in the commitment program.

(2) Between September 1, 2006, and July 1, 2010, a pilot program shall be conducted in the First, Eleventh, and Thirteenth Judicial Circuits, which authorizes delinquency courts to select commitment programs for youth. The purpose of the pilot program is to identify and evaluate the benefits and disadvantages of affording such judicial discretion prior to legislative consideration of statewide implementation.

(3) Before August 31, 2006, the department shall:

(a) Develop, in consultation with delinquency court judges, procedures to implement this section.

(b) Publish on its Internet website information that identifies the name and address of each commitment program and that describes for each identified commitment program the population of youth served; the maximum capacity; the services offered; the admission criteria; the most recent recidivism rates; and the most recent cost-effectiveness rankings and quality assurance results under s. 985.412, Florida Statutes. The department shall continually update information published under this paragraph as modifications occur.

(4) Between September 1, 2006, and July 1, 2010, a delinquency court may:

(a) Order the department to include in a youth's predisposition report a list of all available placements within each restrictiveness level identified by the court or recommended by the department. The list shall also indicate the wait period for each available placement identified by the department.

(b)1. Specify for a youth committed by the court an available placement identified in the listing under paragraph (a), which has a wait period of 30 calendar days or less for a minimum-risk nonresidential, low-risk residential, moderate-risk residential, or high-risk residential commitment program or a wait period of 20 calendar days or less for a maximum-risk residential commitment program; or

2. Alternatively, a delinquency court may specify:

a. An available placement with a wait period in excess of those identified in subparagraph 1., if the court states reasons on the record establishing by a preponderance of the evidence that the available placement is in the youth's best interest; or

b. A commitment program that is not listed as an available placement, if the court states reasons on the record establishing by a preponderance of the evidence that the youth is eligible for the commitment program and that the commitment program is in the youth's best interest.

(5) When a delinquency court specifies an available placement or commitment program for a youth under paragraph (4)(b), the youth shall be placed, as specified by the court,

when the next regularly scheduled opening occurs after the placement of other youth who were previously committed and waiting for that program.

(6)(a) The Office of Program Policy Analysis and Government Accountability shall conduct a longitudinal evaluation of the pilot program created by this section and shall submit a written report to the appropriate substantive and fiscal committees of the Legislature and to the Governor on January 1, 2008, and annually thereafter, which identifies, according to judicial circuit and restrictiveness level, the following data, as it becomes available, for the pilot program period:

1. The number of youth committed to the department by a delinquency court.

2. The number of youth placed by a delinquency court in an available placement under subparagraph (4)(b)1. and sub-subparagraph (4)(b)2.a., and in a commitment program under sub-subparagraph (4)(b)2.b.

3. The number of youth placed in a department-specified commitment program.

4. The average wait period for, and the average number of days spent by youth in secure detention while awaiting placement in, delinquency court-specified commitment programs and department-specified commitment programs.

5. The number of youth who complete, and who are otherwise released from, delinquency court-specified commitment programs and department-specified commitment programs.

6. Educational achievements made by youth while participating in delinquency court-specified commitment programs and department-specified commitment programs.

7. The number of youth who are taken into custody for a felony or misdemeanor within 6 months following completion of delinquency court-specified commitment programs and department-specified commitment programs.

(b) Before August 31, 2006:

1. The department, in consultation with the Office of Program Policy Analysis and Government Accountability, shall develop reporting protocols to collect and maintain data necessary for the report required by this subsection.

2. The Office of Program Policy Analysis and Government Accountability, in consultation with staff of the appropriate substantive and fiscal committees of the Legislature, shall develop common terminology and operational definitions for the measurement of data necessary for the report required by this subsection.

(c) The reports required under paragraph (a) to be submitted on January 1, 2009, and January 1, 2010, must also include:

1. Findings by the Office of Program Policy Analysis and Government Accountability, the department, and delinquency courts regarding the benefits and disadvantages of authorizing courts to select commitment programs.

2. Recommendations by the Office of Program Policy Analysis and Government Accountability, the department, and

delinquency courts, if found to be warranted, for amendments to current statutes addressing commitment.

(7) This section is repealed effective July 1, 2010.

Section 2. This act shall take effect July 1, 2006.

# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 7177 (PCB CRJU 06-09) Statute of Limitations in Criminal Cases
**SPONSOR(S):** Criminal Justice Committee
**TIED BILLS:** **IDEN./SIM. BILLS:**

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| Orig. Comm.: Criminal Justice Committee | 7 Y, 0 N | Cunningham | Kramer |
| 1) | | | |
| 2) | | | |
| 3) | | | |
| 4) | | | |
| 5) | | | |

## SUMMARY ANALYSIS

Section 775.15, F.S., controls the time limitations for initiating a criminal prosecution for any felony offense in the following manner:

- For a capital felony, a life felony, or a felony resulting in death, there is no time limitation;
- For a first degree felony, there is a four-year limitation; and
- For any other felony, there is a three-year limitation.

Florida's DNA database, and others throughout the country, provides opportunities for law enforcement agencies to solve crimes where they have physical evidence containing DNA by checking that evidence against information in the database. The practice of some agencies to sift through evidence in "cold cases" - cases where the investigative leads have long since been exhausted – has resulted in defendants being identified with crimes that were unsolved for many years.

Section 775.15(15), F.S., seeks to address the situation in which the general time limitations for commencing prosecution have expired before the perpetrator is identified. The statute provides that a prosecution for sexual battery and lewd and lascivious offenses 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 deoxyribonucleic acid (DNA) evidence.

This bill provides that a prosecution for any of the below-listed offenses that are not otherwise barred from prosecution 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. The following offenses are specified:

- An offense of sexual battery under chapter 794;
- A lewd or lascivious offense under s. 800.04 or s. 825.1025;
- Aggravated battery or any felony battery offense under chapter 784;
- Kidnapping under s. 787.01 or false imprisonment under s. 787.02;
- A burglary offense under s. 810.02;
- A robbery offense under s. 812.13, s. 812.131, or s. 812.135;
- Carjacking under s. 812.133; and
- Aggravated child abuse under s. 827.03.

This act takes effect July 1, 2006.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government → This bill provides that a prosecution for certain specified offenses, unless otherwise barred by law, may be commenced at any time after the date on which the identity of the accused is established, or should have been established using due diligence, through the analysis of DNA evidence.

B. EFFECT OF PROPOSED CHANGES:

*Statute of Limitations*

Section 775.15, F.S., sets forth time limitations for commencing criminal prosecutions, or "statute of limitations."

There was no statute of limitations at common law.[1] It is purely a statutory creation. In *State v. Hickman*, the court borrowed a section from 22 C.J.S., Criminal Law s. 223 and explained that:

> "Statutes of Limitation are construed as being acts of grace, and as a surrendering by the sovereign of its right to prosecute or of its right to prosecute at its discretion, and they are considered as equivalent to acts of amnesty. Such statutes are founded on the liberal theory that prosecutions should not be allowed to ferment endlessly in the files of the government to explode only after witnesses and proofs necessary to the protection of accused have by sheer lapse of time passed beyond availability. They serve, not only to bar prosecutions on aged and untrustworthy evidence, but also to cut off prosecution for crimes a reasonable time after completion, when no further danger to society is contemplated from the criminal activity." *State v. Hickman*, 189 So.2d 254, 262 (Fla. 2nd DCA 1966).

Section 775.15(3), F.S., provides that time for prosecution of a criminal case starts to run on the day after the offense is committed. An offense is deemed to have been committed either when every element of the offense has occurred, or, if the legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's duplicity therein is terminated.[2]

Section 775.15, F.S., controls the time limitations for initiating a criminal prosecution for any felony offense in the following manner:

- For a capital felony, a life felony, or a felony resulting in death, there is no time limitation;
- For a first degree felony, there is a four-year limitation; and
- For any other felony, there is a three-year limitation.

Generally, the controlling criminal statute of limitations is the version that is in effect when a crime is committed.[3] The legislature can extend the limitations period without violating the constitutional prohibition against ex post facto laws if it does so before prosecution is barred by the old statute and clearly indicates that the new statute is to apply to cases pending when it becomes effective.[4] If the pre-existing statute of limitations had already expired prior to passage of the new statue of limitations,

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[1] *State v. McCloud*, 67 So.2d 242 (Fla. 1953).
[2] s. 775.15, F.S.
[3] *See Andrews v. State*, 392 So.2d 270,271 (Fla. 2d DCA 1980).
[4] *Id.*

the retroactive application of the new statute of limitations would violate the ex post facto provisions of both the Unites States Constitution (Art. I, ss. 9, 10) and the Florida Constitution (Art. I, s. 10.).[5]

*DNA – An Investigative Tool*

Florida's DNA database, and others throughout the country, provides opportunities for law enforcement agencies to solve crimes where they have physical evidence containing DNA by checking that evidence against information in the database. The practice of some agencies to sift through evidence in "cold cases" - cases where the investigative leads have long since been exhausted – has resulted in defendants being charged with crimes that were unsolved for many years.

One example of such a case occurred after DNA sample collections from people convicted of burglary offenses in Florida began in July 2000. In October 2000, a man in a Florida prison on a burglary conviction, who gave the required blood samples for inclusion in the FDLE database, became a suspect in a 1999 sexual assault on a 77-year old West Virginia woman. According to reports, when he was identified as a suspect, another man who had previously been charged with the West Virginia crime was likely to be exonerated.[6]

Most of the crimes where it would be more likely to have DNA left at the crime scene, due to the nature of the offense, currently have no time limitation for commencing prosecution of the perpetrator (e.g. murder; sexual battery, when reported within 72 hours after the commission of the crime). However, in some cases the time may have expired before the perpetrator is identified. For example, if a sexual battery offense goes unreported for more than 72 hours, the time limitation for commencing prosecution would be four years (first degree felony) or three years (any other felony).

*Exception to the General Statute of Limitations – Section 775.15(15), F.S.*

Section 775.15(15), F.S., seeks to address the situation in which the general time limitations for commencing prosecution have expired before the perpetrator is identified. Currently, the statute provides:

> In addition to the time periods prescribed in this section, a prosecution for any of the following offenses 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 deoxyribonucleic acid (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:
>
> 1. An offense of sexual battery under chapter 794.
> 2. A lewd or lascivious offense under s. 800.04 or s. 825.1025.
>
> This subsection applies to any offense that is not otherwise barred from prosecution on or after July 1, 2004.

**Effect of the Bill**

This bill provides that a prosecution for any of the below-listed offenses that are not otherwise barred from prosecution 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. The following offenses are specified:

- An offense of sexual battery under chapter 794;
- A lewd or lascivious offense under s. 800.04 or s. 825.1025;
- Aggravated battery or any felony battery offense under chapter 784;
- Kidnapping under s. 787.01 or false imprisonment under s. 787.02;

[5] *See United States v. Richardson,* 512 F.2d 105, 106 (3rd Cir. 1975); *Reino v. State,* 352 So.2d 853 (Fla. 1977).
[6] *See* Senate Staff Analysis and Economic Impact Statement, CS/SB 300, February 15, 2002.

- A burglary offense under s. 810.02;
- A robbery offense under s. 812.13, s. 812.131, or s. 812.135;
- Carjacking under s. 812.133; and
- Aggravated child abuse under s. 827.03.

C. SECTION DIRECTORY:

**Section 1.** Amends s. 775.15(15), F.S., providing that a prosecution for certain specified offenses, unless otherwise barred by law, may be commenced at any time after the date on which the identity of the accused is established, or should have been established using due diligence, through the analysis of DNA evidence.

**Section 2.** This act takes effect July 1, 2006.

## 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:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable because this bill does not appear to: require the counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 22, 2006, the Criminal Justice Committee adopted a strike-all amendment to the proposed committee bill and reported the bill favorably. The strike-all amendment provides that a prosecution for any of the below-listed offenses that are not otherwise barred from prosecution 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.

A bill to be entitled

An act relating to time limitations for criminal prosecutions; amending s. 775.15, F.S.; specifying the applicability period of a provision allowing an additional limitations period for specified offenses in certain circumstances; providing that a prosecution for specified offenses, unless otherwise barred by law, 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 deoxyribonucleic acid (DNA) evidence; providing an effective date.

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

Section 1. Subsection (15) of section 775.15, Florida Statutes, is amended, and subsection (16) is added to that section, to read:

775.15 Time limitations; general time limitations; exceptions.--

(15)(a) In addition to the time periods prescribed in this section, a prosecution for any of the following offenses 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 deoxyribonucleic acid (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:

1. An offense of sexual battery under chapter 794.

2. A lewd or lascivious offense under s. 800.04 or s. 825.1025.

(b) This subsection applies to any offense that is not otherwise barred from prosecution between ~~on or after~~ July 1, 2004, and June 30, 2006.

(16)(a) In addition to the time periods prescribed in this section, a prosecution for any of the following offenses 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 deoxyribonucleic acid (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:

1. Aggravated battery or any felony battery offense under chapter 784.

2. Kidnapping under s. 787.01 or false imprisonment under s. 787.02.

3. An offense of sexual battery under chapter 794.

4. A lewd or lascivious offense under s. 800.04 or s. 825.1025.

5. A burglary offense under s. 810.02.

6. A robbery offense under s. 812.13, s. 812.131, or s. 812.135.

7. Carjacking under s. 812.133.

8. Aggravated child abuse under s. 827.03.

(b) This subsection applies to any offense that is not otherwise barred from prosecution on or after July 1, 2006.

Section 2. This act shall take effect July 1, 2006.

**HB 7259**

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 7259 PCB JU 06-07 Class action lawsuits
**SPONSOR(S):** Judiciary Committee
**TIED BILLS:** **IDEN./SIM. BILLS:**

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| Orig. Comm.: Judiciary Committee | 12 Y, 0 N | Hogge | Hogge |
| 1) | | | |
| 2) | | | |
| 3) | | | |
| 4) | | | |
| 5) | | | |

## SUMMARY ANALYSIS

The bill would make policy changes relating to capacity to sue and proof of damage for class action lawsuits.

- ***Capacity to sue.*** The bill would limit membership in any class action filed in Florida state courts to Florida residents, except in certain circumstances. The bill specifically provides that the claimant class may include nonresidents if the conduct giving rise to the claim occurred in or emanated from this state.

- ***Damages.*** The bill would require class action claimants to prove actual damages in order to maintain a class action lawsuit to recover statutory penalties under chapters 320 (motor vehicle license), 501 (consumer protection), 520 (retail installment sales), and 521 (motor vehicle lease disclosure). The bill also provides that nothing in the bill precludes the attorney general from bringing a class action lawsuit to recover statutory penalties, if otherwise authorized by law.

The bill also would provide that this act does not affect any class action lawsuits involving federal or state civil rights laws.

The bill would have no discernable fiscal impact on state or local government.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government—The bill limits nonresident participation in class action lawsuits filed in Florida state courts, in certain circumstances.

B. EFFECT OF PROPOSED CHANGES:

**Background**

Class action lawsuits entail a balancing of policy considerations. On the one hand, no one can be bound by a judgment affecting his interests without his or her day in court.[1] On the other hand, class action lawsuits can "save a multiplicity of suits, reduce the expense of litigation, make legal process more effective and expeditious and make available a remedy that would not otherwise exist."[2]

Regulation of Class Action Lawsuits

The Florida Legislature has enacted legislation regulating class actions lawsuits in a variety of contexts. For instance, the Legislature has:

- expressly authorized class actions for certain subject matter (e.g., in chapters 718, F.S., and 719, F.S., re: condominiums);
- provided that certain provisions of law "shall not be construed to authorize a class action," (e.g., ss. 634.3284, F.S., and 642.0475, F.S., in the Insurance Code);
- prohibited class action lawsuits for certain subject matters (e.g., s. 282.5004, F.S., relating to Y2K-related suits);
- prohibited the use of funds to maintain a class action relating to civil legal assistance for the poor (e.g., s. 68.098, F.S.); and
- made limits on punitive damages inapplicable in certain actions (e.g., s. 768.735, F.S.).

Class action lawsuits generally are not looked upon favorably or are considered inappropriate for certain matters such as contract actions and causes of action based upon fraud and deceit.[3]

The Florida Supreme Court has adopted procedural requirements for class action litigation, including prerequisites for class certification, pleading and notice requirements, and dismissal or compromise.[4] The Florida Rules of Civil Procedure establish four prerequisites for a class action:

- Numerous members: The class is so numerous as to make joinder of the parties impracticable.
- Common questions of law or fact: The representative's claim or defense raises questions of law or fact common to the questions of law or fact raised by each class member.

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[1] Fla. Jur. 2d., PARTIES, s. 34.
[2] Fla. Jur. 2d., PARTIES, s. 37-38.
[3] Fla. Jur. 2d., s. 37-38, at 48-49.
[4] Fla. R. Civ. Pro. 1.220

- Typical claim or defense: The class representative's claim or defense is typical of that of each class member.

- Fair and adequate: The representative can fairly and adequately protect and represent the interests of each class member.[5]

If these four prerequisites are satisfied, the court must next conclude that the class fits into one of three categories: 1) that the prosecution of separate claims would create a risk of inconsistent or varying adjudications resulting in incompatible standards of conduct for the party opposing the class, or, as a practical matter, adjudications dispositive of the interests of other class members; 2) the party opposing the class has acted or refused to act on grounds generally applicable to all class members, making relief appropriate for the class as a whole; or 3) the claim is not maintainable under 1) or 2), but the common questions of law or fact predominate over any question affecting only individual members of the class.[6]

The court then either grants or denies class certification.[7] Once the class is certified, due process requires all potential class members to be notified. These class members may be included in the class or take steps to "opt out."[8] Final judgments of a state court over which it has personal and subject matter jurisdiction are entitled to full faith and credit in any other state court.[9]

**Proposed Changes**

The bill would make a number of changes affecting class actions in Florida.

Capacity to sue

The bill would limit membership in any class action filed in Florida state courts to Florida residents, but permit expansion to include nonresident claimants under certain circumstances. A court could expand a class to include nonresidents:

- Whose claim is recognized within their state of residence;

- Whose claim is not time barred; and,

- Who cannot assert their rights because their state of residence lacks personal jurisdiction over the defendant.

In addition, the claimant class could include nonresidents if the conduct giving rise to the claim occurred in or emanated from this state.

[Currently, Florida does not limit class membership to Florida residents in class actions filed in Florida state courts. However, in Florida, the Third District Court of Appeal ruled in the case of

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[5] Fla. R. Civ. Pro. 1.220(a)

[6] Fla. R. Civ. Pro. 1.220(b)

[7] "The class certification process...does not examine the merits of the underlying claim. Rather, the certification process determines whether a class action is the best manner by which to proceed with litigation. Connell, Michele, "Full Faith and Credit Clause: A Defense to Nationwide Class Action Certification?" 53 Case W.L.Res. L. Rev. 1041, 1050 (Summer 2003).

[8] A state generally must have both subject matter jurisdiction over the case and personal jurisdiction ("minimum contacts" in the case of nonresident defendants, and procedural due process in the case of nonresident plaintiff class members). Personal jurisdiction over plaintiffs becomes an issue in class action lawsuits because typically only the class representative has placed himself under the jurisdiction of the court. Personal jurisdiction over potential members, especially those from another state, can therefore be uncertain. In the case of a nationwide class action, class members can be located in multiple states. Since a judgment in a class action binds all class members, courts have repeatedly held that due process requires that potential nonresident class members be notified of the class action and be given the opportunity to "opt out" of the action. See, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 (1985).

[9] Art. I, s. 4, U.S. Const.

R.J. Reynolds v. Engle,[10] that the class should be restricted to Florida residents. This case involved a class of over one million members. The court found it appropriate in this case for a court, in considering whether to certify a class, to consider the effect on the judicial system itself, including the burden on taxpayers.

> Although there is nothing inherently wrong about certifying a national class in a state court action..., where, as here, the class contains so many members from so many different states and territories that it threatens to overwhelm the resources of a state court, it is settled that such a broad-based class is totally unmanageable and cannot be certified.[11]

In other states, in 1977, in Shutts I,[12] the Kansas Supreme Court, in considering the propriety of permitting nonresident class members to be included as class members in a state other than their state of residence, permitted the state court to hear the nationwide class action, citing recent United States Supreme Court cases that had restricted access to the federal courts in class action lawsuits. This, the court said, made it necessary for state courts to hear nationwide class actions:

> Recently the United States Supreme Court has required plaintiffs to assume the cost of notice in common-question class actions. The United States Supreme Court has also refused to aggregate class action claims to meet the $10,000 federal jurisdictional requirements. While the results are supported by the fear of overloading the federal judicial system and the desire not to judicially expand the constitutionally established jurisdictional limits, these recent United States Supreme Court cases have clearly restricted access to federal courts. (In this instance,) (i)f the state courts will not hear the matter, who will grant relief?[13]

Today, with congressional passage of the federal Class Action Fairness Act of 2005, the pendulum has swung the other way: federal courts will now entertain many of these actions. The federal Class Action Fairness Act of 2005, signed into law on February 18, 2005, grants diversity jurisdiction to federal courts over class actions meeting certain criteria. With respect to these changes, Congress found that "(a)buses in class actions undermine the national judicial system,...in that State and local courts are...(A) keeping cases of national importance out of Federal court; (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States."[14]

As a result, Congress vested federal courts with diversity jurisdiction over these actions when the amount in controversy exceeds $5 million in the aggregate, there are at least 100 class members (if a non-federal question class action), and any class member is a citizen of a state different from any defendant. The exercise of jurisdiction by the court is tied to the number of class members from the forum state, as follows:

| Proposed class members: residents of forum state | Defendants | Federal jurisdiction |
|---|---|---|
| <1/3rd | | Must accept |

[10] R. J. Reynolds Tobacco Company v. Engle, 672 So.2d 39 (Fla. 3rd DCA 1996).
[11] *Id.* at 42.
[12] Shutts v. Phillips Petroleum Co., 567 P.2d 1292 (Kan. 1977), *cert. denied* 434 U.S. 1068 (1978). In this case, Phillips had argued that the action should be brought in several different state courts. The Kansas Supreme Court disagreed, noting that if the in personam claims of nonresident plaintiff class members were dismissed from the action, those persons would be barred from recovering on their claims elsewhere.
[13] Shutts v. Phillips Petroleum Co., 679 P.2d 1159 (Kan. 1984)
[14] S. 5, Class Action Fairness Act of 2005 (Enrolled as Agreed to or Passed by Both House and Senate), Sec. 2(a)(4).

| | | |
|---|---|---|
| >1/3rd < 2/3rds | Primary defendants are citizens of forum state | May accept or decline |
| <2/3rd | One defendant from whom "significant relief" is sought; conduct formed "significant basis" for the claims; and citizen of forum state[15] | Must decline |

Certain actions involving securities and corporate governance claims are excluded from the federal act. The federal act also authorizes a defendant to remove a class action from state court to federal court, without regard to whether any defendant is a citizen of the State in which the action is brought.

Damages

The bill would require class action claimants to prove actual damages in order to maintain a class action lawsuit to recover statutory penalties under chapters 320 (motor vehicle license), 501 (consumer protection), 520 (retail installment sales), and 521 (motor vehicle lease disclosure). It would recognize that class action claimants may still seek nonmonetary relief, if appropriate, regardless of whether they can prove actual damages. Further, it would provide that nothing in the bill limits the ability of the attorney general to bring a class action to recover statutory penalties, if otherwise authorized by law.

[Florida currently only requires proof of nominal damages, not actual damages, for the recovery of monetary relief in class actions. "Nominal damages" have been defined as "damages of an inconsequential amount[16]...where there is no substantial loss or injury to be compensated...or where, although there has been a real injury, the plaintiff's evidence entirely fails to show its amount."[17] In contrast, "actual damages" are damages awarded for "actual and real loss or injury."[18] They are compensatory in nature, designed to replace the loss.]

Civil rights lawsuits

The bill includes a statement that it "does not affect any class action lawsuits involving federal or state civil rights laws."

C. SECTION DIRECTORY:

Section 1. Creates s. 774.01, F.S., relating to class actions; capacity to sue; requiring proof of actual damages.

Section 2. Provides that the act "does not affect any class action lawsuits involving federal or state civil rights laws."

Section 3. Provides an effective date of July 1, 2005.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

[15] In addition, at least one defendant must be a defendant "from whom significant relief is sought by members of the plaintiff class."
[16] Fla. Jur. 2d., DAMAGES, s. 5.
[17] Black's Law Dictionary, 6th Ed., at 392.
[18] *Id.* at 390.

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Indeterminate, but potentially negligible recurring negative fiscal impact for the court system, if the bill leads to a greater number of suits brought as individual actions rather than consolidated into class actions. However, it could produce an indeterminate positive fiscal impact on the court system by reducing the number of complex class action lawsuits involving large numbers of nonresidents.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Indeterminate, but potentially negligible recurring negative fiscal impact for the clerks of the court, if the bill leads to a greater number of suits brought as individual actions rather than consolidated into class actions. However, it could produce an indeterminate positive fiscal impact on the clerks of court by reducing the number of complex class action lawsuits involving large numbers of nonresidents.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

Privileges and immunities

Limiting Florida state courts to resident plaintiffs in a class action could implicate the Privileges and Immunities Clause of the United States Constitution. There are two Privileges and Immunities Clauses in the United States Constitution. The Privileges and Immunities Clause of Article IV is relevant to this bill. It provides that "(T)he citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[19] This clause prohibits discrimination by states against nonresidents.[20] But, like other constitutional provisions, it is not an absolute. The Clause does not

[19] Art. IV, s. 2, U.S. Const.

[20] The only cases staff could find discussing the application of the Privileges and Immunities Clause to state exclusion of nonresidents from a class action solely based on nonresidency are the Shutts cases out of Kansas. Although the Kansas Supreme Court did not hold that excluding nonresidents would violate the clause, it did reference a commentary from Newberg on Class Actions, s. 1206(d), in which Newberg writes: "...exclusion of non-residents from the class solely on the ground of their non-residency may be an unconstitutional discrimination against non-residents with respect to access to this state's courts, in violation of the Privileges &

"preclude disparity of treatment in the many situations where there are perfectly valid, independent reasons for it.[21] And, it does not infuse citizens with "new and independent rights."[22]

If confronted with a challenge under the Privileges and Immunities Clause to the distinctions between residents and nonresidents in this bill, the state may defend its position by demonstrating that there is a substantial reason for the difference in treatment, and that the discrimination practiced against nonresidents bears a substantial relationship to the state's objective.[23] The courts will give "due regard for the principle that states should have considerable leeway in analyzing local evils and in prescribing appropriate cures."[24]

In enacting the Class Action Fairness Act of 2005, Congress cited a number of policy reasons for assuming federal jurisdiction over nationwide class actions, many of which might constitute a "substantial reason" for limiting class members to residents of the state in which the action is brought. These include: cases of national importance are being kept out of federal court (presumably where they belong), and state and local courts acting in ways that could bias out-of-state defendants and making judgments that impose their view on other states and bind the rights of the residents of those States.[25] This bill does not recite the specific reasons for the difference in treatment between residents and nonresidents.

Access to courts

Placing limits on the use of Florida courts by nonresidents in a class action could implicate the right to access the courts. There are two sources of the right to access the courts—that implied from the United States Constitution[26] and that expressly provided in the Florida Constitution.

According to Article I, Section 21, of the Florida Constitution:[27]

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

The Legislature must not unduly or unreasonably burden or restrict access. The Florida Constitution protects "only rights that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution.[28] In order to make a colorable claim of denial of access to courts, an aggrieved party must demonstrate that the Legislature has abolished a common-law right previously enjoyed by the "people of Florida" and, if so, that it has provided a reasonable alternative for redress, unless there is an "overpowering public necessity" for eliminating the right and no alternative method exists.[29]

In this bill, nonresidents are not barred from asserting their rights and the bill does not impose limits on the right of the "people of Florida" to participate in class action lawsuits. The bill neither limits their ability to file an individual action in Florida or in their state of residence, nor file a separate class action in their state of residence. Further, unlike when the Shutts case was decided, the federal courts are now available to as a forum for many of the nationwide class action lawsuits. Further, at least one Florida court has recognized the propriety and necessity of limiting a class to Florida

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Immunities Clause of the United States Constitution. Each state court system, while possessing its own jurisdiction, is nevertheless part of a larger network of courts of the several states." Shutts v. Phillips Petroleum Co., 679 P.2d. 1159, 1170 (Kan. 1984) and Shutts v. Phillips Petroleum Co., 567 P.2d 1292 (Kan. 1977), cert. denied 434 U.S. 1068 (1978). However, in Missouri v. Mayfield, 340 U.S. 1, 3-4 (1950), the United States Supreme Court, while recognizing that the Privileges and Immunities Clause prohibits a state from discriminating against citizens of another state, found it to be a "choice within its own control" for a state to "prefer residents in access to often overcrowded Courts and to deny such access to all nonresidents, whether its own citizens or those of other states...."

[21] Am. Jur. 2d., CONSTITUTIONAL LAW, s. 749.

[22] *Id.*

[23] Fla. Jur. 2d., CONSTITUTIONAL LAW, s.388; Lunding v. New York Tax Appeals Tribunal, 118 S. Ct. 766 (U.S. 1998).

[24] Lunding, supra, note 24.

[25] See discussion in body of analysis cited in note 12, *supra.*

[26] The right is not express. The United States Supreme Court, nevertheless, has held that there is such a right arising from several constitutional provisions including the First Amendment, the Due Process Clause, and the Equal Protection Clause. Fla. Jur. 2d., s. 360.

[27] Art. I, s. 22, Fla. Const.

[28] Fla. Jur. 2d., s. 360.

[29] Kluger v. White, 281 So.2d 1, 4 (Fla. 1973).

residents because of the burden on the court system and the ability of the court system to manage the class.[30]

Separation of Powers: procedural and substantive changes

This bill could implicate separation of powers. The resolution of this question will turn on whether the provisions affecting class membership are substantive or procedural. If considered to be substantive, the bill would survive a separation of powers challenge. If procedural, it would not.

Article II, Section 3, of the Florida Constitution, provides,

> No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Article III, Section 1, of the Florida Constitution, vests "legislative power" in the Legislature. Article V, Section 2(a), of the Florida Constitution, directs the Supreme Court to adopt rules of "practice and procedure" for all courts.[31] The Legislature does have the power to repeal court rules. In *In re Rules of Criminal Procedure*, Justice Adkins defined "practice and procedure" to encompass the course, form, manner, means, method, mode, order, process, or steps by which a party enforces substantive rights or obtains redress....[32] Rules of practice and procedure include all rules governing the parties, their counsel and courts throughout the progress of the case from the time of its initiation until final judgment and its execution.[33] In contrast, Justice Adkins defined substantive law as consisting of the "rules and principles which fix and declare the primary rights of individuals as respects their persons and property."[34] "Capacity to sue" is an absence of legal disability which would deprive a party of the right to come into court. It is considered a substantive right within the purview of the Legislature.[35]

B. RULE-MAKING AUTHORITY:

None authorized or necessitated by the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 28, 2006, the Judiciary Committee adopted three amendments to this proposed committee bill and reported it favorably with a committee substitute. The bill with the committee substitute differs from the bill as filed in that the committee substitute would require class action claimants to prove actual damages only when seeking to recover statutory penalties under chapters 320 (motor vehicle license), 501 (consumer protection), 520 (retail installment), and 521 (motor vehicle lease disclosure), rather than when seeking to obtain "any monetary relief."

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[30] R. J. Reynolds Tobacco Company v. Engle, 672 So.2d 39 (Fla. 3d DCA 1996).
[31] Art. V, s. 2(a), Fla. Const.
[32] Allen v. Butterworth, 756 So.2d 52, 60 (Fla. 2000), Citing In Re Florida Rules of Criminal Procedure, 272 So.2d 65, 66 (Fla. 1972).
[33] *Id.*
[34] *Id.*
[35] The Florida Bar, In Re Rule 1.220(b), Florida Rules of Civil Procedure, 358 So.2d 95, 97 (Fla. 1977

A bill to be entitled

An act relating to class action lawsuits; creating s. 778.01, F.S.; providing requirements for capacity to file a class action; limiting actions to Florida residents; providing exceptions; eliminating private class action recovery of statutory penalties in certain actions unless actual damages are alleged and proven; providing that the Attorney General's ability to seek statutory penalties is not affected; providing for availability of nonmonetary relief; providing no effect on class action lawsuits involving civil rights laws; providing an effective date.

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

Section 1. Section 778.01, Florida Statutes, is created to read:

778.01 Capacity to sue.--

(1)(a) In any action asserting the right to class action status, the claimant class having capacity to sue shall be limited to residents of this state at the time of the alleged misconduct, except as provided in paragraph (b).

(b)1. Before issuing a class certification order, the court hearing an action asserting the right to class action status may expand a class to include any nonresident whose claim is recognized within the claimant's state of residence and is not time barred, but whose rights cannot be asserted because the claimant's state of residence lacks personal jurisdiction over the defendant or defendants.

2. In addition, the claimant class may include nonresidents if the conduct giving rise to the claim occurred in or emanated from this state.

(2) Notwithstanding any law to the contrary, in order to maintain a class action seeking statutory penalties under chapters 320, 501, 520, and 521, the class action claimants must allege and prove actual damages. This section does not limit or restrict the ability of the Attorney General to bring a class action for the recovery of statutory penalties, if otherwise authorized by law. However, class action claimants may seek to obtain, if appropriate, nonmonetary relief, including injunctive relief, orders or declaratory relief, and orders or judgments enjoining wrongful conduct, regardless of whether the class action claimants can prove any actual monetary damages. This section does not in any way limit or restrict the availability of such nonmonetary relief.

(3) This section does not affect any class action lawsuits involving federal or state civil rights laws.

Section 2. This act shall take effect July 1, 2006.