CRIMINAL JUSTICE COMMITTEE MEETING

Wednesday, March 15, 2006
9:00 a.m. - 11:00 a.m.
404 House Office Building

MEETING PACKET

Allan G. Bense
Speaker

Dick Kravitz
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

Criminal Justice Committee

Start Date and Time:	Wednesday, March 15, 2006 09:00 am
End Date and Time:	Wednesday, March 15, 2006 11:00 am
Location:	404 HOB
Duration:	2.00 hrs

Consideration of the following proposed committee bill(s):

PCB CRJU 06-04 -- Youthful Offenders
PCB CRJU 06-06 -- DOC Random Drug Testing

Consideration of the following bill(s):

HB 827 Pretrial Release by Planas
HB 981 Criminal Sentencing by Seiler
HB 1029 Carrying of Firearms in National Forests by Baxley
HB 1087 Prostitution by Clarke
HB 1167 Sexual Predators by Bean
HB 1169 Vehicular Accidents Involving Death or Personal Injuries by Galvano
HB 1239 Child Abuse by Detert

NOTICE FINALIZED on 03/13/2006 15:49 by THOMPSON.SONJA

FLORIDA HOUSE OF REPRESENTATIVES

Allan G. Bense, Speaker

Justice Council
Criminal Justice Committee

Dick Kravitz
Chair

Wilbert "Tee" Holloway
Vice Chair

Meeting Agenda
Wednesday, March 15, 2006
404 House Office Building
9:00 a.m. – 11:00 a.m.

I. Opening remarks by Chair Kravitz

II. Roll call

III. Consideration of the following proposed committee bill(s):

- **PCB CRJU 06-04—Youthful Offenders**
- **PCB CRJU 06-06—DOC Random Drug Testing**

IV. Consideration of the following bill(s):

- **HB 827—Pretrial Release by Planas**
- **HB 981—Criminal Sentencing by Seiler**
- **HB 1029—Carrying of Firearms in National Forests by Baxley**
- **HB 1087—Prostitution by Clarke**
- **HB 1167—Sexual Predators by Bean**
- **HB 1169—Vehicular Accidents Involving Death or Personal Injuries by Galvano**
- **HB 1239—Child Abuse by Detert**

V. Closing comments / Meeting adjourned

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB CRJU 06-04 Youthful Offenders
SPONSOR(S): Criminal Justice Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Criminal Justice Committee		Cunningham	Kramer
1)			
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

The Youthful Offender Act provides a sentencing alternative for an offender guilty of a non-capital or non-life felony that was committed before his or her 21st birthday. If classified as a youthful offender, the offender may only receive one of the following four types of sanctions: (1) probation or community control; (2) incarceration for up to 364 days, as a condition of probation or community control; (3) a split sentence that provides for incarceration followed by probation or community control; or (4) commitment to the custody of the Department of Corrections. The total sanction may not exceed six years.

The Department of Corrections must offer a basic training program for youthful offenders. If an offender successfully completes basic training, the court must place the offender on probation. If the offender later violates that probation, the court is limited to sentencing the offender to no more 364 days in jail, rather than choosing one of the other sanctions originally available to the court in the youthful offender's case.

This bill amends s. 958.045(5)(c), F.S., to remove the phrase "as a condition of probation." This amendment will have the effect of removing the 364-day jail limit found to exist by Florida courts and will permit the court to sentence a youthful offender who has violated probation after completing basic training to any of the four sanctions that it could have originally imposed.

The bill takes effect on July 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promotes Personal Responsibility → Under the bill, sanctions greater than those authorized in current law may be imposed by a trial court for an offender who has violated his or her probation following the completion of the Department of Correction's (DOC's) basic training program.

B. EFFECT OF PROPOSED CHANGES:

Youthful Offenders

Chapter 958, F.S., contains Florida's Youthful Offender Act, the purpose of which is to provide a sentencing alternative[1] that will improve the chances for rehabilitation of an offender who: (1) is at least 18 years of age or has been transferred for criminal prosecution pursuant to ch. 985, F.S.; (2) has entered a plea to, or has been found guilty of, a felony, other than a capital or life felony, that was committed before the offender's 21st birthday; and (3) has not been previously sentenced as a youthful offender by a court.[2]

Section 958.04, F.S., provides that courts who elect to adjudicate and sentence a defendant as a youthful offender may: (1) impose probation or community control; (2) impose incarceration for up to 364 days, as a condition of probation or community control; (3) impose a split sentence that provides for incarceration followed by probation or community control; or (4) commit the youthful offender to the custody of the DOC.[3] These sentencing options are the exclusive sanctions that may be imposed for a court-adjudicated youthful offender[4], and, in general, the total sentence (probation or community control and incarceration) length may be no longer than six years.[5]

In cases where the court has elected adult, rather than youthful offender, adjudication and sentencing, the DOC may administratively classify a defendant as a youthful offender if that person: (1) is at least 18 years of age or has been transferred for criminal prosecution pursuant to ch. 985, F.S.; (2) has not been previously sentenced as a youthful offender by a court; (3) is less than 24 years old; and (4) has received a sentence that does not exceed 10 years.[6] Unlike court youthful offender adjudication, which results in limited sentence length and the sealing of court records, DOC youthful offender classification only determines the programs and institutions in which youthful offenders may be placed.[7] Such DOC classification does not affect the original sentence imposed by the court.[8]

Basic Training

Section 958.045, F.S., requires the DOC to create a basic training program for youthful offenders (both those adjudicated as such by the court and those classified as such by the DOC), which lasts at least 120 days and includes marching drills, calisthenics, a rigid dress code, manual labor assignments, physical training, personal development training, general education and adult basic education courses, and drug counseling and other rehabilitation programs.[9] In determining eligibility for the basic training program, the DOC must find that a youthful offender: (1) has no physical limitations that preclude

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[1] In *Allen v. State*, 526 So.2d 69, 70 (Fla. 1988), the Court explained that youthful offender sentencing is more stringent than that of the juvenile system, but less harsh than the adult system.
[2] ss. 958.021, 958.04(1), F.S.
[3] s. 958.04(2), F.S.
[4] *Whitlock v. State*, 404 So.2d 795 (Fla. 3rd DCA 1981).
[5] s. 958.04(2), F.S.
[6] ss. 958.03(5), 958.11(4), F.S.; *Thomas v. State*, 825 So.2d 1032 (Fla. 1st DCA 2002).
[7] *Lezcano v. State*, 586 So.2d 1287 (Fla. 3rd DCA 1991).
[8] *Johnson v. State*, 586 So.2d 1322, 1324-1325 (Fla. 2nd DCA 1991).
[9] s. 958.045, F.S.

strenuous activity; (2) is not impaired; and (3) has not previously been incarcerated in a federal or state correctional facility.[10] Additionally, the DOC must consider the offender's criminal history and potential rehabilitative benefits of "shock" incarceration.[11] If the statutory criteria are satisfied and space is available, the DOC must submit a written request to the sentencing court's seeking approval for placement of the youthful offender in a basic training program.[12] If a youthful offender satisfactorily completes basic training: (1) the court must issue an order modifying the offender's sentence and placing the offender on probation; and (2) the releasing authority must establish a release date for the offender within 30 days following program completion.[13]

In the event a youthful offender subsequently violates his or her probation after completing basic training, the court, pursuant to s. 958.045(5)(c), F.S., may " . . . revoke probation and impose any sentence that it might have originally imposed ***as a condition of probation***." (emphasis added). Section 958.04(2)(b), F.S., provides that one of the sentencing options that a court may originally impose is, "... a period of incarceration ***as a condition of probation*** ...," for up to 364 days. (emphasis added).[14] The Fourth District Court of Appeals has explained that, "Read together, these two [sections of] statutes have been consistently construed as limiting to 364 days the period of incarceration which may be imposed following successful completion of basic training."[15] Most recently in March 2004, the Third District Court of Appeals stated:

> The language of section 958.045(5)(c) may warrant further review by the legislature. We doubt that the legislature actually intended the result this language has created. We are inclined to believe that the legislature intended to permit the court to impose any sentence "that it might have originally imposed." Indeed, a judge may be hesitant to recommend boot camp in an effort to rehabilitate a youth if the judge realizes that the youth's sentence upon a future violation of probation will be limited to such a short term of incarceration. Nevertheless, the legislature has not amended the statutes since our opinion in *Bloodworth*, 769 So.2d 1117, and we are constrained by the plain language of the statutes.[16]

Effect of Bill

This bill amends s. 958.045(5)(c), F.S., to remove the phrase "as a condition of probation." This amendment will have the effect of removing the 364-day jail limit found to exist by Florida courts and will permit the court to sentence a youthful offender who has violated probation after completing basic training to any of the four sentencing alternatives that were originally available to the judge under s. 958.04(2), F.S.

C. SECTION DIRECTORY:

Section 1. Amends s. 958.045, F.S., deleting a provision limiting certain sentencing options available to the court following a violation of the conditions of probation by a youthful offender.

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

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[10] s. 958.045(2), F.S.
[11] *Id.*
[12] *Id.*
[13] ss. 958.045(5)(c) and (8)(d), F.S.
[14] *Bloodworth v. State*, 769 So.2d 1117 (Fla. 2nd DCA 2000); *Burkett v. State*, 816 So.2d 767 (Fla. 1st DCA 2002).
[15] *Lee v. State*, 884 So.2d 460, 461 (Fla. 4th DCA 2004).
[16] *Blaxton v. State*, 868 So.2d 620, 621 (Fla. 2nd DCA 2004).

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

In their analysis of this PCB, the Department of Corrections states that approximately 200 youthful offenders successfully complete basic training each year and are released on supervision. Of these, approximately 22 percent violate the conditions of their supervision. In most instances, pursuant to current law, violators are sentenced to up to 364 days in county jail. This bill may have a prison bed impact in that it will permit youthful offenders who have violated probation following completion of DOC's basic training program to be sentenced to prison rather than jail.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Because youthful offenders who have violated probation following completion of DOC's basic training program may be sentenced to prison rather than jail, the bill may result in an indeterminate reduction in local government costs for jails.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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:

Art. I, s. 10, Fla. Const., prohibits passage of an ex post facto law. Accordingly, the portion of this bill increasing the possible penalty for violation of probation or community control by a basic training program graduate may only apply to an offender who committed his or her offense on or after the effective date of the bill.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

A 2005, Senate Criminal Justice staff survey of circuit court judges revealed that the vast majority of judges want greater discretion in sentencing youthful offenders who violate probation following completion of DOC's basic training program. The survey further revealed that, as a result of the sentencing limitation, many judges are reluctant to sentence defendants as youthful offenders or to approve a youthful offender's placement in basic training. After reviewing the statutes, caselaw, and survey responses, the Senate Criminal Justice Committee concluded that s. 958.045(5)(c), F.S., be amended to remove the language limiting the trial court's discretion to sentence a youthful offender who violates the terms of his or her probation after completing basic training.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

A bill to be entitled

An act relating to youthful offenders; amending s. 958.045, F.S.; deleting a provision limiting certain sentencing options available to the court following a violation of the conditions of probation by a youthful offender; providing an effective date.

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

Section 1. Paragraph (c) of subsection (5) of section 958.045, Florida Statutes, is amended to read:

958.045 Youthful offender basic training program.--

(5)

(c) The portion of the sentence served prior to placement in the basic training program may not be counted toward program completion. Upon the offender's completion of the basic training program, the department shall submit a report to the court that describes the offender's performance. If the offender's performance has been satisfactory, the court shall issue an order modifying the sentence imposed and placing the offender on probation. The term of probation may include placement in a community residential program. If the offender violates the conditions of probation, the court may revoke probation and impose any sentence that it might have originally imposed ~~as a condition of probation~~.

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

PCB CRJU 06-06

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB CRJU 06-06 DOC Random Drug Testing
SPONSOR(S): Criminal Justice Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Criminal Justice Committee		Cunningham	Kramer
1)			
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

Florida Statutes currently authorize the Department of Corrections to test its employees for the illegal use of controlled substances (including steroids) using *random* drug testing. However, the Department is precluded from testing its employees for the illegal use of steroids using *reasonable suspicion* drug testing because the Drug-Free Workplace Act, which concerns *reasonable suspicion* drug testing, does not include steroids in its definition of "drugs."

This bill authorizes the Department of Corrections to develop a program to test employees in safety sensitive and high risk positions for anabolic steroids using *reasonable suspicion* drug testing. The reasonable suspicion drug testing must be conducted in a manner consistent with s. 112.0455, F.S. (the Drug-free Workplace Act), but may also be conducted based on violent acts or violent behavior on or off duty.

This bill has a minimal fiscal impact and takes effect July 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government → This bill authorizes the Department of Corrections to conduct reasonable suspicion drug testing of employees for the illegal use of steroids.

B. EFFECT OF PROPOSED CHANGES:

Reasonable Suspicion Drug Testing

Florida's Drug-Free Workplace Act[1] (Act) authorizes all state agencies to conduct *reasonable suspicion* testing for use of specifically listed drugs. The Act defines reasonable suspicion drug testing, in part, as drug testing based on a belief that an employee is using or has used drugs in violation of the employer's policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience.[2] The Act states that, among other things, facts and inferences may be based upon:

- Observable phenomena while at work, such as direct observation of drug use or of the physical symptoms or manifestations of being under the influence of a drug.
- Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.
- A report of drug use, provided by a reliable and credible source, which has been independently corroborated.
- Evidence that an individual has tampered with a drug test during employment with the current employer.
- Information that an employee has caused, or contributed to, an accident while at work.
- Evidence that an employee has used, possessed, sold, solicited, or transferred drugs while working or while on the employer's premises or while operating the employer's vehicle, machinery, or equipment.

Currently, the definition of "drugs" contained in the Drug-Free Workplace Act does not include steroids. Thus, state agencies are precluded from testing employees for steroids through *reasonable suspicion* drug testing under the Act.

Random Drug Testing

Section 944.474, F.S., prohibits Department of Corrections (DOC) employees from testing positive for illegal use of controlled substances and authorizes DOC to develop a program for the *random* drug testing of all employees. DOC defines "random drug testing" as "a drug test conducted based on a computer generated random sampling in positions identified as being subject to random testing, administered for purposes of determining the presence of drugs or their metabolites."[3]

The term "controlled substances" is defined in s. 893.02(4), F.S., as "any substance named or described in Schedules I-V of s. 893.03, F.S." Because Schedules I-V of s. 893.03, F.S., include steroids, DOC is currently authorized to test employees for steroids through *random* drug testing.

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[1] s. 112.0455, F.S.

[2] *Id.* Additionally, the Act provides that reasonable suspicion drug testing shall not be required except upon the recommendation of a supervisor who is at least one level of supervision higher than the immediate supervisor of the employee in question.

[3] Rule 33-208.403, F.A.C.

Effect of the Bill

This bill authorizes DOC to conduct *reasonable suspicion* drug testing of employees in safety sensitive and high risk positions for anabolic steroids[4]. The reasonable suspicion drug testing must be conducted in a manner consistent with s. 112.0455, F.S. (the Drug-free Workplace Act), but may also be conducted based on violent acts or violent behavior on or off duty.

C. SECTION DIRECTORY:

Section 1. Amends s. 944.474, F.S., authorizing the Department of Corrections to conduct reasonable suspicion drug testing of employees in safety sensitive or high risk positions for steroids.

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:

   DOC states that the fiscal impact of this bill will be "minimal," and that any costs will be absorbed in their existing budget.

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.

[4] Anabolic steroids are defined in s. 893.03(3)(d), F.S.

2. Other:

From a constitutional standpoint, the primary issues raised by employee drug testing policies revolve around Fourth Amendment privacy concerns. In general, the courts have upheld reasonable suspicion drug testing policies based upon *on duty* drug use or impairment.[5] Courts have been divided; however, on the issue of whether *off duty* drug use or impairment can form a legitimate basis for reasonable suspicion drug testing without falling afoul of the Fourth Amendment. The distinguishing factor seems to be whether the employee falls within the classification of a safety sensitive position.

For example, in *Benavidez v. Albuquerque*, 101 F. 3d 620 (10th Cir. 1996), the court indicated that "information which would lead a reasonable person to suspect non safety sensitive employees . . . of on-the job drug use, possession, or impairment" would provide a sufficient basis for reasonable suspicion drug testing. Additionally, in *American Federation of Government Employees v. Roberts*, 9 F.3d at 1468 (9th Cir. 1993), the court found that employees of a correctional institution were primary law enforcement officers and therefore could be subjected to reasonable suspicion drug testing based upon either on or off duty conduct. Moreover, in *American Federation of Government Employees v. Martin*, 969 F. 2d 788, 792-93 (9th Cir. 1992), the court held that reasonable suspicion of safety sensitive employees could be conducted based on off-duty drug use or impairment.

Conversely, in *National Treasury Employees v. Yeutter*, 918 F. 2d 968 (D.C. Cir. 1990), the court held that a reasonable suspicion drug testing program that tested non safety sensitive employees for off duty drug use was unconstitutional. Lastly, in *Rutherford v. Albuquerque*, 77 F. 3d 1258, 1263 (10th Cir. 1996), the court found drug testing unreasonable in part because it screened for off-duty drug use which was wholly unrelated to employer's asserted interest in on the job safety.

Because the bill limits reasonable suspicion drug testing to employees in safety sensitive and high risk positions, it would not appear to raise any Fourth Amendment concerns.

B. RULE-MAKING AUTHORITY:

This bill provides a general grant of rulemaking power to the Departments of Corrections to implement the bill's provisions (lines 38-39). The bill appears to give sufficient rule making authority that is appropriately limited.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Concerns have been identified relating to whether employees who are legally using controlled substances (e.g. they drug was prescribed to the employee, etc...) will be disciplined should they receive a positive drug test. The Drug-Free Workplace Act (applicable to *reasonable suspicion* drug testing) addresses this concern by requiring agencies with drug-testing programs to give employees being tested a copy of the agency's drug-testing policy, which must include procedures for employees to confidentially report the use of prescription or nonprescription medications both before and after being tested.[6] Additionally, the drug-testing policy must include a statement that an employee who receives a positive confirmed drug test result may contest or explain the result to the employer within five working days after written notification of the positive test result.[7] The bill directs DOC to develop a reasonable suspicion drug testing program and provides that such drug testing must be conducted *in manner consistent with the Act.* Thus, DOC would likely include the above-described protective measures, or something similar thereto, in their Rules.

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[5] *See e.g., Saavedra v. Albuquerque*, 73 F3d 1525 (10th Cir. 1996); *Garrison v. Department of Justice*, 72 F. 3d 1566 (Fed. Cir. 1995).
[6] s. 112.0455, F.S.
[7] *Id.*

The terms "safety sensitive positions" and "high risk positions" are not defined by the bill or elsewhere in statute. However, it is anticipated that DOC will define these terms in their rules.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

A bill to be entitled

An act relating to drug testing within the Department of Corrections; amending s. 944.474, F.S.; authorizing the department to develop a program for testing employees who are in safety-sensitive and high-risk positions for certain controlled substances based upon a reasonable suspicion; providing for the reasonable suspicion to include violent acts or behavior of an employee while on or off duty; requiring that the department adopt rules; providing an effective date.

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

Section 1. 944.474 Legislative intent; employee wellness program; drug and alcohol testing.--

(1) It is the intent of the Legislature that the state correctional system provide a safe and secure environment for both inmates and staff. A healthy workforce is a productive workforce, and security of the state correctional system can best be provided by strong and healthy employees. The Department of Corrections may develop and implement an employee wellness program. The program may include, but is not limited to, wellness education, smoking cessation, nutritional education, and overall health-risk reduction, including the effects of using drugs and alcohol.

(2) Under no circumstances shall employees of the department test positive for illegal use of controlled substances. An employee of the department may not be under the influence of alcohol while on duty. In order to ensure that these

prohibitions are adhered to by all employees of the department and notwithstanding s. 112.0455, the department may develop a program for the random drug testing of all employees. The department may randomly evaluate employees for the contemporaneous use or influence of alcohol through the use of alcohol tests and observation methods. Notwithstanding s. 112.0455, the department may develop a program for the reasonable-suspicion drug testing of employees who are in safety-sensitive and high-risk positions for controlled substances listed in s. 893.03(3)(d). The reasonable-suspicion drug testing authorized by this subsection shall be conducted in a manner that is consistent with s. 112.0455, but may also include testing upon reasonable suspicion based on violent acts or violent behavior of an employee who is on or off duty. The department shall adopt rules pursuant to ss. 120.536(1) and 120.54 which are necessary to administer this subsection.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 827 Pretrial Release
SPONSOR(S): Planas
TIED BILLS: **IDEN./SIM. BILLS:** SB 2018

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee		Cunningham	Kramer
2) Criminal Justice Appropriations Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

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. With certain exceptions, there is a presumption in favor of release on nonmonetary conditions. Additionally, courts *must* impose conditions requiring the defendant on pretrial release to refrain from criminal activity of any kind and to refrain from contact with the victim.

HB 827 requires judges who grant monetary bail to set a separate and specific bail amount for each charge. This bill also provides that defendants charged with a second or subsequent felony within three years after the date of a prior felony charge, regardless of whether a conviction was entered, forfeit their right to a presumption in favor of release on nonmonetary conditions. This bill also provides that a court must require a defendant to comply with all conditions of pretrial release.

Bail, one of the most common monetary conditions of pretrial release, requires an accused to pay a set sum of money to the sheriff. As an alternative to posting bail, a defendant may employ the services of a bail bond agent who pledges that a defendant will appear at all scheduled proceedings before a court. If a defendant does not appear for judicial proceedings as ensured by the bail bond, the bond is considered breached and the court declares the bond "forfeited." In cases where a bond has been forfeited and not paid or discharged by a court within 60 days, the court enters a judgment against the bail bond agent for the amount of the bond.

HB 827 amends statutes relating to bail bonds, specifically their forfeiture, judgment, and cancellation. Additionally, it clarifies that the original appearance bond does not guarantee a defendant's appearance after a defendant enters a guilty or nolo contendere plea, after a defendant is adjudicated guilty, after adjudication is withheld, and in other situations.

This bill takes effect October 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Maintain Public Security → This bill provides that a court must require persons on pretrial release to comply with all conditions of pretrial release; provides that a court must set a separate bail for each charged offense; provides that defendants charged with a second or subsequent felony within three years after the date of a prior felony charge, regardless of whether a conviction was entered, forfeit their right to a presumption in favor of pretrial release on nonmonetary conditions; and requires courts to issue a capias or arrest warrant if a defendant on bond fails to appear.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Pretrial Release

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.[1] There is a presumption in favor of release on *nonmonetary* conditions[2] for any person who is granted pretrial release unless such person is charged with a dangerous crime.[3] Although courts have the authority to impose any number of pretrial release conditions, courts *must* impose conditions requiring the defendant to refrain from criminal activity of any kind and to refrain from contact with the victim.[4]

Bail Bonds

Bail, one of the most common monetary conditions of pretrial release, requires an accused to pay a set sum of money to the sheriff. As an alternative to posting bail, a defendant may employ the services of a bail bond agent.[5] A bail bond serves as a pledge by a bail bond agent that a defendant will appear at all scheduled proceedings before a court.

Bail bond agents are licensed and regulated by the Department of Financial Services (DFS), pursuant to chapter 648, F.S. A bail bond agent may either be a limited surety agent who is appointed by a surety insurance company to execute or countersign bail bonds, or a professional bail bond agent who pledges his or her own funds as security for a bail bond. The chapter provides requirements for licensure of bail bond agents, limits the amount of premium and expenses which can be charged, restricts the types of collateral which can be demanded, and requires that such collateral be returned in a timely manner once the bond has been canceled.

Chapter 903, F.S., sets forth the requirements relating to bail and bail bonds, including all forms of pretrial release. After a defendant has been released on bail, the bail bond agent has the authority to "surrender," or return, the defendant to the custody of the person who would have held the defendant

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[1] Conditions of pretrial release are determined at a defendant's first appearance hearing. Rule 3.130, Fla. R. Crim. Proc.
[2] Nonmonetary conditions include releasing defendants on their own recognizance. Rule 3.131(b)(1), Fla. R. Crim. Proc.
[3] "Dangerous crimes" include: 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. s. 907.041, F.S.
[4] s. 903.047, F.S.
[5] Section 648.25, F.S., defines "Professional bail bond agent" as any person who pledges United States currency, United States postal money orders, or cashier's checks as security for a bail bond in connection with a judicial proceeding and receives or is promised therefor money or other things of value.

absent the bail.[6] Ordinarily, a bail bond agent will do this if the bail bond agent believes the defendant is a flight risk or if the collateral provided for bail is discovered to be insufficient. Upon surrender, the official taking custody of the defendant will issue a certificate acknowledging the surrender.[7] The bail bond agent then can present the certificate and bond to the court which will issue an order exonerating the obligors and refunding money or bonds deposited as bail.[8]

If a defendant does not appear for judicial proceedings as ensured by the bail bond, the bond is considered breached and the court declares the bond "forfeited."[9] Within 5 days after forfeiture of a bail bond, the court must mail a notice to the surety agent and the surety company.[10] The forfeiture of a bond must be paid within 60 days of the date the notice to the bail bond agent and surety was filed.[11] However, after a breach of the bond, the law requires a court to "discharge" a forfeiture (before it is paid) within 60 days upon:

- a determination that it was impossible for the defendant to appear as required due to circumstances beyond the defendant's control;
- a determination that, at the time of the appearance, the defendant was adjudicated insane and confined in an institution or hospital or was confined in a jail or prison; or
- surrender or arrest of the defendant if the delay has not thwarted the proper prosecution of the defendant.[12]

In addition to the above, the clerk of court must discharge the forfeiture of the bond if the defendant is arrested and returned to the county of jurisdiction of the court prior to judgment.[13] The bail bond agent is required to pay the costs associated with returning the defendant to the county of jurisdiction, as a condition of the clerk discharging the forfeiture.[14]

In cases where a bond has been forfeited and not paid or discharged by a court within 60 days, the court enters a judgment against the bail bond agent for the amount of the bond.[15] After the judgment is entered, the court is required to furnish DFS and the surety company issuing the bond with a certified copy of the judgment.[16] If this judgment is not paid within 35 days, the court provides DFS and the sheriff of the county in which the bond was executed, copies of the judgment and a certification that the judgment has not been satisfied.[17] DFS receives notice of the judgment and monitors unpaid judgments as a part of its regulation of surety insurance companies. Bail bond agents who have outstanding judgments which are unpaid for 35 days are precluded by law from executing bail bonds. After 50 days of an unpaid judgment, the surety company is precluded by law from issuing bail bonds.[18]

The law provides that within 10 days after all of the conditions of a bond have been satisfied or the forfeiture discharged or remitted, the court shall order the bond canceled.[19] All of the conditions of a bond are deemed to be satisfied after the defendant has been adjudicated guilty or not guilty.[20]

Polakoff Bail Bonds v. Orange County

Section 903.31(1), F.S., states, in part: "An adjudication of guilt or innocence of the defendant shall satisfy the conditions of the bond."

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[6] s. 903.21, F.S.
[7] *Id.*
[8] *Id.*
[9] s. 903.26, F.S.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] s. 903.27, F.S.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] s. 903.31, F.S.
[20] *Id.*

Section 903.31(2), F.S. states:

> The original appearance bond shall not be construed to guarantee deferred sentences, appearance during or after a presentence investigation, appearance during or after appeals, conduct during or appearance after admission to a pretrial intervention program, payment of fines, or attendance at educational or rehabilitation facilities the court otherwise provides in the judgment. If the original appearance bond has been forfeited or revoked, the bond shall not be reinstated without approval from the surety on the original bond.

In *Polakoff Bail Bonds v. Orange County*, the Florida Supreme Court said the condition of an appearance bond was not satisfied when the trial court accepts a plea of guilty and enters a finding of guilt, but withholds adjudication and judgment and continues the case for sentencing until the completion of the presentence investigation.[21] The court found that a judgment must be entered in order for the conditions of bond to be satisfied.[22] The court read s. 903.31, F. S., in conjunction with s. 903.045, F.S., which explains the nature of a surety bail bond:

> It is the public policy of this state and the intent of the Legislature that a criminal surety bail bond, executed by a bail bond agent licensed pursuant to chapter 648 in connection with the pretrial or appellate release of a criminal defendant, shall be construed as a commitment by and an obligation upon the bail bond agent to ensure that the defendant appears at all subsequent criminal proceedings and otherwise fulfills all conditions of the bond. The failure of a defendant to appear at any subsequent criminal proceeding or the breach by the defendant of any other condition of the bond constitutes a breach by the bail bond agent of this commitment and obligation.[23]

The court found that "in the context of a presentence investigation, unless the trial court adjudicates the defendant guilty and provides for the presentence investigation within the judgment, the bond is not satisfied and the defendant must continue to appear at all subsequent proceedings to avoid forfeiture."[24]

Subsequent to the *Polakoff Bail Bonds* decision, the Fifth District Court of Appeal found that the Florida Supreme Court's decision in *Polakoff Bail Bonds* was limited to the circumstances of a presentence investigation where no judgment had been entered, but reasoned that "because there is never an adjudication of guilt or innocence before a defendant is accepted into a pretrial intervention program, we believe that the legislature must have intended, in cases involving pretrial intervention, an exception to the general rule requiring an adjudication for discharge of a bond."[25]

Effect of Proposed Changes

Pretrial Release

As noted above, there is currently a presumption in favor of release on *nonmonetary* conditions for any person who is granted pretrial release unless such person is charged with a dangerous crime. This bill provides that defendants charged with a second or subsequent felony within three years after the date of a prior felony charge, regardless of whether a conviction was entered, forfeit their right to a presumption in favor of release on nonmonetary conditions.

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[21] 634 So.2d 1083 (Fla. 1994).
[22] *Id.* at 1085.
[23] *Id.*
[24] *Id.*
[25] *Rosenberg Bail Bonds v. Orange County*, 663 So.2d 1389, 1392 (Fla. 5th DCA 1995).

Additionally, existing law mandates certain conditions of pretrial release. A defendant on pretrial release must refrain from criminal activity and must refrain from contact with the victim. This bill requires a defendant to comply with all conditions of pretrial release.

This bill also *requires* judges who grant monetary bail to set a separate and specific bail amount for each charge.[26]

Bail Bonds

This bill amends the bail bond forfeiture statute to *require* a court to issue a capias or an arrest warrant for a defendant who has failed to appear.[27] The capias or arrest warrant must comply with the requirements of s. 903.046(2)(d), F.S.,[28] and must require extradition of the defendant when arrested in another state if the original charge is a felony. The capias must also require return transportation of the defendant when arrested in another state to the jurisdiction of the court. The bill provides that if the court fails to issue a capias or an arrest warrant, any bonds deposited by a bail bond agent shall be discharged.

This bill also allows for exoneration of the surety if the State Attorney fails to institute extradition proceedings or extradite a defendant on a bail bond if the surety agrees in writing to pay transportation costs. In such instances, any forfeiture or judgment must be set aside or vacated.

This bill provides that in any case in which a bond forfeiture has been discharged by the court conditioned on payment of costs and fees, the amount for which judgment may be entered my not exceed the costs and fees. The bill provides for the cancellation of the bond by the clerk of the court without a court order. This bill provides that a bond does not guarantee a defendant's conduct or appearance at any time after:

- The defendant enters a plea of guilty or nolo contendere;
- The defendant enters into an agreement for deferred prosecution or agrees to enter a pretrial intervention program;
- The defendant is acquitted;
- The defendant is adjudicated guilty;
- Adjudication of guilt is withheld; or
- The defendant is found guilty by a judge or jury.

This bill would have the effect of overruling the *Polakoff Bail Bond* holding that a bond is not satisfied when adjudication is withheld.

C. SECTION DIRECTORY:

Section 1. Amends s. 903.02, F.S., providing that any judge setting or granting bail shall set a separate bail amount for each charge or offense.

Section2. Amends s. 903.046, F.S., providing that a defendant forfeits the right to a presumption in favor of release on nonmonetary conditions if charged with a second or subsequent felony within a certain time period;

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[26] Florida Statutes do not currently require (or prevent) a judge to set a separate bail for each offense charged. However, the usual practice is for judges to set one bail amount regardless of how many offenses a defendant is charged with.

[27] Although not required by statute, courts will generally issue a capias or an arrest warrant for a defendant who has failed to appear as required by a bail bond. Additionally, Rule 3.131(g), Fla. R. Crim. Proc., authorizes, but does not require, courts to direct the arrest and commitment of a defendant at large on bail when there has been a breach.

[28] Section 903.046(2)(d), F.S., relates to what a court may consider in determining whether to release a defendant on bail or other conditions. It is not related to capiases or arrest warrants and thus appears to be an incorrect citation.

Section 3. Amends s. 903.047, F.S., requiring a defendant to comply with all conditions of pretrial release.

Section 4. Amends s, 903.26, F.S., providing for issuance of a capias or arrest warrant for a defendant who has failed to appear; providing requirements for such a capias or warrant; providing for exoneration of a surety and discharge of any bonds if a court fails or refuses to issue such capias or warrant; providing that failure of the state attorney to institute extradition proceedings or extradite the principal on a bail bond after the surety's written agreement to pay actual transportation costs exonerates the surety.

Section 5. Amends s. 903.27, F.S., providing that in cases in which the bond forfeiture has been discharged by the court, the amount of the judgment may not exceed the amount of unpaid fees or costs upon which the discharge had been conditioned.

Section 6. Amends s. 903.31, F.S., providing that the clerk of court shall furnish an executed certificate of cancellation to the surety; providing that the original appearance bond does not guarantee the defendant's conduct or appearance in court under certain circumstances.

Section 7. This act takes effect October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   It is unclear what fiscal impact this bill might have on state governments. However, it is anticipated that the bill would increase the workload on courts and state attorneys.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   It is unclear what fiscal impact this bill might have on local governments. However, it is anticipated that the bill would increase the workload on clerks, jails, and local law enforcement agencies.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bail bond industry will benefit in the following ways:

- Requiring judges to set separate bail amounts for each charged offense may result in an increase of bail bond premiums;
- Removing the presumption in favor of release on nonmonetary conditions for defendants charged with a second or subsequent felony within three years of a prior felony charge will likely increase the number of persons who receive bail and use the services of a bail bond agent;
- Bail bond agents will be exonerated and their bond will be returned if a court fails to issue a capias or warrant that contains specific conditions in **all** instances where a defendant fails to appear; and
- After a bail bond agent agrees in writing to pay the transport costs, the agent will be exonerated and their bond will be returned if the state attorney fails to institute extradition proceedings or extradite the principal on a bail bond.

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:

Section 2 of the bill provides that defendants give up their right to a presumption in favor of release on nonmonetary conditions if the defendant is charged with a second or subsequent felony offense within three years after the date of a prior felony charge.

- The Florida Constitution provides, with some exceptions, that persons charged with a crime are entitled to pretrial release *on reasonable conditions.* Section 907.041, F.S., creates a presumption in favor of release on nonmonetary conditions, and provides that persons must be released on monetary conditions if such conditions are necessary to assure the presence of the person at court proceedings, protect the community from risk of physical harm to persons; and to assure the integrity of the judicial process. Any challenge to the above provision would likely relate to whether it is a reasonable condition that would assure the defendant's presence in court, protect the community from risk of physical harm to persons, and assure the integrity of the judicial process.

Section 4 of the bill *requires* a court to issue a capias or an arrest warrant for a defendant who has failed to appear. The capias or arrest warrant must comply with the requirements of s. 903.046(2)(d), F.S., must require extradition of the defendant when arrested in another state if the original charge is a felony, and must require return transportation of the defendant when arrested in another state to the jurisdiction of the court. If the court fails to issue a capias or an arrest warrant, any bonds deposited by a bail bond agent shall be discharged.

- As noted above, the citation to s. 903.046(2)(d), F.S., appears to be incorrect as the cited section does not discuss capiases or arrest warrants.
- Currently, Florida Statutes do not *require* a court to issue a capias or warrant when a defendant fails to appear. Instead, courts are given *discretion* to issue a capias or warrant in such circumstances. *See* Rule 3.131, Fla. R. Crim. Proc. There are times when a defendant fails to appear because he or she is unavailable (e.g. hospitalized, has another court appearance at the same time) to attend. In many of these instances, the court is aware of the circumstances and permits the defendant to be absent. However, as drafted, this bill would *require* a court to issue a capias or warrant in these circumstances. If the court fails to do so, even if it was intentional, any bonds deposited by the bail bond agent must be discharged (i.e. given back to the bail bond agent).

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

A bill to be entitled

An act relating to pretrial release; amending s. 903.02, F.S.; providing that any judge setting or granting bail shall set a separate bail amount for each charge or offense; amending s. 903.046, F.S.; providing that a defendant forfeits the right to a presumption in favor of release on nonmonetary conditions if charged with a second or subsequent felony within a certain time period; amending s. 903.047, F.S.; requiring a defendant to comply with all conditions of pretrial release; amending s. 903.26, F.S.; providing for issuance of a capias or arrest warrant for a defendant who has failed to appear; providing requirements for such a capias or warrant; providing for exoneration of a surety and discharge of any bonds if a court fails or refuses to issue such capias or arrest warrant; providing that failure of the state attorney to institute extradition proceedings or extradite the principal on a bail bond after the surety's written agreement to pay actual transportation costs exonerates the surety; amending s. 903.27, F.S; providing that in cases in which the bond forfeiture has been discharged by the court, the amount of the judgment may not exceed the amount of the unpaid fees or costs upon which the discharge had been conditioned; amending s. 903.31, F.S.; providing that the clerk of court shall furnish an executed certificate of cancellation to the surety; providing that the original appearance bond does not guarantee the defendant's conduct or appearance in court

under certain circumstances; providing an effective date.

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

Section 1. Subsection (4) is added to section 903.02, Florida Statutes, to read:

903.02 Actions following ~~with respect to~~ denial; changes in bail ~~or~~ conditions ~~of bail~~ or bond amount; separation by charge or offense ~~of bond prohibited; "court" defined~~.--

(4) Any judge setting or granting monetary bail shall set a separate and specific bail amount for each charge or offense. When bail is posted, each charge or offense requires a separate bond.

Section 2. Subsection (3) is added to section 903.046, Florida Statutes, to read:

903.046 Purpose of and criteria for bail determination.--

(3) If a defendant is charged with a second or subsequent felony within 3 years after the date of a prior felony charge, regardless of whether a conviction was entered, the defendant forfeits the right to a presumption in favor of release on nonmonetary conditions as provided in s. 907.041.

Section 3. Subsection (1) of section 903.047, Florida Statutes, is amended to read:

903.047 Conditions of pretrial release.--

(1) As a condition of pretrial release, whether such release is by surety bail bond or recognizance bond or in some other form, the defendant ~~court~~ shall ~~require that~~:

(a) ~~The defendant~~ Refrain from criminal activity of any

kind.~~; and~~

(b) ~~The defendant~~ Refrain from any contact of any type with the victim, except through pretrial discovery pursuant to the Florida Rules of Criminal Procedure.

(c) Comply with all conditions of pretrial release.

Section 4. Subsections (1) and (5) of section 903.26, Florida Statutes, are amended to read:

903.26 Forfeiture of ~~the~~ bond; ~~when and how directed;~~ discharge; ~~how and when made;~~ effect of payment.--

(1)(a) A bail bond shall not be forfeited unless:

1.~~(a)~~ The information, indictment, or affidavit was filed within 6 months from the date of arrest;~~,~~ and

2.~~(b)~~ The clerk of court gave the surety at least 72 hours' notice, exclusive of Saturdays, Sundays, and holidays, before the time of the required appearance of the defendant. Notice shall not be necessary if the time for appearance is within 72 hours from the time of arrest~~,~~ or if the time is stated on the bond.

(b) Instant with any failure to appear by a defendant, the court shall order and issue to the sheriff for execution a capias or arrest warrant for the defendant who has failed to appear. Such capias or warrant shall comply with the requirements of s. 903.046(2)(d) and shall also require extradition of the defendant when arrested in another state if the original charge is a felony and require return transportation of the defendant when arrested in another state to the jurisdiction of the court when arrested on any case within the state. If the court fails or refuses to issue such

capias or arrest warrant, the surety shall immediately be exonerated and any bonds deposited shall be discharged by the clerk of the court in compliance with s. 903.31(1).

(5)(a) The court shall discharge a forfeiture within 60 days upon:

1.~~(a)~~ A determination that it was impossible for the defendant to appear as required due to circumstances beyond the defendant's control. The potential adverse economic consequences of appearing as required shall not be considered as constituting a ground for such a determination;

2.~~(b)~~ A determination that, at the time of the required appearance, the defendant was adjudicated insane and confined in an institution or hospital or was confined in a jail or prison;

3.~~(c)~~ Surrender or arrest of the defendant if the delay has not thwarted the proper prosecution of the defendant. If the forfeiture has been before discharge, the court shall direct remission of the forfeiture. The court shall condition a discharge or remission on the payment of costs and the expenses incurred by an official in returning the defendant to the jurisdiction of the court.

(b) Failure of the state attorney to institute extradition proceedings or extradite the principal on a bail bond after the surety has agreed in writing to pay actual transportation costs shall exonerate the surety, and any forfeiture or judgment shall be set aside or vacated and any payment by the surety of a forfeiture or judgment shall be remitted in full.

Section 5. Subsection (1) of section 903.27, Florida Statutes, is amended to read:

903.27 Forfeiture to judgment.--

(1) If the forfeiture is not paid or discharged by order of a court of competent jurisdiction within 60 days and the bond is secured other than by money and bonds authorized in s. 903.16, the clerk of the circuit court for the county where the order was made shall enter a judgment against the surety for the amount of the penalty and issue execution. However, in any case in which the bond forfeiture has been discharged by the court of competent jurisdiction conditioned upon the payment by the surety of certain costs or fees as allowed by statute, the amount for which judgment may be entered may not exceed the amount of the unpaid fees or costs upon which the discharge had been conditioned. Judgment for the full amount of the forfeiture shall not be entered if payment of a lesser amount will satisfy the conditions to discharge the forfeiture. Within 10 days, the clerk shall furnish the Department of Financial Services and the Office of Insurance Regulation of the Financial Services Commission with a certified copy of the judgment docket and shall furnish the surety company at its home office a copy of the judgment, which shall include the power of attorney number of the bond and the name of the executing agent. If the judgment is not paid within 35 days, the clerk shall furnish the Department of Financial Services, the Office of Insurance Regulation, and the sheriff of the county in which the bond was executed, or the official responsible for operation of the county jail, if other than the sheriff, two copies of the judgment and a certificate stating that the judgment remains unsatisfied. When and if the judgment is properly paid or an

order to vacate the judgment has been entered by a court of competent jurisdiction, the clerk shall immediately notify the sheriff, or the official responsible for the operation of the county jail, if other than the sheriff, and the Department of Financial Services and the Office of Insurance Regulation, if the department and office had been previously notified of nonpayment, of such payment or order to vacate the judgment. The clerk shall also immediately prepare and record in the public records a satisfaction of the judgment or record the order to vacate judgment. If the defendant is returned to the county of jurisdiction of the court, whenever a motion to set aside the judgment is filed, the operation of this section is tolled until the court makes a disposition of the motion.

Section 6. Section 903.31, Florida Statutes, is amended to read:

903.31 Canceling the bond.--

(1) Within 10 business days after the conditions of a bond have been satisfied or the forfeiture discharged or remitted, ~~the court shall order~~ the bond shall be canceled and, if the surety has attached a certificate of cancellation to the original bond, the clerk of the court shall furnish an executed certificate of cancellation to the surety without cost. An adjudication of guilt or innocence of the defendant shall satisfy the conditions of the bond. The original appearance bond shall expire 36 months after such bond has been posted for the release of the defendant from custody. This subsection does not apply to cases in which a bond has been declared forfeited.

(2) The original appearance bond does ~~shall~~ not ~~be~~

~~construed to~~ guarantee deferred sentences, appearance during or after a presentence investigation, appearance during or after appeals, ~~conduct during or appearance after admission to a pretrial intervention program,~~ payment of fines, or attendance at educational or rehabilitation facilities the court otherwise provides in the judgment. If the original appearance bond has been forfeited or revoked, the bond shall not be reinstated without approval from the surety on the original bond.

(3) The original appearance bond does not guarantee the defendant's conduct or appearance in court at any time after:

(a) The defendant enters a plea of guilty or nolo contendere;

(b) The defendant enters into an agreement for deferred prosecution or agrees to enter a pretrial intervention program;

(c) The defendant is acquitted;

(d) The defendant is adjudicated guilty;

(e) Adjudication of guilt of the defendant is withheld; or

(f) The defendant is found guilty by a judge or jury.

(4) ~~(3)~~ In any case where no formal charges have been brought against the defendant within 365 days after arrest, the court shall order the bond canceled unless good cause is shown by the state.

Section 7. This act shall take effect October 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 981 Criminal Sentencing
SPONSOR(S): Seiler
TIED BILLS: **IDEN./SIM. BILLS:** SB 1126

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee		Ferguson KF	Kramer
2) Criminal Justice Appropriations Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

Currently, the Criminal Punishment Code provides for enhanced penalties for enumerated offenses committed against a law enforcement officer or other specified official as part of the Law Enforcement Protection Act. HB 981 adds the offense of attempted felony murder to the list of enumerated offenses. As a result of this bill, the lowest permissible sentence that can be imposed for the offense of attempted felony murder against a law enforcement officer or other specified official will be significantly increased.

This bill provides an effective date of October 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government / Safeguard Individual Liberty- This bill adds the offense of attempted felony murder to the Law Enforcement Protection Act. As a result, the lowest permissible sentence that can be imposed for the offense when committed against a law enforcement officer or other specified official will be significantly increased.

B. EFFECT OF PROPOSED CHANGES:

Section 775.0823, F.S., known as the Law Enforcement Protection Act, when read in conjunction with s. 921.0024, F.S., provides for enhancement penalties for violent offenses committed against law enforcement officers, correctional officers, state attorneys, assistant state attorneys, justices, or judges.[1]

These violent offenses include: murder in the first degree, attempted murder in the first degree, murder in the second degree, attempted murder in the second degree, murder in the third degree, attempted murder in the third degree, manslaughter during the commission of a crime, kidnapping, aggravated battery, and aggravated assault.[2] Section 775.0823, F.S., provides that an adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld for any person charged with these offenses.

This bill amends section 775.0823, F.S., to include the offense of attempted felony murder.

The Criminal Punishment Code[3] applies to sentencing for felony offenses committed on or after October 1, 1998. A defendant's sentence is calculated based on points assigned for factors including: the offense for which the defendant is being sentenced; the injury to the victim; additional offenses that the defendant committed at the time of the primary offense; the defendant's prior record and other aggravating factors.

Offenses are ranked in the "offense severity ranking chart" from level one (least severe) to level ten (most severe) and are assigned points based on the severity of the offense as determined by the legislature. Attempted felony murder under s. 782.051(3), F.S., is an offense ranked in level 7 of the Criminal Punishment Code and would be assigned 56 sentence points under s. 921.0024(1)(a), F.S.; under s. 782.051(2), F.S., is an offense ranked in level 8 of the Criminal Punishment Code and would be assigned 74 sentence points; under s. 782.051(1), F.S., is an offense ranked in level 9 of the Criminal Punishment Code and would be assigned 92 sentence points.

The points are added in order to determine a subtotal. The subtotal is then multiplied by a sentencing multiplier if applicable. A sentencing multiplier applies if the primary offense is drug trafficking, a violation of the Law Enforcement Protection Act, grand theft of a motor vehicle, an offense related to a criminal street gang, or domestic violence in the presence of a child. This bill provides that the sentencing multiplier for attempted felony murder committed against law enforcement officers, correctional officers, state attorneys, assistant state attorneys, justices, or judges is 2.5. The subtotal is then used to calculate the lowest permissible sentence that can be imposed.

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1 *See* Matthews v. State, 774 So.2d 1, 3 (2nd DCA 2000).
2 Section 775.0823(1)-(10), F.S.
3 Section 921.0022, F.S.

The permissible sentence for an offense ranges from the calculated lowest permissible sentence to the statutory maximum for the primary offense. Attempted felony murder is a first degree felony punishable by imprisonment for a term of years not exceeding life.[4]

Multiplying the subtotal points for attempted felony murder by 2.5 will have the effect of significantly increasing the lowest permissible sentence that can be imposed if the offense is committed against a law enforcement officer or other specified person.

Under the bill, for a conviction for the attempted felony murder offense set forth in s. 782.051(3), F.S., the multiplier will result in the lowest permissible sentence (assuming no prior record or victim injury points) increasing from 21 months to 84 months in prison; for a conviction under s. 782.051(2), F.S., increasing from 34.5 months to 117.75 months and for a conviction under 782.051(1), F.S., increasing from 48 months to 151 months.

C. SECTION DIRECTORY:

Section 1 amends 775.0823, F.S., providing that adjudication of guilt or imposition of sentence may not be withheld for an attempted felony murder committed against law enforcement officers, correctional officers, state attorneys, assistant state attorneys, justices, or judges.

Section 2 amends 921.0024, F.S., to provide for computing sentence points if the primary offense is a violation of 775.0823, F.S.

Section 3 amends 947.146, F.S., relating to inmates who are ineligible for control release; conforming cross-references to changes made by this act.

Section 4 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 Criminal Justice Estimating Conference has not met to determine the 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:

None.

[4] Section 782.051(1), F.S.

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

A bill to be entitled

An act relating to criminal sentencing; amending s. 775.0823, F.S.; providing that adjudication of guilt or imposition of sentence may not be suspended, deferred, or withheld for an attempted felony murder committed against a law enforcement officer, correctional officer, state attorney, assistant state attorney, justice, or judge; amending s. 921.0024, F.S., relating to the worksheet for the Criminal Punishment Code; providing for computing sentence points if the primary offense is a violation of s. 775.0823, F.S.; amending s. 947.146, F.S., relating to inmates who are ineligible for control release; conforming cross-references to changes made by the act; providing an effective date.

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

Section 1. Section 775.0823, Florida Statutes, is amended to read:

775.0823 Violent offenses committed against law enforcement officers, correctional officers, state attorneys, assistant state attorneys, justices, or judges.--The Legislature does hereby provide for an increase and certainty of penalty for any person convicted of a violent offense against any law enforcement or correctional officer, as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9); against any state attorney elected pursuant to s. 27.01 or assistant state attorney appointed under s. 27.181; or against any justice or judge of a

court described in Art. V of the State Constitution, which offense arises out of or in the scope of the officer's duty as a law enforcement or correctional officer, the state attorney's or assistant state attorney's duty as a prosecutor or investigator, or the justice's or judge's duty as a judicial officer, as follows:

(1) For murder in the first degree as described in s. 782.04(1), if the death sentence is not imposed, a sentence of imprisonment for life without eligibility for release.

(2) For attempted murder in the first degree as described in s. 782.04(1), a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

(3) For attempted felony murder as described in s. 782.051(1), (2), or (3), a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

(4) ~~(3)~~ For murder in the second degree as described in s. 782.04(2) and (3), a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

(5) ~~(4)~~ For attempted murder in the second degree as described in s. 782.04(2) and (3), a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

(6) ~~(5)~~ For murder in the third degree as described in s. 782.04(4), a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

(7) ~~(6)~~ For attempted murder in the third degree as described in s. 782.04(4), a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

(8) ~~(7)~~ For manslaughter as described in s. 782.07 during

the commission of a crime, a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

(9) ~~(8)~~ For kidnapping as described in s. 787.01, a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

(10) ~~(9)~~ For aggravated battery as described in s. 784.045, a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

(11) ~~(10)~~ For aggravated assault as described in s. 784.021, a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

Notwithstanding the provisions of s. 948.01, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld.

Section 2. Paragraph (b) of subsection (1) of section 921.0024, Florida Statutes, is amended to read:

921.0024 Criminal Punishment Code; worksheet computations; scoresheets.--

(1)

(b) WORKSHEET KEY:

Legal status points are assessed when any form of legal status existed at the time the offender committed an offense before the court for sentencing. Four (4) sentence points are assessed for an offender's legal status.

Community sanction violation points are assessed when a community sanction violation is before the court for sentencing.

Six (6) sentence points are assessed for each community sanction violation, and each successive community sanction violation; however, if the community sanction violation includes a new felony conviction before the sentencing court, twelve (12) community sanction violation points are assessed for such violation, and for each successive community sanction violation involving a new felony conviction. Multiple counts of community sanction violations before the sentencing court shall not be a basis for multiplying the assessment of community sanction violation points.

Prior serious felony points: If the offender has a primary offense or any additional offense ranked in level 8, level 9, or level 10, and one or more prior serious felonies, a single assessment of 30 points shall be added. For purposes of this section, a prior serious felony is an offense in the offender's prior record that is ranked in level 8, level 9, or level 10 under s. 921.0022 or s. 921.0023 and for which the offender is serving a sentence of confinement, supervision, or other sanction or for which the offender's date of release from confinement, supervision, or other sanction, whichever is later, is within 3 years before the date the primary offense or any additional offense was committed.

Prior capital felony points: If the offender has one or more prior capital felonies in the offender's criminal record, points shall be added to the subtotal sentence points of the offender equal to twice the number of points the offender receives for

the primary offense and any additional offense. A prior capital felony in the offender's criminal record is a previous capital felony offense for which the offender has entered a plea of nolo contendere or guilty or has been found guilty; or a felony in another jurisdiction which is a capital felony in that jurisdiction, or would be a capital felony if the offense were committed in this state.

Possession of a firearm, semiautomatic firearm, or machine gun: If the offender is convicted of committing or attempting to commit any felony other than those enumerated in s. 775.087(2) while having in his or her possession: a firearm as defined in s. 790.001(6), an additional 18 sentence points are assessed; or if the offender is convicted of committing or attempting to commit any felony other than those enumerated in s. 775.087(3) while having in his or her possession a semiautomatic firearm as defined in s. 775.087(3) or a machine gun as defined in s. 790.001(9), an additional 25 sentence points are assessed.

Sentencing multipliers:

Drug trafficking: If the primary offense is drug trafficking under s. 893.135, the subtotal sentence points are multiplied, at the discretion of the court, for a level 7 or level 8 offense, by 1.5. The state attorney may move the sentencing court to reduce or suspend the sentence of a person convicted of a level 7 or level 8 offense, if the offender provides substantial assistance as described in s. 893.135(4).

Law enforcement protection: If the primary offense is a violation of the Law Enforcement Protection Act under s. 775.0823(2), (3), or (4), the subtotal sentence points are multiplied by 2.5. If the primary offense is a violation of s. 775.0823~~(3), (4),~~ (5), (6), (7), ~~or~~ (8), or (9), the subtotal sentence points are multiplied by 2.0. If the primary offense is a violation of s. 784.07(3) or s. 775.0875(1), or of the Law Enforcement Protection Act under s. 775.0823~~(9) or~~ (10) or (11), the subtotal sentence points are multiplied by 1.5.

Grand theft of a motor vehicle: If the primary offense is grand theft of the third degree involving a motor vehicle and in the offender's prior record, there are three or more grand thefts of the third degree involving a motor vehicle, the subtotal sentence points are multiplied by 1.5.

Offense related to a criminal street gang: If the offender is convicted of the primary offense and committed that offense for the purpose of benefiting, promoting, or furthering the interests of a criminal street gang as prohibited under s. 874.04, the subtotal sentence points are multiplied by 1.5.

Domestic violence in the presence of a child: If the offender is convicted of the primary offense and the primary offense is a crime of domestic violence, as defined in s. 741.28, which was committed in the presence of a child under 16 years of age who is a family or household member as defined in s. 741.28(3) with

the victim or perpetrator, the subtotal sentence points are multiplied by 1.5.

Section 3. Subsection (3) of section 947.146, Florida Statutes, is amended to read:

947.146 Control Release Authority.--

(3) Within 120 days prior to the date the state correctional system is projected pursuant to s. 216.136 to exceed 99 percent of total capacity, the authority shall determine eligibility for and establish a control release date for an appropriate number of parole ineligible inmates committed to the department and incarcerated within the state who have been determined by the authority to be eligible for discretionary early release pursuant to this section. In establishing control release dates, it is the intent of the Legislature that the authority prioritize consideration of eligible inmates closest to their tentative release date. The authority shall rely upon commitment data on the offender information system maintained by the department to initially identify inmates who are to be reviewed for control release consideration. The authority may use a method of objective risk assessment in determining if an eligible inmate should be released. Such assessment shall be a part of the department's management information system. However, the authority shall have sole responsibility for determining control release eligibility, establishing a control release date, and effectuating the release of a sufficient number of inmates to maintain the inmate population between 99 percent and 100 percent of total capacity. Inmates who are ineligible for control release are inmates who

are parole eligible or inmates who:

(a) Are serving a sentence that includes a mandatory minimum provision for a capital offense or drug trafficking offense and have not served the number of days equal to the mandatory minimum term less any jail-time credit awarded by the court;

(b) Are serving the mandatory minimum portion of a sentence enhanced under s. 775.087(2) or (3), or s. 784.07(3);

(c) Are convicted, or have been previously convicted, of committing or attempting to commit sexual battery, incest, or any of the following lewd or indecent assaults or acts: masturbating in public; exposing the sexual organs in a perverted manner; or nonconsensual handling or fondling of the sexual organs of another person;

(d) Are convicted, or have been previously convicted, of committing or attempting to commit assault, aggravated assault, battery, or aggravated battery, and a sex act was attempted or completed during commission of such offense;

(e) Are convicted, or have been previously convicted, of committing or attempting to commit kidnapping, burglary, or murder, and the offense was committed with the intent to commit sexual battery or a sex act was attempted or completed during commission of the offense;

(f) Are convicted, or have been previously convicted, of committing or attempting to commit false imprisonment upon a child under the age of 13 and, in the course of committing the offense, the inmate committed aggravated child abuse, sexual battery against the child, or a lewd or lascivious offense

committed upon or in the presence of a person less than 16 years of age;

(g) Are sentenced, have previously been sentenced, or have been sentenced at any time under s. 775.084, or have been sentenced at any time in another jurisdiction as a habitual offender;

(h) Are convicted, or have been previously convicted, of committing or attempting to commit assault, aggravated assault, battery, aggravated battery, kidnapping, manslaughter, or murder against an officer as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9); against a state attorney or assistant state attorney; or against a justice or judge of a court described in Art. V of the State Constitution; or against an officer, judge, or state attorney employed in a comparable position by any other jurisdiction; ~~or~~

(i) Are convicted, or have been previously convicted, of committing or attempting to commit murder in the first, second, or third degree under s. 782.04(1), (2), (3), or (4), or have ever been convicted of any degree of murder or attempted murder in another jurisdiction;

(j) Are convicted, or have been previously convicted, of DUI manslaughter under s. 316.193(3)(c)3., and are sentenced, or have been sentenced at any time, as a habitual offender for such offense, or have been sentenced at any time in another jurisdiction as a habitual offender for such offense;

(k)1. Are serving a sentence for an offense committed on or after January 1, 1994, for a violation of the Law Enforcement Protection Act under s. 775.0823(2), (3), (4), ~~or~~ (5), or (6),

and the subtotal of the offender's sentence points is multiplied pursuant to former s. 921.0014 or s. 921.0024;

2. Are serving a sentence for an offense committed on or after October 1, 1995, for a violation of the Law Enforcement Protection Act under s. 775.0823(2), (3), (4), (5), (6), (7), ~~or~~ (8), or (9), and the subtotal of the offender's sentence points is multiplied pursuant to former s. 921.0014 or s. 921.0024;

(l) Are serving a sentence for an offense committed on or after January 1, 1994, for possession of a firearm, semiautomatic firearm, or machine gun in which additional points are added to the subtotal of the offender's sentence points pursuant to former s. 921.0014 or s. 921.0024; or

(m) Are convicted, or have been previously convicted, of committing or attempting to commit manslaughter, kidnapping, robbery, carjacking, home-invasion robbery, or a burglary under s. 810.02(2).

In making control release eligibility determinations under this subsection, the authority may rely on any document leading to or generated during the course of the criminal proceedings, including, but not limited to, any presentence or postsentence investigation or any information contained in arrest reports relating to circumstances of the offense.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1029 Carrying of Firearms in National Forests
SPONSOR(S): Baxley and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1546

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee		Cunningham	Kramer
2) Environmental Regulation Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

Section 790.11, F.S., currently prohibits persons from carrying any gun or firearm of any description within the limits of a national forest area (except during hunting season), without first obtaining a permit. Section 790.12, F.S. provides that the board of county commissioners of the county where such national forest area is located may grant a special permit for the carrying of firearms. Any person who violates any of the above provisions commits a second degree misdemeanor.

In regards to state parks, Department of Environmental Protection Rule 62D-2.014(10), F.A.C., currently prohibits persons from using, carrying, or possessing firearms of any type in any *state park* unless used for authorized resource management.

This bill repeals the statutes prohibiting persons from carrying firearms in *national forests*, authorizing special permits for the carrying of firearms in national forests, and providing penalties for violations. The bill also directs the Department of Environmental Protection to adopt amendments to Rule 62D-2.014(10), F.A.C., to repeal the provision prohibiting persons from using, carrying, or possessing firearms in state parks.

This bill takes effect October 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government → This bill eliminates the prohibition on carrying firearms in national forests and directs the Department of Environmental Protection to adopt amendments to Rule 62D-2.014(10), F.A.C., to repeal the provision prohibiting persons from using, carrying, or possessing firearms in state parks.

Safeguard Individual Liberty → This bill eliminates the prohibition on carrying firearms in national forests and directs the Department of Environmental Protection to adopt amendments to Rule 62D-2.014(10), F.A.C., to repeal the provision prohibiting persons from using, carrying, or possessing firearms in state parks.

Maintain Public Security → This bill eliminates the prohibition on carrying firearms in national forests and directs the Department of Environmental Protection to adopt amendments to Rule 62D-2.014(10), F.A.C., to repeal the provision prohibiting persons from using, carrying, or possessing firearms in state parks.

B. EFFECT OF PROPOSED CHANGES:

National Forests & Wildlife Management Areas

The U.S. Department of Agriculture (USDA) Forest Service is a Federal agency that manages public lands in national forests and grasslands.[1] The Forest Service manages public lands, known collectively as the National Forest System, located in 44 States, Puerto Rico, and the Virgin Islands.[2] Nationwide, there are 155 national forests, which comprise 8.5 percent of the total land area in the United States.[3]

There are four national forests in Florida: Apalachicola, Choctawhatchee, Ocala, and Osceola National Forest.[4] According to the U.S. Department of Agriculture Forest Service, all of the National Forests in Florida are also Wildlife Management Areas (WMAs), which are regulated, in part, by Florida's Fish and Wildlife Conservation Commission (FWCC). The result of this dual-designation is that FWCC regulates the *wildlife*, while the USDA Forest Service regulates the *land* (e.g. resources, timber, hiking trails, etc...).

There do not appear to be any federal regulations specifically prohibiting persons from carrying firearms in National Forests. However, Title 36 of the Code of Federal Regulations, relating in part to National Forests, prohibits persons from *discharging* a firearm or any other implement capable of taking human life causing injury, or damaging property in or within 150 yards of a residence, building, campsite, developed recreation site, or occupied area; across or on a National Forest System road or a body of water adjacent thereto; or in any manner or place whereby any person or property is exposed to injury or damage as a result in such discharge; or into or within any cave.[5] Additionally, in regards to hunting laws, the federal government defers to state hunting laws.[6]

There do not appear to be any state statutes specifically prohibiting persons from carrying firearms in WMAs. However, FWCC's rules currently prohibit persons from possessing any gun on any WMA

[1] http://www.fs.fed.us/aboutus/meetfs.shtml
[2] *Id.*
[3] *Id.*
[4] http://www.fs.fed.us/r8/florida/about
[5] 36 C.F.R. 261.10(d)
[6] 36 C.F.R. 261.8

during any period in which hunting by the use of a gun is prohibited unless otherwise authorized by permit from the executive director.[7]

Section 790.11, F.S., currently prohibits persons from carrying any gun or firearm[8] of any description within the limits of a National Forest (except during hunting season), without first obtaining a permit.[9] Section 790.12, F.S. provides that the board of county commissioners of the county where such National Forest area is located may grant a special permit for the carrying of firearms.[10] However, the officer or employee of the United States Government in charge of such National Forest area must first recommend in writing that the permit should be granted.[11] Section 790.14, F.S., states that any person who violates any of the above provisions commits a second degree misdemeanor[12].

State Parks

There do not appear to be any state statutes specifically prohibiting persons from carrying firearms in *state parks*. However, the Department of Environmental Protection (DEP) has adopted rules that prohibit persons from using, carrying, or possessing firearms of any type in any *state park*[13] unless used for authorized resource management.[14]

Effect of the Bill

HB 1029 repeals ss. 790.11, 790.12, and 790.14, F.S., prohibiting persons from carrying firearms in *national forests*, authorizing special permits for the carrying of firearms in national forests, and providing penalties for violations. The bill amends the "Lawful ownership, possession, and use of firearms and other weapons" statute (s. 790.25, F.S.), deleting the references to ss. 790.11, 790.12, and 790.14, F.S.

HB 1029 also directs DEP to adopt amendments to Rule 62D-2.014(10), F.A.C., to repeal the provision prohibiting persons from using, carrying, or possessing firearms in state parks.

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[7] Rule 68A-15.004(6), F.A.C.

[8] Section 790.001, F.S., defines "firearm" as any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term "firearm" does not include an antique firearm unless the antique firearm is used in the commission of a crime.

[9] The statute provides an exception for carrying a gun or firearm on state roads when securely locked within a vehicle. *See* s. 790.11, F.S.

[10] If a national forest lies in more than one county, the permit must be granted by the board of county commissioners of each of the several counties involved before it is valid. *See* s. 790.12, F.S.

[11] s. 790.12, F.S. In 1997, the Office of General Counsel of the USDA issued a legal opinion regarding s. 790.012, F.S., (requiring counties to get a written recommendation from the U.S. Government employee in charge of the National Forest before issuing a permit allowing someone to carry a firearm in a National Forest). The opinion states that "Nothing in the language of s. 790.12 imposes an explicit or implied duty upon the Forest Service to make such recommendations. Furthermore, even assuming *arguendo* that s. 790.12 could reasonably be interpreted as requiring the Forest Service to make such recommendations, the Supremacy Clause of the United States Constitution would prevent its application." The opinion went on to recommend that the federal government not make any recommendations relating to permits discussed in s. 790.12, F.S.

[12] A second degree misdemeanor is punishable by a term of imprisonment not exceeding 60 days and by a fine of up to $500. *See* ss. 775.082 and 775.083, F.S.

[13] Florida's state park system is one of the largest in the country with 159 parks spanning more than 723,000 acres and 100 miles of beach. State parks include all real property in the State of Florida under the jurisdiction of the Florida Department of Environmental Protection, Division of Recreation and Parks, or which may come under its jurisdiction regardless of the property's designation. Among the designations included in the state park system are state park, state recreation area, state archaeological site, state historic site, state geological site, state botanical site, state preserve, state garden, state museum, state reserve, state cultural site, state wildlife park, state folk cultural center, and state trail. *See* Rule 62D-2.013(1), F.A.C.

[14] Rule 62D-2.014(10), F.A.C.

C. SECTION DIRECTORY:

Section 1. Repeals ss. 790.11, 790.12, and 790.14, F.S.

Section 2. Amending s. 790.25, F.S., correcting cross-references.

Section 3. Directing the Department of Environmental Protection to amend rules in the Florida Administrative Code.

Section 4. This act takes effect 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:

   As noted above, s. 790.12, F.S. provides that the board of county commissioners of the county where such national forest area is located may grant a special permit for the carrying of firearms. Counties may lose permit revenue to the extent that persons are no longer required to obtain a permit to carry a firearm in a national forest. However, as noted in footnote 11 above, the federal government has, since 1997, declined to recommend that counties issue permits to carry firearms in National Forests. Thus, it would not appear that counties would incur a significant fiscal impact from a loss of permit revenue.

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 direct the Department of Environmental Protection to adopt amendments to Rule 62D-2.014(1), F.A.C., to repeal the provision that no person shall use, carry, or possess firearms in state parks.

C. DRAFTING ISSUES OR OTHER COMMENTS:

As noted above, the FWCC currently has a rule prohibiting persons from possessing any gun on any WMA during any period in which hunting by the use of a gun is prohibited unless otherwise authorized by permit from the executive director. Because all National Forests in Florida are also WMAs, the FWCC rule would apply in National Forests. Thus, even though the bill has the effect of removing the firearm prohibition in regards to National Forests, people would still be prohibited from carrying firearms in WMAs (and therefore National Forests). In order to effectuate the purpose of the bill (i.e. remove the prohibition on carrying firearms in National Forrests), the bill should direct the FWCC to amend its rules (e.g. the bill could direct the FWCC to amend its rules to allow firearms in WMAs that are also National Forests).

The FWCC reports that, effective July 1, 2006, an amended version of its firearms rule will take effect. The amended rule would allow persons with concealed weapons permits to carry firearms in WMAs at any time. This amended rule would still conflict with the provisions of the bill in the manner described above.

It should be noted that repealing the statutes and rules prohibiting persons from carrying firearms in National Forests/WMAs and state parks does not mean that persons will automatically be able to openly carry weapons in such areas, carry concealed weapons in such areas without a permit, etc... The laws that apply to the carrying, use, etc... of firearms would apply (e.g. section 790.053, F.S., prohibiting persons from openly carrying firearms, would apply; s. 790.06, F.S., requiring a permit to carry a concealed weapon, would apply and require anyone in a National Forest/WMA or state park to have a permit to carry a concealed weapon).

It should also be noted that the bill does not affect the provisions of 36 C.F.R. 261.10(d), discussed above, relating to the *discharge* of a firearm in a National Forest.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

A bill to be entitled

An act relating to the carrying of firearms in national forests; repealing s. 790.11, F.S., which prohibits the carrying of firearms in national forests; repealing s. 790.12, F.S., which authorizes the granting of a special permit for the carrying of firearms in a national forest; repealing s. 790.14, F.S., which provides a penalty for violation of ss. 790.11 and 790.12, F.S.; amending s. 790.25, F.S.; correcting cross-references; directing the Department of Environmental Protection to amend the correlative rule in the Florida Administrative Code, to conform; providing an effective date.

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

Section 1. Sections 790.11, 790.12, and 790.14, Florida Statutes, are repealed.

Section 2. Paragraph (b) of subsection (2) of section 790.25, Florida Statutes, is amended to read:

790.25 Lawful ownership, possession, and use of firearms and other weapons.--

(2) USES NOT AUTHORIZED.--

(b) The protections of this section do not apply to the following:

1. A person who has been adjudged mentally incompetent, who is addicted to the use of narcotics or any similar drug, or who is a habitual or chronic alcoholic, or a person using

weapons or firearms in violation of ss. 790.07-790.115 ~~790.07-790.12~~, 790.145-790.19 ~~790.14-790.19~~, 790.22-790.24;

2. Vagrants and other undesirable persons as defined in s. 856.02;

3. A person in or about a place of nuisance as defined in s. 823.05, unless such person is there for law enforcement or some other lawful purpose.

Section 3. The Department of Environmental Protection is directed to adopt amendments to rule 62D-2.014(10), Florida Administrative Code, to repeal the provision that no person shall use, carry, or possess firearms in state parks.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1087 Prostitution
SPONSOR(S): Clarke
TIED BILLS: **IDEN./SIM. BILLS:** SB 2274

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee		Ferguson KF	Kramer YK
2) Criminal Justice Appropriations Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

This bill increases criminal penalties for prostitution offenses committed within 1,000 feet of the following locations:

- Child care facility.
- School.
- Place of worship.
- Park.
- Community center.
- Recreational facility.

A second prostitution offense will be reclassified from a first degree misdemeanor to a third degree felony, and a third or subsequent prostitution offense will be reclassified from a third degree felony to a second degree felony if the offense is committed within 1,000 feet of the above listed locations. A first prostitution violation will remain a second degree misdemeanor regardless of where it is committed.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government / Promote Personal Responsibility- This bill increases criminal penalties for prostitution offenses committed within 1,000 feet of certain locations.

B. EFFECT OF PROPOSED CHANGES:

Current Florida Law

Section 796.07(2), F.S., provides that it is unlawful:

- To own, establish, maintain, or operate any place, structure, building, or conveyance for the purpose of lewdness, assignation, or prostitution.
- To offer, or to offer or agree to secure, another for the purpose of prostitution or for any other lewd or indecent act.
- To receive, or to offer or agree to receive, any person into any place, structure, building, or conveyance for the purpose of prostitution, lewdness, or assignation, or to permit any person to remain there for such purpose.
- To direct, take, or transport, or to offer or agree to direct, take, or transport, any person to any place, structure, or building, or to any other person, with knowledge or reasonable cause to believe that the purpose of such directing, taking, or transporting is prostitution, lewdness, or assignation.
- To offer to commit, or to commit, or to engage in, prostitution, lewdness, or assignation.
- To solicit, induce, entice, or procure another to commit prostitution, lewdness, or assignation.
- To reside in, enter, or remain in, any place, structure, or building, or to enter or remain in any conveyance, for the purpose of prostitution, lewdness, or assignation.
- To aid, abet, or participate in any of the acts or things enumerated in this subsection.
- To purchase the services of any person engaged in prostitution.

Section 796.07(4), F.S., provides that a first offense under s. 796.07, F.S., is a 2nd degree misdemeanor[1], a second offense is a 1st degree misdemeanor[2], and a third or subsequent offense is a third degree felony.[3]

Effective of Bill

This bill amends section 796.07(4), F.S., to increase criminal penalties for prostitution offenses committed within 1,000 feet of the following:

- A child care facility as defined in s. 402.302, F.S.[4] that is in compliance with the signage requirements of s. 893.13(1)(c), F.S.[5]

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[1] Punishable by a term of imprisonment not exceeding 60 days and a fine of $500. ss. 775.082(4)(b) and 775.083(1)(e), F.S.

[2] Punishable by a term of imprisonment not exceeding 1 year and a fine of $1,000. ss. 775.082(4)(a) and 775.083(1)(d), F.S.

[3] Punishable by a term of imprisonment not exceeding 5 years and a fine of $5,000. ss. 775.082(3)(d) and 775.083(1)(c), F.S.

[4] This section defines the term as follows: A child care center or child care arrangement which provides child care for more then five children unrelated to the operator and which receives a payment, fee, or grant of any of the children receiving care, wherever operated, and whether or not operated for profit. The following are not included: (a) Public schools and nonpublic schools and their integral programs, except as provided in s. 402.3025, F.S.; (b) Summer camps having children in full-time residence; (c) Summer day camps; (d) Bible schools normally conducted during vacation periods; and (e) Operators of transient establishments which provide child care services solely for the guests of their establishment or resort, provided that all child care personnel of the establishment are screened according to the level 2 screening requirements of chapter 435.

- A public or private elementary, middle, or secondary school.
- A physical place for worship where a church or religious organization regularly conducts religious services.
- A state, county, or municipal park.
- A community center.
- A publicly owned recreational facility.

Under the bill, a second prostitution offense is increased from a first degree misdemeanor to a third degree felony which is punishable by a term of imprisonment not exceeding 5 years[6] and a fine of $5,000[7] if the offense is committed within 1,000 feet of one of the locations listed above. Also, a third or subsequent prostitution offense is increased from a third degree felony to a second degree felony which is punishable by a term of imprisonment not exceeding 15 years[8]and a fine of $10,000[9] if committed within 1,000 feet of one of the locations listed above.

This increase in criminal penalties for prostitution offenses committed within 1,000 feet of certain locations is somewhat similar to section 893.13(1)(c), F.S., which has increased penalties for the sale, manufacture or delivery of a controlled substance or the possession with intent to sell, manufacture or deliver a controlled substance that occurs within 1,000 feet of a child care facility, school, park, community center or recreational facility.

C. SECTION DIRECTORY:

Section 1 amends section 796.07, F.S., to provide for reclassification of penalties for certain violations committed within a specified distance of certain locations.

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:

   The Criminal Justice Impact Conference has not met to determine this bills prison bed impact on the Department of Corrections.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

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[5] This section requires a sign that is not less than 2 square feet in size with a word legend identifying the facility as a licensed child care facility and that is posted on the property of the child care facility in a conspicuous place where the sign is reasonably visible to the public.

[6] Section 775.082(3)(d), F.S.

[7] Section 775.083(1)(c), F.S.

[8] Section 775.082(3)(c), F.S.

[9] Section 775.083(1)(b), F.S.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

A bill to be entitled

An act relating to prostitution; amending s. 796.07, F.S.; providing for reclassification of penalties for certain violations committed within a specified distance of certain locations; providing an effective date.

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

Section 1. Subsection (4) of section 796.07, Florida Statutes, is amended to read:

796.07 Prohibiting prostitution, etc.; evidence; penalties; definitions.--

(4)(a) A person who violates any provision of this section commits:

1.~~(a)~~ A misdemeanor of the second degree for a first violation, punishable as provided in s. 775.082 or s. 775.083.

2.~~(b)~~ A misdemeanor of the first degree for a second violation, punishable as provided in s. 775.082 or s. 775.083.

3.~~(c)~~ A felony of the third degree for a third or subsequent violation, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) If a felony or first degree misdemeanor violation of this section was committed within 1,000 feet of the real property comprising a child care facility as defined in s. 402.302 that is in compliance with the signage requirements for child care facilities in s. 893.13(1)(c); a public or private elementary, middle, or secondary school; or a physical place for worship where a church or religious organization regularly

conducts religious services; or in, on, or within 1,000 feet of real property comprising a state, county, or municipal park, a community center, or a publicly owned recreational facility, the penalty shall be reclassified as follows:

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

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

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1167 Sexual Predators
SPONSOR(S): Bean and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1834

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee		Cunningham	Kramer
2) Justice Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

Section 775.21, F.S., provides that a person convicted of certain enumerated sexual offenses must be designated a "sexual predator." Currently, there do not appear to be any statutory provisions prohibiting persons (e.g. physicians, pharmacists, drug store clerks, etc...) from prescribing, dispensing, or selling erectile dysfunction drugs to sexual predators. Nor do there appear to be any statutory provisions limiting or prohibiting sexual predators from possessing erectile dysfunction drugs (prescription or otherwise).

This bill would prohibit persons from *distributing* any drug treating erectile dysfunction to a person designated a sexual predator. A person who violates this provision once commits a second degree misdemeanor, and any subsequent violations are first degree misdemeanors. However, the bill provides an affirmative defense to this charge if the sexual predator was not listed on the sexual predator registry at the time the drug was distributed.

The bill also prohibits a sexual predator from *possessing* an erectile dysfunction drug. A sexual predator who violates this provision commits a second degree misdemeanor, and any subsequent violations are first degree misdemeanors.

This bill takes effect July 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government → This bill prohibits the distribution of any erectile dysfunction drug to a person designated a sexual predator.

Safeguard Individual Liberty → This bill prohibits a sexual predator from possessing an erectile dysfunction drug.

B. EFFECT OF PROPOSED CHANGES:

Sexual Predators

Section 775.21, F.S., provides that a person convicted of an enumerated sexual offense must be designated a "sexual predator." Specifically, a person must be designated a sexual predator if he or she has been convicted of:

1. A capital, life, or first-degree felony violation, or any attempt thereof, of one of the following offenses:
    a. kidnapping or false imprisonment[1] where the victim is a minor and the defendant is not the victim's parent;
    b. sexual battery;[2]
    c. lewd or lascivious offenses;[3]
    d. selling or buying a minors for child pornography;[4] or
    e. a violation of a similar law of another jurisdiction.
2. Any felony violation of one of the following offenses where the offender has previously been convicted of or found to have committed, or has pled nolo contendere or guilty to, regardless of adjudication one of the following offenses:
    a. kidnapping, false imprisonment or luring or enticing a child[5] where the victim is a minor and the defendant is not the victim's parent,
    b. sexual battery;[6]
    c. procuring a person under the age of 18 for prostitution;[7]
    d. lewd or lascivious offenses;
    e. lewd or lascivious battery on an elderly person;[8]
    f. promoting sexual performance by a child;[9]
    g. selling or buying a minors for child pornography; or
    h. a violation of a similar law of another jurisdiction.[10]

In order to be counted as a prior felony, the felony must have resulted in a conviction sentenced separately or an adjudication of delinquency entered separately, prior to the current offense and sentenced or adjudicated separately from any other felony conviction that is to be counted as a prior felony.

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[1] s. 787.01, F.S. or s. 787.02, F.S.,
[2] See chapter 794. F.S.
[3] s. 800.04, F.S.
[4] s. 847.0145, F.S.
[5] s. 787.025, F.S.
[6] Excluded are offenses contained in ss. 794.011(10) and 794.0235, F.S.
[7] s. 796.03, F.S.
[8] s. 825.1025(2)(b), F.S.
[9] s. 827.071, F.S.
[10] Additionally, a person must be designated as a sexual predator if he or she committed one of the offenses listed in a. through h. above and has previously been convicted of the offense of selling or showing obscenity to a minor or using a computer to solicit sexual conduct of or with a minor [ss. 847.0133 or 847.0135, F.S.]

If the sexual predator is in the custody or control of, or under the supervision of, the Department of Corrections (DOC), or is in the custody of a private correctional facility, the predator must register with the DOC and provide specified information. Private correctional facilities are also governed by these requirements.

If the sexual predator is not in the custody or control of, or under the supervision of, the DOC, or is not in the custody of a private correctional facility, and the predator establishes or maintains a residence in this state, the predator must initially register in person at an Florida Department of Law Enforcement (FDLE) office, or at the sheriff's office in the county of residence within 48 hours after establishing permanent or temporary residence.

Within 48 hours of initial registration, a sexual predator who is not incarcerated and who resides in the community, including a predator under DOC supervision, must register at a driver's license office of the Department of Highway Safety and Motor Vehicles (DHSMV) and present proof of registration, provide specified information, and secure a driver's license, if qualified, or an identification card. Each time a sexual predator's driver's license or identification card is subject to renewal, and within 48 hours after any change in the predator's residence or name, he or she must report in person to a driver's license facility of the DHSMV and is subject to specified registration requirements. This information is provided to FDLE which maintains the statewide registry of all sexual predators and sexual offenders (discussed further below). The department maintains a searchable web-site containing the names and addresses of all sexual predators and offenders as well as a toll-free telephone number.

A sexual predator's failure to comply with registration requirements is a third degree felony.[11] A sexual predator is required to maintain registration for the duration of his or her life, unless the sexual predator has received a full pardon or has had a conviction set aside in a postconviction proceeding.

Erectile Dysfunction

The term erectile dysfunction (ED) covers a range of disorders, but usually refers to the inability to obtain an adequate erection for satisfactory sexual activity.[12] Approximately 30 million men in the United States have erectile dysfunction.[13] According to the Department of Health (DOH), some ED drugs must be obtained by prescription while others (e.g. herbal remedies, etc...) may be obtained over-the-counter without a prescription.

Currently, there do not appear to be any statutory provisions prohibiting persons (e.g. physicians, pharmacists, drug store clerks, etc...) from prescribing, dispensing, or selling ED drugs to a specific group of persons (e.g. sexual predators). Nor do there appear to be any statutory provisions limiting or prohibiting a specific group of persons from possessing an ED drug (prescription or otherwise).[14]

Effect of the Bill

This bill would prohibit persons from *distributing* any drug treating ED to a person designated as a sexual predator. A person who violates this provision once commits a second degree misdemeanor,[15] and any subsequent violations are first degree misdemeanors[16]. However, the bill provides an affirmative defense to this charge if the sexual predator was not listed on the sexual predator registry at the time the drug was distributed.

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[11] s. 775.21(10), F.S.

[12] http://www.mayoclinic.com/health/erectile-dysfunction/DS00162

[13] http://www.mmhc-online.com/articles/impotency.html

[14] There is a statute that limits *how many doses* of ED drugs Medicaid recipients may receive. *See* s. 409.912(39), F.S.

[15] A second degree misdemeanor is punishable by a maximum of 60 days in jail and a maximum fine of $500. *See* ss. 775.082, 775.083, F.S.

[16] A first degree misdemeanor is punishable by a term of imprisonment not exceeding 1 year and a $1,000 fine. *See* ss. 775.082 and 775.083.

The bill also prohibits a sexual predator from *possessing* an ED drug. A sexual predator who violates this provision once commits a second degree misdemeanor, and any subsequent violations are first degree misdemeanors.[17]

C. SECTION DIRECTORY:

Section 1. Creates s. 794.075, F.S.; prohibiting distribution of any drug treating erectile dysfunction to a person designated a sexual predator; providing an affirmative defense; prohibiting a sexual predator from possessing an erectile dysfunction drug.

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:

The ED drug market may lose revenue in that sexual predators will no longer be able to possess ED drugs.

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:

   See "Drafting Issues or Other Comments".

B. RULE-MAKING AUTHORITY:

None.

[17] *Id.*

C. DRAFTING ISSUES OR OTHER COMMENTS:

This bill would prohibit persons from *distributing* any drug treating ED to a person designated as a sexual predator. Sections 499.003 and 893.02, F.S., define "distribute" as selling; offering to sell; giving away; transferring, whether by passage of title, physical movement, or both; delivering, or offering to deliver. The statute specifies that the term does not mean "dispense". Throughout Florida's statutes, the term "dispense" applies to the transfer of possession of drugs by licensed physicians and pharmacists.[18] Because the bill uses the term "distribute", everyone *except* licensed physicians and pharmacists would be prohibited from giving an ED drug to a sexual predator. It is unclear whether this is the intent of the bill.

The bill states that it is a second degree misdemeanor for someone to distribute any drug treating ED to a sexual predator. The bill then defines the term "drug" as provided in s. 499.003, F.S. According to DOH, this definition would include both prescription ED drugs as well as over-the-counter ED drugs (e.g. herbal remedies sold at drug stores). Thus, a clerk at a drug store would be required to determine whether the person he or she is selling ED drugs to is a sexual predator.

It should be noted that ED drugs can be obtained (with or without a prescription) via the Internet. It is unclear how the bill would address this scenario (e.g. would an Internet sale of an ED drug fall within the definition of "distribute", etc...).

The bill references the "sexual predator registry" and provides an affirmative defense to a criminal charge if the sexual predator was not listed on the sexual predator registry at the time the drug was distributed. However, it is unclear what the term "sexual predator registry" is referring to. There are sexual offender/predator registries on both the state and national level. In Florida, the Florida Department of Law Enforcement maintains the statewide registry of all sexual predators and sexual offenders.

Although ED drugs are primarily used to treat ED, they have recently been found to help treat certain cardiac conditions (hypertension, enlarged heart, etc...) and Crohn's disease.[19] Prohibiting sexual predators from possessing a drug that could help treat cardiac, or other non-ED related conditions could raise Equal Protection concerns.

There are a number of prescription and over-the-counter drugs that may cause erectile dysfunction (e.g. diuretics and antihypertensives, antidepressants, anti-anxiety drugs and antiepileptic drugs, antihistamines, Parkinson's disease medications, prostate cancer medications, and chemotherapy medications).[20] Many people take such drugs to treat medical conditions (e.g. Epilepsy, depression, Parkinson's disease, etc...).

The bill's effective date is July 1, 2006. Generally, criminal bills have en effective date of October 1.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

[18] *See e.g.* ss. 465.003(6) and 893.02(6), F.S.,

[19] "Viagra may offer help for enlarged hearts", http://www.msnbc.msn.com/id/6858619/; "Viagra may treat heart failure"; http://www.medicinenet.com/script/main/art.asp?articlekey=55034; "Viagra may help Crohn's disease", http://www.webmd.com/content/article/119/113246; "Viagra reduces heart stress", http://www.nelh.nhs.uk/hth/viagra_heart_stress.asp.

[20] http://www.webmd.com/content/article/57/66229.htm

A bill to be entitled

An act relating to sexual predators; creating s. 794.075, F.S.; defining the term "drug"; prohibiting distribution of any drug treating erectile dysfunction to a person designated as a sexual predator; providing an affirmative defense; prohibiting a sexual predator from possessing such a drug; providing criminal penalties; providing an effective date.

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

Section 1. Section 794.075, Florida Statutes, is created to read:

794.075 Sexual predators; erectile dysfunction drugs.--

(1) For purposes of this section, the term "drug" has the same meaning as in s. 499.003.

(2)(a) A person may not distribute any drug treating erectile dysfunction to a person designated as a sexual predator under s. 775.21.

(b) It is an affirmative defense to a charge under this subsection that the sexual predator was not listed on the sexual predator registry at the time the drug was distributed.

(3) A person may not possess an erectile dysfunction drug if the person is designated as a sexual predator under s. 775.21.

(4) A person who violates a provision of this section for the first time commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. A person who

violates a provision of this section a second or subsequent time commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1169 Vehicular Accidents Involving Death or Personal Injuries
SPONSOR(S): Galvano
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee		Kramer TK	Kramer TK
2) Criminal Justice Appropriations Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

HB 1169 requires the imposition of a two year minimum mandatory sentence for the offense of leaving the scene of an accident involving death where the offender was driving under the influence. The bill also requires that a judge order an offender to make restitution to the victim upon conviction for the offenses of leaving the scene of an accident involving injury or death. The bill requires the imposition of "victim injury points" for these offenses. This will have the effect of significantly increasing the lowest permissible sentence that a judge can impose for the offense of leaving the scene of an accident involving death.

The bill requires the imposition of a four year minimum mandatory sentence for the offense of DUI manslaughter.

During the 2005 session, the Criminal Justice Estimating Conference determined that an identical bill would have an indeterminate minimal prison bed impact on the Department of Corrections. Please see Section II, Fiscal Analysis & Economic Impact Statement, for more details.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: The bill requires the imposition of minimum mandatory terms of imprisonment for certain criminal offenses.

Promote personal responsibility: The bill increases the severity of the sanction for injurious behavior. The bill requires that an offender be required to pay restitution to a victim in certain circumstances.

B. EFFECT OF PROPOSED CHANGES:

***Leaving the Scene of an Accident Involving Injuries or Death*:** Section 316.062, F.S. requires a driver of a vehicle involved in a crash resulting in property damage or injury or death to provide certain information to the person who was injured or whose property was damaged or to law enforcement investigating the crash. The driver must provide his or her name, address, vehicle registration number and driver's license. The driver also must render reasonable assistance to the injured person.[1]

Section 316.027(1), F.S. provides that a driver of a vehicle involved in a crash resulting in the injury or death of any person must immediately stop the vehicle at or near the scene of the crash, and must remain at the scene until he or she has complied with the requirements of s. 316.062, F.S., listed above. A willful violation of this provision is a third degree felony where injury occurs and is commonly known as leaving the scene of an accident involving injury. A willful violation of this provision is a second degree felony where death occurs and is commonly known as leaving the scene of an accident involving death. It is not necessary that a person *caused* the accident – merely that he or she willfully left the scene without complying with s. 316.062, F.S. in order to be charged under s. 316.027(1), F.S.

Criminal Punishment Code: The Criminal Punishment Code applies to sentencing for felony offenses committed on or after October 1, 1998. Criminal offenses are ranked in the "offense severity ranking chart"[2] from level one (least severe) to level ten (most severe) and are assigned points based on the severity of the offense as determined by the legislature. If an offense is not listed in the ranking chart, it defaults to a ranking based on the degree of the felony. A defendant's sentence is calculated based on points assigned for factors including: the offense for which the defendant is being sentenced; injury to the victim; additional offenses that the defendant committed at the time of the primary offense; the defendant's prior record and other aggravating factors. The points are added in order to determine the "lowest permissible sentence" for the offense. A judge cannot impose a sentence below the lowest permissible sentence unless the judge makes written findings that there are "circumstances or factors that reasonably justify the downward departure."[3] The permissible sentence (absent downward departure) for an offense ranges from the calculated lowest permissible sentence to the statutory maximum for the primary offense. The statutory maximum sentence for a first degree felony is thirty years, for a second degree felony is fifteen years and for a third degree felony is five years.[4]

Victim injury: For sentencing purposes, victim injury is defined to mean the "physical injury or death suffered by a person as a *direct result*" of the criminal offense.[5] Generally, victim injury points are not assessed for the offense of leaving the scene of an accident involving injury or death because the injury

[1] A violation of this provision is considered a nonmoving violation punishable by a thirty dollar fine. s. 318.18(2)
[2] s. 921.0022, F.S.
[3] s. 921.0026, F.S.
[4] s. 775.082, F.S.
[5] s. 921.0021(7)(a), F.S.

or death is not a direct result of the offender leaving the scene.[6] There are only two reported decisions affirming an assessment of victim injury points for leaving the scene on an accident involving death. In both cases, there was evidence that the victim was dragged after being hit. In May v. State, 747 So.2d 459 (Fla. 4th DCA 1999) the offender dragged the victim for 500 feet and there was evidence that the dragging was a direct cause of death. In Sims v. State, 869 So.2d 45, 48 (Fla. 5th DCA 2004), the court concluded that because there was evidence that the victim was dragged after being hit by the offender's vehicle, "there was sufficient causal connection between the leaving of the accident scene and the death to justify the imposition of victim injury points."

HB 1169 amends section 921.0021, F.S. to require that victim injury points be assessed when a person is convicted of leaving the scene of an accident involving death or injury. This would have the effect of significantly increasing the lowest permissible sentence for these offenses in most cases as follows. The offense of leaving the scene of an accident involving injuries is ranked in Level 5 of the ranking chart. The sentence for this offense for a first time offender ranges from any non-state prison sanction to five years in prison. The addition of victim injury points would change the lowest permissible sentence, depending on the severity of the injury. If the victim injury was severe, the lowest permissible sentence would increase to 30 months in prison; if the injury was moderate, the lowest permissible sentence would be increased to13.5 months in prison and if the victim injury was slight, the lowest permissible sentence would remain any non-state prison sanction. The maximum sentence for the offense would still be five years in prison.

The offense of leaving the scene of an accident involving death is a Level 7 felony. The sentence for this offense for a first time offender ranges from 21 months to 15 years in prison. The addition of victim injury points for the death of the victim would greatly increase the lowest permissible sentence for the offense to 111 months (9 years and 3 months) in prison.

Minimum mandatory sentence: HB 1169[7] amends s. 316.027(1)(b), F.S. to provide that a person who commits the offense of leaving the scene of an accident involving death, while driving under the influence, shall be sentenced to a mandatory minimum term of imprisonment of 2 years. Because the lowest permissible sentence for this offense, as a result of the addition of victim injury points as required by this bill, will be greater than 2 years, this provision would not increase the sentence in cases in which the offender is sentenced in excess of the lowest permissible sentence but would have the effect of prohibiting a judge from giving a downward departure sentence of less than 2 years in prison in cases in which a defendant is convicted of leaving the scene of an accident while driving under the influence.

Restitution: A judge is required to order a defendant to make restitution to a victim for damage or loss caused directly or indirectly by the defendant's offense and damage or loss related to the defendant's criminal episode unless the judge finds clear and compelling reasons not to order such restitution.[8] Generally, restitution cannot be ordered against a person convicted of the offense of leaving the scene of an accident involving injury or death.[9] HB 1169 provides that if the driver of a vehicle commits the

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[6] Geary v. State, 675 So.2d 625 (Fla. 2nd DCA 1996).

[7] Section 1 of the bill provides that sections 316.027 and 316.193, F.S. may be cited as the "Adam Arnold Act". According to newspaper accounts, Adam Arnold was a 16 year old who was killed in an automobile accident in 1996 where the driver of the other vehicle left the scene of the accident and was apprehended two days later. http://www.bradenton.com/mld/bradenton/13970830.htm

[8] s. 775.089(1), F.S.

[9] In Schuette v. State, 822 So.2d 1275 (Fla 2002), the defendant was charged with and convicted of driving with a suspended license and leaving the scene of an accident involving an injury. Florida Supreme Court held that

> [T]he mere occurrence of an accident, while the defendant is engaged in the criminal offense of driving with a suspended license does not as a matter of law mandate the award of restitution for the damages arising out of the accident. An award of restitution requires the existence of a causal relationship between the criminal offense of driving with a suspended license and the accident that resulted in the damaged or loss."

In the opinion, the Supreme Court relied on State v. Williams, 520 So.2d 276 (Fla. 1988), an earlier opinion which struck an award of restitution for the offense of leaving the scene of an accident and noted the lower court's assertion that it "is undisputed that restitution could not be ordered [based on] the conviction for leaving the scene of an accident." Id. at 1277. See also, Longshore v. State, 655

offense of leaving the scene of an accident involving injury or death, the court must order the driver to make restitution to the victim for any damage or loss unless the court finds clear and convincing reasons not to order the restitution. Consistent with s. 775.089(1)(a), the restitution statute, the bill provides that:

- restitution may be monetary or non-monetary
- the court must make the payment of restitution a condition of probation in accordance with s. 948.03, F.S.
- requiring the court to make restitution to a victim does not remove or diminish the requirement that the court order payment to the Crime Compensation Trust Fund pursuant to chapter 960
- payment of an award by this trust fund creates an order of restition

Driving Under the Influence: The offense of driving under the influence is committed if a person is driving or in the actual physical control of a vehicle within the state and:

- The person is under the influence of alcoholic beverages, any chemical substance or any controlled substance when affected to the extent that the person's normal faculties are impaired;
- The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or
- The person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.

A person who is in violation of the above provision, who operates a vehicle and who by reason of such operation, causes or contributes to causing the death of any human being commits DUI manslaughter. The offense is a second degree felony. The offense is a first degree felony if at the time of the crash, the person knew or should have known that the crash occurred and failed to give information and render aid as required by s. 316.062, F.S., described above.

The offense of DUI manslaughter (where the offender did not leave the scene) is ranked in level 8 of the offense severity ranking chart. A key factor in calculating the lowest permissible sentence for this offense is the large number of victim injury points that must be scored for the death of the victim. This results in a lowest permissible sentence for a first time offender of 124.5 months (10 years and 4.5 months) in prison. The maximum sentence, based on the fact that the offense is a second degree felony, is 15 years in prison.

HB 1169 provides that a person convicted of DUI manslaughter must be sentenced to a mandatory term of imprisonment of 4 years. Because the lowest permissible sentence for this offense is already greater than 4 years, this provision would not increase the sentence in cases in which the offender is sentenced in excess of the lowest permissible sentence but would have the effect of prohibiting a judge from giving a downward departure sentence of less than 4 years in prison in cases in which a defendant is convicted of DUI manslaughter.

C. SECTION DIRECTORY:

Section 1. Provides that sections 316.027 and 316.193, F.S. may be cited as the "Adam Arnold Act."

Section 2. Amends s. 316.027, F.S., relating to leaving the scene of an accident involving injury or death; requiring minimum mandatory sentence; requiring imposition of victim injury points; requiring restitution.

Section 3. Amends s. 316.193, F.S., relating to leaving the driving under the influence; requiring minimum mandatory sentence for DUI manslaughter.

So.2d 1139 (Fla. 5th DCA 1995); Triplett v. State, 709 So.2d 107 (Fla. 5th DCA 1998)(court certified question of court may impose restitution for damages which are related to but not caused by the offense for which the defendant pleads guilty; review was denied by Florida Supreme Court, see State v. Triplett, 725 So.2d 1110 (Fla. Sep 25, 1998).

Section 4. Amends s. 921.0021, F.S., relating to restitution for the offense of leaving the scene of an accident.

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:

   During the 2005 session, the Criminal Justice Impact Conference determined the prison bed impact of an identical bill on the Department of Corrections to be indeterminate - minimal.

   The bill requires the imposition of a 2 year minimum mandatory sentence for the offense of leaving the scene of an accident involving death. Further, as described in the "Effect of Proposed Changes" section of this analysis, the addition of victim injury points for the offense of leaving the scene of an accident will significantly increase the lowest permissible sentence that a judge can impose for that offense. According to information supplied by the Office of Economic and Demographic Research (EDR), 46 percent of the 54 defendants that were convicted of leaving the scene of an accident involving death, for which they have records, received a prison sentence during FY 2003-04. Based on the fact that the lowest permissible sentence for this offense with the addition of victim injury points would be in 9.25 years, it is expected that a higher percentage of these offenders would be sentenced to prison. Also, even if a judge were to give a downward departure sentence, because of the minimum mandatory provision, the sentence would have to be at least 2 years in prison.

   The staff of EDR also indicated that they have information relating to 591 offenders being sentenced for the offense of leaving the scene of an accident involving injuries. Of these, 19.8 percent received a prison sentence. Based on the addition of the victim injury points, it is expected that a larger percentage of these offenders would receive a prison sentence under the bill. However, because victim injury points are not generally assessed for the offense of leaving the scene of an accident involving injury, it is difficult to predict what percentage of the victim injury points assessed for this offense in the future will be slight, moderate or severe. Victim injury points for moderate or severe injury for this offense would result in a lowest permissible sentence of 13.5 months or 30 months respectively for a first time offender. [See further discussion in Effect of Proposed Changes section of analysis].

   The bill will also prohibit a judge from giving a downward departure sentence of less than 4 years in prison for DUI manslaughter.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill will require a defendant who commits the offense of leaving the scene of an accident involving injury or death to pay restitution for the victim's injuries.

D. FISCAL COMMENTS:

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

A bill to be entitled

An act relating to vehicular accidents involving death or personal injuries; providing a short title; amending s. 316.027, F.S.; requiring a court to sentence a driver of a vehicle to a minimum term of imprisonment if the person is driving under the influence and leaves the scene of a crash that results in death; requiring a court to order the driver of a vehicle to make restitution to the victim for any damage or loss if a driver leaves the scene of an accident that results in injury or death; requiring a court to make the payment of restitution a condition of probation; providing that an order requiring the defendant to make restitution to a victim does not remove or diminish the requirement that the court order payment to the Crimes Compensation Trust Fund; amending s. 316.193, F.S.; requiring that a person convicted of DUI manslaughter be sentenced to a mandatory minimum term of imprisonment; amending s. 921.0021, F.S.; allowing assessment of victim injury points for certain offenses if the court finds that the offender caused victim injury; providing an effective date.

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

Section 1. Sections 316.027 and 316.193, Florida Statutes, may be cited as the "Adam Arnold Act."

Section 2. Subsection (1) of section 316.027, Florida Statutes, is amended to read:

316.027 Crash involving death or personal injuries.--

(1)(a) The driver of any vehicle involved in a crash resulting in injury of any person must immediately stop the vehicle at the scene of the crash, or as close thereto as possible, and must remain at the scene of the crash until he or she has fulfilled the requirements of s. 316.062. Any person who willfully violates this paragraph commits ~~is guilty of~~ a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) The driver of any vehicle involved in a crash resulting in the death of any person must immediately stop the vehicle at the scene of the crash, or as close thereto as possible, and must remain at the scene of the crash until he or she has fulfilled the requirements of s. 316.062. Any person who willfully violates this paragraph commits ~~is guilty of~~ a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Any person who willfully violates this paragraph while driving under the influence as set forth in s. 316.193(1) shall be sentenced to a mandatory minimum term of imprisonment of 2 years.

(c) Notwithstanding s. 775.089(1)(a), if the driver of a vehicle violates paragraph (a) or paragraph (b), the court shall order the driver to make restitution to the victim for any damage or loss unless the court finds clear and compelling reasons not to order the restitution. Restitution may be monetary or nonmonetary restitution. The court shall make the payment of restitution a condition of probation in accordance with s. 948.03. An order requiring the defendant to make

restitution to a victim does not remove or diminish the requirement that the court order payment to the Crimes Compensation Trust Fund pursuant to chapter 960. Payment of an award by the Crimes Compensation Trust Fund creates an order of restitution to the Crimes Compensation Trust Fund unless specifically waived in accordance with s. 775.089(1)(b).

Section 3. Subsection (3) of section 316.193, Florida Statutes, is amended to read:

316.193 Driving under the influence; penalties.--

(3) Any person:

(a) Who is in violation of subsection (1);

(b) Who operates a vehicle; and

(c) Who, by reason of such operation, causes or contributes to causing:

1. Damage to the property or person of another commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

2. Serious bodily injury to another, as defined in s. 316.1933, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

3. The death of any human being or unborn quick child commits DUI manslaughter, and commits:

a. A felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

b. A felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if:

(I) At the time of the crash, the person knew, or should have known, that the crash occurred; and

(II) The person failed to give information and render aid as required by s. 316.062.

For purposes of this subsection, the definition of the term "unborn quick child" shall be determined in accordance with the definition of viable fetus as set forth in s. 782.071. A person who is convicted of DUI manslaughter shall be sentenced to a mandatory minimum term of imprisonment of 4 years.

Section 4. Subsection (7) of section 921.0021, Florida Statutes, is amended to read:

921.0021 Definitions.--As used in this chapter, for any felony offense, except any capital felony, committed on or after October 1, 1998, the term:

(7)(a) "Victim injury" means the physical injury or death suffered by a person as a direct result of the primary offense, or any additional offense, for which an offender is convicted and which is pending before the court for sentencing at the time of the primary offense.

(b) Except as provided in paragraph (c) or paragraph (d),

1. If the conviction is for an offense involving sexual contact that includes sexual penetration, the sexual penetration must be scored in accordance with the sentence points provided under s. 921.0024 for sexual penetration, regardless of whether there is evidence of any physical injury.

2. If the conviction is for an offense involving sexual contact that does not include sexual penetration, the sexual contact must be scored in accordance with the sentence points provided under s. 921.0024 for sexual contact, regardless of

whether there is evidence of any physical injury.

If the victim of an offense involving sexual contact suffers any physical injury as a direct result of the primary offense or any additional offense committed by the offender resulting in conviction, such physical injury must be scored separately and in addition to the points scored for the sexual contact or the sexual penetration.

(c) The sentence points provided under s. 921.0024 for sexual contact or sexual penetration may not be assessed for a violation of s. 944.35(3)(b)2.

(d) If the conviction is for the offense described in s. 872.06, the sentence points provided under s. 921.0024 for sexual contact or sexual penetration may not be assessed.

(e) Notwithstanding paragraph (a), if the conviction is for an offense described in s. 316.027 and the court finds that the offender caused victim injury, sentence points for victim injury may be assessed against the offender.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1239 Child Abuse
SPONSOR(S): Detert
TIED BILLS: **IDEN./SIM. BILLS:** SB 2266

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee		Cunningham	Kramer
2) Future of Florida's Families Committee			
3) Criminal Justice Appropriations Committee			
4) Justice Council			
5)			

SUMMARY ANALYSIS

Courts and legislative bodies have repeatedly recognized the difficulty in delineating a precise line between permissible corporal punishment and prohibited child abuse. However, the task of doing so is principally a legislative function.

Florida has two statutes that address child abuse. Chapter 39, F.S., is a civil statute relating to dependency that defines child abuse and specifically defines what constitutes excessive corporal punishment. Section 827.03, F.S., is a criminal statute that defines "child abuse" (simple child abuse) and "aggravated child abuse", but does not specifically address corporal punishment.

Courts have looked to the above statutes in an attempt to determine when corporal discipline rises to the level of criminal child abuse. The courts' analyses and opinions have resulted in an "either or" approach to classifying excessive corporal discipline. Either excessive corporal discipline is *civil* child abuse, or it's *simple* (or aggravated) criminal abuse. The caselaw does not appear to contemplate that the same act of excessive corporal discipline (e.g. a severe beating the causes significant bruises or welts) could qualify as both civil *and* simple child abuse.

This bill amends the definition of the term "child abuse" in s. 827.03(1), F.S., to include inappropriate or excessively harsh discipline of a child by a parent, legal custodian, or caregiver. The bill then defines the term "inappropriate or excessively harsh corporal discipline" as "an act of discipline that results in or could reasonably be expected to result in any of the following or other similar injuries:

- sprains, dislocations, or cartilage damage;
- bone or skull fractures;
- brain or spinal cord damage;
- intracranial hemorrhage or injury to other internal organs;
- asphyxiation, suffocation, or drowning;
- injury resulting from the use of a deadly weapon;
- burns or scalding;
- cuts, lacerations, punctures, or bites;
- disfigurement;
- loss or impairment of a body part or function;
- significant bruises or welts;
- mental injury.

As a result, courts will no longer have to look to Ch. 39, F.S., to try and glean the legislature's intent in regards to when excessive corporal punishment rises to the level of criminal child abuse.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard Individual Liberty → The bill amends the definition of child abuse contained in s. 827.03, F.S., to include inappropriate or excessively harsh discipline of a child by a parent, legal custodian, or caregiver and defines the term "inappropriate or excessively harsh corporal discipline."

Promote Personal Responsibility → The bill amends the definition of child abuse contained in s. 827.03, F.S., to include inappropriate or excessively harsh discipline of a child by a parent, legal custodian, or caregiver and defines the term "inappropriate or excessively harsh corporal discipline."

B. EFFECT OF PROPOSED CHANGES:

Current Situation

Courts and legislative bodies have repeatedly recognized the difficulty in delineating a precise line between permissible corporal punishment and prohibited child abuse.[1] However, as stated by the Florida Supreme Court, the task of doing so is principally a legislative function.[2] Florida has two statutes that address child abuse. Chapter 39, F.S., is a civil statute that defines child abuse and specifically defines what constitutes excessive corporal punishment. Section 827.03, F.S., is a criminal statute that defines child abuse, but does not specifically address corporal punishment.

Chapter 39 – Civil Child Abuse

Chapter 39, F.S., a *civil* statute, designates certain types of excessive corporal punishment as *civil* child abuse.[3] Section 39.01, F.S., provides that "corporal discipline may be considered excessive or abusive when it results in any of the following or other similar injuries:

- Sprains, dislocations, or cartilage damage;
- Bone or skull fractures;
- Brain or spinal cord damage;
- Intracranial hemorrhage or injury to other internal organs;
- Asphyxiation, suffocation, or drowning;
- Injury resulting from the use of a deadly weapon;
- Burns or scalding;
- Cuts, lacerations, punctures, or bites;
- Permanent or temporary disfigurement;
- Permanent or temporary loss or impairment of a body part or function;
- Significant bruises or welts."

Under Chapter 39, F.S., protective investigations and dependency proceedings could result if there is a report that a child has been abused. A person who is found to have abused a child under Ch. 39, F.S., could also be charged with contributing to the dependency of a minor pursuant to s. 827.04, F.S.

Section 827.03(1), F.S. – Criminal Child Abuse

Section 827.03(1), F.S., a *criminal* statute, defines child abuse as:

(a) Intentional infliction of physical or mental injury upon a child;
(b) An intentional act that could reasonably be expected to result in physical or mental injury to a child; or
(c) Active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or mental injury to a child.

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[1] *See, e.g., State v. McDonald*, 785 So.2d 640 (Fla. 2nd DCA 2001); *Corsen v. State*, 784 (So.2d 535 (Fla. 5th DCA 2001); *Moakley v. State*, 547 So.2d 1246 (Fla. 5th DCA 1989).
[2] *Raford v. State*, 828 So.2d 1012 (Fla. 2002).
[3] *Id.*

A person who knowingly or willfully abuses a child *without* causing great bodily harm, permanent disability, or permanent disfigurement to the child commits a third degree felony[4]. This type of child abuse is often referred to as "simple" child abuse.

Section 827.03(2), F.S., defines *aggravated* child abuse, and provides, in part, that aggravated child abuse occurs when someone knowingly and willfully abuses a child and in doing so actually *causes* great bodily harm, permanent disability, or permanent disfigurement to a child.[5]

Caselaw - Relationship Between Chapter 39 and Section 827.03, F.S.

It would appear from the plain language of the statutes that a person who commits excessive corporal discipline, as defined by Ch. 39, F.S., could also be also be charged with a crime under s. 827.03, F.S. (either simple or aggravated depending on how serious the injury was). The courts, however, have used a different analysis.

In 2002, the Florida Supreme Court held that there is no parental privilege barring prosecution for simple child abuse under s. 827.03(1), F.S.[6] In its decision, the court discussed corporal punishment and when such punishment rises to the level of simple child abuse. After reviewing the legislative histories of Ch. 39 and s. 827.03, F.S., the court stated that a parent can be charged with *simple* child abuse for excessive corporal punishment that falls between the level of abuse required to establish *civil* child abuse and that required to prove *aggravated* child abuse.[7] The court stated that if a parent commits *civil* child abuse when a spanking results in significant welts, the legislature intended more serious beatings that do not rise to the level of aggravated child abuse to be treated as simple child abuse.[8]

In *King v. State*, 903 So.2d 954 (Fla. 2nd DCA 2005), the court cited the *Raford* case and held that a school administrator's spanking that resulted in significant bruises or welts did not rise to the level of simple child abuse, but instead fell under the category of *civil* child abuse. The court noted, however, that their holding contradicted the plain language of s. 827.03(1), F.S. (defining child abuse as the intentional infliction of physical injury upon a child without causing great bodily harm, permanent disability, or permanent disfigurement). As such, the *King* court certified the following question to the Florida Supreme Court:

> "Whether a spanking administered as corporal punishment that results in significant bruises or welts may constitute felony child abuse under Section 827.03(1), Florida Statutes."

Despite the seeming incongruity in the law, the Florida Supreme Court denied review.[9]

Effect of the Caselaw

In essence, the courts appear to have created an "either or" approach to classifying excessive corporal discipline. Either excessive corporal discipline is *civil* child abuse, or it's *simple* (or aggravated) criminal abuse. The caselaw does not appear to contemplate that the same act of excessive corporal discipline (e.g. a severe beating the causes significant bruises or welts) could qualify as both civil *and* simple child abuse. This is especially puzzling considering that the list of injuries that constitute excessive corporal discipline contained in Ch. 39, F.S. encompass a wide range of injuries (e.g. injuries ranging from cuts and sprains to skull fractures, spinal cord damage, and permanent loss of a body part). If an act does not rise to the level of *simple* child abuse simply because it qualifies as *civil* child abuse, it is unclear when, if ever, a court will find that excessive corporal discipline qualifies as simple child abuse.

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[4] A third degree felony is punishable by up to five years imprisonment and a $5,000 fine. Ss. 775.082 and 775.083, F.S.
[5] s. 827.03(2), F.S.
[6] *Raford v. State*, 828 So.2d 1012, 1020 (Fla. 2002)
[7] *Id. See also, State v. McDonald*, 785 So.2d 640 (Fla. 2nd DCA 2001) (If a parent can be charged with civil child abuse when a spanking results in significant welts, the legislature intended more serious beatings that do not result in permanent disability or permanent disfigurement to be treated as simple child abuse.).
[8] *Id* at 1019.
[9] *State v. King*, 908 So.2d 1058 (Fla. 2005).

Effect of the Bill

This bill amends the definition of the term "child abuse" in s. 827.03(1), F.S., to include inappropriate or excessively harsh discipline of a child by a parent, legal custodian, or caregiver. The bill then defines the term "inappropriate or excessively harsh corporal discipline" as "an act of discipline that results in or could reasonably be expected to result in any of the following or other similar injuries:

- sprains, dislocations, or cartilage damage;
- bone or skull fractures;
- brain or spinal cord damage;
- intracranial hemorrhage or injury to other internal organs;
- asphyxiation, suffocation, or drowning;
- injury resulting from the use of a deadly weapon;
- burns or scalding;
- cuts, lacerations, punctures, or bites;
- disfigurement;
- loss or impairment of a body part or function;
- significant bruises or welts;
- mental injury."[10]

As a result, courts will no longer have to look to Ch. 39, F.S., to try and glean the legislature's intent in regards to when excessive corporal punishment rises to the level of criminal child abuse.

The bill also reenacts ss. 775.082(9)(a), 787.04(5), and 901.15(8), F.S., to incorporate the amendments to s. 827.03, F.S., in references thereto.

C. SECTION DIRECTORY:

Section 1. Amends s. 827.03, F.S.; revising the definition of the term "child abuse" to include inappropriate or excessively harsh discipline of a child by a parent, legal custodian, or caregiver; providing a penalty; defining "inappropriate or excessively harsh corporal discipline.

Section 2. Reenacting s. 775.082(9)(a), F.S., relating to mandatory minimum sentences for certain reoffenders previously released from prison, to incorporate the amendment to s. 827.03, F.S., in references thereto.

Section 3. Reenacting s. 787.04(5), F.S., relating to removing minors from the state or concealing minors contrary to state agency order or court order, to incorporate the amendment to s. 827.03, F.S., in references thereto.

Section 4. Reenacting s. 901.15(8), F.S., relating to when an arrest by an officer without a warrant is lawful, to incorporate the amendment to s. 827.03, F.S., in references thereto.

Section 5. This act takes effect July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

[10] This definition largely mirrors the language in Ch. 39, F.S.

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:

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:

In *Marshall v. Reams,* 32 Fla. 499, 14 So. 95 (1893), the Florida Supreme Court recognized the "right of a parent, or one standing in loco parentis, to moderately chastise for correction a child under his or her control and authority." This bill would not remove this right from parents. As stated in *Raford*, "a parent may assert as an affirmative defense his or her parental right to administer 'reasonable' or 'nonexcessive' corporal punishment, i.e., a typical spanking, in a prosecution for simple child abuse."[11]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

[11] *Raford v. State*, 828 So.2d 1012, 1020.

A bill to be entitled

An act relating to child abuse; amending s. 827.03, F.S.; revising the definition of the term "child abuse" to include inappropriate or excessively harsh discipline of a child by a parent, legal custodian, or caregiver; providing a criminal penalty; defining the term "inappropriate or excessively harsh corporal discipline"; reenacting ss. 775.082(9)(a), 787.04(5), and 901.15(8), F.S., relating to mandatory minimum sentences for certain reoffenders previously released from prison, removing minors from the state or concealing minors contrary to state agency order or court order, and when arrest by an officer without a warrant is lawful, to incorporate the amendment to s. 827.03, F.S., in references thereto; providing an effective date.

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

Section 1. Subsection (1) of section 827.03, Florida Statutes, is amended, and subsection (5) is added to that section, to read:

827.03 Abuse, aggravated abuse, and neglect of a child; penalties.--

(1) "Child abuse" means:

(a) Intentional infliction of physical or mental injury upon a child;

(b) An intentional act that could reasonably be expected to result in physical or mental injury to a child; ~~or~~

(c) Active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or mental injury to a child; or~~.~~

(d) Inappropriate or excessively harsh corporal discipline of a child by a parent, legal custodian, or caregiver.

A person who knowingly or willfully abuses a child without causing great bodily harm, permanent disability, or permanent disfigurement to the child commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(5) For purposes of this section, "inappropriate or excessively harsh corporal discipline" means an act of discipline that results or could reasonably be expected to result in any of the following or other similar injuries:

(a) Sprains, dislocations, or cartilage damage.

(b) Bone or skull fractures.

(c) Brain or spinal cord damage.

(d) Intracranial hemorrhage or injury to other internal organs.

(e) Asphyxiation, suffocation, or drowning.

(f) Injury resulting from the use of a deadly weapon.

(g) Burns or scalding.

(h) Cuts, lacerations, punctures, or bites.

(i) Disfigurement.

(j) Loss or impairment of a body part or function.

(k) Significant bruises or welts.

(l) Mental injury, as defined in s. 39.01.

Section 2. For the purpose of incorporating the amendment made by this act to section 827.03, Florida Statutes, in a reference thereto, paragraph (a) of subsection (9) of section 775.082, Florida Statutes, is reenacted to read:

775.082 Penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison.--

(9)(a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:

a. Treason;

b. Murder;

c. Manslaughter;

d. Sexual battery;

e. Carjacking;

f. Home-invasion robbery;

g. Robbery;

h. Arson;

i. Kidnapping;

j. Aggravated assault with a deadly weapon;

k. Aggravated battery;

l. Aggravated stalking;

m. Aircraft piracy;

n. Unlawful throwing, placing, or discharging of a destructive device or bomb;

o. Any felony that involves the use or threat of physical force or violence against an individual;

p. Armed burglary;

q. Burglary of a dwelling or burglary of an occupied structure; or

r. Any felony violation of s. 790.07, s. 800.04, s. 827.03, or s. 827.071;

within 3 years after being released from a state correctional facility operated by the Department of Corrections or a private vendor or within 3 years after being released from a correctional institution of another state, the District of Columbia, the United States, any possession or territory of the United States, or any foreign jurisdiction, following incarceration for an offense for which the sentence is punishable by more than 1 year in this state.

2. "Prison releasee reoffender" also means any defendant who commits or attempts to commit any offense listed in sub-subparagraphs (a)1.a.-r. while the defendant was serving a prison sentence or on escape status from a state correctional facility operated by the Department of Corrections or a private vendor or while the defendant was on escape status from a correctional institution of another state, the District of Columbia, the United States, any possession or territory of the United States, or any foreign jurisdiction, following incarceration for an offense for which the sentence is punishable by more than 1 year in this state.

3. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state

attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:

a. For a felony punishable by life, by a term of imprisonment for life;

b. For a felony of the first degree, by a term of imprisonment of 30 years;

c. For a felony of the second degree, by a term of imprisonment of 15 years; and

d. For a felony of the third degree, by a term of imprisonment of 5 years.

Section 3. For the purpose of incorporating the amendment made by this act to section 827.03, Florida Statutes, in a reference thereto, subsection (5) of section 787.04, Florida Statutes, is reenacted to read:

787.04 Removing minors from state or concealing minors contrary to state agency order or court order.--

(5) It is a defense under this section that a person who leads, takes, entices, or removes a minor beyond the limits of the state reasonably believes that his or her action was necessary to protect the minor from child abuse as defined in s. 827.03.

Section 4. For the purpose of incorporating the amendment made by this act to section 827.03, Florida Statutes, in a reference thereto, subsection (8) of section 901.15, Florida Statutes, is reenacted to read:

901.15 When arrest by officer without warrant is lawful.--A law enforcement officer may arrest a person without a warrant when:

(8) There is probable cause to believe that the person has committed child abuse, as defined in s. 827.03. The decision to arrest shall not require consent of the victim or consideration of the relationship of the parties. It is the public policy of this state to protect abused children by strongly encouraging the arrest and prosecution of persons who commit child abuse. A law enforcement officer who acts in good faith and exercises due care in making an arrest under this subsection is immune from civil liability that otherwise might result by reason of his or her action.

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