Criminal Justice Subcommittee

March 8th, 2011

1:00 PM

404 HOB

Dean Cannon
Speaker

Dennis Baxley
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Criminal Justice Subcommittee

Start Date and Time: Tuesday, March 08, 2011 01:00 pm

End Date and Time: Tuesday, March 08, 2011 03:00 pm

Location: 404 HOB
Duration: 2.00 hrs

Consideration of the following bill(s):

HB 3 Assault or Battery of Law Enforcement Officers by Nehr
HB 155 Privacy of Firearms Owners by Brodeur

Presentation by Department of Corrections Secretary Edwin Buss.

Presentation by Office of Program Policy Analysis and Government Accountability and Department of Corrections on the Prison Diversion Program.

NOTICE FINALIZED on 03/04/2011 16:12 by hudson.jessica

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 3 Assault or Battery of Law Enforcement Officers
SPONSOR(S): Nehr and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 464

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee		Krol TK	Cunningham
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

In May 2008, Governor Charlie Crist signed an Executive Order establishing the Florida Law Enforcement Officer (LEO) Alert. This alert was created in response to the increasing number of law enforcement officers in the state who were killed or injured in the line of duty; in some of these cases, the offender used a vehicle to flee in an attempt to escape. The LEO Alert is issued when an offender kills or seriously injures a law enforcement officer and a detailed description of the offender's vehicle or means of escape is available to broadcast to the public using highway Dynamic Message Signs and other highway advisory methods.

HB 3 creates s. 784.071, F.S., establishing a "blue alert," which is defined as "an alert issued after an attack upon a law enforcement officer."

The bill provides that the Florida Highway Patrol is responsible for activating the Emergency Alert System and issuing a blue alert when requested by a law enforcement agency investigating an offense against a law enforcement officer that meets specific criteria.

The bill provides an effective date of July 1, 2011 and is estimated to have no fiscal impact.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

In May 2008, Governor Charlie Crist signed an Executive Order establishing the Florida Law Enforcement Officer (LEO) Alert.[1] The LEO Alert was created in response to the increasing number of law enforcement officers in the state who were killed or injured in the line of duty; in some of these cases, the offender used a vehicle to flee in an attempt to escape.[2]

The Executive Order directed the Florida Department of Transportation (FDOT) and the Department of Highway Safety and Motor Vehicles' Florida Highway Patrol (FHP) to coordinate with the Florida Department of Law Enforcement (FDLE) to immediately broadcast important information about an offender who has killed or critically injured a law enforcement officer.[3] The information is broadcast through FDOT's highway Dynamic Message Signs and other highway advisory methods alerting the public to report information about the offender to the investigating law enforcement agency (investigating agency), thereby increasing the chances of apprehension.[4]

The coordination between the agencies created the Florida LEO ALERT Plan Policy. This policy outlines the criteria needed to activate an LEO Alert and the steps each agency must take in the alert activation process. Before an LEO Alert can be activated, the policy specifies that the following criteria must be met:

1) The offender killed or critically injured a law enforcement officer.

2) The investigating agency determines that the offender poses a serious public risk.

3) A detailed description of the offender's vehicle or other means of escape is available for broadcast.

4) The activation must be recommended by the investigating agency.[5]

The policy also establishes the LEO Alert activation process, which occurs in the following order:

1) The investigating agency calls FDLE's Florida Fusion Center (FFC) located in Tallahassee. The FFC is manned 24 hours a day, seven days a week.

2) FDLE works with the investigating agency to offer assistance, ensures the activation criteria have been met, and determines if the alert will be displayed regionally or statewide.

3) FDLE works with the investigating agency to prepare information for public release, including suspect and/or suspect vehicle information, as well as agency contact information.

4) FDLE contacts FHP's Orlando Regional Communications Center (ORCC) to send the LEO Alert. ORCC relays that information to other regional communication centers where the activation is to take place.

5) FDLE contacts FDOT's Orlando Regional Transportation Management Center to develop the message content using the FDOT-approved template which includes vehicle information, tag number and other identifiers.

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[1] Office of the Governor, Executive Order Number 08-81.
[2] FDLE 2011 Analysis of HB 3.
[3] *Id.*
[4] The Florida LEO ALERT Plan Policy. Updated 4/29/08. On file with Criminal Justice Subcommittee staff.
[5] *Id.*

6) FDOT displays the message until the offender is captured or for a maximum of six hours. The alert is displayed on dynamic highway message signs on all requested highways unless a traffic emergency occurs which requires a motorist safety message to be displayed. FDOT also records an LEO Alert message on the My Florida 511 System[6] when the LEO Alert is activated.

7) Once FDLE is notified that the offender has been captured, FDLE contacts the appropriate parties to cancel the alert. FHP then notifies its other offices of the cancellation.[7]

The LEO Alert Policy Plan requires each activation to be reviewed by a committee of state agency partners and law enforcement representatives to ensure that criteria and goals are met and that each activation took place in a timely fashion.[8]

Effect of the Bill

HB 3 creates a "blue alert," which is defined as "an alert issued after an attack upon a law enforcement officer."

The bill requires the Florida Highway Patrol to activate the Emergency Alert System and issue a blue alert at the request of an authorized person at a law enforcement agency who is investigating an offense against a law enforcement officer that meets the following criteria:

- A law enforcement officer has been killed, has suffered serious bodily injury, or has been assaulted with a deadly weapon and a suspect has fled the scene of the offense.
- The investigating agency determines that the suspect poses an imminent threat to the public or other law enforcement personnel.
- A detailed description of the suspect's vehicle or other means of escape or license plate is available for broadcast.
- Dissemination of available information to the public may help avert further harm or assist in the apprehension of the suspect.

B. SECTION DIRECTORY:

Section 1. Creates 784.071, F.S., relating to assault or battery of law enforcement officer; alert.

Section 2. Provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The Department of Highway Safety and Motor Vehicles and FDLE report that the bill will have no fiscal impact as the Law Enforcement Officer Alert Plan has been in existence since May 2008.[9]

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[6] The My Florida 511 System is a free telephone service provided by FDOT that allows the public to access information on traffic congestion, construction, crashes, and serve or unusual weather conditions effecting traffic.

[7] *Supra* the Florida LEO ALERT Plan Policy. The same activation steps are used if there is revised vehicle information or a broadcast area is changed.

[8] *Id.*

[9] The Department of Highway and Motor Vehicles 2011 Analysis of HB 3 and FDLE 2011 Analysis of HB 3.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   It appears the bill would have no fiscal impact on local governments as the Law Enforcement Officer Alert Plan has been in existence since May 2008.

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 cities or counties to spend funds or take actions 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:

- As drafted HB 3 requires only the Florida Highway Patrol to activate the Emergency Alert System and issue a blue alert. However, the current alert system is a collaborative effort by the Department of Highway Safety and Motor Vehicles, the Department of Transportation and the Florida Department of Law Enforcement.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to assault or battery of law enforcement officers; creating s. 784.071, F.S.; providing a definition; requiring issuance of a specified alert after an attack upon a law enforcement officer in certain circumstances; providing an effective date.

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

Section 1. Section 784.071, Florida Statutes, is created to read:

784.071 Assault or battery of law enforcement officer; alert.—

(1) As used in this section, the term "blue alert" means an alert issued after an attack upon a law enforcement officer as described in subsection (2).

(2) Upon the request of an authorized person at a law enforcement agency that is investigating an offense described in paragraph (a), the Florida Highway Patrol shall activate the Emergency Alert System and issue a blue alert if all of the following conditions are met:

(a) A law enforcement officer, as defined in s. 784.07, has been killed, has suffered serious bodily injury, or has been assaulted with a deadly weapon and a suspect has fled the scene of the offense.

(b) A law enforcement agency investigating the offense determines that such a suspect poses an imminent threat to the public or other law enforcement personnel.

(c) A detailed description of the suspect's vehicle or other means of escape or license plate is available for broadcast.

(d) Dissemination of available information to the public may help avert further harm or assist in the apprehension of the suspect.

Section 2. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 155 Privacy of Firearms Owners
SPONSOR(S): Brodeur and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 432

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee		Cunningham	Cunningham
2) Health & Human Services Committee			
3) Judiciary Committee			

SUMMARY ANALYSIS

In recent months, there has been media attention surrounding an incident in Ocala, Florida, where, during a routine doctor's visit, a pediatrician asked a patient's mother whether there were firearms in the home. The doctor stated that he asked all of his patients the same question in an effort to provide safety advice in the event there was a firearm in the home. The mother, however, felt that the question invaded her privacy. This incident has led many to question whether it should be an accepted practice for a doctor to inquire about a patient's firearm ownership.

Florida law contains numerous provisions relating to the regulation of the medical profession, regulation of medical professionals, and the sale, purchase, possession, and carrying of weapons and firearms. However, Florida law does not contain any provision that prohibits physicians or other medical staff from asking a patient whether he or she owns a firearm or whether there is a firearm in the patient's home.

HB 155 creates s. 790.338, F.S., specifying that it is an invasion of privacy for a public or private physician, nurse, or other medical staff person to make a verbal or written inquiry regarding:

- The ownership of a firearm by a patient or the family of a patient; or
- The presence of a firearm in a private home or other domicile of a patient or the family of a patient.

The bill does not make it a crime for a doctor to ask a patient about firearms, but does provide that doing so is an invasion of a patient's privacy.

The bill makes it a 3rd degree felony for a public or private physician, nurse, or other medical staff to:

- Condition receipt of medical treatment or care on a person's willingness or refusal to disclose personal and private information unrelated to medical treatment in violation of an individual's privacy, as specified above.
- Enter any intentionally, accidentally, or inadvertently disclose information concerning firearms into any record, whether written or electronic, or disclose such information to any other source.

The bill also provides that a person who violates s. 790.338, F.S., may be assessed a fine of no more than $5 million if the court determines that the person knew or reasonably should have known that the conduct was unlawful.

On March 2, 2011, the Criminal Justice Impact Conference met and determined that HB 155 would have an insignificant prison bed impact on the Department of Corrections. The bill could have a positive fiscal impact on state government in that it authorizes a fine of up to $5 million if medical personnel violate s. 790.338, F.S., and the court determines that the person knew or reasonably should have known that the conduct was unlawful.

The bill is effective upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Physicians Inquiring About Firearms

In recent months, there has been media attention surrounding an incident in Ocala, Florida, where, during a routine doctor's visit, a pediatrician asked a patient's mother whether there were firearms in the home. When the mother refused to answer, the doctor advised her that she had 30 days to find a new pediatrician.[1] The doctor stated that he asked all of his patients the same question in an effort to provide safety advice in the event there was a firearm in the home.[2] He further stated that he asked similar questions about whether there was a pool at the home, and whether teenage drivers use their cell phone while driving for similar reasons – to give safety advice to patients. The mother, however, felt that the question invaded her privacy.[3] This incident has led many to question whether it should be an accepted practice for a doctor to inquire about a patient's firearm ownership.

Various professional medical groups have adopted policies that encourage or recommend that physicians ask patients about the presence of a firearm in the home. For example, the AMA encourages its members to inquire as to the presence of household firearms as a part of childproofing the home and to educate patients to the dangers of firearms to children.[4] Additionally, the American Academy of Pediatrics (AAP) recommends that pediatricians incorporate questions about guns into their patient history taking.[5]

Florida law contains numerous provisions relating to the regulation of the medical profession, regulation of medical professionals, and the sale, purchase, possession, and carrying of firearms.[6] However, Florida law does not contain any provision that prohibits physicians or other medical staff from asking a patient whether he or she owns a firearm or whether there is a firearm in the patient's home.

Terminating the Doctor - Patient Relationship

The relationship between a physician and a patient is generally considered a private relationship and contractual in nature. According to the American Medical Association (AMA), both the patient and the physician are free to enter into or decline the relationship.[7] Once a physician-patient relationship has been established, patients are free to terminate the relationship at any time.[8] Generally, doctors can only terminate existing relationships after giving the patient notice and a reasonable opportunity to obtain the services of another physician.[9] Florida's statutes do not currently contain any provisions that dictate when physicians and patients can terminate a doctor-patient relationship.

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[1] Family and pediatrician tangle over gun question, http://www.ocala.com/article/20100723/news/100729867/1402/news?p=1&tc=pg (last accessed January 27, 2011).

[2] *Id.*

[3] *Id.*

[4] H-145.990 Prevention of Firearm Accidents in Children https://ssl3.ama-assn.org/apps/ecomm/PolicyFinderForm.pl?site=www.ama-assn.org&uri=%2fama1%2fpub%2fupload%2fmm%2fPolicyFinder%2fpolicyfiles%2fHnE%2fH-145.990.HTM (last accessed January 28, 2011).

[5] American Academy of Pediatrics: Firearm-Related Injuries Affecting the Pediatric Population. Pediatrics Vol. 105 No. 4, April 2000, pp. 888-895. http://aappolicy.aappublications.org/cgi/content/full/pediatrics;105/4/888 (last accessed January 28, 2011).

[6] *See, e.g.,* Chapters 456, 458, 790, F.S.

[7] AMA Code of Medical Ethics, Opinion 9.12, *Patient-Physician Relationship: Respect for Law and Human Rights*, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion912.shtml (last accessed February 7, 2011). Doctors who offer their services to the public may not decline to accept patients because of race, color, religion, national origin, sexual orientation, gender identity, or any other basis that would constitute invidious discrimination.

[8] AMA's Code of Medical Ethics, Opinion 9.06 *Free Choice. http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion906.shtml* (last accessed February 7, 2011).

[9] A health care provider owes a duty to the patient to provide the necessary and appropriate medical care to the patient with due diligence and to continue providing those services until: 1) they are no longer needed by the patient; 2) the relationship is ended with the consent of or at the request of the patient; or 3) the health care provider withdraws from the relationship after giving the patient

Effect of the Bill

HB 155 creates s. 790.338, F.S., entitled "Medical privacy concerning firearms." The bill specifies that a verbal or written inquiry by a public or private physician, nurse, or other medical staff person regarding the ownership of a firearm by a patient or the family of a patient or the presence of a firearm in a private home or other domicile of a patient or the family of a patient violates the privacy of the patient or the patient's family members. The bill does not make it a crime for a doctor to ask a patient about firearms, but does provide that doing so is an invasion of a patient's privacy.[10]

The bill makes it a 3rd degree felony[11] for a public or private physician, nurse, or other medical staff to:

- Condition receipt of medical treatment or care on a person's willingness or refusal to disclose personal and private information unrelated to medical treatment in violation of an individual's privacy, as specified above.
- Enter any intentionally, accidentally, or inadvertently disclosed information concerning firearms into any record, whether written or electronic, or disclose such information to any other source.

The bill also provides that a person who violates s. 790.338, F.S., may be assessed a fine of no more than $5 million if the court determines that the person knew or reasonably should have known that the conduct was unlawful.

The bill requires the state attorney with jurisdiction to investigate complaints of criminal violations of s. 790.338, F.S., and, if there is probable cause to indicate that a person may have committed a violation, to prosecute the violator and notify the Attorney General. The bill requires the Attorney General to bring a civil action to enforce any fine assessed if such fine is not paid after 90 days.

B. SECTION DIRECTORY:

Section 1. Creates s. 790.338, F.S., relating to medical privacy concerning firearms.

Section 2. The bill takes effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill authorizes a fine of up to $5 million if a public or private physician, nurse, or other medical staff violates s. 790.338, F.S., and the court determines the person knew or reasonably should have known the conduct was unlawful. This could have a positive fiscal impact on state government.

2. Expenditures:

On March 2, 2011, the Criminal Justice Impact Conference met and determined that HB 155 would have an insignificant prison bed impact on the Department of Corrections.

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notice and a reasonable opportunity to obtain the services of another health care provider. The relationship typically terminates when the patient's medical condition is cured or resolved, and this often occurs at the last visit when the health care provider notes in his records that the patient is to return as needed. *See Saunders v. Lischkoff*, 188 So. 815 (Fla. 1939). *See also, Ending the Patient-Physician Relationship*, AMA White Paper http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/ending-patient-physician-relationship.shtml (last accessed February 7, 2011); AMA's Code of Medical Ethics, Opinion 8.115 *Termination of the Physician-Patient Relationship. http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion8115.shtml* (last accessed February 7, 2011).

[10] Invading someone's privacy is not a criminal act. However, there is a common law tort claim of invasion of privacy. *See Allstate Insurance Company v. Ginsberg*, 863 So.2d 156 (Fla. 2003).

[11] A third degree felony is punishable by up to five years imprisonment and a $5,000 fine. ss. 775.082, 775.083, and 775.084, F.S.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill authorizes a fine of up to $5 million if a public or private physician, nurse, or other medical staff violates s. 790.338, F.S., and the court determines that the person knew or reasonably should have known that the conduct was unlawful. This could have a negative fiscal impact on these entities.

The felony penalties imposed by the bill could negatively impact the professional licenses of physicians and nurses arrested and/or convicted of the offenses described in the bill.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

1. Currently, the bill is effective upon becoming a law. Generally, bills that impose criminal penalties are effective on October 1 so as to give adequate notice to the public, state attorneys, public defenders, etc.

2. The bill creates s. 790.338, F.S., to make it a crime for a *public or private physician, nurse, or other medical staff* to do certain acts. The bill does not define these terms, nor are they defined in ch. 790, F.S. Defining these terms, or using a term already defined in Florida law such as "healthcare practitioner," would clarify who the bill's penalties apply to.

3. In 1996, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA). HIPAA contains detailed requirements for the use or disclosure of protected health information (PHI). PHI is defined as all "individually identifiable health information" which includes information relating to:

- the individual's past, present or future physical or mental health or condition,
- the provision of health care to the individual, or
- the past, present, or future payment for the provision of health care to the individual,

and that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual.[12] Covered entities may only use and disclose PHI as permitted by HIPAA or more protective state rules.[13] HIPAA establishes both civil monetary penalties and criminal penalties for the knowing use or disclosure of individually identifiable health information in violation of HIPAA.[14]

The bill makes it a 3rd degree felony for a public or private physician, nurse, or other medical staff to enter any intentionally, accidentally, or inadvertently disclose information concerning firearms into any record, whether written or electronic, or disclose such information to any other source. If "information concerning firearms" qualifies as PHI, it would appear that HIPAA already prohibits and penalizes such acts.

Additionally, HIPAA authorizes covered entities to disclose PHI to certain entities without a waiver or authorization (e.g., covered entities may use PHI for the purposes of treatment, payment and health care operations without any special permission from a patient). The bill prohibits disclosure of firearm information to *any other source*. If firearm information qualifies as PHI, this prohibition appears to conflict with HIPAA.

4. In certain instances, questions about gun ownership may be necessary to the treatment of a patient (e.g., psychiatrists treating suicidal patients, emergency room physicians treating gun shot victims who need to know the type, caliber, etc. of firearm and ammunition used, etc.). However, the bill does not provide any exceptions to the criminal penalties to address such instances.

5. Lines 45 – 47 provide that a person who violates s. 790.338, F.S., commits a 3rd degree felony, punishable, except as provided in paragraph (b), as provided in ss. 775.082, 775.083, or 775.084, F.S. Paragraph (b) authorizes the court to impose a fine of up to $5 million in certain instances. If the intent is to authorize a fine of up to $5 million *in addition to* the penalties provided for in ss. 775.082, 775.083, and 775.084, F.S., the following language could be used:

   Delete lines 46-48 and insert:

   of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
   (b) In addition to the penalties provided in paragraph (a), a person who violates this section may be assessed a

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

[12] 45 C.F.R. s. 160.103

[13] In general, covered entities may use PHI for the purposes of treatment, payment and health care operations (TPO) without any special permission from a patient. Special permission, called an authorization, must be obtained for uses and disclosures other than for TPO. For some uses and disclosures, a covered entity need not obtain an authorization but must give the patient the opportunity to agree or object (e.g., give patients the option to disclose health information to family or friends). Finally, in some situations, such as reporting to public health authorities, emergencies, or in research studies in which a waiver has been obtained from an Institutional Review Board (IRB), a covered entity does not need to obtain an authorization or provide an opportunity to agree or object. *Health Insurance Portability and Accountability Act.* http://hipaa.yale.edu/overview/index.html (last accessed February 4, 2011).

[14] *Health Insurance Portability and Accountability Act.* http://hipaa.yale.edu/overview/index.html (last accessed February 4, 2011). Fines range from $100 to $50,000 per violation with specified annual caps. Criminal penalties include fines ranging from $50,000 to $250,000 and imprisonment of up to 10 years. *HIPAA Violations and Enforcement.* http://www.ama-assn.org/ama/pub/physician-resources/solutions-managing-your-practice/coding-billing-insurance/hipaahealth-insurance-portability-accountability-act/hipaa-violations-enforcement.shtml (last accessed February 4, 2011).

A bill to be entitled

An act relating to the privacy of firearms owners; creating s. 790.338, F.S.; providing that inquiries by physicians or other medical personnel concerning the ownership of a firearm by a patient or the family of a patient or the presence of a firearm in a private home or other domicile of a patient or the family of a patient violates the privacy of the patient or the patient's family members, respectively; prohibits conditioning the receipt of medical treatment or care on a person's willingness or refusal to disclose personal and private information unrelated to medical treatment in violation of an individual's privacy contrary to specified provisions; prohibiting entry of certain information concerning firearms into medical records or disclosure of such information by specified individuals; providing criminal penalties; providing increased maximum fines for certain violations; requiring informing the Attorney General of prosecution of violations; providing for collection of fines by the Attorney General in certain circumstances; providing an effective date.

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

Section 1. Section 790.338, Florida Statutes, is created to read:

790.338 Medical privacy concerning firearms.—

(1)(a) A verbal or written inquiry by a public or private physician, nurse, or other medical staff person regarding the ownership of a firearm by a patient or the family of a patient or the presence of a firearm in a private home or other domicile of a patient or the family of a patient violates the privacy of the patient or the patient's family members, respectively.

(b) A public or private physician, nurse, or other medical staff person may not condition receipt of medical treatment or medical care on a person's willingness or refusal to disclose personal and private information unrelated to medical treatment in violation of an individual's privacy as specified in this section.

(c) A public or private physician, nurse, or other medical staff person may not enter any intentionally, accidentally, or inadvertently disclosed information concerning firearms into any record, whether written or electronic, or disclose such information to any other source.

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

(b) A person who violates this section may be assessed a fine of not more than $5 million if the court determines that the person knew or reasonably should have known that the conduct was unlawful.

(c) The state attorney with jurisdiction shall investigate complaints of criminal violations of this section and, if there is probable cause to indicate that a person may have committed a

violation, shall prosecute the violator and notify the Attorney General.

(d) Notwithstanding s. 28.246(6), if a fine for a violation of this section remains unpaid after 90 days, the Attorney General shall bring a civil action to enforce the fine.

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

Status of Department of Corrections' Prison Diversion Programs

Presentation to the House Criminal Justice Subcommittee

Marti W. Harkness
Staff Director, Criminal Justice
OPPAGA

March 8, 2011

Prison Diversion Programs

- Ch. 2009-63, *Laws of Florida*, permits judges to divert nonviolent, prison-bound offenders to community-based treatment services
  - $1.4 million appropriated over last two years to DOC to fund two pilot prison diversion programs
- Offenders must meet certain criteria, including
  - Primary offense is a third degree felony
  - Criminal punishment code score not more than 48 points (or 54 points and 6 of those points are for VOP and do not involve new law violation)

Status of Hillsborough County Prison Diversion Program

- The 13th Judicial Circuit program (operated by DACCO) is fully operational but serving offenders outside the criminal punishment score range
  - Almost 2/3 of the offenders (55 or 72%) had sentencing scores lower than 44 points and 16 (21%) offenders had scores over 54 points

Status of Pinellas County Prison Diversion Program

- The 6th Judicial Circuit program (operated by Operation PAR) failed to receive enough referrals and ceased operation in August 2010
  - 11 offenders referred to the program and 6 admitted
  - Program staff and stakeholders noted that statutory criminal punishment code point range was too narrow
  - Program was also competing with expansion drug court, which targeted offenders with similar offenses and point scores

Options for Increasing Program Participation

- Program staff and judges identified a number of options for the department and the Legislature to consider for increasing referrals to the pilot programs
  - Expand program eligibility criteria
  - "Toughen" the program by adding a short-term jail term or electronic monitoring
  - Create a pilot program in a judicial circuit that does not operate a drug court

Any Questions?

Office of Program Policy Analysis & Government Accountability

OPPAGA supports the Florida Legislature by providing data, evaluative research, and objective analyses that assist legislative budget and policy deliberations.

The Florida Legislature

OFFICE OF PROGRAM POLICY ANALYSIS AND GOVERNMENT ACCOUNTABILITY

RESEARCH MEMORANDUM

Prison Diversion Programs

December 15, 2010

Summary

The Legislature has appropriated $1.4 million over the last two years to the Department of Corrections to fund two pilot prison diversion programs in the 6th and 13th judicial circuits. These programs are intended to divert non-violent, prison-bound offenders to community-based treatment services, thereby reducing state costs and saving prison beds for more serious offenders. The program in the 13th Judicial Circuit (Hillsborough County) is fully operational, but is serving many offenders whose sentencing scores suggest they are not prison-bound. The program in the 6th Judicial Circuit (Pinellas and Pasco counties) ceased operation in August 2010 due to a lack of referrals. To increase judicial referrals to the programs, the Legislature and department could expand the eligibility criteria or offer diversion in circuits that do not already have drug courts.

Background

In 2009, the Legislature enacted Ch. 2009-63, *Laws of Florida*, to allow judges to divert non-violent, prison-bound offenders to community-based treatment services, thereby reducing state costs and saving prison beds for more serious offenders. The Legislature has funded the prison diversion program a total of $1.4 million over the two-year period of Fiscal Years 2009-10 and 2010-11. According to the bill analysis, the appropriation was intended to eliminate the need for 184 new prison beds for Fiscal Year 2009-10. At an average cost of $19,000 a year to fund a prison bed, the diversion programs would save approximately $3.5 million in prison bed costs the first year.

To be eligible for a diversion program, offenders must meet all of the following criteria.

- The offense(s) occurred on or after July 1, 2009.
- The primary offense is a third degree felony.[1]
- The criminal punishment code score is not more than 48 points (or 54 points and 6 of those points are for a violation of probation, community control, or other community supervision, and do not involve a new violation of law).[2]
- The offender has not been convicted or previously convicted of a forcible felony.[3]
- The offender's primary offense does not require a minimum mandatory sentence.

[1] A third degree felony is the least serious category of felonies; first degree is the most serious.

[2] Under the Florida Criminal Punishment Code, offenders are assigned points for their crime and any past crimes and these scores are used in sentencing. If an offender's total points equal 44 or less, the lowest permissible sentence is a non-state prison sanction unless the court determines within its discretion that a prison sentence up to the statutory maximum can be imposed.

[3] As defined in s. 776.08, *F.S.*, but excluding any third degree felony violation under Ch. 810, *F.S.*

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The law gives the court the authority to sentence an offender to a Department of Corrections' prison diversion program that may include residential or day-reporting requirements, substance abuse treatment, employment, restitution, academic, or vocational opportunities, or community service work. The judge that sentences a defendant to the program must make written findings that the defendant meets the eligibility criteria and may order the offender to pay all or a portion of the program costs related to the prison diversion program if the offender has the ability to pay.

The Department of Corrections established two pilot prison diversion programs–one in the 13th Judicial Circuit (Hillsborough County) and one in the 6th Judicial Circuit (Pinellas and Pasco counties). The department contracted with two local community treatment providers to operate the programs–Drug Abuse Comprehensive Coordinating Office, Inc. (DACCO), in Hillsborough County and Operation PAR, Inc., in Pinellas County. The DACCO program began accepting clients in November 2009 and Operation PAR began accepting clients in October 2009.

Status of the Pilot Programs

The 13th Judicial Circuit program is fully operational but serving offenders outside the criminal punishment score range. The DACCO program offers a myriad of services including cognitive-behavioral therapy, employment services, housing, life skills, and anger management. DACCO also offers a residential treatment component for offenders with significant substance abuse treatment needs. The program's goal is to allow clients to retain community support, access the services they require, receive life skills and employment assistance, and be part of a structured environment. Clients receive services specific to their assessed needs and generally spend 12 months in the program. Clients are referred to the program through Circuit Violation of Probation Court. DACCO program staff recommends early supervision termination for those clients who successfully complete program requirements yet have remaining community supervision time.

Because the Hillsborough pilot first admitted clients in November 2009, most program participants are still in treatment. From November 2009 through November 30, 2010, program staff reported that 155 offenders had been admitted into the program. Of those admitted, 77 (50%) were still in treatment as of November 30, 2010, and 2 offenders had successfully completed the program. Twenty-eight offenders (18%) failed to complete the program and were sentenced to prison and another 45 offenders (29%) had a pending court action such as a violation awaiting court's sanction or an active warrant.

Most of the offenders admitted into the DACCO program have sentencing scores outside the point range established by the Legislature. Florida law requires that program participants be prison-eligible, which generally means that they should have more than 44 sentencing points, yet not more than 48 points (or 54 points for a violation of probation case). However, as shown in Exhibit 1, according to data provided by the Department of Corrections, only 5 of the 91 offenders admitted during Fiscal Year 2009-10 had sentencing scores between 44 and 54 points.[4] Most of the offenders (55 or 72%) had sentencing scores lower than 44 points and the remaining 16 (21%) offenders had scores over 54 points.[5]

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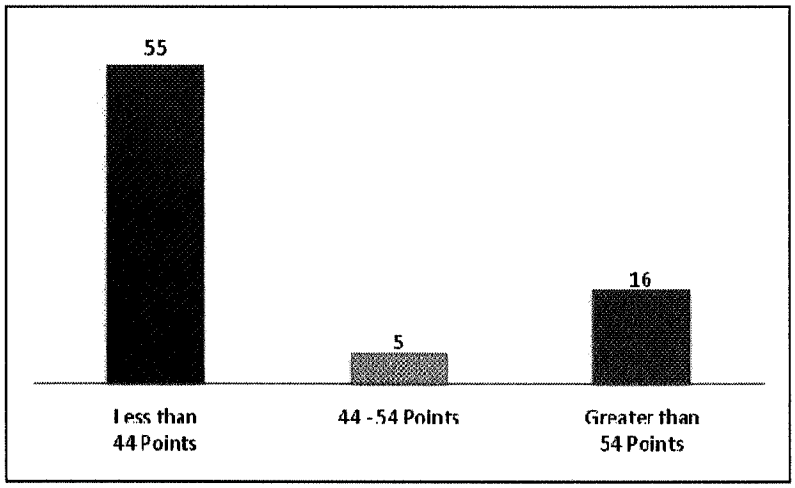
[4] The department reported 91 cases, one more case than reported by the DACCO. Of the 91 cases, 15 cases were missing sentencing guideline scores, leaving 76 valid cases for analysis.

[5] While 44 sentencing points is the presumptive threshold for a prison sentence, judges may admit an offender with fewer than 44 points into the program as long as they make written notice that the offender meets the eligibility criteria. Judges reported that some offenders under 44 points would be sentenced to prison if it were not for the prison diversion program.

Exhibit 1
Most Offenders Admitted into the DACCO Program Have Sentencing Scores Outside the Point Range Established by the Legislature



Source: Florida Department of Corrections.

The 6th Judicial Circuit program failed to receive enough referrals and ceased operation in August 2010. Operation PAR developed a program using evidence-based practices that would provide intensive outpatient substance abuse services with a variety of ancillary services, such as anger management, parenting services, and life skills training. The goal of Operation PAR's program was to reduce recidivism and promote a sober, productive lifestyle, which includes gainful employment, completion of probation, and payment of all court and program fees. Clients were referred to the program through the circuit felony division, but all judges were permitted to refer offenders to the program.

However, judges referred few clients to the program and it ceased operation in August 2010. According to program staff, only 11 offenders were referred to the program and 6 were admitted. Because the program hired two staff in anticipation of full participation, it expended $109,024 during the year it was in operation.

The primary reason that the program failed in the 6th Judicial Circuit was that the statutory sentencing guideline point range was too narrow according to program staff and other stakeholders including the state attorney and a circuit court judge. As previously stated, offenders have to be prison-eligible, which generally means that they must have more than 44 sentencing guideline points, yet not more than 48 points (or 54 points for a violation of probation case). According to stakeholders, the court strictly followed statutory guidelines and it was difficult to identify a significant number of appropriate offenders with scores within this narrow point range. This program was also competing with the expansion drug court, which was targeting offenders with similar offenses and point scores.

Options for Increasing Program Participation

Program staff and judges identified a number of options for the department and the Legislature to consider for increasing referrals to the pilot programs.

- **Expand program eligibility criteria** – Stakeholders in both programs stated that expanding the eligibility criteria would allow the programs to serve additional clients. For example, raising the upper point threshold from 54 to 60 or 65 points would expand the pool of potentially eligible offenders. In addition, one judge explained that the restriction allowing only third-degree felons to be served excludes second degree felons who may be appropriate for residential treatment, such as second degree felons convicted of dealing in stolen property. One state attorney felt that it was too restrictive to not allow offenders who violated their probation by committing a new misdemeanor offense to be eligible for the program. While expanding the program's eligibility will increase the number of offenders available to participate, it will also permit the courts to place more dangerous offenders into the community thereby potentially reducing public safety.
- **"Toughen" the program by adding a short-term jail term or electronic monitoring** – Court officials may also be more willing to use the diversion program if it were paired with a short jail incarceration or electronic monitoring. For example, the program could be enhanced to require offenders to serve a 90-day jail term followed by a year or more of the prison diversion program. Alternatively, the program could require electronic monitoring to enhance the oversight of offenders placed in the program.[6] Adding sanctions to the program, however, increases the cost of the program–a jail sentence increases county costs and electronic monitoring would add to the state's cost.
- **Create a pilot program in a judicial circuit that does not operate a drug court** – According to stakeholders, offender eligibility for both drug court and the prison diversion program resulted in fewer offenders participating in the prison diversion program. Placing a pilot program in a judicial circuit that is not operating a drug court would eliminate the competition for participants.

[6] Judges currently have the discretion to order electronic monitoring as part of an offender's community supervision term, where available. This option would require electronic monitoring in all prison diversion cases to enhance offender monitoring.