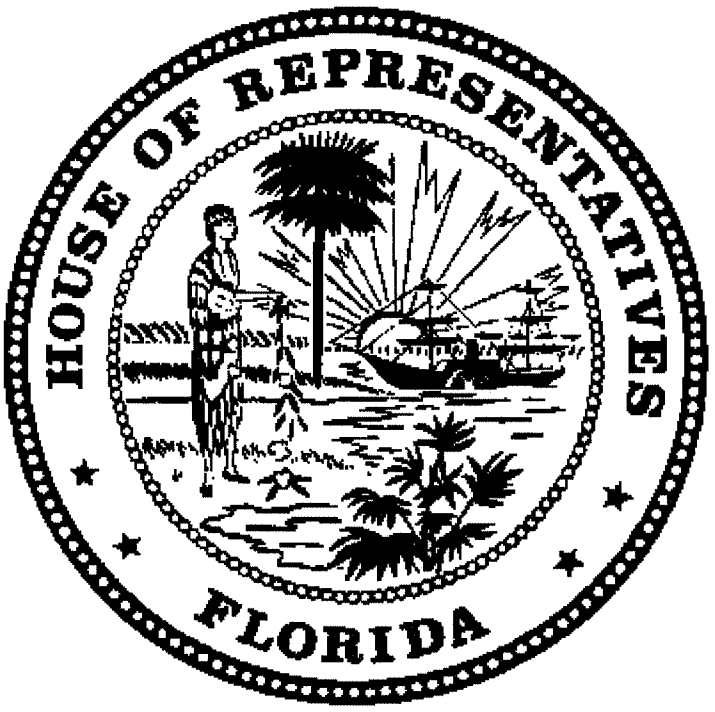

Criminal Justice Subcommittee

April 6th, 2011

9:00 AM

404 HOB

Dean Cannon
Speaker

Dennis Baxley
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Criminal Justice Subcommittee

Start Date and Time: Wednesday, April 06, 2011 09:00 am

End Date and Time: Wednesday, April 06, 2011 11:00 am

Location: 404 HOB
Duration: 2.00 hrs

Consideration of the following bill(s):

HB 411 Pub. Rec./Photographs and Video and Audio Recordings Depicting or Recording the Killing of a Person by Burgin
HB 487 Dextromethorphan by Gonzalez
HB 595 Sexual Performance by a Child by Pafford
HB 739 Transition-to-Adulthood Services by Porth
HB 779 Restraint of Incarcerated Pregnant Women by Reed
HB 1005 Murder of a Child 17 Years Of Age or Younger by Artiles
HB 1217 Persons with Disabilities by Taylor

Consideration of the following proposed committee substitute(s):

PCS for HB 1369 -- Criminal History Records

NOTICE FINALIZED on 04/04/2011 16:19 by hudson.jessica

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 411 Pub. Rec./Photographs and Video and Audio Recordings Depicting or Recording the Killing of a Person
SPONSOR(S): Burgin
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 416

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	12 Y, 0 N	Williamson	Williamson
2) Criminal Justice Subcommittee		Krol TK	Cunningham
3) State Affairs Committee			

SUMMARY ANALYSIS

The bill creates a public record exemption for photographs and video and audio recordings that depict or record the killing of a person. It is identical to the public record exemption provided for photographs and video and audio recordings of an autopsy.

Such photograph or video or audio recording is confidential and exempt from public records requirements; however, a surviving spouse or other enumerated relatives may view and copy a photograph or video recording or listen to or copy the audio recording of the decedent. The surviving relative with whom authority rests to obtain such confidential and exempt records may designate in writing an agent to obtain those records.

Pursuant to a written request and in the furtherance of its duties and responsibilities, a local governmental entity or a state or federal agency may view or copy a photograph or video recording or may listen to or copy an audio recording of the killing of a person.

Without a court order, the custodian of such records may not permit any other person to view or copy a photograph or video recording or to listen to or copy the audio recording of the killing of a person. A person must file a petition and obtain a court order in order to view, listen to, or copy such records. A surviving spouse or other enumerated relative must receive reasonable notice of the petition and of the opportunity to be present and heard at any hearing on the matter. Upon a showing of good cause, the court may issue an order authorizing a person to view or copy a photograph or video recording or to listen to or copy the audio recording of the killing of a person.

The bill provides that the public record exemption does not apply to such photographs or video or audio recordings submitted as part of a criminal or administrative proceeding; however, a court in such proceeding is not prohibited from restricting or controlling the disclosure of such records upon a showing of good cause.

The bill provides penalty provisions for violating the public record exemption.

The bill provides for repeal of the exemption on October 2, 2016, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the State Constitution, and provides for retroactive application of the exemption.

The bill appears to have an insignificant fiscal impact to the state and is effective July 1, 2011.

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. The bill creates a new public record exemption; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.[1]

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act[2] provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protects trade or business secrets.

Public Record Exemption, Criminal Intelligence and Criminal Investigative Information

Current law provides a public record exemption for criminal intelligence information[3] and criminal investigative information.[4] Active criminal intelligence information[5] and active criminal investigative information[6] are exempt[7] from public records requirements.

Public Record Exemption, Autopsy Photos and Video Audio Recordings

Current law provides a public record exemption for photographs and video and audio recordings of an autopsy held by a medical examiner.[8] Such photographs and video and audio recordings are

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[1] Section 24(c), Art. I of the State Constitution.

[2] Section 119.15, F.S.

[3] Section 119.011(3)(a), F.S., defines "criminal intelligence information" to mean "information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity."

[4] Section 119.011(3)(b), F.S., defines "criminal investigative information" to mean "information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including, but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance."

[5] Criminal intelligence information is considered "active" as long as it is related to intelligence gathering conducted with a reasonable, good faith belief that it will lead to detection of ongoing or reasonably anticipated criminal activities. Section 119.011(3)(d)1., F.S.

[6] Criminal investigative information is considered "active" as long as it is related to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future. Section 119.011(3)(d)2., F.S.

[7] There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. (*See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. (*See* Attorney General Opinion 85-62, August 1, 1985).

[8] Section 406.135(2), F.S.

confidential and exempt from public records requirements, except that a surviving spouse and other enumerated family members may obtain the records.

Pursuant to a written request and in the furtherance of its duties and responsibilities, a local governmental entity or a state or federal agency may view or copy a photograph or video recording or may listen to or copy an audio recording of an autopsy. The identity of the deceased must remain confidential and exempt.[9]

Other than these exceptions, a custodian of the photographs and video and audio recordings is prohibited from releasing such photographs and recordings to any other person not authorized under the exemption, without a court order.[10]

Effect of Bill

The bill creates a public record exemption for photographs and video and audio recordings that depict or record the killing of a person. The public record exemption is identical to the public record exemption provided for photographs and video and audio recordings of an autopsy.

The bill defines "killing of a person" to mean:

> [A]ll acts or events that cause or otherwise relate to the death of any human being, including any related acts or events immediately preceding or subsequent to the acts or events that were the proximate cause of death.

Such photograph or video or audio recording is confidential and exempt from public records requirements; however, a surviving spouse may view and copy a photograph or video recording or listen to or copy the audio recording of the decedent. If there is no surviving spouse, then the surviving parents have access to such records. If there is no surviving spouse or parent, then an adult child has access to such records. The surviving relative with whom authority rests to obtain such confidential and exempt records may designate in writing an agent to obtain those records.

Pursuant to a written request and in the furtherance of its duties and responsibilities, a local governmental entity or a state or federal agency may view or copy a photograph or video recording or may listen to or copy an audio recording of the killing of a person. The identity of the deceased must remain confidential and exempt.

Without a court order, the custodian of such records may not permit any other person to view or copy a photograph or video recording or to listen to or copy the audio recording of the killing of a person. A person must file a petition and obtain a court order in order to view, listen to, or copy such records. A surviving spouse must receive reasonable notice of the petition and of the opportunity to be present and heard at any hearing on the matter. If there is no surviving spouse, then such notice must be provided to the deceased's parents, and if the deceased has no living parent, then to the adult child of the deceased.

Upon a showing of good cause, the court may issue an order authorizing a person to view or copy a photograph or video recording or to listen to or copy the audio recording of the killing of a person. The bill provides that, in determining good cause, the court must consider:

- Whether such disclosure is necessary for the public evaluation of governmental performance;
- The seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and
- The availability of similar information in other public records, regardless of form.

The bill provides that the public record exemption does not apply to such photographs or video or audio recordings submitted as part of a criminal or administrative proceeding; however, it appears to apply to

[9] Section 406.135(3)(b), F.S.
[10] Section 406.135(4), F.S.

such information submitted as part of a civil proceeding. In addition, a court in such proceeding is not prohibited from restricting or controlling the disclosure of such records upon a showing of good cause.

It is a third degree felony[11] for any:

- Custodian of such photograph or video or audio recording to willfully and knowingly violate the provisions of the exemption.
- Person to willfully and knowingly violate a court order issued pursuant to the exemption.

The bill provides for repeal of the exemption on October 2, 2016, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the State Constitution,[12] and provides for retroactive application[13] of the public record exemption.

B. SECTION DIRECTORY:

Section 1. Creates an unnumbered section of law to create a public record exemption for photographs and video and audio recordings that depict or record the killing of a person.

Section 2. Provides a public necessity statement.

Section 3. 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:

   On March 2, 2011, the Criminal Justice Impact Conference determined the fiscal impact of SB 416[14] to be insignificant due to anticipated low volume and because the felonies created by the bill are unranked.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill requires a person to petition the court for access to photographs and video and audio recordings of a killing of a person. As such, a person petitioning the court would be subject to court costs and fees.

D. FISCAL COMMENTS:

None.

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[11] A third degree felony is punishable by up to five years imprisonment and up to $5,000 fine. Sections 775.082 and 775.083, F.S.
[12] Section 24(c), Art. I of the State Constitution.
[13] The Supreme Court of Florida ruled that a public record exemption is not to be applied retroactively unless the legislation clearly expresses intent that such exemption is to be applied retroactively. *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So.2d. 373 (Fla. 2001).
[14] SB 416 is the companion to HB 411.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

Vote Requirement
Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. The bill creates a new public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement
Article I, s. 24(c) of the State Constitution, requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a new public record exemption; thus, it includes a public necessity statement.

Overly Broad
Article I, s. 24(c) of the State Constitution, requires that an exemption be no broader than necessary to accomplish its stated purpose.

In *Campus Communications, Inc., v. Earnhardt*,[15] the Fifth District Court of Appeal upheld a similar law exempting autopsy photographs and video and audio recordings against an unconstitutional over breath challenge brought by a newspaper. The court went on to certify the question of constitutionality to the Florida Supreme Court. On July 1, 2003, the Florida Supreme Court, per curiam, denied review of this case, leaving in place the appellate court's holding.[16]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Opponents of the bill have expressed concerns because, according to opponents, the bill restricts oversight of governmental actions and creates less accountability. Opponents have listed as examples the Martin Lee Anderson incident at the Bay County Boot Camp,[17] and the execution of Jesse Joseph Tafero.[18]

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

[15] 821 So.2d 388 (Fla. 5th DCA 2002), review denied, 848 So.2d 1153 (Fla. 2003).
[16] 848 So.2d 1153 (Fla. 2003).
[17] In January 2006, Martin Lee Anderson, a resident of the Bay County Boot Camp, which was operated by the Bay County Sheriff's Office, died from suffocation a day after entering boot camp. A videotape of the events surrounding his death, specifically the activities of boot camp employees, resulted in the Legislature closing boot camps, but only after the news media and others made the video public. Letter from the First Amendment Foundation to Representative Burgin (February 25, 2011), on file with the Government Operations Subcommittee.
[18] In 1990, the execution of Jesse Joseph Tafero was botched causing his head to catch fire. Videos or photos of this event would be protected under this bill, also limiting oversight. *Id.*

A bill to be entitled

An act relating to public records; providing a definition; providing an exemption from public records requirements for photographs and video and audio recordings that depict or record the killing of a person; authorizing access to such photographs or video or audio recordings by specified members of the immediate family of the deceased subject of the photographs or video or audio recordings; providing for access to such records by local governmental entities or state or federal agencies in furtherance of official duties; providing for access pursuant to court order; providing guidelines of the court in issuing an order authorizing such photographs or video or audio recordings to be viewed, copied, or heard; requiring specified notice of a court petition to view or copy such records; providing penalties; exempting criminal or administrative proceedings from the act; providing for retroactive application; providing for future legislative review and repeal of the exemption; providing a finding of public necessity; providing an effective date.

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

Section 1. (1) As used in this section, the term "killing of a person" means all acts or events that cause or otherwise relate to the death of any human being, including any related acts or events immediately preceding or subsequent to the acts or events that were the proximate cause of death.

(2) A photograph or video or audio recording that depicts or records the killing of a person is confidential and exempt from section 119.07(1), Florida Statutes, and s. 24(a), Art. I of the State Constitution, except that a surviving spouse of the decedent may view and copy any such photograph or video recording or listen to or copy any such audio recording. If there is no surviving spouse, then the surviving parents shall have access to such records. If there is no surviving spouse or parent, then an adult child shall have access to such records.

(3)(a) The deceased's surviving relative, with whom authority rests to obtain such records, may designate in writing an agent to obtain such records.

(b) A local governmental entity, or a state or federal agency, in furtherance of its official duties, pursuant to a written request, may view or copy a photograph or video recording or may listen to or copy an audio recording of the killing of a person and, unless otherwise required in the performance of their duties, the identity of the deceased shall remain confidential and exempt.

(c) The custodian of the record, or his or her designee, may not permit any other person to view or copy such photograph or video recording or listen to or copy such audio recording without a court order.

(4)(a) The court, upon a showing of good cause, may issue an order authorizing any person to view or copy a photograph or video recording that depicts or records the killing of a person or to listen to or copy an audio recording that depicts or

records the killing of a person and may prescribe any restrictions or stipulations that the court deems appropriate.

(b) In determining good cause, the court shall consider:

1. Whether such disclosure is necessary for the public evaluation of governmental performance;

2. The seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and

3. The availability of similar information in other public records, regardless of form.

(c) In all cases, the viewing, copying, listening to, or other handling of a photograph or video or audio recording that depicts or records the killing of a person must be under the direct supervision of the custodian of the record or his or her designee.

(5) A surviving spouse shall be given reasonable notice of a petition filed with the court to view or copy a photograph or video recording that depicts or records the killing of a person or to listen to or copy any such audio recording, a copy of such petition, and reasonable notice of the opportunity to be present and heard at any hearing on the matter. If there is no surviving spouse, then such notice must be given to the parents of the deceased and, if the deceased has no living parent, then to the adult children of the deceased.

(6)(a) Any custodian of a photograph or video or audio recording that depicts or records the killing of a person who willfully and knowingly violates this section commits a felony

of the third degree, punishable as provided in section 775.082, section 775.083, or section 775.084, Florida Statutes.

(b) Any person who willfully and knowingly violates a court order issued pursuant to this section commits a felony of the third degree, punishable as provided in section 775.082, section 775.083, or section 775.084, Florida Statutes.

(c) A criminal or administrative proceeding is exempt from this section but, unless otherwise exempted, is subject to all other provisions of chapter 119, Florida Statutes, provided however that this section does not prohibit a court in a criminal or administrative proceeding upon good cause shown from restricting or otherwise controlling the disclosure of a killing, crime scene, or similar photograph or video or audio recordings in the manner prescribed herein.

(7) This exemption shall be given retroactive application and shall apply to all photographs or video or audio recordings that depict or record the killing of a person, regardless of whether the killing of the person occurred before, on, or after July 1, 2011.

(8) This section is subject to the Open Government Sunset Review Act in accordance with s. 119.15, Florida Statutes, and shall stand repealed on October 2, 2016, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that is a public necessity that photographs and video and audio recordings that depict or record the killing of any person be made confidential and exempt from the requirements of section 119.07(1), Florida Statutes, and Section 24(a) of Article I of the State

Constitution. The Legislature finds that photographs or video or audio recordings that depict or record the killing of any person render a visual or aural representation of the deceased in graphic and often disturbing fashion. Such photographs or video or audio recordings provide a view of the deceased in the final moments of life, often bruised, bloodied, broken, with bullet wounds or other wounds, cut open, dismembered, or decapitated. As such, photographs or video or audio recordings that depict or record the killing of any person are highly sensitive representations of the deceased which, if heard, viewed, copied or publicized, could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injury to the memory of the deceased. The Legislature recognizes that the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of such photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of photographs and video and audio recordings would subject the immediate family of the deceased to continuous injury. The Legislature further recognizes that there continue to be other types of available information, such as crime scene reports, which are less intrusive and injurious to the immediate family members of the deceased and which continue to provide for public oversight. The Legislature further finds that the exemption provided in this act should be given retroactive application because it is remedial in nature.

Section 3. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 487 Dextromethorphan
SPONSOR(S): Gonzalez and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1156

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

SUMMARY ANALYSIS

Section 893.1495, F.S., regulates the retail sale of ephedrine and related compounds. The statute:

- Prohibits a person from knowingly obtaining or delivering to an individual in any retail over-the-counter sale any nonprescription compound, mixture, or preparation containing ephedrine or related compounds in excess of specified amounts:
- Prohibits a person from knowingly displaying and offering for retail sale packages of any drug having a sole active ingredient of ephedrine or related compounds other than behind a checkout counter where the public is not permitted.
- Requires owners or primary operators of retail stores to ensure that all employees who engage in the retail sale of ephedrine or related compounds attend an employee training program that includes basic instruction on state and federal regulations relating to the sale and distribution of such compounds.

Any person who violates the above described provisions commits a 2nd degree misdemeanor for a first offense, a 1st degree misdemeanor for a second offense, and a 3rd degree felony for a third or subsequent offense.

Section 893.1495, F.S., also requires purchasers of ephedrine or related compounds to:

- Be at least 18 years of age; and
- Present a government issued photo identification showing their name, date of birth, address, and photo identification number.

Dextromethorphan (DXM), a cough suppressant, is found in cold medications, either alone or in combination with other drugs. When ingested at recommended dosage levels, DXM is generally safe and effective. However, within the past few years, reports of illicit use and abuse of DXM have risen. The United States Drug Enforcement Administration reports that illicit use may be related to the ease of purchasing nonprescription cough medicines from a variety of drug stores and internet companies. Currently, s. 893.1495, F.S., does not regulate the retail sale or delivery of any nonprescription compound, mixture, or preparation containing DXM.

HB 487 amends s. 893.1495, F.S., to add DXM to the term "ephedrine, or related compounds." As a result, all of the above-described prohibitions and requirements that relate to sale of ephedrine will apply to the sale of DXM.

On March 2, 2011, the Criminal Justice Impact Conference determined that this bill will have an insignificant prison bed impact on the Department of Corrections. Since the bill creates new misdemeanor offenses, there may also be a fiscal impact on county jails.

The bill provides an effective date of July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Dextromethorphan:
In 1958, the Food and Drug Administration (FDA) approved dextromethorphan (DXM) after research supported its legitimacy and effectiveness as a cough suppressant.[1] Since that time, DMX has been found in more than 120 over-the-counter (OCT) cold medications, either alone or in combination with other drugs such as analgesics, antihistamines, decongestants and expectorants.[2] When ingested at recommended dosage levels, DXM generally is a safe and effective cough suppressant.[3] The typical adult dose for a cough is 15 or 30 mg taken three to four times daily, with the cough-suppressing effects of DXM persisting five to six hours after taken.[4]

Substance Abuse:
DXM is a dissociative anesthetic that, at high doses, can create powerful psychedelic effects.[5] These effects include confusion, agitation, paranoia, and hallucinations.[6] Anecdotal reports and limited clinical research suggest that extensive and prolonged abuse of DXM may cause learning and memory impairment.[7]

In recent years, reports of illicit use and abuse of DXM have risen.[8] The Unites States Drug Enforcement Administration (DEA) reports that illicit use of DXM may be related to the ease of purchasing nonprescription cough medicines from drug stores and internet companies.[9] The most frequently abused products containing DXM are Coricidin HBP Cough & Cold and Robitussin DM.[10]

The Consumer Healthcare Products Association (CHPA) reports that DXM is not addictive and that the ingredient is most dangerous when it is in its raw (or unfinished) form.[11] DXM contained in OTC products is not in raw form. CHPA supports federal initiatives that prohibit the sale of cough medicines containing DXM to persons under the age of 18 and also supports a prohibition of the sale of the raw, unfinished form of DXM to ensure only entities registered with the FDA have access to such form of the ingredient.[12]

OTC products that contain DXM often contain other ingredients such as acetaminophen,[13] chlorpheniramine,[14] and guaifenesin[15] that have their own effects if used in large dosages, such as liver damage, increased heart rate, lack of coordination, seizures, vomiting and coma.[16]

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[1] Dextromethorphan (DXM), CESAR: Center for Substance Abuse Research, University of Maryland. May 2005. (http://www.cesar.umd.edu/cesar/drugs/dxm.asp) (last accessed March 30, 2011).
[2] "Drugs and Chemicals of Concern," U.S. Dept. of Justice Drug Enforcement Administration, Office of Diversion Control, August 2010. (http://www.deadiversion.usdoj.gov/drugs_concern/dextro_m/dextro_m.htm) (last accessed on March 30, 2011).
[3] "Intelligence Bulletin: DXM (Dextromethorphan)" National Drug Intelligence Center. Doc. Id. # 2004-L0424-029. October 2004. (http://www.justice.gov/ndic/pubs11/11563/11563p.pdf) (last accessed March 30, 2011).
[4] *Get Smart About Drugs: A Resource for Parents from the DEA*. Drug Fact Sheet. November 17, 2010. (http://www.justice.gov/dea/pubs/abuse/drug_data_sheets/dextromethorphan_dxm_DrugDataSheet.pdf) (last accessed March 30, 2011).
[5] See *supra* note 1.
[6] *Get Smart About Drugs: A Resource for Parents from the DEA*. Drug Fact Sheet. November 17, 2010. (http://www.justice.gov/dea/pubs/abuse/drug_data_sheets/dextromethorphan_dxm_DrugDataSheet.pdf) (last accessed March 30, 2011).
[7] See *supra* note 3.
[8] See *supra* note 1.
[9] *Id.*
[10] Coricidin HBP Cough & Cold contains 30 mg of DXM per tablet and Robitussin DM contains 2 mg of DXM per milliliter. See *supra* note 3.
[11] OTC Cough Medicine Abuse and Dextromethorphan. Consumer Healthcare Products Association. 2010. (http://www.chpa-info.org/governmentalaffairs/Medicine_Abuse_DXM.aspx) (last accessed March 30, 2011).
[12] *Id.*
[13] "Acetaminophen," also called APAP, is a drug that relieves pain and fever and can be found in both prescription and OCT products. *FDA limits acetaminophen in prescription combination products; requires liver toxicity warnings.* U.S. Food and Drug

Federal Actions:
DXM is neither a controlled substance nor a regulated chemical under the Federal Controlled Substances Act.[17] However, in August 2010, the DEA listed this substance as a drug of concern, and is reviewing it for possible control scheduling.[18]

Florida law:
Currently, Florida does not regulate the retail sale or delivery of any nonprescription compound, mixture, or preparation containing DXM. However, s. 893.1495, F.S., does regulate the retail sale of ephedrine, a similar OCT substance, and related compounds.[19]

Section 893.1495(1), F.S., defines the term "ephedrine or related compounds" as "ephedrine, pseudoephedrine, phenylpropanolamine, or any of their salts, optical isomers, or salts of optical isomers". The statute provides that a person may not knowingly obtain or deliver to an individual in any retail OTC sale any nonprescription compound, mixture, or preparation containing ephedrine or related compounds in excess of the following amounts:

- In any single day, any number of packages that contain a total of 3.6 grams of ephedrine or related compounds;
- In any single retail, over-the-counter sale, three packages, regardless of weight, containing ephedrine or related compounds; or
- In any 30-day period, in any number of retail, over-the-counter sales, a total of 9 grams or more of ephedrine or related compounds.[20]

Additionally, the statute prohibits a person from knowingly displaying and offering for retail sale packages of any drug having a sole active ingredient of ephedrine or related compounds other than behind a checkout counter where the public is not permitted.[21] Owners or primary operators of retail stores must ensure that all employees who engage in the retail sale of ephedrine or related compounds attend an employee training program that includes basic instruction on state and federal regulations relating to the sale and distribution of such compounds.[22]

Any person who violates the above-described provisions of s. 893.1495, F.S., commits a misdemeanor of the second degree[23] for a first offense, a misdemeanor of the first degree[24] for a second offense, and a felony of the third degree[25] for a third or subsequent offense.[26]

Administration, January 13, 2011. (http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm239894.htm) (last accessed March 30, 2011).

[14] "Chlorpheniramine" is an antihistamine that helps control the symptoms of cold or allergies. Chlorpheniramine. MedlinePlus Drug Information. U.S. National Library of Medicine. August 2010. (http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682543.html) (last accessed March 30, 2011).

[15] "Guaifenesin" is a expectorant used to relieve chest congestion. Guaifenesin. MedlinePlus Drug Information. U.S. National Library of Medicine. August 2010. (http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682494.html) (last accessed March 30, 2011).

[16] See *supra* note 2.

[17] 21 U.S.C. Chapter 13, entitled, "Drug Abuse Prevention and Control."

[18] See *supra* note 2.

[19] The provisions of s. 893.1495, F.S., do not apply to any of the following: licensed manufacturers who lawfully manufacture and distribute products; wholesalers who lawfully distribute products; healthcare facilities licensed under ch. 395, F.S.; licensed long-term care facilities; government-operated health departments; physician offices; publicly operated prisons, jails, juvenile correctional facilities, or private adult or juvenile correctional facilities under contract with the state; public or private educational institutions that maintain health care programs; and government operated or industry operated medical facilities serving employees of the government or industry operating them. s. 893.1495(10), F.S.

[20] Section 893.1495(2), F.S.

[21] Section 893.1495(3), F.S.

[22] Section 893.1495(4), F.S.

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

[24] A first degree misdemeanor is punishable by up to one year in county jail and a maximum $1,000 fine. *See* ss. 775.082 and 775.083, F.S.

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

[26] Section 893.1495(11), F.S.

Section 893.1495, F.S., also requires purchasers of ephedrine or related compounds to:

- Be at least 18 years of age;
- Present a government issued photo identification showing their name, date of birth, address, and photo identification number; and
- Provide a signature on paper or on an electronic signature capture device for recordkeeping.[27]

A person who sells any product containing ephedrine or related compounds in good faith, is immune from civil liability for the release of the above information to federal, state, or local law enforcement officers, or any person acting on their behalf, unless the release constitutes gross negligence or intentional, wanton or willful misconduct.[28]

Currently, s. 893.1495, F.S., does not regulate the retail sale or delivery of any nonprescription compound, mixture, or preparation containing DXM.

Effect of bill:
HB 487 amends s. 893.1495, F.S., to add DXM to the term "ephedrine, or related compounds" and defines the term as "ephedrine, pseudoephedrine, phenylpropanolamine, dextromethorphan, or any of their salts, optical isomers, or salts of optical isomers." The bill makes this change in terminology throughout s. 893.1495, F.S.

As a result, the following prohibitions and requirements that relate to the sale of ephedrine will also relate to the sale of DXM:

- A prohibition on knowingly obtaining or delivering to an individual in any retail over-the-counter sale any nonprescription compound, mixture, or preparation containing DXM in excess of amounts described above.
- A prohibition on knowingly displaying and offering for retail sale packages of any drug having a sole active ingredient of DXM other than behind a checkout counter where the public is not permitted.
- A requirement that owners or primary operators of retail stores ensure that all employees who engage in the retail sale of ephedrine or related compounds attend an employee training program that includes basic instruction on state and federal regulations relating to the sale and distribution of DXM.

The bill also requires anyone purchasing DXM to:

- Be at least 18 years of age; and
- Present a government issued photo identification showing their name, date of birth, address, and photo identification number.

A person who sells any product containing DXM in good faith, is immune from civil liability for the release of information to federal, state, or local law enforcement officers, or any person acting on their behalf, unless the release constitutes gross negligence or intentional, wanton or willful misconduct.

The bill does not include DXM in any provisions of current law relating to the Florida Department of Law Enforcement's (FDLE) electronic recordkeeping system for products containing ephedrine or related compounds.

B. SECTION DIRECTORY:

Section 1. Amends s. 893.1495, F.S., related to retail sale of ephedrine and related compounds.

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

[27] Section 893.1495(5)(a), F.S.
[28] Section 893.1495(13), F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   On March 2, 2011, the Criminal Justice Impact Conference determined that this bill will have an insignificant prison bed impact on the Department of Corrections.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   The bill provides that a person who violates certain provisions of s. 893.1495, F.S., commits a misdemeanor of the second degree for a first offense, and a misdemeanor of the first degree for a second offense. As a result, this could impact county jails.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill could cause an indeterminate increase in the cost of doing business for retailers who sell products containing DXM due to the requirements in the bill related to product sales, product display, and employee training.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill replaces the current-law definition of "ephedrine or related compounds" with the definition of "ephedrine, dextromethorphan, or related compounds." However, certain portions of s. 893.1495, F.S., that are not amended by the bill rely on the existing definition of "ephedrine or related compounds," and without that existing definition, those provisions would contain an undefined term if the bill becomes law. The provisions in question:

- Require FDLE to approve an electronic recordkeeping system for the purpose of monitoring the real-time purchase of products containing ephedrine or related compounds.[29]
- Require retailers, in order to be granted an exemption from electronic reporting, to maintain a sales volume of less than 72 grams of ephedrine or related compounds in a 30-day period.[30]
- Require the electronic recordkeeping system to record the name of the product containing ephedrine or related compounds.[31]
- Prohibit a nonprescription product containing any quantity of ephedrine or related compounds from being sold over the counter unless reported to the FDLE electronic recordkeeping system.[32]
- Specify that the requirements of s. 893.1495, F.S., relating to the marketing, sale, or distribution of products containing ephedrine or related compounds, supersede any local ordinance or regulation.[33]

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

[29] *See* s. 893.1495(5)(b), F.S.
[30] *Id.*
[31] *See* s. 893.1495(5)(b)3., F.S.
[32] *See* s. 893.1495(6), F.S.
[33] *See* s. 893.1495(9), F.S.

A bill to be entitled

An act relating to dextromethorphan; amending s. 893.1495, F.S., and reenacting subsection (11), relating to penalties; revising a definition; prohibiting obtaining or delivering to an individual in a retail sale any nonprescription compound, mixture, or preparation containing dextromethorphan or related compounds in excess of specified amounts; regulating retail display of products containing dextromethorphan or related compounds; requiring the training of retail employees; requiring a person who purchases or otherwise acquires a nonprescription compound, mixture, or preparation containing any detectable quantity of dextromethorphan or related compounds to meet specified requirements; providing criminal penalties; providing limited civil immunity for the release of information to law enforcement officers; providing an effective date.

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

Section 1. Subsections (1) through (4), paragraph (a) of subsection (5), and subsection (13) of section 893.1495, Florida Statutes, are amended, and subsection (11) of that section is reenacted, to read:

893.1495 Retail sale of ephedrine, dextromethorphan, and related compounds.—

(1) For purposes of this section, the term "ephedrine, dextromethorphan, or related compounds" means ephedrine,

CODING: Words stricken are deletions; words underlined are additions.

pseudoephedrine, phenylpropanolamine, dextromethorphan, or any of their salts, optical isomers, or salts of optical isomers.

(2) A person may not knowingly obtain or deliver to an individual in any retail over-the-counter sale any nonprescription compound, mixture, or preparation containing ephedrine, dextromethorphan, or related compounds in excess of the following amounts:

(a) In any single day, any number of packages that contain a total of 3.6 grams of ephedrine, dextromethorphan, or related compounds;

(b) In any single retail, over-the-counter sale, three packages, regardless of weight, containing ephedrine, dextromethorphan, or related compounds; or

(c) In any 30-day period, in any number of retail, over-the-counter sales, a total of 9 grams or more of ephedrine, dextromethorphan, or related compounds.

(3) A person may not knowingly display and offer for retail sale any nonprescription compound, mixture, or preparation containing ephedrine, dextromethorphan, or related compounds other than behind a checkout counter where the public is not permitted or other such location that is not otherwise accessible to the general public.

(4) A person who is the owner or primary operator of a retail outlet where any nonprescription compound, mixture, or preparation containing ephedrine, dextromethorphan, or related compounds is available for sale may not knowingly allow an employee to engage in the retail sale of such compound, mixture, or preparation unless the employee has completed an employee

training program that shall include, at a minimum, basic instruction on state and federal regulations relating to the sale and distribution of such compounds, mixtures, or preparations.

(5)(a)1. Any person purchasing, receiving, or otherwise acquiring any nonprescription compound, mixture, or preparation containing any detectable quantity of ephedrine, dextromethorphan, or related compounds must:

a.~~1.~~ Be at least 18 years of age.

b.~~2.~~ Produce a government-issued photo identification showing his or her name, date of birth, address, and photo identification number or an alternative form of identification acceptable under federal regulation 8 C.F.R. s. 274a.2(b)(1)(v)(A) and (B).

2.~~3.~~ Any person purchasing, receiving, or otherwise acquiring any nonprescription compound, mixture, or preparation containing any detectable quantity of ephedrine or related compounds must sign his or her name on a record of the purchase, either on paper or on an electronic signature capture device.

(11) Any individual who violates subsection (2), subsection (3), or subsection (4) commits:

(a) For a first offense, a misdemeanor of the second degree, punishable as provided in s. 775.083.

(b) For a second offense, a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(c) For a third or subsequent offense, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(13) A person who sells any product containing ephedrine, dextromethorphan, or related compounds who in good faith releases information under this section to federal, state, or local law enforcement officers, or any person acting on behalf of such an officer, is immune from civil liability for the release unless the release constitutes gross negligence or intentional, wanton, or willful misconduct.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 595 Sexual Performance by a Child
SPONSOR(S): Pafford and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 846

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

SUMMARY ANALYSIS

Currently, Florida law does not specifically prohibit a person from *viewing* child pornography. Florida law does currently prohibit a person from *possessing* child pornography.

Section 827.071(5), F.S., makes it a 3rd degree felony, ranked in Level 5 of the offense severity ranking chart, for any person to knowingly possess any of the following, which, in whole or in part, he or she knows to include any sexual conduct by a child:

- Photograph,
- Motion picture,
- Exhibition,
- Show,
- Representation, or
- Other presentation.

HB 595 amends s. 827.071(5), F.S., to prohibit a person from *controlling or intentionally viewing* child pornography and expands the list of items that cannot be possessed, controlled, or viewed if such items contain sexual conduct by a child. The bill defines the term "intentionally view" as "to deliberately, purposefully, and voluntarily view," and keeps the offense ranked in Level 5 of the offense severity ranking chart.

On March 2, 2011, the Criminal Justice Impact Conference determined that this bill would have an indeterminate prison bed impact on the Department of Corrections.

The bill is effect October 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation.
Currently, Florida law does not specifically prohibit a person from *viewing* child pornography. Florida law does currently prohibit a person from *possessing* child pornography.

Section 827.071(5), F.S., makes it a 3rd degree felony[1] for any person to knowingly possess any of the following, which, in whole or in part, he or she knows to include any sexual conduct[2] by a child:

- Photograph,
- Motion picture,
- Exhibition,
- Show,
- Representation, or
- Other presentation.[3]

The statute specifies that the possession of each photograph, motion picture, exhibition, show, representation, or presentation is a separate offense.[4] This offense is ranked in Level 5 of the offense severity ranking chart.[5]

In 2006, Florida's 4th District Court of Appeal held that the passive viewing on the Internet of child pornography does not violate the law because viewing does not constitute possession.[6] Similarly, federal courts have analyzed the issue of temporary Internet files in the context of the federal child pornography statutes and have held that the mere viewing of a child pornographic image does not constitute knowing possession of the image.[7] However, the court acknowledged that "knowing possession" should be based upon the manner in which the defendant manages the files.[8]

As of August 2010, eight states had enacted statutes that prohibited a person from viewing child pornography.[9] Federal law prohibits a person from knowingly accessing with the intent to view specified items that contain child pornography.[10]

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[1] A third degree felony is punishable by up to five years imprisonment and a $5,000 fine. Sections 775.082 and 775.083, F.S.
[2] Section 827.071(1)(g), F.S., defines the term "sexual conduct" as actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. A mother's breastfeeding of her baby does not under any circumstance constitute sexual conduct.
[3] Florida's 4th DCA has held that "a pornographic computer image of an actual child constitutes a photograph, representation or other presentation" under s. 827.071(5), F.S. *State v. Cohen*, 696 So.2d 435, 436 (Fla. 4th DCA 1997).
[4] Section 827.071(5), F.S.
[5] Criminal offenses are ranked in the "offense severity ranking chart" from level one (least severe) to level ten (most severe) and are assigned points based on the severity of the offense as determined by the legislature. 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.
[6] *Strouse v. State*, 932 So.2d 326, 328 (Fla. 4th DCA 2006).
[7] *United States v. Perez,* 247 F.Supp.2d 459, 484 (S.D.N.Y. 2003) (citing *United States v. Zimmerman,* 277 F.3d 426, 435 (3d Cir. 2002)).
[8] *Id.* (citing *United States v. Tucker,* 305 F.3d 1193, 1205 (10th Cir. 2002) (upholding a conviction based on automatically stored files because the defendant habitually deleted the temporary files manually, demonstrating that he exercised control over them), *cert. denied,* 537 U.S. 1223 (2003)).
[9] The eight states include Alaska, Arkansas, Delaware, New Jersey, Ohio, Pennsylvania, Utah, and Washington. National Center for Prosecution of Child Abuse. National District Attorneys Association, *Viewing Child Pornography Statutes* (Updated August 2010) ,http://www.ndaa.org/pdf/Viewing%20Child%20Pornography%208-2010.pdf (last accessed March 30, 2011).
[10] 18 U.S.C. s. 2252A (2010)

Effect of the Bill

The bill amends s. 827.071(5), F.S., to prohibit a person from controlling or intentionally viewing child pornography and expands the list of items that cannot be possessed, controlled, or viewed if such items contain sexual conduct by a child. Specifically, the bill makes it a 3rd degree felony for a person to possess, *control, or intentionally view* any of the following, which, in whole or in part, he or she knows to include any sexual conduct by a child:

- Photograph,
- Motion picture,
- Exhibition,
- Show,
- *Representation of an image,*
- *Data,*
- *Computer depiction,* or
- Other presentation.

The bill defines the term "intentionally view" as "to deliberately, purposefully, and voluntarily view," and specifies that the control or viewing of each of the above-listed items is a separate offense. The bill keeps the offense ranked in Level 5 of the offense severity ranking chart.

B. SECTION DIRECTORY:

Section 1. Amends s. 827.071, F.S., relating to sexual performance by a child; penalties.

Section 2. Amends s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity ranking chart.

Section 3. The bill is effective October 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   On March 2, 2011, the Criminal Justice Impact Conference determined that this bill would have an indeterminate 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.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill makes it a crime to knowingly intentionally view child pornography. There are likely many instances in which child pornography is possessed, controlled, or viewed for bona fide educational, scientific, governmental, or judicial purposes; however, the bill does not currently contain any exceptions to the felony penalty created by the bill.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to sexual performance by a child; amending s. 827.071, F.S.; defining the term "intentionally view"; prohibiting controlling or intentionally viewing any photograph, motion picture, exhibition, show, representation of an image, data, computer depiction, or other presentation that includes sexual conduct by a child; providing penalties; amending s. 921.0022, F.S.; conforming provisions of the offense severity ranking chart of the Criminal Punishment Code to changes made by the act; providing an effective date.

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

Section 1. Subsections (1) and (5) of section 827.071, Florida Statutes, are amended to read:

827.071 Sexual performance by a child; penalties.—

(1) As used in this section, the following definitions shall apply:

(a) "Deviate sexual intercourse" means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

(b) "Intentionally view" means to deliberately, purposefully, and voluntarily view.

(c) ~~(b)~~ "Performance" means any play, motion picture, photograph, or dance or any other visual representation exhibited before an audience.

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(d) ~~(c)~~ "Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer or agree to do the same.

(e) ~~(d)~~ "Sadomasochistic abuse" means flagellation or torture by or upon a person, or the condition of being fettered, bound, or otherwise physically restrained, for the purpose of deriving sexual satisfaction from inflicting harm on another or receiving such harm oneself.

(f) ~~(e)~~ "Sexual battery" means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, "sexual battery" does not include an act done for a bona fide medical purpose.

(g) ~~(f)~~ "Sexual bestiality" means any sexual act between a person and an animal involving the sex organ of the one and the mouth, anus, or vagina of the other.

(h) ~~(g)~~ "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. A mother's breastfeeding of her baby does not under any circumstance constitute "sexual conduct."

(i) ~~(h)~~ "Sexual performance" means any performance or part

thereof which includes sexual conduct by a child of less than 18 years of age.

(j) ~~(i)~~ "Simulated" means the explicit depiction of conduct set forth in paragraph (h) ~~(g)~~ which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

(5) It is unlawful for any person to knowingly possess, control, or intentionally view any ~~a~~ photograph, motion picture, exhibition, show, representation of an image, data, computer depiction, or other presentation which, in whole or in part, he or she knows to include any sexual conduct by a child. The possession, control, or viewing of each such photograph, motion picture, exhibition, show, representation of an image, data, computer depiction, or presentation is a separate offense. A person who ~~Whoever~~ violates this subsection commits ~~is guilty of~~ a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 2. Paragraph (e) of subsection (3) of section 921.0022, Florida Statutes, is amended to read:

921.0022 Criminal Punishment Code; offense severity ranking chart.—

(3) OFFENSE SEVERITY RANKING CHART

(e) LEVEL 5

Florida Statute	Felony Degree	Description

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

316.027(1)(a)	3rd	Accidents involving personal injuries, failure to stop; leaving scene.
316.1935(4)(a)	2nd	Aggravated fleeing or eluding.
322.34(6)	3rd	Careless operation of motor vehicle with suspended license, resulting in death or serious bodily injury.
327.30(5)	3rd	Vessel accidents involving personal injury; leaving scene.
381.0041(11)(b)	3rd	Donate blood, plasma, or organs knowing HIV positive.
440.10(1)(g)	2nd	Failure to obtain workers' compensation coverage.
440.105(5)	2nd	Unlawful solicitation for the purpose of making workers' compensation claims.
440.381(2)	2nd	Submission of false, misleading, or incomplete information with the purpose of

		avoiding or reducing workers' compensation premiums.
624.401(4)(b)2.	2nd	Transacting insurance without a certificate or authority; premium collected $20,000 or more but less than $100,000.
626.902(1)(c)	2nd	Representing an unauthorized insurer; repeat offender.
790.01(2)	3rd	Carrying a concealed firearm.
790.162	2nd	Threat to throw or discharge destructive device.
790.163(1)	2nd	False report of deadly explosive or weapon of mass destruction.
790.221(1)	2nd	Possession of short-barreled shotgun or machine gun.
790.23	2nd	Felons in possession of firearms, ammunition, or electronic weapons or devices.

800.04(6)(c)	3rd	Lewd or lascivious conduct; offender less than 18 years.
800.04(7)(b)	2nd	Lewd or lascivious exhibition; offender 18 years or older.
806.111(1)	3rd	Possess, manufacture, or dispense fire bomb with intent to damage any structure or property.
812.0145(2)(b)	2nd	Theft from person 65 years of age or older; $10,000 or more but less than $50,000.
812.015(8)	3rd	Retail theft; property stolen is valued at $300 or more and one or more specified acts.
812.019(1)	2nd	Stolen property; dealing in or trafficking in.
812.131(2)(b)	3rd	Robbery by sudden snatching.
812.16(2)	3rd	Owning, operating, or conducting a chop shop.

817.034(4)(a)2.	2nd	Communications fraud, value $20,000 to $50,000.
817.234(11)(b)	2nd	Insurance fraud; property value $20,000 or more but less than $100,000.
817.2341(1),(2)(a) & (3)(a)	3rd	Filing false financial statements, making false entries of material fact or false statements regarding property values relating to the solvency of an insuring entity.
817.568(2)(b)	2nd	Fraudulent use of personal identification information; value of benefit, services received, payment avoided, or amount of injury or fraud, $5,000 or more or use of personal identification information of 10 or more individuals.
817.625(2)(b)	2nd	Second or subsequent fraudulent use of scanning device or

		reencoder.
825.1025(4)	3rd	Lewd or lascivious exhibition in the presence of an elderly person or disabled adult.
827.071(4)	2nd	Possess with intent to promote any photographic material, motion picture, etc., which includes sexual conduct by a child.
827.071(5)	3rd	Possess<u>, control, or intentionally view</u> any photographic material, motion picture, etc., which includes sexual conduct by a child.
839.13(2)(b)	2nd	Falsifying records of an individual in the care and custody of a state agency involving great bodily harm or death.
843.01	3rd	Resist officer with violence to person; resist arrest with violence.

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847.0135(5)(b)	2nd	Lewd or lascivious exhibition using computer; offender 18 years or older.
847.0137(2) & (3)	3rd	Transmission of pornography by electronic device or equipment.
847.0138(2) & (3)	3rd	Transmission of material harmful to minors to a minor by electronic device or equipment.
874.05(2)	2nd	Encouraging or recruiting another to join a criminal gang; second or subsequent offense.
893.13(1)(a)1.	2nd	Sell, manufacture, or deliver cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4. drugs).
893.13(1)(c)2.	2nd	Sell, manufacture, or deliver cannabis (or other s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8.,

			(2)(c)9., (3), or (4) drugs) within 1,000 feet of a child care facility, school, or state, county, or municipal park or publicly owned recreational facility or community center.
120			
	893.13(1)(d)1.	1st	Sell, manufacture, or deliver cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4. drugs) within 1,000 feet of university.
121			
	893.13(1)(e)2.	2nd	Sell, manufacture, or deliver cannabis or other drug prohibited under s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) within 1,000 feet of property used for religious services or a specified business site.
122			
	893.13(1)(f)1.	1st	Sell, manufacture, or deliver

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			cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), or (2)(a), (2)(b), or (2)(c)4. drugs) within 1,000 feet of public housing facility.
893.13(4)(b)		2nd	Deliver to minor cannabis (or other s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) drugs).
893.1351(1)		3rd	Ownership, lease, or rental for trafficking in or manufacturing of controlled substance.

Section 3. This act shall take effect October 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 739 Transition-to-Adulthood Services
SPONSOR(S): Porth
TIED BILLS: None **IDEN./SIM. BILLS:** SB 404

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health & Human Services Access Subcommittee	14 Y, 0 N	Batchelor	Schoolfield
2) Criminal Justice Subcommittee		Williams	Cunningham
3) Appropriations Committee			
4) Health & Human Services Committee			

SUMMARY ANALYSIS

HB 739 allows the Department of Juvenile Justice (DJJ) to provide older youth in its custody or under its supervision opportunities to participate in activities and services that assist in transition to adulthood. The bill also ensures that youth, who are in the custody of the Department of Children and Family Services (DCF) and enter a DJJ residential program, remain eligible for DCF services including independent living transition services.

The bill also permits the court to retain jurisdiction over a child for a year beyond the child's 19th birthday if they are participating in the transition to adulthood program.

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

The bill takes effect on July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Independent Living Transition Services

The Department of Children and Family Services (DCF) administers a system of independent living transition services to assist older children in foster care and 18 year olds exiting foster care to transition into self-sufficient adults.[1] This program was created in 2002, utilizing both state and federal funds to provide a continuum of services and financial assistance to prepare current and former foster youth to live independently.[2] Under the program, DCF serves children who have reached 13 years of age but are not 18 years of age and are in foster care.[3] DCF also serves young adults who have turned 18 years old but are not 23 years old and were in foster care when they turned 18 years old. They also serve youth, who after turning 16 years old were adopted from foster care or placed with a court approved dependency guardian and spent at least 6 months in foster care within the 12 months preceding placement or adoption.[4]

The DCF program provides services to assist young adults in obtaining life skills and education for independent living and employment.[5] Private and county government-based child welfare organizations deliver these services through the community-based care system.[6] DCF includes youth that have been adjudicated dependent and/or delinquent in independent living services programs. Foster youth who have been adjudicated delinquent and enter a juvenile justice placement are the shared responsibility of DCF and DJJ.[7] Current law provides no specific statutory requirement that requires DCF to provide independent living transition services to youth who are in foster care and also are being served by the Department of Juvenile Justice (DJJ). DCF presumes that these youth remain eligible for independent living transition services.[8]

Department of Juvenile Justice

DJJ is tasked with providing conditional release services to youth exiting juvenile justice residential programs. Conditional release is the care, treatment, help, and supervision provided to juveniles released from residential commitment programs to promote rehabilitation and prevent recidivism.[9] The program is intended to help prepare youth for a successful transition from DJJ commitment back to the community. Each youth in a DJJ residential program must be assessed to determine need for conditional release.

If upon leaving a DJJ residential program a youth's family abandons him or her or refuses to resume their parental duties, the youth has two options. First, he or she may use review teams, which are created through the interagency agreement with DCF and other agencies to remove obstacles that caused a parent to abandon the child, thus allowing the youth to return to their family. The youth may also call the DCF Central Abuse Hotline and file a report, which could result in an investigation by a child protective investigator if the report meets the statutory definition of abuse, neglect, or abandonment.[10] If, following the investigation, it is determined that the youth is in need of protection

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[1] s. 409.1451, F.S.
[2] *Id*
[3] s. 409.1451(2)(a)
[4] s. 409.1451(2)(b), F.S.
[5] s. 409.1451(1)(b), F.S.
[6] s. 409.1671, F.S.
[7] Staff Analysis, HB 739 (2011), Department of Children and Family Services. (On file with committee staff).
[8] *Id*
[9] s. 985.46(1)(a), F.S.
[10] s. 39.301,(9)(b), F.S.

and supervision of the court, DCF is required to file a petition for dependence. [11] Once adjucated dependent, DCF will take responsibility for serving the individual through the foster care system which may include independent living transition services.

Court Jurisdiction

A child who has committed a delinquent act will usually remain under the jurisdiction of the court, unless otherwise relinquished, until the child's 19th birthday. The court may also retain jurisdiction for a child beyond 19 years for special circumstances such as commitments to juvenile prison or high risk residential programs.[12]

Effect of Proposed Changes

The bill creates a definition for "transition to adulthood" to mean services for youth, which are in the custody or supervision of DJJ, to provide them with knowledge, skills and aptitudes to assist them in their adult lives. The bill also defines the services which may be included under this definition including assessment, plan development and services toward achieving transition to adulthood.

The bill provides Legislative intent that DJJ may provide older youth in custody or under supervision the opportunity to participate in transition to adulthood services. This appears to be a similar and augmented authority to what currently exists in the conditional release program operated by DJJ for youth transitioning back to the community.[13]

The bill also provides that youth who enter a DJJ placement from a foster care placement, and who are in legal custody of DCF are eligible to receive independent living transition services pursuant to s. 409.1451, F.S. The bill also provides that court ordered commitment or probation are not barriers to eligibility for youth to receive the array of services available if they were in foster care alone. This is consistent with current DCF policy.

The bill provides that adjudication of delinquency may not be considered by itself as disqualifying criteria for eligibility in DCF's Independent Living Program.

The bill permits DJJ to assess youth prior to placement in a transition to adulthood program. The assessment will include determining the youth's ability to live independently and become self-sufficient. DJJ is also given authority to develop a list of age-appropriate activities and responsibilities. Some of the activities include, but are not limited to, life skills training, banking and budgeting skills, interviewing and career planning skills, parenting skills, personal health management, time management or organizational skills, educational support, employment training, and counseling.

The bill permits DJJ to request parental or guardian consent for the youth to participate in the transition to adulthood program. The activities the youth will participate in and other transition services are to be incorporated into an overall plan which must be reviewed and updated quarterly. The plan must not interfere with parents or guardians rights to train the child.

DJJ is also given authority to contract for transition to adulthood services including residential services. The bill provides for program eligibility to include youth at least 17 but not yet 19 years of age and who are not a danger to the public and have a demonstrated aptitude for the program. The effect of this change will permit DJJ to provide services to youth in their custody or supervision to increase their ability to live independently and become self-sufficient adults.

The bill also allows the court to retain jurisdiction for an additional 365 days beyond a youth's 19th birthday if he or she is participating in a DJJ transition to adulthood program. This is similar to the

[11] *Id*
[12] s. 985.0301,F.S.
[13] s. 985.46, F.S.

provision for continued court jurisdiction of up to one year for children from the foster care system who are participating in the Independent Living program administered by DCF.[14]

B. SECTION DIRECTORY:

Section 1: Amends s. 985.03, F.S., relating to definitions.

Section 2: Creates s. 985.461, F.S., relating to transition to adulthood.

Section 3: Amends s. 985.0301, F.S., relating to jurisdiction.

Section 4: Creates an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

According to DJJ, this bill does not appear to have a fiscal impact.[15]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

[14] s. 39.013, F.S.

[15] ABAR: Analysis for HB 739, Department of Juvenile Justice. (On file with the House Criminal Justice Subcommittee).

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to transition-to-adulthood services; amending s. 985.03, F.S.; defining the term "transition-to-adulthood services"; creating s. 985.461, F.S.; providing legislative intent concerning transition-to-adulthood services for youth in the custody of the Department of Juvenile Justice; providing for eligibility for services for youth served by the department who are legally in the custody of the Department of Children and Family Services; providing that an adjudication of delinquency does not disqualify a youth in foster care from certain services from the Department of Children and Family Services; providing powers and duties of the Department of Juvenile Justice for transition services; providing for assessments; requiring that services be part of a plan leading to independence; amending s. 985.0301, F.S.; providing for retention of court jurisdiction over a child for a specified period following the child's 19th birthday if the child is participating in transition-to-adulthood services; providing that certain services require voluntary participation by affected youth and do not create an involuntary court-sanctioned residential commitment; providing an effective date.

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

Section 1. Present subsections (57) and (58) of section 985.03, Florida Statutes, are renumbered as subsections (58) and

(59), respectively, and a new subsection (57) is added to that section to read:

985.03 Definitions.—As used in this chapter, the term:

(57) "Transition-to-adulthood services" means services that are provided for youth in the custody of the department or under the supervision of the department and that have the objective of instilling the knowledge, skills, and aptitudes essential to a socially integrated, self-supporting adult life. The services may include, but are not limited to:

(a) Assessment of the youth's ability and readiness for adult life.

(b) A plan for the youth to acquire the knowledge, information, and counseling necessary to make a successful transition to adulthood.

(c) Services that have proven effective toward achieving the transition to adulthood.

Section 2. Section 985.461, Florida Statutes, is created to read:

985.461 Transition to adulthood.—

(1) The Legislature finds that older youth are faced with the need to learn how to support themselves within legal means and overcome the stigma of being delinquent. In most cases, parents expedite this transition. It is the intent of the Legislature that the department provide older youth in its custody or under its supervision with opportunities for participating in transition-to-adulthood services while in the department's commitment programs or in probation or conditional release programs in the community. These services should be

reasonable and appropriate for the youths' respective ages or special needs and provide activities that build life skills and increase the ability to live independently and become self-sufficient.

(2) Youth served by the department who are in the custody of the Department of Children and Family Services and who entered juvenile justice placement from a foster care placement, if otherwise eligible, may receive independent living transition services pursuant to s. 409.1451. Court-ordered commitment or probation with the department is not a barrier to eligibility for the array of services available to a youth who is in the dependency foster care system only.

(3) For a dependent child in the foster care system, adjudication for delinquency does not, by itself, disqualify such child for eligibility in the Department of Children and Family Services' independent living program.

(4) To support participation in transition-to-adulthood services and subject to appropriation, the department may:

(a) Assess the child's skills and abilities to live independently and become self-sufficient. The specific services to be provided shall be determined using an assessment of his or her readiness for adult life.

(b) Develop a list of age-appropriate activities and responsibilities to be incorporated in the child's written case plan for any youth 17 years of age or older who is under the custody or supervision of the department. Activities may include, but are not limited to, life skills training, including training to develop banking and budgeting skills, interviewing

and career planning skills, parenting skills, personal health management, and time management or organizational skills; educational support; employment training; and counseling.

(c) Provide information related to social security insurance benefits and public assistance.

(d) Request parental or guardian permission for the youth to participate in transition-to-adulthood services. Upon such consent, age-appropriate activities shall be incorporated into the youth's written case plan. This plan may include specific goals and objectives and shall be reviewed and updated at least quarterly. If the parent or guardian is cooperative, the plan may not interfere with the parent's or guardian's rights to nurture and train his or her child in ways that are otherwise in compliance with the law and court order.

(e) Contract for transition-to-adulthood services that include residential services and assistance and allow the child to live independently of the daily care and supervision of an adult in a setting that is not licensed under s. 409.175. A child under the care or supervision of the department who has reached 17 years of age but is not yet 19 years of age is eligible for such services if he or she does not pose a danger to the public and is able to demonstrate minimally sufficient skills and aptitude for living under decreased adult supervision, as determined by the department, using established procedures and assessments.

(5) For a child who is 17 years of age or older, under the department's care or supervision, and without benefit of parents or legal guardians capable of assisting the child in the

transition to adult life, the department may provide an assessment to determine the child's skills and abilities to live independently and become self-sufficient. Based on the assessment and within existing resources, services and training may be provided in order to develop the necessary skills and abilities before the child's 18th birthday.

(6) The provision of transition-to-adulthood services must be part of an overall plan leading to the total independence of the child from department supervision. The plan must include, but need not be limited to:

(a) A description of the child's skills and a plan for learning additional identified skills;

(b) The behavior that the child has exhibited which indicates an ability to be responsible and a plan for developing additional responsibilities, as appropriate;

(c) A plan for the provision of future educational, vocational, and training skills;

(d) Present financial and budgeting capabilities and a plan for improving resources and abilities;

(e) A description of the proposed residence;

(f) Documentation that the child understands the specific consequences of his or her conduct in such a program;

(g) Documentation of proposed services to be provided by the department and other agencies, including the type of services and the nature and frequency of contact; and

(h) A plan for maintaining or developing relationships with family, other adults, friends, and the community, as appropriate.

Section 3. Paragraph (a) of subsection (5) of section 985.0301, Florida Statutes, is amended to read:

985.0301 Jurisdiction.—

(5)(a) Notwithstanding ss. 743.07, 985.43, 985.433, 985.435, 985.439, and 985.441, and except as provided in ss. 985.461, 985.465, and 985.47 and paragraph (f), when the jurisdiction of any child who is alleged to have committed a delinquent act or violation of law is obtained, the court shall retain jurisdiction, unless relinquished by its order, until the child reaches 19 years of age, with the same power over the child which ~~that~~ the court had before ~~prior to~~ the child became ~~becoming~~ an adult. For the purposes of s. 985.461, the court may retain jurisdiction for an additional 365 days following the child's 19th birthday if the child is participating in transition-to-adulthood services. The additional services do not extend involuntary court-sanctioned residential commitment and therefore require voluntary participation by the affected youth.

Section 4. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 779 Restraint of Incarcerated Pregnant Women
SPONSOR(S): Reed
TIED BILLS: None **IDEN./SIM. BILLS:** CS/CS/SB 1086

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

SUMMARY ANALYSIS

HB 779 prohibits corrections officials from using restraints on a prisoner who is known to be pregnant, including during labor, transport to a medical facility, delivery, and postpartum recovery, unless the corrections official makes a determination of extraordinary circumstances that require the use of such restraints.

The bill requires a corrections official who authorizes the use of restraints due to an extraordinary circumstance to document the reasons for the exception within 10 days of the use of the restraints and the correctional institution must maintain this documentation on file and available for public inspection for at least 5 years.

The bill allows a prisoner who is restrained in violation of this section to file a complaint within one year after the incident.

The bill authorizes the Department of Corrections and the Department of Juvenile Justice to adopt rules to administer the new law.

The bill appears to have no fiscal impact and is effective July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

On October 10, 2010, the National Commission on Correctional Health Care Board of Directors adopted the following Position Statement on Restraint of Pregnant Inmates:

> "Restraint is potentially harmful to the expectant mother and fetus, especially in the third trimester as well as during labor and delivery. Restraint of pregnant inmates during labor and delivery should not be used. The application of restraints during all other pre-and postpartum periods should be restricted as much as possible and, when used, done so with consultation from medical staff. For the most successful outcome of a pregnancy, cooperation among custody staff, medical staff, and the patient is required."[1]

The Department of Juvenile Justice

The Department of Juvenile Justice (DJJ), through administrative rule, currently limits the use of mechanical restraints on pregnant youth: "If handcuffs are used on pregnant youth, they shall be cuffed in front. Leg restraints, waist chains, and the restraint belt shall not be used on pregnant youth."[2]

While this rule does not address the removal of restraints during labor and delivery, current practice is to remove the restraints during labor and delivery and any time a health care professional treating the youth requests the removal.[3]

County and Municipal Jails

The Florida Model Jail Standards contain the following provision related to the shackling of inmates:

> "Shackles or other personal restraints may be used within the secured areas of the facility. This standard should apply to inmates in transit or to inmates whose behavior presents an immediate danger to themselves, other inmates, or staff. Such inmates may be temporarily restrained by such devices only upon orders of the Officer-in-Charge or designee. Restraints shall never be used as punishment."[4]

These standards currently have no provisions related to the shackling of pregnant inmates, however, the standards direct local jails' written policies and defined procedures to require that pregnant inmates receive advice on appropriate levels of safety precautions.[5]

The Department of Corrections

The Department of Corrections (DOC) is responsible for the health care of inmates in its custody[6] and treats more than 80 pregnant inmates per year.[7] Florida refers each pregnant inmate to an OB/GYN

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[1] Position Paper on Restraint of Pregnant Inmates, adopted by the National Commission on Correctional Health Care Board of Directors (October 10, 2010), http://www.ncchc.org/resources/statements/restraint_pregnant_inmates.html (Last accessed March 31, 2011.)

[2] 63H-1.005(10), F.A.C.

[3] Department of Juvenile Justice 2011 Analysis of HB 779.

[4] "Chapter 11 Security and Control." 11.11. Florida Model Jail Standards. Effective 1/1/11. http://secure.flsheriffs.org/content/44/File/FMJS_-_010111.doc (Last accessed April 4, 2011.)

[5] *Ibid.* "Chapter 7 Medical." 7.25 - Prenatal Care.

[6] Section 945.6034, F.S.

physician to provide prenatal care and to follow her throughout her pregnancy. Inmates receive an extra nutritional meal each day, prenatal counseling, vitamins, and exams.[8]

DOC has an established procedure that limits the use of restraints on pregnant inmates.[9] Key components include:

- After it is learned that an inmate is pregnant (and during her postpartum period), her hands are not restrained behind her back and leg irons are not used. The use of waist chains or black boxes is also prohibited when there is any danger that they will cause harm to the inmate or fetus. The inmate's hands can be handcuffed in front of her body during transport and at the medical facility if required by security conditions due to her custody level and behavior. The shift supervisor's approval is required to remove handcuffs for medical reasons, except that approval is not required in an emergency situation.

- Unarmed escort officers are required to maintain close supervision of a pregnant inmate and to provide a "custodial touch" when necessary to prevent falls.

- An inmate in labor is not restrained, but after delivery she may be restrained to the bed with normal procedures (tethered to the bed by one ankle) for the remainder of her hospital stay. A correctional officer is stationed in the room with the inmate to be sure that she has access to the bathroom or can perform other needs that require movement.[10]

From 2009 to the present, there have been no formal inmate medical grievances submitted regarding the application of restraints during pregnancy.[11]

Effect of the Bill

HB 779 contains the following whereas clauses:

- Whereas, restraining a pregnant prisoner can pose undue health risks and increase the potential for physical harm to the woman and her pregnancy;

- Whereas, the vast majority of female prisoners in this state are nonviolent offenders;

- Whereas, the impact of such harm to a pregnant woman can negatively affect her pregnancy;

- Whereas, freedom from physical restraints is especially critical during labor, delivery, and postpartum recovery after delivery as women often need to move around during labor and recovery, including moving their legs as part of the birthing process;

- Whereas, restraints on a pregnant woman can interfere with the medical staff's ability to appropriately assist in childbirth or to conduct sudden emergency procedures; and

- Whereas, the Federal Bureau of Prisons, the United States Marshals Service, the American Correctional Association, the American College of Obstetricians and Gynecologists, and the American Public Health Association all oppose restraining women during labor, delivery, and postpartum recovery because it is unnecessary and dangerous to a woman's health and well-being.

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[7] Department of Corrections 2011 Analysis of HB 779.
[8] *Id.*
[9] Department of Corrections Procedure 602.024 (The Utilization of Restraints on Inmates During Prenatal and Postpartum Periods.)
[10] *Id.* Department of Corrections 2011 Analysis of HB 779.
[11] Department of Corrections 2011 Analysis of HB 779.

The bill creates the following definitions:

- "Corrections official" refers to the person who is responsible for oversight of a correctional facility, or his or her designee.

- "Correctional institutions" include any facility under the authority of DOC or DJJ as well as county and municipal detention facilities.

- "Labor" is the period of time before a birth during which contractions are of sufficient frequency, intensity, and duration to bring about effacement and progressive dilation of the cervix.

- "Postpartum recovery" is the time immediately following delivery, including recovery time in the hospital or infirmary following birth. The duration of postpartum recovery is determined by the physician.

- "Prisoner" includes any person who is incarcerated or detained in a correctional institution at any time in relation to a criminal offense, including both pre-trial and post-trial actions. It also includes any woman who is detained in a correctional institution under federal immigration laws.

- "Restraints" as any physical restraint or mechanical device used to control the movement of the body or limbs, including, but not limited to, flex cuffs, soft restraints, hard metal handcuffs, black boxes, chubb cuffs, leg irons, belly chains, security chairs, and convex shields.

The bill prohibits corrections officials from using restraints on a prisoner who is known to be pregnant, including during labor, transport to a medical facility, delivery, and postpartum recovery; unless the corrections official makes an individualized determination of extraordinary circumstances that require the use of such restraints. The bill defines "extraordinary circumstances" as an instance when:

(1) The prisoner presents a substantial flight risk; or

(2) There is an extraordinary medical or security circumstance that dictates the use of restraints for the safety and security of the prisoner, corrections or medical staff, other prisoners, or the public.

The bill specifies that even if there are extraordinary circumstances:

(1) The corrections official accompanying the prisoner must remove all restraints if removal is requested by the treating doctor, nurse, or other health care professional; and

(2) The use of leg and waist restraints is completely prohibited during labor and delivery.

The bill requires a corrections official who authorizes the use of restraints due to an extraordinary circumstance to document the reasons for the exception within 10 days of the use of the restraints. The correctional institution must maintain this documentation on file and available for public inspection for at least 5 years. However, the prisoner's identifying information may not be made public without the prisoner's consent.

In addition to maintaining a record of exceptions, the bill requires the secretaries of DOC and DJJ and the official responsible for any local correctional facility where a pregnant woman was shackled during the previous year to submit a written report to the Governor with an account of every instance in which shackles were used.

The bill authorizes DOC and DJJ to adopt rules to administer the new law, and requires each correctional institution to inform prisoners of the rules when they are admitted to the institution, include the policies and practices in the prison handbook, and post the policies in appropriate places within the institution.

The bill allows a prisoner who is restrained in violation of this section to file a complaint within one year after the incident and does not prevent her from filing a complaint under any other relevant provision of federal or state law.

B. SECTION DIRECTORY:

Section 1. Creates a new section of statute relating to shackling of incarcerated pregnant women.

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 Corrections reports that this bill would create an additional workload for staff as the bill requires the department to develop rules; update procedures and training materials; document the use of restraints; maintain documentation for five years and make it available for public inspection; and prepare any needed annual reports.[12]

   The Department of Juvenile Justice reports no fiscal impact,[13] however, the bill may create additional workload for staff to update procedures and training materials; document the use of restraints; maintain documentation for five years and make it available for public inspection; and prepare any needed annual reports.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   This bill may create additional staff workload for county and municipal detention facilities to update procedures and training materials; document the use of restraints; maintain documentation for five years and make it available for public inspection; and prepare any needed annual reports.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

[12] Department of Corrections 2011 Analysis of HB 779.
[13] Department of Juvenile Justice 2011 Analysis of HB 779.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill authorizes the Department of Corrections and the Department of Juvenile Justice to adopt rules pursuant to ss. 120.536(1) and 120.54, F.S., to administer this section.

C. DRAFTING ISSUES OR OTHER COMMENTS:

- The bill states that restraints may not be used "on a prisoner known to be pregnant, including during labor, transport to a medical facility, delivery, and postpartum recovery ..." This implies that restraints may not be used on a prisoner who is at any stage in her pregnancy. If the intent is to prohibit the use of restraints during latter stages, clarifying language should be added.

- Clarification should be made as to whether the bill is intended to apply to correctional facilities operated by private companies.

- Unless it is already covered by an existing exemption, the requirement to redact prisoner's identifying information from publicly obtainable information creates a new public records exemption and therefore must meet requirements for enacting such legislation. It is unclear whether this new law provides protection of this personal identifying information within existing public records exemptions found in s. 945.10, F.S.

  However, it appears that s. 985.04, F.S., which states that records in the custody of the DJJ regarding children are not open to inspection by the public, is consistent with the bill as it prohibits releasing the name of the child prisoner.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to the restraint of incarcerated pregnant women; providing a short title; defining terms; prohibiting a correctional institution or county or municipal detention facility from using restraints on a prisoner known to be pregnant unless a corrections official makes an individualized determination that the prisoner presents an extraordinary circumstance requiring restraints; providing that a doctor, nurse, or other health care professional treating the prisoner may request that restraints not be used, in which case the corrections official accompanying the prisoner shall remove all restraints; requiring that any restraint applied must be done in the least restrictive manner necessary; requiring the corrections official to make written findings within 10 days as to the extraordinary circumstance that dictated the use of restraints; requiring that the findings be kept on file by the correctional institution or detention facility for at least 5 years and be made available for public inspection under certain circumstances; authorizing any woman who is restrained in violation of the act to file a complaint within a specified period; providing that these remedies do not prevent a woman harmed from filing a complaint under any other relevant provision of federal or state law; directing the Department of Corrections and the Department of Juvenile Justice to adopt rules; requiring correctional institutions and detention facilities to inform prisoners of the rules upon admission, including

the policies and practices in the prisoner handbook, and post the policies and practices in the correctional institution or detention facility; requiring the Secretary of Corrections, the Secretary of Juvenile Justice, and county and municipal corrections officials to annually file written reports with the Executive Office of the Governor detailing each incident of shackling; providing an effective date.

WHEREAS, restraining a pregnant prisoner can pose undue health risks and increase the potential for physical harm to the woman and her pregnancy, and

WHEREAS, the vast majority of female prisoners in this state are nonviolent offenders, and

WHEREAS, the impact of such harm to a pregnant woman can negatively affect her pregnancy, and

WHEREAS, freedom from physical restraints is especially critical during labor, delivery, and postpartum recovery after delivery as women often need to move around during labor and recovery, including moving their legs as part of the birthing process, and

WHEREAS, restraints on a pregnant woman can interfere with the medical staff's ability to appropriately assist in childbirth or to conduct sudden emergency procedures, and

WHEREAS, the Federal Bureau of Prisons, the United States Marshals Service, the American Correctional Association, the American College of Obstetricians and Gynecologists, and the American Public Health Association all oppose restraining women

during labor, delivery, and postpartum recovery because it is unnecessary and dangerous to a woman's health and well-being, NOW, THEREFORE,

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

Section 1. Shackling of incarcerated pregnant women.—

(1) SHORT TITLE.—This section may be cited as the "Healthy Pregnancies for Incarcerated Women Act."

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

(a) "Correctional institution" means any facility under the authority of the department, the Department of Juvenile Justice, or a county or municipal detention facility.

(b) "Corrections official" means the official who is responsible for oversight of a correctional institution, or his or her designee.

(c) "Department" means the Department of Corrections.

(d) "Extraordinary circumstance" means a substantial flight risk or some other extraordinary medical or security circumstance that dictates restraints be used to ensure the safety and security of the prisoner, the staff of the correctional institution or medical facility, other prisoners, or the public.

(e) "Labor" means the period of time before a birth during which contractions are of sufficient frequency, intensity, and duration to bring about effacement and progressive dilation of the cervix.

(f) "Postpartum recovery" means, as determined by her

physician, the period immediately following delivery, including the recovery period when a woman is in the hospital or infirmary following birth.

(g) "Prisoner" means any person incarcerated or detained in any correctional institution who is accused of, convicted of, sentenced for, or adjudicated delinquent for a violation of criminal law or the terms and conditions of parole, probation, community control, pretrial release, or a diversionary program. For purposes of this section, the term includes any woman detained under the immigration laws of the United States at any correctional institution.

(h) "Restraints" means any physical restraint or mechanical device used to control the movement of a prisoner's body or limbs, including, but not limited to, flex cuffs, soft restraints, hard metal handcuffs, a black box, chubb cuffs, leg irons, belly chains, a security or tether chain, or a convex shield.

(3) RESTRAINT OF PRISONERS.—

(a) A corrections official may not use restraints on a prisoner known to be pregnant, including during labor, transport to a medical facility, delivery, and postpartum recovery, unless the corrections official makes an individualized determination that the prisoner presents an extraordinary circumstance, except that:

1. If the doctor, nurse, or other health care professional treating the prisoner requests that restraints not be used, the corrections official accompanying the pregnant prisoner shall remove all restraints; and

2. Under no circumstances shall leg or waist restraints be used on any pregnant prisoner who is in labor or delivery.

(b) If restraints are used on a pregnant prisoner pursuant to paragraph (a):

1. The type of restraint applied and the application of the restraint must be done in the least restrictive manner necessary; and

2. The corrections official shall make written findings within 10 days as to the extraordinary circumstance that dictated the use of the restraints. These findings shall be kept on file by the correctional institution for at least 5 years and be made available for public inspection, except that the identifying information of a prisoner may not be made public without the prisoner's prior written consent.

(4) ENFORCEMENT.—

(a) Notwithstanding any relief or claims afforded by federal or state law, any prisoner who is restrained in violation of this section may file a complaint within 1 year after the incident.

(b) This section does not prevent a woman harmed under this section from filing a complaint under any other relevant provision of federal or state law.

(5) NOTICE TO PRISONERS.—

(a) By September 1, 2011, the department and the Department of Juvenile Justice shall adopt rules pursuant to ss. 120.536(1) and 120.54, Florida Statutes, to administer this section.

(b) Each correctional institution shall inform prisoners

of the rules developed pursuant to paragraph (a) upon admission to the correctional institution, including the policies and practices in the prisoner handbook, and post the policies and practices in locations in the correctional institution where such notices are commonly posted, including common housing areas and medical care facilities.

(6) ANNUAL REPORT.—By June 30 of each year, the Secretary of Corrections, the Secretary of Juvenile Justice, and the corrections official of each municipal and county detention facility where a pregnant prisoner had been shackled during that previous year shall submit a written report to the Executive Office of the Governor which includes an account of every instance using restraints pursuant to this section. The written reports may not contain identifying information of any prisoner. Such reports shall be made available for public inspection.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1005 Murder of a Child 17 Years Of Age or Younger
SPONSOR(S): Artiles and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1536

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

SUMMARY ANALYSIS

HB 1005 creates s. 782.066, F.S., entitled "Murder; child 17 years of age or younger." The bill provides that when a person is charged with second or third degree murder pursuant to s. 782.04(2), (3), or (4), F.S., where the victim was a child 17 years of age or younger, the offense for which the person is charged will be reclassified, regardless of whether the person had a reason to know the age of the victim. The bill reclassifies the offenses as follows:

- In the case of a violation of s. 782.04(2), F.S., (second degree murder) from a 1st degree felony to a capital felony.
- In the case of a violation of s. 782.04(3), F.S., (second degree murder) from a 1st degree felony to a 1st degree felony punishable by imprisonment for a term of years not exceeding life or by up to 30 years imprisonment and a $10,000 fine.
- In the case of a violation of s. 782.04(4), F.S., (third degree murder) from a 2nd degree felony to a 1st degree felony punishable by up to 30 years imprisonment and a $10,000 fine.

The bill prohibits a court from suspending, deferring, or withholding adjudication of guilt or imposition of sentence for any violation of s. 782.066, F.S.

The Criminal Justice Impact Conference has not met to determine the prison bed impact of the bill. However, because the bill reclassifies the felony penalties for murder offenses committed against a person 17 years of age or younger to a higher degree, it will likely have a prison bed impact.

The bill is effective October 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

First Degree Murder
Section 782.04(1), F.S., defines first degree murder as the unlawful killing of a human being:

- When perpetrated from a premeditated design to effect the death of the person killed or any human being;
- When committed by a person engaged in the perpetration of, or in the attempt to perpetrate:
  - Trafficking offense prohibited by s. 893.135(1), F.S.,
  - Arson,
  - Sexual battery,
  - Robbery,
  - Burglary,
  - Kidnapping,
  - Escape,
  - Aggravated child abuse,
  - Aggravated abuse of an elderly person or disabled adult,
  - Aircraft piracy,
  - Unlawful throwing, placing, or discharging of a destructive device or bomb,
  - Carjacking,
  - Home-invasion robbery,
  - Aggravated stalking,
  - Murder of another human being,
  - Resisting an officer with violence to his or her person,
  - Felony that is an act of terrorism[1] or is in furtherance of an act of terrorism; or
- Which resulted from the unlawful distribution of any substance controlled under s. 893.03(1), F.S., cocaine as described in s. 893.03(2)(a)4., F.S., opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or methadone by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user.

First degree murder is a capital felony punishable by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141, F.S.,[2] results in findings by the court that such person shall be punished by death. If such proceeding results in findings by the court that the person shall not be punished by death, such person must be punished by life imprisonment and is ineligible for parole.

Second Degree Murder
Section 782.04(2), F.S., provides that it is second degree murder to unlawfully kill a human being when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual.

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[1] Section 782.04(5), F.S., defines "terrorism" as an activity that involves a violent act or an act dangerous to human life which is a violation of the criminal laws of this state or of the United States, or involves a violation of s. 815.06; and is intended to:
- Intimidate, injure, or coerce a civilian population;
- Influence the policy of a government by intimidation or coercion; or
- Affect the conduct of government through destruction of property, assassination, murder, kidnapping, or aircraft piracy.

[2] Section 921.141, F.S., requires a court, upon conviction or adjudication of guilt of a defendant of a capital felony, to conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable. After hearing all the evidence, the jury must deliberate and render an advisory sentence to the court, based upon specified aggravating and mitigating circumstances. Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, must enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it must set forth in writing its findings upon which the sentence of death is based.

Section 782.04(3), F.S., provides that when a person is killed in the perpetration of, or in the attempt to perpetrate, any of the following offenses by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony is guilty of second degree murder:

- Trafficking offense prohibited by s. 893.135(1), F.S.,
- Arson,
- Sexual battery,
- Robbery,
- Burglary,
- Kidnapping,
- Escape,
- Aggravated child abuse,
- Aggravated abuse of an elderly person or disabled adult,
- Aircraft piracy,
- Unlawful throwing, placing, or discharging of a destructive device or bomb,
- Carjacking,
- Home-invasion robbery,
- Aggravated stalking,
- Murder of another human being,
- Resisting an officer with violence to his or her person, or
- Felony that is an act of terrorism or is in furtherance of an act of terrorism,

Second degree murder, as provided in s. 782.04(2) and (3), F.S., is a 1st degree felony punishable by imprisonment for a term of years not exceeding life or by up to 30 years imprisonment and a $10,000 fine.

Third Degree Murder
Section 782.04(4), F.S., defines third degree murder as the unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any:

- Trafficking offense prohibited by s. 893.135(1), F.S.,
- Arson,
- Sexual battery,
- Robbery,
- Burglary,
- Kidnapping,
- Escape,
- Aggravated child abuse,
- Aggravated abuse of an elderly person or disabled adult,
- Aircraft piracy,
- Unlawful throwing, placing, or discharging of a destructive device or bomb,
- Unlawful distribution of any substance controlled under s. 893.03(1), F.S., cocaine as described in s. 893.03(2)(a)4., F.S., or opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,
- Carjacking,
- Home-invasion robbery,
- Aggravated stalking,
- Murder of another human being,
- Resisting an officer with violence to his or her person, or
- Felony that is an act of terrorism or is in furtherance of an act of terrorism,

Third degree murder is a 2nd degree felony punishable by up to 15 years imprisonment and a $10,000 fine.

Effect of the Bill

HB 1005 creates s. 782.066, F.S., entitled "Murder; child 17 years of age or younger." The bill provides that when a person is charged with second or third degree murder pursuant to s. 782.04(2), (3), or (4), F.S., where the victim was a child 17 years of age or younger, the offense for which the person is charged will be reclassified, regardless of whether the person had a reason to know the age of the victim. The bill reclassifies the offenses as follows:

- In the case of a violation of s. 782.04(2), F.S., (second degree murder) from a 1st degree felony to a capital felony.
- In the case of a violation of s. 782.04(3), F.S., (second degree murder) from a 1st degree felony to a 1st degree felony punishable by imprisonment for a term of years not exceeding life or by up to 30 years imprisonment and a $10,000 fine.
- In the case of a violation of s. 782.04(4), F.S., (third degree murder) from a 2nd degree felony to a 1st degree felony punishable by up to 30 years imprisonment and a $10,000 fine.

The bill provides that notwithstanding s. 948.01, F.S.,[3] the court may not suspend, defer, or withhold adjudication of guilt or imposition of sentence for any violation.

B. SECTION DIRECTORY:

Section 1. Creates s. 782.066, F.S., relating to murder; child 17 years of age or younger.

Section 2. The bill is effective October 1, 2011.

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 the prison bed impact of the bill. However, because the bill reclassifies the felony penalties for murder offenses committed against a person 17 years of age or younger to a higher degree, it will likely have a prison bed impact.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

[3] Section 948.01(2), F.S., provides that if it appears to the court upon a hearing of the matter that a defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt. In either case, the court shall stay and withhold the imposition of sentence upon the defendant and shall place a felony defendant upon probation.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill provides that when a person is charged with second degree murder pursuant to s. 782.04(3), F.S., where the victim was a child 17 years of age or younger, the offense for which the person is charged will be reclassified from a 1st degree felony to a 1st degree felony punishable by imprisonment for a term of years not exceeding life or by up to 30 years imprisonment and a $10,000 fine.

This provision appears unnecessary because violations of s. 782.04(3), F.S., are currently punishable by imprisonment for a term of years not exceeding life or by up to 30 years imprisonment and a $10,000 fine.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to murder of a child 17 years of age or younger; creating s. 782.066, F.S.; reclassifying specified murder offenses if committed upon a child 17 years of age or younger; prohibiting a court from suspending, deferring, or withholding adjudication of guilt or imposition of sentence; providing an effective date.

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

Section 1. Section 782.066, Florida Statutes, is created to read:

782.066 Murder; child 17 years of age or younger.—

(1) Whenever a person is charged with committing a violation of s. 782.04, other than s. 782.04(1), upon a child 17 years of age or younger, the offense for which the person is charged shall be reclassified as follows, regardless of whether he or she had a reason to know the age of the victim:

(a) In the case of a violation of s. 782.04(2), from a felony of the first degree to a capital felony, punishable as provided in s. 775.082.

(b) In the case of a violation of s. 782.04(3), from a felony of the first degree to a felony of the first degree punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) In the case of a violation of s. 782.04(4), from a felony of the second degree to a felony of the first degree.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

(2) Notwithstanding s. 948.01, a court may not suspend, defer, or withhold adjudication of guilt or imposition of sentence for any violation of this section.

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

CODING: Words stricken are deletions; words underlined are additions.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1217 Persons with Disabilities
SPONSOR(S): Taylor
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1974

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee		Williams	Cunningham
2) Transportation & Highway Safety Subcommittee			
3) Appropriations Committee			
4) Judiciary Committee			

SUMMARY ANALYSIS

Section 322.12, F.S., requires every applicant for a Florida driver's license to pass an examination and specifies what such exam must include.

HB 1217 amends s. 322.12, F.S., to require Class E and commercial driver's license exams to include one question testing the applicant's knowledge of traffic regulations to assist blind persons. This question must emphasize pedestrian right of way when a driver is making a right turn at an intersection and must be answered correctly in order for the applicant to pass the examination.

This bill also:

- Requires the curricula of traffic law and substance abuse education programs and certain driver education courses to include the study of traffic laws to assist blind persons;
- Requires law enforcement agencies to report certain criminal activity and enforcement of regulations to assist blind persons to the Florida Department of Law Enforcement (FDLE) and the Florida Department of Highway Safety and Motor Vehicles (DHSMV); and
- Requires the law enforcement officer basic recruit training course curricula to include the study of traffic laws to assist blind persons.

This bill may have a fiscal impact on the FDLE and the DHSMV. See Fiscal section.

The bill is effective July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Driver's License Handbook

The Florida Driver's Handbook provides basic information on safe driving and Florida's traffic laws and regulations. This handbook includes facts and procedures on obtaining a driver's license, driving privileges, and driving safety. The handbook also includes safety rules for drivers on sharing the road with pedestrians, bicyclists, and persons who are blind. For example, section 5.16.2, entitled "Persons Who are Blind," includes advice on how to recognize a blind pedestrian and states that "[d]rivers must always yield the right-of-way to persons who are blind. When a pedestrian is crossing a street or highway guided by a dog or carrying a white cane (or a white cane with a red tip), vehicles must come to a complete stop."[1]

Copies of the Florida Driver's Handbook are available at the Florida Department of Highway Safety and Motor Vehicles (DHSMV) or online,[2] to assist applicants in preparation for the Florida driver's license examination.

Examination

Section 322.12, F.S., requires every applicant for an original Florida driver's license to pass an examination.[3] An examination for a Class E[4] driver's license includes the following:

- A test of the applicant's eyesight;
- A test of the applicant's hearing;
- A test of the applicant's ability to read and understand highway signs regulating, warning, and directing traffic; his or her knowledge of the traffic laws of this state, including laws regulating driving under the influence of alcohol or controlled substances, driving with an unlawful blood-alcohol level, and driving while intoxicated;
- A test of the applicant's knowledge of the effects of alcohol and controlled substances upon persons and the dangers of driving a motor vehicle while under the influence of alcohol or controlled substances; and
- An actual demonstration of ability to exercise ordinary and reasonable control in the operation of a motor vehicle.[5]

In addition to the above, an examination for a commercial driver's license[6] must also include:

- A test of the applicant's knowledge of the traffic laws of this state pertaining to the class of motor vehicle which he or she is applying to be licensed to operate;
- A test of the applicant's knowledge of any special skills, requirements, or precautions necessary for the safe operation of the class of vehicle the applicant is applying to be licensed to operate; and
- An actual demonstration of the applicant's ability to exercise ordinary and reasonable control in the safe operation of a motor vehicle or combination of vehicles of the type covered by the

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[1] 2011 Florida Driver's Handbook. Department of Highway Safety and Motor Vehicle. Revised September 2010. (http://www.fpts.us/documents/Florida_Driver_Handbook.pdf) (last assessed April 1, 2011).

[2] http://www.fpts.us/documents/Florida_Driver_Handbook.pdf

[3] Section 322.12(1), F.S.

[4] Class E is for drivers of non-commercial vehicles. 2011 Florida Driver's Handbook. Department of Highway Safety and Motor Vehicle. Revised September 2010. Section 2.2 - Florida Classified Driver Licenses. (http://www.fpts.us/documents/Florida_Driver_Handbook.pdf) (last assessed April 1, 2011).

[5] Section 322.12(3), F.S.

[6] "Commercial driver's license" means a Class A, Class B, or Class C driver's license issued in accordance with the requirements of s. 322.01(7).

license classification which the applicant is seeking, including an examination of the applicant's ability to perform an inspection of his or her vehicle.[7]

Driver's License exams are currently formulated by pulling random questions from a pool and scrambling the order of the pulled questions.[8] Twenty road signs, to be identified by color, shape or meaning, and 20 questions regarding Florida traffic laws are selected for each applicant taking the exam.[9] Questions about blind pedestrians may be, but are not guaranteed to be, tested on current driver's license examinations. To pass an examination an applicant must receive a test score of 80% or above.[10]

Effect of the Bill
HB 1217 amends s. 322.12, F.S., to require the examinations given for a Class E driver's license and a commercial driver's license to include one question testing the applicant's knowledge of traffic regulations to assist blind persons. The question must emphasize pedestrian right of way when a driver is making a right turn at an intersection. The bill requires the applicant to answer the question correctly in order for the applicant to pass the examination.

Educational Courses
Section 322.095, F.S., requires the DHSMV to approve traffic law and substance abuse education courses that must be completed by applicants for Florida driver's license. The curricula for the courses must provide instruction on the physiological and psychological consequences of the abuse of alcohol and other drugs, the societal and economic costs of alcohol and drug abuse, the effects of alcohol and drug abuse on the driver of a motor vehicle,[11] and the laws of this state relating to the operation of a motor vehicle.[12] Similarly s. 1003.48, F.S., requires each district school board of secondary schools in Florida to provide a course of study and instruction on the safe and lawful operation of a motor vehicle including motorcycles and mopeds.

Currently, the courses required by ss. 322.095 and 1003.48, F.S., are not required to include the study of traffic laws relating to blind persons. However, traffic law and substance abuse education courses do address the importance of being alert of all pedestrians on the roadway.[13]

Effect of the Bill
HB 1217 amends ss. 322.095 and 1003.48, F.S., to require the curricula of the courses required by these sections to include the study of traffic laws to assist blind persons.

Law Enforcement
In Florida, the Criminal Justice Standards and Training Commission (CJSTC), housed within the Florida Department of Law Enforcement (FDLE), establishes uniform minimum standards for the employment and training of full-time, part-time, and auxiliary law enforcement, correctional, and correctional probation officers. Every prospective law enforcement officer, correctional officer, and correctional

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[7] Section 322.12(4), F.S.
[8] Email from Stephen Fielder, Department of Highway Safety and Motor Vehicles. March 31, 2011. (On file with the House Criminal Justice Subcommittee).
[9] 2011 Florida Driver's Handbook. Department of Highway Safety and Motor Vehicle. Revised September 2010. (http://www.fpts.us/documents/Florida_Driver_Handbook.pdf) (last assessed April 1, 2011).
[10] Department of Highway Safety and Motor Vehicle, Agency Bill Analysis. March 17, 2011. (On file with House Criminal Justice Subcommittee staff).
[11] "Motor vehicle" means an automobile, motorcycle, truck, trailer, semitrailer, truck tractor and semitrailer combination, or any other vehicle operated on the roads of this state, used to transport persons or property, and propelled by power other than muscular power, but the term does not include traction engines, road rollers, such vehicles as run only upon a track, bicycles, or mopeds. s. 320.01(1)(a), F.S.
[12] Section 322.095(1), F.S.
[13] Department of Highway Safety and Motor Vehicle, Agency Bill Analysis. March 17, 2011. (On file with House Criminal Justice Subcommittee staff).

probation officer must successfully complete a CJSTC-developed Basic Recruit Training Program in order to receive their certification.[14]

Section 943.17, F.S., requires the CJSTC, in consultation with the Florida Violent Crime and Drug Council, [15] to establish standards for basic and advance training programs on investigating and preventing violent crimes for law enforcement officers. The statute also requires every law enforcement officer basic recruit training course to include training on violent crime prevention and investigations.[16]

Effect of the Bill
HB 1217 also amends s. 943.17, F.S., to require the law enforcement officer basic recruit training course curricula to include the study of traffic laws to assist blind persons.

The bill creates an unnumbered section of statute to require each law enforcement agency of this state to report crimes which affect persons with disabilities to the FDLE and to report the agency's enforcement of traffic regulations to assist blind persons to the DHSMV. The report to the DHSMV must include incidents of crashes involving blind persons. These reports must be provided each month.

The bill also requires the FDLE and the DHSMV to provide procedures for collecting and maintaining the reports from the law enforcement agencies in the same manner in which other criminal activity and enforcement reports are currently collected and maintained within each department.

B. SECTION DIRECTORY:

Section 1. Creates an unnumbered section of the Florida Statutes relating to law enforcement reports.

Section 2. Amends s. 322.12, F.S., relating to examination of applicants.

Section 3. Amends s. 322.095, F.S., relating to traffic law and substance abuse education program for driver's license applicants.

Section 4. Amends s. 943.17, F.S., relating to basic recruit, advanced, and career development training programs; participation; cost; evaluation.

Section 5. Amends s. 1003.48, F.S., relating to instruction in operation of motor vehicles.

Section 6. Provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

HB 1217 requires one question, emphasizing a pedestrian's right of way when a driver is making a right turn at an intersection, to be answered correctly by an applicant in order to pass a driver's examination.

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[14] *See* (http://www.fdle.state.fl.us/Content/getdoc/91a75023-5a74-40ef-814d-8e7e5b622d4d/CJSTC-Home-Page.aspx) (last accessed March 31, 2011).
[15] The Florida Violent Crime and Drug Council was established in 1993, to financially assist local law enforcement agencies in finding solutions to combat drug and violent crime; these solutions often include legislative recommendations, technology innovations, improved investigative techniques, enhanced communication, and advanced training for law enforcement officers and criminal justice agencies. *See* (http://www.fdle.state.fl.us/Content/getdoc/5bcffc57-b3f4-4190-833b-0236a4608d1e/Home.aspx) (last accessed March 31, 2011).
[16] Section 943.17(5), F.S.

The Florida Handbook provides that an applicant that fails the examination must pay a $10 fee to take another exam. Therefore, additional revenue may be collected if an increased number of applicants fail the exam due to the question requirement of the bill. According to the DHSMV, this revenue will be deposited into the DHSMV's operating trust fund, but the amount is indeterminate.[17]

2. Expenditures:

This bill requires the FDLE to provide procedures for collecting and maintaining reports of crimes affecting persons of disabilities. Currently crime data is submitted to the FDLE on paper by the reporting agencies.[18] According to the FDLE programming changes would be required to create a database capable of collecting crimes against persons with disabilities.[19] FDLE would require 512 hours of contract programming ($38,400) and equipment in the amount of $2,000 to complete this project.[20]

This bill also requires the curricula of every law enforcement office basic recruit training course to include the study of traffic laws to assist blind persons. According to the FDLE, there is no cost associated with this provision because the existing curriculum of basic recruit training courses already addresses the issue.[21]

Additionally, the bill requires the examinations given for a Class E driver's license and a commercial driver's license, to include one question testing the applicant's knowledge of traffic regulations to assist blind persons. This question must emphasize pedestrian right of way when a driver is making a right turn at an intersection and must also be answered correctly by the applicant in order to pass the examination.

According to the DHSMV, modification of their system to include the question required by the bill would be simple.[22] However, the process required to disqualify someone for incorrectly answering the specific question required by the bill, even if they score 80% of the questions correctly, would require extensive programming.[23]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See "Fiscal Comments."

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill requires the traffic law and substance abuse education courses to include a study of traffic laws to assist blind persons. The DHSMV reports that there are currently 12 different organizations that provide traffic law and substance abuse education courses. According to the DHSMV, the direct cost to the private sector would be that needed to incorporate the curricula requirements of the bill into their courses.[24]

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[17] Department of Highway Safety and Motor Vehicle, Agency Bill Analysis. March 17, 2011. (On file with House Criminal Justice Subcommittee staff).
[18] Department of the Florida Department of Law Enforcement, Agency Bill Analysis. April 4, 2011. (On file with House Criminal Justice Subcommittee staff).
[19] *Id.*
[20] *Id.*
[21] Email from Rachel Truxell, Florida Department of Law Enforcement, Office of Legislative Affairs. April 4, 2011. (On file with House Criminal Justice Subcommittee staff).
[22] Department of Highway Safety and Motor Vehicle, Agency Bill Analysis. March 17, 2011. (On file with House Criminal Justice Subcommittee staff).
[23] *Id.*
[24] *Id.*

D. FISCAL COMMENTS:

Section 1003.48, F.S., requires each district school board of secondary schools in Florida to provide a course of study and instruction on the safe and lawful operation of a motor vehicle including motorcycles and mopeds. The bill requires the curricula of such course to include a study of traffic laws to assist blind persons. This may have a fiscal impact on district school boards of secondary schools.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to persons with disabilities; requiring law enforcement agencies to report certain criminal activity and enforcement of certain regulations to the Department of Law Enforcement and the Department of Highway Safety and Motor Vehicles; amending s. 322.12, F.S.; providing requirements for examination questions pertaining to traffic regulations relating to blind pedestrians; amending s. 322.095, F.S.; requiring certain traffic law education programs to include the study of traffic laws to assist blind persons; amending s. 943.17, F.S.; requiring the basic skills course required in order for law enforcement officers to obtain certification to include the study of traffic laws to assist blind persons; amending s. 1003.48, F.S.; requiring driver education programs to include study of traffic laws to assist blind persons; providing an effective date.

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

Section 1. Law enforcement reports.—Each month, each law enforcement agency in the state shall report crimes affecting persons with disabilities to the Department of Law Enforcement and report its enforcement of traffic regulations to assist blind persons to the Department of Highway Safety and Motor Vehicles. The report to the Department of Highway Safety and Motor Vehicles shall include incidents of crashes involving blind persons. The Department of Law Enforcement and the

CODING: Words stricken are deletions; words underlined are additions.

Department of Highway Safety and Motor Vehicles shall each provide procedures for the collection and maintenance of the reports in the same manner as other criminal activity and enforcement reports are collected and maintained by that department.

Section 2. Subsection (6) is added to section 322.12, Florida Statutes, to read:

322.12 Examination of applicants.—

(6) Each examination given for a Class E driver's license or a commercial driver's license under this section must include one question testing the applicant's knowledge of traffic regulations to assist blind persons. To pass the examination, the applicant must answer that question on the examination correctly. In developing questions under this subsection, the department shall emphasize pedestrian right of way when a driver is making a right turn at an intersection.

Section 3. Subsection (1) of section 322.095, Florida Statutes, is amended to read:

322.095 Traffic law and substance abuse education program for driver's license applicants.—

(1) The Department of Highway Safety and Motor Vehicles must approve traffic law and substance abuse education courses that must be completed by applicants for a Florida driver's license. The curricula for the courses must provide instruction on the physiological and psychological consequences of the abuse of alcohol and other drugs, the societal and economic costs of alcohol and drug abuse, the effects of alcohol and drug abuse on the driver of a motor vehicle, and the laws of this state

relating to the operation of a motor vehicle. The curricula must also include the study of traffic laws to assist blind persons. All instructors teaching the courses shall be certified by the department.

Section 4. Subsection (5) of section 943.17, Florida Statutes, is amended to read:

943.17 Basic recruit, advanced, and career development training programs; participation; cost; evaluation.—The commission shall, by rule, design, implement, maintain, evaluate, and revise entry requirements and job-related curricula and performance standards for basic recruit, advanced, and career development training programs and courses. The rules shall include, but are not limited to, a methodology to assess relevance of the subject matter to the job, student performance, and instructor competency.

(5) The commission, in consultation with the Florida Violent Crime and Drug Control Council, shall establish standards for basic and advanced training programs for law enforcement officers in the subjects of investigating and preventing violent crime. The curricula of every basic skills course required in order for law enforcement officers to obtain initial certification must include the study of traffic laws to assist blind persons. After January 1, 1995, every basic skills course required in order for law enforcement officers to obtain initial certification must include training on violent crime prevention and investigations.

Section 5. Subsection (1) of section 1003.48, Florida Statutes, is amended to read:

1003.48 Instruction in operation of motor vehicles.—

(1) A course of study and instruction in the safe and lawful operation of a motor vehicle shall be made available by each district school board to students in the secondary schools in the state. As used in this section, the term "motor vehicle" shall have the same meaning as in s. 320.01(1)(a) and shall include motorcycles and mopeds. Instruction in motorcycle or moped operation may be limited to classroom instruction. The curricula of every course must include the study of traffic laws to assist blind persons. The course shall not be made a part of, or a substitute for, any of the minimum requirements for graduation.

Section 6. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 1369 Criminal History Records
SPONSOR(S): Criminal Justice Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Criminal Justice Subcommittee		Krol TK	Cunningham

SUMMARY ANALYSIS

When a criminal history record is expunged, criminal justice agencies other than the Florida Department of Law Enforcement (FDLE) must physically destroy the record. Criminal justice agencies are allowed to make a notation indicating compliance with an expunction order. The FDLE, on the other hand, is required to retain expunged records. When a record is sealed, it is not destroyed, but access is limited to the subject of the record, his or her attorney, law enforcement agencies for their respective criminal justice purposes, and certain other specified agencies for their respective licensing and employment purposes.

Currently a person may seal or expunge a criminal history record one time.

The proposed committee substitute (PCS) allows for a second sealing and expunging of a criminal history record.

The PCS provides additional eligibility requirements for obtaining a certificate for a second sealing or expunction.

The PCS allows, in specific circumstances, a person to:

- Deny or fail or acknowledge arrests and subsequent dispositions covered by a sealed or expunged record; and
- Fail to recite or acknowledge a sealed or expunged record on an employment application.

The PCS requires FDLE to disclose the contents of an expunged record to the subject of the record upon receiving a written, notarized request from the subject of the record.

The PCS also requires each clerk of court website to include information relating to procedures to seal or expunge criminal history records and a link to related information on FDLE's website.

This PCS may have a fiscal impact on FDLE and is effective July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Sealing and Expunction of Criminal History Records

Sections 943.0585 and 943.059, F.S., set forth procedures for sealing and expunging criminal history records. The courts have jurisdiction over their own judicial records containing criminal history information and over their procedures for maintaining and destroying those records. The Florida Department of Law Enforcement (FDLE) can administratively expunge non-judicial records of arrest that are made contrary to law or by mistake.[1]

When a criminal history record is expunged, criminal justice agencies other than FDLE must physically destroy the record. Criminal justice agencies are allowed to make a notation indicating compliance with an expunction order. The FDLE, on the other hand, is required to retain expunged records. When a record is sealed, it is not destroyed, but access is limited to the subject of the record, his or her attorney, law enforcement agencies for their respective criminal justice purposes, and certain other specified agencies for their respective licensing and employment purposes.[2]

Records that have been sealed or expunged are confidential and exempt from the public records law. It is a first-degree misdemeanor to divulge their existence, except to specified entities for licensing or employment purposes.[3]

A person who has had their criminal history records sealed or expunged may lawfully deny or fail to acknowledge the arrests covered by their sealed or expunged record, except when they are applying for certain types of employment,[4] petitioning the court for a sealing or expunction, or are a defendant in a criminal prosecution.[5]

In 1992, the Legislature amended the sealing and expunction statutes to require a person seeking a sealing or expunction to first obtain a certificate of eligibility (certificate) from FDLE. Before a person can petition the court to seal or expunge a criminal history record, they must receive a certificate of eligibility from FDLE. In order to receive a certificate, a person must:

> (1) Submit to FDLE a written, certified statement from the appropriate state attorney or statewide prosecutor that indicates an indictment, information, or other charging document was not filed or issued in the case or if filed and was dismissed or nolle prosequi by the state attorney or statewide prosecutor or was dismissed by a court of competent jurisdiction. Charges related to the record the person wishes to expunge cannot have resulted in a trial, without regard to whether the outcome of the trial was other than an adjudication of guilt.
>
> Criminal history records relating to certain offenses[6] in which a defendant (adult or juvenile) has been found guilty or has pled guilty or nolo contendere, regardless of whether adjudication is withheld,[7] may not be sealed or expunged.[8]

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[1] Section 943.0581, F.S.
[2] Section 943.0585(4), F.S.
[3] Section 943.0585(4)(c), F.S.
[4] These types of employment include: law enforcement, the Florida Bar, working with children, the developmentally disabled, or the elderly through the Department of Children and Families, the Department of Juvenile Justice, the Department of Education, any district school board, or local governmental entity licensing child care facilities, or a Florida seaport.
[5] Section 943.0585(4)(a), F.S.
[6] These offenses include: sexual misconduct with developmentally disabled clients, mental health patients, or forensic clients, or the reporting of such sexual misconduct; luring or enticing a child; sexual battery; procuring a person under 18 years for prostitution; lewd, lascivious, or indecent assault upon a child, lewd or lascivious offenses committed on an elderly or disabled person; communications fraud; sexual performance by a child; unlawful distribution of obscene materials to a minor; unlawful activities involving computer pornography; selling or buying minors for the purpose of engaging in sexually explicit conduct; offenses by public

(2) Pay a $75 processing fee.

(3) Submit a certified copy of the disposition of the record they wish to have expunged.

(4) Have never been adjudicated guilty or delinquent for committing a felony or misdemeanor specified in 943.051(3)(b), F.S.,[9] prior to the date of their application for the certificate.[10]

(5) Have never been adjudicated guilty or delinquent for committing any of the acts stemming from the arrest or alleged criminal activity of the record they wish to have expunged.

(6) Have never had a prior sealing or expunction of criminal history record unless an expunction is sought for a record previously sealed for 10 years and the record is otherwise eligible for expunction. A record must have been sealed for 10 years before it can be expunged, unless charges were not filed or were dismissed by the prosecutor or court.[11]

This requirement does not apply when a plea was not entered or all charges relating to the arrest or alleged criminal activity to which the petition to expunge pertains were dismissed prior to trial.[12]

(7) No longer be under any court supervision related to the disposition of the record they wish to have expunged.

In addition to the certificate, the petitioner must also submit a sworn statement that they:

- Have not previously been adjudicated guilty of any offense or adjudicated delinquent for certain offenses;
- Have not been adjudicated guilty or delinquent for any of the charges they are currently trying to have sealed or expunged;
- Have not obtained a prior sealing or expunction; and
- Are eligible to the best of their knowledge and has no other pending expunction or sealing petitions before the court.[13]

Any person knowingly providing false information on the sworn statement commits a felony of the third degree.[14]

If the person meets the statutory criteria based on FDLE's criminal history check and receives a certificate, he or she can petition the court for a record sealing or expunction.[15] It is then up to the court to decide whether the sealing or expunction is appropriate.[16]

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officers and employees; drug trafficking; and other dangerous crimes such as arson, aggravated assault or battery, kidnapping, murder, robbery, home invasion robbery, carjacking, stalking, domestic violence, and burglary.

[7] A withhold of adjudication is a manner of disposition in which the court does not pronounce a formal judgment of conviction. http://www.flcourts.org/gen_public/pubs/bin/srsmanual/Glossary_2002.pdf (Last visited March 12, 2010).

[8] Sections 943.059 and 943.0585, F.S.

[9] These offenses include: assault, as defined in s. 784.011; battery, as defined in s. 784.03; carrying a concealed weapon, as defined in s. 790.01(1); unlawful use of destructive devices or bombs, as defined in s. 790.1615(1); negligent treatment of children, as defined in s. 827.05; assault or battery on a law enforcement officer, a firefighter, or other specified officers, as defined in s. 784.07(2)(a) and (b); open carrying of a weapon, as defined in s. 790.053; exposure of sexual organs, as defined in s. 800.03; unlawful possession of a firearm, as defined in s. 790.22(5); petit theft, as defined in s. 812.014(3); cruelty to animals, as defined in s. 828.12(1); arson, as defined in s. 806.031(1); and unlawful possession or discharge of a weapon or firearm at a school-sponsored event or on school property as defined in s. 790.115.

[10] Section 943.0585(2)(d), F.S.

[11] Section 943.0585(2)(h), F.S.

[12] *Id.*

[13] Section 943.0585(1)(b), F.S.

[14] 14 Section 943.0585(1), F.S.

[15] Section 943.0585(2), F.S.

FDLE reports that it processes about 1,500 court orders per month that meet the sealing and expunging criteria.[17]

Sealing and Expunging Juvenile Records
Juveniles have a few more options than adults do when choosing to have a record expunged. If a juvenile successfully completes a prearrest, postarrest, or teen court diversion program after being arrested for a nonviolent misdemeanor, he or she is eligible to have the arrest expunged providing there is no other past criminal history. This expunction does not prohibit the juvenile from requesting a regular sealing or expunction under s. 943.0585 or s. 943.059, F.S., if he or she is otherwise eligible.[18]

Juvenile delinquency criminal history records maintained by the FDLE are also expunged automatically when the juvenile turns 24 years of age (if he or she is not a serious or habitual juvenile offender or committed to a juvenile prison) or 26 years of age (if he or she was a serious or habitual juvenile offender or was in a juvenile prison), as long as the juvenile is not arrested as an adult or adjudicated as an adult for a forcible felony.[19] This automatic expunction does not prohibit the juvenile from requesting a sealing or expunction under s. 943.0585 or s. 943.095, F.S., if he or she is otherwise eligible.

Criminal history records are public records under Florida law and must be disclosed unless they have been sealed or expunged or have otherwise been exempted or made confidential.[20] Fingerprints are exempt and are not disclosed by the FDLE. Juvenile criminal history information that has been compiled and maintained by the FDLE since July 1, 1996, is also considered by FDLE to be a public record, including felony and misdemeanor criminal history information.[21]

Effect of the Proposed Committee Substitute
The proposed committee substitute (PCS) allows for a second sealing and expunction of a criminal history record. The PCS provides that a person must obtain a certificate from the department to seal or expunge a second criminal history record. The requirements regarding eligibility for the certificate are the same as current law.

In addition to the current requirement, the PCS provides that FDLE will issue a certificate for a second sealing if:

- The person has had only one prior expunction or sealing of his or her criminal history record under ss. 943.0585 or 943.059, F.S., or one prior expunction following the sealing of the same arrest or alleged criminal activity that was expunged;
- The person has not been arrested in this state during the 5-year period prior to the date on which the application for the certificate is filed; and
- The person has not previously sealed or expunged a criminal history record that involved the same offense to which the petition to seal pertains.

FDLE will issue a certificate for a second expunction if:

- The person has had only one prior expunction of his or her criminal history record under this section or one prior expunction following the sealing of the same arrest or alleged criminal activity;
- The person has not been arrested in this state during the 10-year period prior to the date on which the application for the certificate is filed; and
- The person has not previously sealed or expunged a criminal history record that involved the same offense to which the petition to expunge pertains.

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[16] Section 943.0585(3)(b), F.S.
[17] FDLE 2011 Analysis of HB 1369.
[18] Section 943.0582, F.S.
[19] Section 943.0515(1) and (2), F.S.
[20] Section 119.07(1), F.S., s. 24(a), Art. I, State Constitution.
[21] Section 943.053(3)(a), F.S., ch. 96-388, L.O.F.

Except when applying for certain types of employment,[22] petitioning the court for a sealing or expunction, or a defendant in a criminal prosecution, the PCS allows a person to:

- Deny or fail or acknowledge arrests *and subsequent dispositions* covered by a sealed or expunged record; and
- Fail to recite or acknowledge a sealed or expunged record on an employment application.

The PCS requires FDLE to disclose the contents of an expunged record to the subject of the record upon receiving a written, notarized request from the subject of the record.

The PCS also requires each clerk of court website to include information relating to procedures to seal or expunge criminal history records and a link to related information on FDLE's website.

B. SECTION DIRECTORY:

Section 1. Provides this act may be cited as the "Jim King Keep Florida Working Act."

Section 2. Amends 943.0585, F.S., relating to court-ordered expunction of criminal history records.

Section 3. Amends 943.059, F.S., relating to court-ordered sealing of criminal history records.

Section 4. 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:

   FDLE has not provided a fiscal analysis on this PCS. FDLE would most likely experience an increase in workload due to the number of people applying for certificates for a second sealing and expunction. However, it is unclear if the $75 cost of the eligibility certificates would be able to cover any increase in cost to FDLE.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

[22] These types of employment include: law enforcement, the Florida Bar, working with children, the developmentally disabled, or the elderly through the Department of Children and Families, the Department of Juvenile Justice, the Department of Education, any district school board, or local governmental entity licensing child care facilities, or a Florida seaport.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The PCS does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to criminal history records; amending s. 943.0585, F.S.; providing a short title; authorizing a court to expunge a criminal history record of a person who had a prior criminal history record sealed or expunged in certain circumstances; providing a person may lawfully deny or fail to acknowledge the arrests and subsequent dispositions of an expunged record under certain circumstances; providing a person may fail to recite or acknowledge an expunged criminal history record on an employment application; requiring the department to disclose the contents of an expunged record to the subject of the record upon the subject's request; requiring the clerk of court to include links related to sealing and expunction procedures and related information on the department's website; amending s. 943.059, F.S.; authorizing a court to seal a criminal history record of a person who had a prior criminal history record sealed or expunged in certain circumstances; providing a person to lawfully deny or fail to acknowledge the arrests and subsequent dispositions of a sealed record under certain circumstances; providing a person may fail to recite or acknowledge a sealed criminal history record on an employment application; providing an effective date.

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

Section 1. This act may be cited as the "Jim King Keep

Florida Working Act."

Section 2. Section 943.0585, Florida Statutes, is amended to read:

943.0585 Court-ordered expunction of criminal history records.—The courts of this state have jurisdiction over their own procedures, including the maintenance, expunction, and correction of judicial records containing criminal history information to the extent such procedures are not inconsistent with the conditions, responsibilities, and duties established by this section. Any court of competent jurisdiction may order a criminal justice agency to expunge the criminal history record of a minor or an adult who complies with the requirements of this section. The court shall not order a criminal justice agency to expunge a criminal history record until the person seeking to expunge a criminal history record has applied for and received a certificate of eligibility for expunction pursuant to subsection (2). A criminal history record that relates to a violation of s. 393.135, s. 394.4593, s. 787.025, chapter 794, s. 796.03, s. 800.04, s. 810.14, s. 817.034, s. 825.1025, s. 827.071, chapter 839, s. 847.0133, s. 847.0135, s. 847.0145, s. 893.135, s. 916.1075, a violation enumerated in s. 907.041, or any violation specified as a predicate offense for registration as a sexual predator pursuant to s. 775.21, without regard to whether that offense alone is sufficient to require such registration, or for registration as a sexual offender pursuant to s. 943.0435, may not be expunged, without regard to whether adjudication was withheld, if the defendant was found guilty of or pled guilty or nolo contendere to the offense, or if the

defendant, as a minor, was found to have committed, or pled guilty or nolo contendere to committing, the offense as a delinquent act. The court may only order expunction of a criminal history record pertaining to one arrest or one incident of alleged criminal activity, except as provided in this section. The court may, at its sole discretion, order the expunction of a criminal history record pertaining to more than one arrest if the additional arrests directly relate to the original arrest. If the court intends to order the expunction of records pertaining to such additional arrests, such intent must be specified in the order. A criminal justice agency may not expunge any record pertaining to such additional arrests if the order to expunge does not articulate the intention of the court to expunge a record pertaining to more than one arrest. This section does not prevent the court from ordering the expunction of only a portion of a criminal history record pertaining to one arrest or one incident of alleged criminal activity. Notwithstanding any law to the contrary, a criminal justice agency may comply with laws, court orders, and official requests of other jurisdictions relating to expunction, correction, or confidential handling of criminal history records or information derived therefrom. This section does not confer any right to the expunction of any criminal history record, and any request for expunction of a criminal history record may be denied at the sole discretion of the court.

(1) PETITION TO EXPUNGE A CRIMINAL HISTORY RECORD.—Each petition to a court to expunge a criminal history record is complete only when accompanied by:

(a) A valid certificate of eligibility for expunction issued by the department pursuant to subsection (2).

(b) The petitioner's sworn statement attesting that the petitioner:

1. Has never, prior to the date on which the petition is filed, been adjudicated guilty of a criminal offense or comparable ordinance violation, or been adjudicated delinquent for committing any felony or a misdemeanor specified in s. 943.051(3)(b).

2. Has not been adjudicated guilty of, or adjudicated delinquent for committing, any of the acts stemming from the arrest or alleged criminal activity to which the petition pertains.

3. Has never secured a prior sealing or expunction, except as provided in subsection (5) and s. 943.059(5), of a criminal history record under this section, former s. 893.14, former s. 901.33, or former s. 943.058, or from any jurisdiction outside the state, unless expunction is sought of a criminal history record previously sealed for 10 years pursuant to paragraph (2)(h) and the record is otherwise eligible for expunction.

4. Is eligible for such an expunction to the best of his or her knowledge or belief and does not have any other petition to expunge or any petition to seal pending before any court.

Any person who knowingly provides false information on such sworn statement to the court commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) CERTIFICATE OF ELIGIBILITY FOR EXPUNCTION.—Prior to petitioning the court to expunge a criminal history record, a person seeking to expunge a criminal history record shall apply to the department for a certificate of eligibility for expunction. The department shall, by rule adopted pursuant to chapter 120, establish procedures pertaining to the application for and issuance of certificates of eligibility for expunction. A certificate of eligibility for expunction is valid for 12 months after the date stamped on the certificate when issued by the department. After that time, the petitioner must reapply to the department for a new certificate of eligibility. Eligibility for a renewed certification of eligibility must be based on the status of the applicant and the law in effect at the time of the renewal application. The department shall issue a certificate of eligibility for expunction to a person who is the subject of a criminal history record if that person:

(a) Has obtained, and submitted to the department, a written, certified statement from the appropriate state attorney or statewide prosecutor which indicates:

1. That an indictment, information, or other charging document was not filed or issued in the case.

2. That an indictment, information, or other charging document, if filed or issued in the case, was dismissed or nolle prosequi by the state attorney or statewide prosecutor, or was dismissed by a court of competent jurisdiction, and that none of the charges related to the arrest or alleged criminal activity to which the petition to expunge pertains resulted in a trial, without regard to whether the outcome of the trial was other

than an adjudication of guilt.

3. That the criminal history record does not relate to a violation of s. 393.135, s. 394.4593, s. 787.025, chapter 794, s. 796.03, s. 800.04, s. 810.14, s. 817.034, s. 825.1025, s. 827.071, chapter 839, s. 847.0133, s. 847.0135, s. 847.0145, s. 893.135, s. 916.1075, a violation enumerated in s. 907.041, or any violation specified as a predicate offense for registration as a sexual predator pursuant to s. 775.21, without regard to whether that offense alone is sufficient to require such registration, or for registration as a sexual offender pursuant to s. 943.0435, where the defendant was found guilty of, or pled guilty or nolo contendere to any such offense, or that the defendant, as a minor, was found to have committed, or pled guilty or nolo contendere to committing, such an offense as a delinquent act, without regard to whether adjudication was withheld.

(b) Remits a $75 processing fee to the department for placement in the Department of Law Enforcement Operating Trust Fund, unless such fee is waived by the executive director.

(c) Has submitted to the department a certified copy of the disposition of the charge to which the petition to expunge pertains.

(d) Has never, prior to the date on which the application for a certificate of eligibility is filed, been adjudicated guilty of a criminal offense or comparable ordinance violation, or been adjudicated delinquent for committing any felony or a misdemeanor specified in s. 943.051(3)(b).

(e) Has not been adjudicated guilty of, or adjudicated

delinquent for committing, any of the acts stemming from the arrest or alleged criminal activity to which the petition to expunge pertains.

(f) Has never secured a prior sealing or expunction, except as provided in subsection (5) and s. 943.059(5), of a criminal history record under this section, former s. 893.14, former s. 901.33, or former s. 943.058, unless expunction is sought of a criminal history record previously sealed for 10 years pursuant to paragraph (h) and the record is otherwise eligible for expunction.

(g) Is no longer under court supervision applicable to the disposition of the arrest or alleged criminal activity to which the petition to expunge pertains.

(h) Has previously obtained a court order sealing the record under this section, former s. 893.14, former s. 901.33, or former s. 943.058 for a minimum of 10 years because adjudication was withheld or because all charges related to the arrest or alleged criminal activity to which the petition to expunge pertains were not dismissed prior to trial, without regard to whether the outcome of the trial was other than an adjudication of guilt. The requirement for the record to have previously been sealed for a minimum of 10 years does not apply when a plea was not entered or all charges related to the arrest or alleged criminal activity to which the petition to expunge pertains were dismissed prior to trial.

(3) PROCESSING OF A PETITION OR ORDER TO EXPUNGE.—

(a) In judicial proceedings under this section, a copy of the completed petition to expunge shall be served upon the

appropriate state attorney or the statewide prosecutor and upon the arresting agency; however, it is not necessary to make any agency other than the state a party. The appropriate state attorney or the statewide prosecutor and the arresting agency may respond to the court regarding the completed petition to expunge.

(b) If relief is granted by the court, the clerk of the court shall certify copies of the order to the appropriate state attorney or the statewide prosecutor and the arresting agency. The arresting agency is responsible for forwarding the order to any other agency to which the arresting agency disseminated the criminal history record information to which the order pertains. The department shall forward the order to expunge to the Federal Bureau of Investigation. The clerk of the court shall certify a copy of the order to any other agency which the records of the court reflect has received the criminal history record from the court.

(c) For an order to expunge entered by a court prior to July 1, 1992, the department shall notify the appropriate state attorney or statewide prosecutor of an order to expunge which is contrary to law because the person who is the subject of the record has previously been convicted of a crime or comparable ordinance violation or has had a prior criminal history record sealed or expunged, except as provided in subsection (5) and s. 943.059(5). Upon receipt of such notice, the appropriate state attorney or statewide prosecutor shall take action, within 60 days, to correct the record and petition the court to void the order to expunge. The department shall seal the record until

such time as the order is voided by the court.

(d) On or after July 1, 1992, the department or any other criminal justice agency is not required to act on an order to expunge entered by a court when such order does not comply with the requirements of this section. Upon receipt of such an order, the department must notify the issuing court, the appropriate state attorney or statewide prosecutor, the petitioner or the petitioner's attorney, and the arresting agency of the reason for noncompliance. The appropriate state attorney or statewide prosecutor shall take action within 60 days to correct the record and petition the court to void the order. No cause of action, including contempt of court, shall arise against any criminal justice agency for failure to comply with an order to expunge when the petitioner for such order failed to obtain the certificate of eligibility as required by this section or such order does not otherwise comply with the requirements of this section.

(4) EFFECT OF CRIMINAL HISTORY RECORD EXPUNCTION.—Any criminal history record of a minor or an adult which is ordered expunged by a court of competent jurisdiction pursuant to this section must be physically destroyed or obliterated by any criminal justice agency having custody of such record; except that any criminal history record in the custody of the department must be retained in all cases. A criminal history record ordered expunged that is retained by the department is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution and not available to any person or entity except upon order of a court of competent

jurisdiction. A criminal justice agency may retain a notation indicating compliance with an order to expunge.

(a) The person who is the subject of a criminal history record that is expunged under this section or under other provisions of law, including former s. 893.14, former s. 901.33, and former s. 943.058, may lawfully deny or fail to acknowledge the arrests and subsequent dispositions covered by the expunged record, except when the subject of the record:

1. Is a candidate for employment with a criminal justice agency;

2. Is a defendant in a criminal prosecution;

3. Concurrently or subsequently petitions for relief under this section or s. 943.059;

4. Is a candidate for admission to The Florida Bar;

5. Is seeking to be employed or licensed by or to contract with the Department of Children and Family Services, the Agency for Health Care Administration, the Agency for Persons with Disabilities, or the Department of Juvenile Justice or to be employed or used by such contractor or licensee in a sensitive position having direct contact with children, the developmentally disabled, the aged, or the elderly as provided in s. 110.1127(3), s. 393.063, s. 394.4572(1), s. 397.451, s. 402.302(3), s. 402.313(3), s. 409.175(2)(i), s. 415.102(4), chapter 916, s. 985.644, chapter 400, or chapter 429;

6. Is seeking to be employed or licensed by the Department of Education, any district school board, any university laboratory school, any charter school, any private or parochial school, or any local governmental entity that licenses child

care facilities; or

7. Is seeking authorization from a seaport listed in s. 311.09 for employment within or access to one or more of such seaports pursuant to s. 311.12.

(b) Subject to the exceptions in paragraph (a), a person who has been granted an expunction under this section, former s. 893.14, former s. 901.33, or former s. 943.058 may not be held under any provision of law of this state to commit perjury or to be otherwise liable for giving a false statement by reason of such person's failure to recite or acknowledge an expunged criminal history record, including failure to recite or acknowledge on an employment application.

(c) Information relating to the existence of an expunged criminal history record which is provided in accordance with paragraph (a) is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution, except that the department shall disclose the existence of a criminal history record ordered expunged to the entities set forth in subparagraphs (a)1., 4., 5., 6., and 7. for their respective licensing, access authorization, and employment purposes, and to criminal justice agencies for their respective criminal justice purposes. It is unlawful for any employee of an entity set forth in subparagraph (a)1., subparagraph (a)4., subparagraph (a)5., subparagraph (a)6., or subparagraph (a)7. to disclose information relating to the existence of an expunged criminal history record of a person seeking employment, access authorization, or licensure with such entity or contractor, except to the person to whom the criminal history record relates

or to persons having direct responsibility for employment, access authorization, or licensure decisions. Any person who violates this paragraph commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(d) The department may disclose the contents of an expunged record to the subject of the record upon the receipt of a written, notarized request from the subject of the record.

(5) EXPUNCTION OF CRIMINAL HISTORY RECORD AFTER PRIOR SEALING OR EXPUNCTION.—

(a) A court may expunge a person's criminal history record after a prior criminal history record has been sealed or expunged only if the person obtains a certificate from the department to expunge the criminal history record. The department shall issue the certificate for a second expunction only if:

1. The person has had only one prior expunction of his or her criminal history record under this section or one prior expunction following the sealing of the same arrest or alleged criminal activity that was expunged;

2. The person has not been arrested in this state during the 10-year period prior to the date on which the application for the certificate is filed; and

3. The person has not previously sealed or expunged a criminal history record that involved the same offense to which the petition to expunge pertains.

(b) All other provisions and requirements of this section apply to an application to expunge a second criminal history record.

(6) INFORMATION.— Each website for the office of a clerk of court must include information relating to procedures to seal of expunge criminal history records. This information must include the link to related information on the website of the department.

(7) ~~(5)~~ STATUTORY REFERENCES.—Any reference to any other chapter, section, or subdivision of the Florida Statutes in this section constitutes a general reference under the doctrine of incorporation by reference.

Section 3. Section 943.059, Florida Statutes, is amended to read:

943.059 Court-ordered sealing of criminal history records.—The courts of this state shall continue to have jurisdiction over their own procedures, including the maintenance, sealing, and correction of judicial records containing criminal history information to the extent such procedures are not inconsistent with the conditions, responsibilities, and duties established by this section. Any court of competent jurisdiction may order a criminal justice agency to seal the criminal history record of a minor or an adult who complies with the requirements of this section. The court shall not order a criminal justice agency to seal a criminal history record until the person seeking to seal a criminal history record has applied for and received a certificate of eligibility for sealing pursuant to subsection (2). A criminal history record that relates to a violation of s. 393.135, s. 394.4593, s. 787.025, chapter 794, s. 796.03, s. 800.04, s. 810.14, s. 817.034, s. 825.1025, s. 827.071, chapter

839, s. 847.0133, s. 847.0135, s. 847.0145, s. 893.135, s. 916.1075, a violation enumerated in s. 907.041, or any violation specified as a predicate offense for registration as a sexual predator pursuant to s. 775.21, without regard to whether that offense alone is sufficient to require such registration, or for registration as a sexual offender pursuant to s. 943.0435, may not be sealed, without regard to whether adjudication was withheld, if the defendant was found guilty of or pled guilty or nolo contendere to the offense, or if the defendant, as a minor, was found to have committed or pled guilty or nolo contendere to committing the offense as a delinquent act. The court may only order sealing of a criminal history record pertaining to one arrest or one incident of alleged criminal activity, except as provided in this section. The court may, at its sole discretion, order the sealing of a criminal history record pertaining to more than one arrest if the additional arrests directly relate to the original arrest. If the court intends to order the sealing of records pertaining to such additional arrests, such intent must be specified in the order. A criminal justice agency may not seal any record pertaining to such additional arrests if the order to seal does not articulate the intention of the court to seal records pertaining to more than one arrest. This section does not prevent the court from ordering the sealing of only a portion of a criminal history record pertaining to one arrest or one incident of alleged criminal activity. Notwithstanding any law to the contrary, a criminal justice agency may comply with laws, court orders, and official requests of other jurisdictions relating to sealing, correction, or confidential handling of

criminal history records or information derived therefrom. This section does not confer any right to the sealing of any criminal history record, and any request for sealing a criminal history record may be denied at the sole discretion of the court.

(1) PETITION TO SEAL A CRIMINAL HISTORY RECORD.—Each petition to a court to seal a criminal history record is complete only when accompanied by:

(a) A valid certificate of eligibility for sealing issued by the department pursuant to subsection (2).

(b) The petitioner's sworn statement attesting that the petitioner:

1. Has never, prior to the date on which the petition is filed, been adjudicated guilty of a criminal offense or comparable ordinance violation, or been adjudicated delinquent for committing any felony or a misdemeanor specified in s. 943.051(3)(b).

2. Has not been adjudicated guilty of or adjudicated delinquent for committing any of the acts stemming from the arrest or alleged criminal activity to which the petition to seal pertains.

3. Has never secured a prior sealing or expunction, except as provided in subsection (5), of a criminal history record under this section, former s. 893.14, former s. 901.33, former s. 943.058, or from any jurisdiction outside the state.

4. Is eligible for such a sealing to the best of his or her knowledge or belief and does not have any other petition to seal or any petition to expunge pending before any court.

Any person who knowingly provides false information on such sworn statement to the court commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) CERTIFICATE OF ELIGIBILITY FOR SEALING.—Prior to petitioning the court to seal a criminal history record, a person seeking to seal a criminal history record shall apply to the department for a certificate of eligibility for sealing. The department shall, by rule adopted pursuant to chapter 120, establish procedures pertaining to the application for and issuance of certificates of eligibility for sealing. A certificate of eligibility for sealing is valid for 12 months after the date stamped on the certificate when issued by the department. After that time, the petitioner must reapply to the department for a new certificate of eligibility. Eligibility for a renewed certification of eligibility must be based on the status of the applicant and the law in effect at the time of the renewal application. The department shall issue a certificate of eligibility for sealing to a person who is the subject of a criminal history record provided that such person:

(a) Has submitted to the department a certified copy of the disposition of the charge to which the petition to seal pertains.

(b) Remits a $75 processing fee to the department for placement in the Department of Law Enforcement Operating Trust Fund, unless such fee is waived by the executive director.

(c) Has never, prior to the date on which the application for a certificate of eligibility is filed, been adjudicated

guilty of a criminal offense or comparable ordinance violation, or been adjudicated delinquent for committing any felony or a misdemeanor specified in s. 943.051(3)(b).

(d) Has not been adjudicated guilty of or adjudicated delinquent for committing any of the acts stemming from the arrest or alleged criminal activity to which the petition to seal pertains.

(e) Has never secured a prior sealing or expunction, except as provided in subsection (5), of a criminal history record under this section, former s. 893.14, former s. 901.33, or former s. 943.058.

(f) Is no longer under court supervision applicable to the disposition of the arrest or alleged criminal activity to which the petition to seal pertains.

(3) PROCESSING OF A PETITION OR ORDER TO SEAL.—

(a) In judicial proceedings under this section, a copy of the completed petition to seal shall be served upon the appropriate state attorney or the statewide prosecutor and upon the arresting agency; however, it is not necessary to make any agency other than the state a party. The appropriate state attorney or the statewide prosecutor and the arresting agency may respond to the court regarding the completed petition to seal.

(b) If relief is granted by the court, the clerk of the court shall certify copies of the order to the appropriate state attorney or the statewide prosecutor and to the arresting agency. The arresting agency is responsible for forwarding the order to any other agency to which the arresting agency

disseminated the criminal history record information to which the order pertains. The department shall forward the order to seal to the Federal Bureau of Investigation. The clerk of the court shall certify a copy of the order to any other agency which the records of the court reflect has received the criminal history record from the court.

(c) For an order to seal entered by a court prior to July 1, 1992, the department shall notify the appropriate state attorney or statewide prosecutor of any order to seal which is contrary to law because the person who is the subject of the record has previously been convicted of a crime or comparable ordinance violation or has had a prior criminal history record sealed or expunged, except as provided in subsection (5). Upon receipt of such notice, the appropriate state attorney or statewide prosecutor shall take action, within 60 days, to correct the record and petition the court to void the order to seal. The department shall seal the record until such time as the order is voided by the court.

(d) On or after July 1, 1992, the department or any other criminal justice agency is not required to act on an order to seal entered by a court when such order does not comply with the requirements of this section. Upon receipt of such an order, the department must notify the issuing court, the appropriate state attorney or statewide prosecutor, the petitioner or the petitioner's attorney, and the arresting agency of the reason for noncompliance. The appropriate state attorney or statewide prosecutor shall take action within 60 days to correct the record and petition the court to void the order. No cause of

action, including contempt of court, shall arise against any criminal justice agency for failure to comply with an order to seal when the petitioner for such order failed to obtain the certificate of eligibility as required by this section or when such order does not comply with the requirements of this section.

(e) An order sealing a criminal history record pursuant to this section does not require that such record be surrendered to the court, and such record shall continue to be maintained by the department and other criminal justice agencies.

(4) EFFECT OF CRIMINAL HISTORY RECORD SEALING.—A criminal history record of a minor or an adult which is ordered sealed by a court of competent jurisdiction pursuant to this section is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution and is available only to the person who is the subject of the record, to the subject's attorney, to criminal justice agencies for their respective criminal justice purposes, which include conducting a criminal history background check for approval of firearms purchases or transfers as authorized by state or federal law, to judges in the state courts system for the purpose of assisting them in their case-related decisionmaking responsibilities, as set forth in s. 943.053(5), or to those entities set forth in subparagraphs (a)1., 4., 5., 6., and 8. for their respective licensing, access authorization, and employment purposes.

(a) The subject of a criminal history record sealed under this section or under other provisions of law, including former s. 893.14, former s. 901.33, and former s. 943.058, may lawfully

deny or fail to acknowledge the arrests and subsequent dispositions covered by the sealed record, except when the subject of the record:

1. Is a candidate for employment with a criminal justice agency;

2. Is a defendant in a criminal prosecution;

3. Concurrently or subsequently petitions for relief under this section or s. 943.0585;

4. Is a candidate for admission to The Florida Bar;

5. Is seeking to be employed or licensed by or to contract with the Department of Children and Family Services, the Agency for Health Care Administration, the Agency for Persons with Disabilities, or the Department of Juvenile Justice or to be employed or used by such contractor or licensee in a sensitive position having direct contact with children, the developmentally disabled, the aged, or the elderly as provided in s. 110.1127(3), s. 393.063, s. 394.4572(1), s. 397.451, s. 402.302(3), s. 402.313(3), s. 409.175(2)(i), s. 415.102(4), s. 415.103, chapter 916, s. 985.644, chapter 400, or chapter 429;

6. Is seeking to be employed or licensed by the Department of Education, any district school board, any university laboratory school, any charter school, any private or parochial school, or any local governmental entity that licenses child care facilities;

7. Is attempting to purchase a firearm from a licensed importer, licensed manufacturer, or licensed dealer and is subject to a criminal history check under state or federal law; or

8. Is seeking authorization from a Florida seaport identified in s. 311.09 for employment within or access to one or more of such seaports pursuant to s. 311.12.

(b) Subject to the exceptions in paragraph (a), a person who has been granted a sealing under this section, former s. 893.14, former s. 901.33, or former s. 943.058 may not be held under any provision of law of this state to commit perjury or to be otherwise liable for giving a false statement by reason of such person's failure to recite or acknowledge a sealed criminal history record, including failure to recite or acknowledge on an employment application.

(c) Information relating to the existence of a sealed criminal record provided in accordance with the provisions of paragraph (a) is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution, except that the department shall disclose the sealed criminal history record to the entities set forth in subparagraphs (a)1., 4., 5., 6., and 8. for their respective licensing, access authorization, and employment purposes. It is unlawful for any employee of an entity set forth in subparagraph (a)1., subparagraph (a)4., subparagraph (a)5., subparagraph (a)6., or subparagraph (a)8. to disclose information relating to the existence of a sealed criminal history record of a person seeking employment, access authorization, or licensure with such entity or contractor, except to the person to whom the criminal history record relates or to persons having direct responsibility for employment, access authorization, or licensure decisions. Any person who violates the provisions of

this paragraph commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(5) SEALING OF CRIMINAL HISTORY RECORD AFTER PRIOR SEALING OR EXPUNCTION.—

(a) A court may seal a person's criminal history record after a prior criminal history record has been sealed or expunged only if the person obtains a certificate from the department to seal the criminal history record. The department shall issue the certificate for a second sealing only if:

1. The person has had only one prior expunction or sealing of his or her criminal history record under s. 943.0585 or this section or one prior expunction following the sealing of the same arrest or alleged criminal activity that was expunged;

2. The person has not been arrested in this state during the 5-year period prior to the date on which the application for the certificate is filed; and

3. The person has not previously sealed or expunged a criminal history record that involved the same offense to which the petition to seal pertains.

(b) All other provisions and requirements of this section apply to an application to seal a second criminal history record.

(6) ~~(5)~~ STATUTORY REFERENCES.—Any reference to any other chapter, section, or subdivision of the Florida Statutes in this section constitutes a general reference under the doctrine of incorporation by reference.

Section 4. This act shall take effect July 1, 2010.