



Committee:

**CRIMINAL AND CIVIL JUSTICE
APPROPRIATIONS**

Senator Crist, Chair
Senator Wilson, Vice Chair

Meeting Packet
Monday, April 19, 2010
10:30—11:30 a.m.
Mallory Horne Committee Room, 37 Senate Office Building

The Florida Senate
COMMITTEE MEETING EXPANDED AGENDA
CRIMINAL AND CIVIL JUSTICE APPROPRIATIONS
Senator Crist, Chair
Senator Wilson, Vice Chair

MEETING DATE: Monday, April 19, 2010
TIME: 10:30—11:30 a.m.
PLACE: Mallory Horne Committee Room, 37 Senate Office Building

MEMBERS: Senator Crist, Chair; Senator Wilson, Vice Chair; Senators Jones, Joyner, and Villalobos

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	CS/CS/CS/SB 960 Judiciary / Children, Families, and Elder Affairs / Criminal Justice / Dockery (Similar CS/CS/H 1005, Compare CS/H 445, H 7035, CS/S 2350)	Corrections [SPSC]; Revises criminal penalties pertaining to sexually transmissible diseases. Provides that a person who is detained in a state or private correctional facility may not commit any lewd or lascivious behavior or other sexual act in the presence of an employee whom the detainee knows or reasonably should know is an employee. Prohibits a probationer from possessing, carrying, or owning a firearm, etc.	CJ 02/03/2010 Fav/CS CF 03/09/2010 Fav/CS JU 04/07/2010 Temporarily Postponed JU 04/13/2010 Fav/CS JA 04/19/2010
2	CS/CS/SB 296 Judiciary / Criminal Justice / Wise (Identical CS/H 761, Compare H 1245, CS/CS/S 1400, S 2568)	State Attorneys [SPSC]; Deletes provisions that require each state attorney to report why a case-qualified defendant did not receive the mandatory minimum prison sentence in cases involving the possession or use of a weapon and in cases involving certain specified offenses. Deletes provisions regarding the burden of establishing financial resources of the defendant, etc.	CJ 01/13/2010 Fav/CS JU 03/09/2010 Fav/CS JA 04/19/2010
3	SB 808 Oelrich (Identical H 369)	Murder/Unlawful Distribution of Methadone [SPSC]; Provides that murder in the first degree includes the unlawful killing of a human being which resulted from the unlawful distribution of methadone by a person aged 18 or older when such drug is proven to be the proximate cause of death of the user, etc.	CJ 03/04/2010 Favorable JU 04/07/2010 Favorable JA 04/19/2010

COMMITTEE MEETING EXPANDED AGENDA

Criminal and Civil Justice Appropriations

Monday, April 19, 2010, 10:30 —11:30 a.m.

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
4	SB 870 Aronberg (Similar H 525)	Statutes of Limitation for Sexual Battery [SPSC]; Eliminates statutes of limitations to the institution of criminal or civil actions relating to sexual battery of a child if the victim is under 16 years of age at the time of the offense. Provides applicability.	CJ 03/09/2010 Favorable JU 04/07/2010 Favorable JA 04/19/2010
5	CS/SB 874 Criminal Justice / Aronberg (Identical CS/H 615)	Substantial Assistance [SPSC]; Permits the state attorney to request the sentencing court to reduce or suspend the sentence of a person who has been convicted of violating any felony offense and who provides substantial assistance in the identification, arrest, or conviction of any accomplice, accessory, coconspirator, or principal of the person or other felon. Provides that the motion may be filed and heard in camera for good cause shown, etc.	CJ 03/18/2010 Fav/CS JU 04/07/2010 Favorable JA 04/19/2010
6	CS/SB 1068 Criminal Justice / Altman (Similar CS/H 33)	Alcoholic Beverages/Persons Under 21 Years of Age [CPSC]; Provides a potential increase in the penalty imposed for a second or subsequent offense of selling, giving, or serving alcoholic beverages to a person under 21 years of age within a specified period following the prior offense. Provides a defense.	RI 03/17/2010 Fav/1 Amendment CJ 04/07/2010 Fav/CS JA 04/19/2010
7	CS/SB 1824 Commerce / Gelber (Similar CS/H 1455)	Misrepresentation of Military Status [CPSC]; Prohibits a person from falsely representing himself or herself as a member of or representing the U.S. Armed Forces or the National Guard for the purpose of solicitation of charitable contributions or participation in a charitable or sponsor sales promotion. Provides criminal penalties, etc.	CM 03/10/2010 Fav/CS CJ 04/07/2010 Favorable JA 04/19/2010

COMMITTEE MEETING EXPANDED AGENDACriminal and Civil Justice Appropriations
Monday, April 19, 2010, 10:30 —11:30 a.m.

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
8	SB 2260 Crist (Identical H 811)	Faith- and Character-based Correctional Programs [SPSC]; Provides requirements for faith- and character-based programs. Deletes provisions relating to funding. Revises requirements for participation. Deletes provisions relating to assignment of chaplains, etc.	CJ 04/07/2010 Favorable JA 04/19/2010 WPSC
9	SB 2276 Negrón (Identical H 7031)	Judiciary [SPSC]; Repeals specified provisions relating to regular terms of the Supreme Court, compensation of the marshal, census commissions for the judicial circuits, terms of the circuit courts, terms of the First - Twentieth Judicial Circuits. Repeals specified provisions relating to requiring a judge to attend the first day of each term of the circuit court, calling all cases on the docket at the end of each term, etc.	JU 04/07/2010 Favorable JA 04/19/2010
10	CS/CS/SB 1050 Judiciary / Criminal Justice / Baker (Similar CS/H 1071)	Ephedrine or Related Compounds/Sale [SPSC]; Prohibits obtaining or delivering to an individual in a retail sale any nonprescription compound, mixture, or preparation containing ephedrine or related compounds in excess of specified amounts. Requires a purchaser of a nonprescription compound, mixture, or preparation containing any detectable quantity of ephedrine or related compounds to meet specified requirements, etc.	CJ 03/18/2010 Fav/CS HR 03/26/2010 Fav/1 Amendment JU 04/07/2010 Fav/CS JA 04/19/2010
11	CS/SB 2584 Criminal Justice / Altman (Similar H 7173)	Handbill Distribution [SPSC]; Provides additional penalties for the offense of unlawfully distributing handbills in a public lodging establishment. Specifies that certain items used in committing such offense are subject to seizure and forfeiture under the Florida Contraband Forfeiture Act, etc.	CJ 04/07/2010 Fav/CS RI 04/13/2010 Favorable JA 04/19/2010

COMMITTEE MEETING EXPANDED AGENDA

Criminal and Civil Justice Appropriations
Monday, April 19, 2010, 10:30 —11:30 a.m.

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
12	SB 2750 Dean (Identical CS/H 1493, Compare H 365)	Career Offenders [SPSC]; Provides that it is a first-degree misdemeanor for a person to perform specified acts with the intent to assist a career offender in eluding a law enforcement agency that is seeking to find the career offender to question the career offender about, or to arrest the career offender for, his or her noncompliance. Provides criminal penalties.	
		CJ 03/26/2010 Favorable JU 04/13/2010 Favorable JA 04/19/2010	
13	CS/SB 300 Criminal Justice / Bennett (Compare H 89)	Officer Andrew Widman Act/Pretrial Proceedings [SPSC]; Provides that at the first appearance of a probationer or an offender on community control arrested for a new offense for which the court finds the existence of probable cause, the court may determine the likelihood of a prison sanction for the violation based on the new arrest. Provides that the court may order detention if it appears more likely than not that a prison sanction may be forthcoming on the violation, etc.	
		CJ 03/04/2010 Fav/CS JA 04/19/2010	

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal and Civil Justice Appropriations Committee

BILL: CS/CS/CS/SB 960

INTRODUCER: Judiciary Committee; Children, Families, and Elder Affairs Committee; Criminal Justice Committee; and Senator Dockery

SUBJECT: Corrections

DATE: April 15, 2010

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	Fav/CS
2.	Walsh	Walsh	CF	Fav/CS
3.	Maclure	Maclure	JU	Fav/CS
4.	Butler <i>(Signature)</i>	Sadberry <i>(Signature)</i>	JA	Pre-meeting
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill makes a number of changes relating to the Department of Corrections (department), including:

- Removing references to “criminal quarantine community control” because no one has been sentenced to that type of community supervision since it was created in 1993.
- Creating a new third-degree felony offense for lewd or lascivious exhibition by an inmate in the presence of a correctional employee.
- Codifying the department’s current practice of electronically transmitting the names of inmates and supervised offenders who are eligible for the restoration of civil rights to the Parole Commission.
- Subjecting employees of private correctional facilities to criminal punishment for engaging in sexual misconduct with an inmate, as is the case with department employees.
- Requiring that the register of defendants, currently prepared weekly by pretrial release programs, be prepared monthly instead.
- Specifically permitting the department to provide information concerning release of certain inmates to law enforcement officials by electronic means.

- Changing references to elderly facilities to include all facilities in which elderly inmates are housed, rather than only specifying River Junction Correctional Institution.
- Revising the Correctional Mental Health Act regarding custody and treatment of mentally ill inmates, and specifically authorizing the department to transport mentally ill inmates to placement hearings while incarcerated and to a receiving facility upon release.
- Authorizing the use of inmate work squads on private property for certain public purposes.
- Creating statutory standard conditions of probation that require an offender who is sentenced to probation or community control to live without violating any law and to submit to a digital photograph.
- Prohibiting a probationer or offender in community control from possessing a firearm, and requiring consent from the correctional probation officer to possess a weapon.
- Authorizing Public Safety Coordinating Councils to develop a comprehensive local reentry plan.

This bill substantially amends the following sections of Florida Statutes: 384.34, 775.0877, 796.08, 907.043, 921.187, 940.061, 944.35, 944.605, 944.804, 944.8041, 945.41, 945.42, 945.43, 945.46, 948.03, 948.09, 948.101, 948.11, and 951.26. It also creates sections 800.09 and 946.42, and repeals sections 944.293 and 948.001(3), Florida Statutes.

II. Present Situation:

Lewd or Lascivious Exhibition in Correctional Facilities

An inmate who intentionally performs lewd acts in the presence of a correctional facility employee is subject to significant punishment under department disciplinary rules – 60 days in disciplinary confinement and the loss of 90 days of gain time.¹ Depending on the facts of the case, the behavior may also be a criminal act that could subject the inmate to further prosecution. However, if the employee is not touched by the inmate the offense is a misdemeanor and is not normally prosecuted.

The department indicates that in recent years it has been sued several times by female employees alleging sexual harassment because the department failed to exercise reasonable care to prevent the inmate's lewd behavior. Some of these lawsuits have been successful, resulting in judgments totaling \$1.6 million to date. The department asserts that the punishment that it can give for the lewd behavior is not adequate to deter the conduct.²

Restoration of Civil Rights Process

The civil rights of a convicted felon are suspended until restored by pardon or restoration of civil rights. Among the civil rights that are lost are the rights to vote, to hold public office, to serve on a jury, to possess a firearm, and to engage in certain regulated occupations or businesses. The power to restore civil rights is granted by the Florida Constitution to the Governor with the consent of at least two Cabinet members pursuant to Article IV, Section 8(a), of the Florida

¹ See Rule 33-601.314, Florida Administrative Code (Rules of Prohibited Conduct and Penalties for Infractions).

² Department of Corrections, 2010 Bill Analysis, Senate Bill 960. The department's analysis also notes that the \$1.6 million in judgments does not include any attorney's fees awarded by the court.

Constitution. The Governor and the Cabinet collectively act as the Clemency Board. The Florida Parole Commission (commission) acts as the agent of the Clemency Board in determining whether offenders are eligible for restoration of rights, investigating applications and conducting hearings when required, and making recommendations to the board.

Section 940.061, F.S., requires the department to: (1) inform and educate inmates and offenders on community supervision about the restoration of civil rights, and (2) assist eligible inmates and offenders on community supervision with the completion of the application for the restoration of civil rights. Section 944.293, F.S., requires the department to obtain the application and any other forms needed to apply for restoration of civil rights, to assist offenders in completing the forms, and to ensure that the forms are forwarded to the governor.

These statutes were enacted when the restoration of civil rights process required persons to fill out and submit paper applications to the commission. Filing of a paper application is no longer required. Since 2001, the department has electronically submitted the names of inmates released from incarceration and offenders terminated from supervision to the commission each month. These lists serve as electronic restoration of civil rights applications. The commission reviews the lists to determine whether a person is eligible for restoration of civil rights without a hearing.

Sexual Misconduct – Private Prisons

Section 944.35(3), F.S., prohibits department employees from engaging in sexual activity with an inmate or an offender under the department's supervision. It is a third degree felony to violate the statute, which applies to sexual acts that in many cases are only illegal because of the status of the participants. The statute does not apply in the case of sexual battery, which may carry a higher penalty and is illegal regardless of the participants' status.

The statute seeks to prevent correctional employees from abusing their authority or becoming subject to coercion from an inmate or offender as the result of a sexual encounter. However, the current statute does not apply to employees of private prisons and thus sexual acts between an employee of a private correctional facility and an inmate cannot be prosecuted unless the acts are illegal under a statute other than s. 944.35(3), F.S.

Notice of Release

Section 944.605, F.S., requires the department to provide prior notification of an inmate's release to a number of persons, including the sheriff of the county in which the inmate intends to reside after release. Section 944.605(3), F.S., requires that additional identifying information be provided concerning inmates who are completing a sentence for, or who have a prior record of, robbery, sexual battery, home-invasion robbery, or carjacking. This information must also be sent to the police chief if the inmate intends to reside in a municipality. The information must be provided within 6 months prior to the inmate's release.

Pretrial Release

Pretrial release is an alternative to incarceration that allows arrested defendants to be released from jail while they await disposition of their criminal charges. Section 907.043(3), F.S.,

requires pretrial release programs to prepare a register containing various information about the defendants released to the program. The register must be updated weekly and must be located in the office of the clerk of the circuit court in the county in which the program is located so that the public may have access to the information. The register must provide the following information:

- The name, location, and funding source of the pretrial services program;
- The number of defendants assessed for pretrial release;
- The number of indigent defendants interviewed for pretrial release;
- The names and number of defendants accepted into the program;
- The names and number of indigent defendants accepted into the program;
- The charges filed against the defendants accepted into the program;
- The nature of any prior criminal convictions of any defendant accepted into the program;
- The court appearances required of defendants accepted into the program;
- The date of each instance in which a defendant accepted into the program fails to appear for a scheduled court appearance;
- The number of warrants which have been issued for a defendant's failure to appear at a scheduled court appearance; and
- The number and type of program noncompliance committed by a defendant in the program and whether the program recommended the court to revoke the defendant's release.

It has been reported that many of the 27 pretrial release programs spend eight or more hours per week compiling the data necessary to complete the weekly register, creating a significant workload for the programs.³

Elderly Facilities

Florida considers an inmate who is 50 years old or older to be "aging or elderly."⁴ The age when an inmate is considered to be elderly is far lower than in the general population because of generally poorer health. This may be due to life experiences before and during incarceration that contribute to lower life expectancy.⁵ Section 944.804, F.S., (the Elderly Offenders' Correctional Facilities Program of 2000), reflected the Legislature's concern that the population of elderly inmates was increasing then and would continue to increase. Because on average it costs approximately three times more to incarcerate an elderly offender as it does to incarcerate a younger inmate, the statute required exploration of alternatives to the current approaches to housing, programming, and treating the medical needs of elderly offenders.⁶ There were no specific geriatric facilities at the time the law was passed, but the new statute specifically required the department to establish River Junction Correctional Institution (RJCI) as a geriatric facility and to establish rules for which offenders are eligible to be housed there.

³ E-mail from Sarah Carroll, Legislative Advocate, Florida Association of Counties, to Committee on Children, Families, and Elder Affairs, March 10, 2010 (on file with the committee).

⁴ Chapter 33-601.217, Florida Administrative Code.

⁵ State of Florida Correctional Medical Authority 2008-2009 Annual Report, 51.

⁶ Section 944.804(1), F.S.

The elderly population has continued to increase since RJCI was opened as a geriatric facility. On June 30, 2009, 15,201 of the 100,894 inmates in the department's custody fit into the elderly or aging classification. This was a 7.5 percent increase in the elderly and aging population from the year before.⁷ Due to the continuing increase since s. 944.804, F.S., was enacted, the department has designated other institutions and dorms within institutions to house elderly and aging inmates. River Junction Work Camp, the successor to RJCI, still has the largest concentration of elderly inmates with 292 of its 340 inmates (86 percent of the population) classified as elderly. However, in three other institutions more than half of the inmate population is elderly.⁸

Section 944.8041, F.S., requires the department and the Correctional Medical Authority to each submit an annual report on the status and treatment of elderly offenders in the state-administered and private state correctional systems, as well as specific information on RJCI. The report must also include an examination of promising geriatric policies, practices, and programs currently implemented in other correctional systems within the United States.

Corrections Mental Health Act

The Corrections Mental Health Act (ss. 945.40 through 945.49, F.S.) provides for the evaluation and appropriate treatment of mentally ill inmates who are in the department's custody. It establishes procedures that must be followed when an inmate is involuntarily placed into a hospital setting for the purpose of mental health treatment. As such, it is analogous to the Baker Act for persons who are not incarcerated.⁹ Inmates who require intensive psychiatric inpatient care and treatment are housed at correctional mental health institutes (CMHI) at specified prisons. In order to admit an inmate into a CMHI, the correctional institution's warden must file a petition in the circuit court for the county where the inmate is imprisoned. The court holds a placement hearing to determine whether the inmate meets the statutory criteria for involuntary placement in the hospital setting. If so, the inmate is ordered to be housed in one of the correctional institutions designated as a CMHI for 6 months.¹⁰ If an inmate's condition improves, he or she is released from the CMHI. If after six months the inmate still requires CMHI level care, the department may file a petition for continuing admission with the Division of Administrative Hearings.

In most circumstances, inmates are in "crisis stabilization status" before they are admitted to a CMHI. Inmates at those institutions are usually transported to other Crisis Stabilization Units for admission hearings.

Section 945.41(4), F.S., provides that a youthful offender cannot be placed at Florida State Prison or Union Correctional Institution for mental health treatment.

Sections 945.42(5) and (6), F.S., are the definitions of "in immediate need of care and treatment" and "in need of care and treatment" for purposes of admission or emergency placement of an

⁷ State of Florida Correctional Medical Authority, *supra* note 5, at 53.

⁸ *Id.* at 56.

⁹ The Baker Act is found in chapter 394, F.S.

¹⁰ Section 945.43(2)(e), F.S.

inmate in a mental health treatment facility. The definitions include basically the same criteria, with the difference being the degree of urgency. The criteria include:

- The inmate refuses to care for himself or herself and is likely to continue to do so, posing a threat of substantial harm to his or her well-being, or there is a threat that the inmate will inflict serious bodily harm on himself or herself or another person;
- The inmate has refused voluntary placement for treatment after sufficient and conscientious explanation and disclosure of the purpose of placement, or is unable to determine for himself or herself whether placement is necessary; and
- All available less restrictive treatment alternatives that would offer an opportunity for improvement of the inmate's condition have been clinically determined to be inappropriate.

Section 945.46, F.S., provides for involuntary placement proceedings under the Baker Act for a mentally ill inmate who is in need of continued treatment after release from the department's custody. The Baker Act requires counties to designate a law enforcement agency within the county to transport individuals to the nearest receiving facility for involuntary examination.¹¹ Inmates are usually not incarcerated in a facility in the county where they will reside after release, and the department does not have statutory authority to transport an inmate to a receiving facility. Unless the sheriff's office of the home county picks up the inmate, which could involve substantial time and expense, there is a possibility of a disruption in needed treatment.

Inmate Work Squads

Section 946.40, F.S., authorizes the department to enter into agreements with state agencies, political subdivisions, and non-profit corporations to provide the services of inmates. The department must determine that the work is not detrimental to the welfare of the inmates or in the state's interest in the inmate's rehabilitation. A person who has been convicted of sexual battery under s. 794.011, F.S., is not eligible for a work program under this section.

Although the section is entitled "Use of prisoners in public works," the phrase "public works" is not in the text of the statute. However, due to other legal consideration the department limits participation of inmates to public work projects. The department also prohibits inmates from entering onto private property to perform work.

¹¹ Section 394.455(26), F.S., defines a receiving facility as any public or private facility that is designated by the Department of Children and Family Services to receive and hold involuntary patients under emergency conditions or for psychiatric evaluation and to provide short-term treatment.

Community Supervision

Overview

More than 117,000 offenders are actively supervised by the Department of Corrections on some form of community supervision.¹² Florida law recommends community supervision for offenders who do not appear likely to reoffend and who present the lowest danger to the welfare of society. Generally, this includes those offenders whose sentencing score sheet result does not fall into the range recommending incarceration under the Criminal Punishment Code.

The two major types of community supervision are probation and community control. Community control is a higher level of supervision that is administered by officers with a statutorily mandated caseload limit. Both probation and community control are judicially imposed sentences that include standard statutory conditions as well as any special conditions that are directed by the sentencing judge.¹³

Section 948.03, F.S., sets forth standard conditions of probation or community control. Standard conditions are effective even if not orally pronounced at the time of sentencing. The sentencing court may also add special conditions that it considers to be proper. A special condition is not enforceable unless it is orally pronounced by the court at the time of sentencing. The standard conditions in s. 948.03, F.S., require an offender who is sentenced to probation or community control to:

- Report to the probation and parole supervisors as directed;
- Permit such supervisors to visit him or her at his or her home or elsewhere;
- Work faithfully at suitable employment insofar as may be possible;
- Remain within a specified place;
- Make reparation or restitution;
- Make payment of the debt due and owing to a county or municipal detention facility for medical care, treatment, hospitalization, or transportation received by the felony probationer while in that detention facility;
- Support his or her legal dependents to the best of his or her ability;
- Pay any monies owed to the crime victim's compensation trust fund;
- Pay the application fee and costs of the public defender;
- Not associate with persons engaged in criminal activities;
- Submit to random testing as directed by the correctional probation officer or the professional staff of the treatment center where he or she is receiving treatment to determine the presence or use of alcohol or controlled substances;
- Not possess, carry, or own any firearm unless authorized by the court and consented to by the probation officer;
- Not use intoxicants to excess or possess any drugs or narcotics unless prescribed by a physician;

¹² Department of Corrections Monthly Status Report of Florida's Community Supervision Population, February 2010.

¹³ See *Jones v. State*, 661 So.2d 50 (Fla. 2d DCA 1995). Some special conditions are included in the statutes as options for the sentencing court, and others are devised by the court.

- Not knowingly visit places where intoxicants, drugs, or other dangerous substances are unlawfully sold, dispensed, or used; and
- Submit to the drawing of blood or other biological specimens, and reimburse the appropriate agency for the costs of drawing and transmitting the blood or other biological specimens to the Department of Law Enforcement.

The conditions of supervision that apply to a particular offender are set forth in the order of supervision that is entered by the court when an offender is sentenced. There is no statewide format for the order of supervision, but the department has developed a uniform order of supervision that it reports is now being used by a majority of judicial circuits. This uniform order is derived in part from the Florida Rules of Criminal Procedure. The uniform order and the Rules set forth statutory standard conditions as well as more restrictive or additional special conditions.¹⁴ While the statutes include a condition prohibiting possession of a firearm without the approval of the court and the probation officer, the uniform order and the Rules strictly prohibit possessing a firearm and add a prohibition against possessing any weapon without the probation officer's approval.

The following special condition is also included in the uniform order and the Rules: "You will live without violating the law. A conviction in a court of law shall not be necessary for such a violation to constitute a violation of your probation." This condition is not a standard condition of community supervision in s. 948.03(1), F.S.

Criminal Quarantine Community Control

Criminal quarantine community control is another form of community supervision that is available for sentencing offenders who are convicted of criminal transmission of HIV pursuant to s. 775.0877, F.S. It is defined in s. 948.001, F.S., as "intensive supervision, by officers with restricted caseloads, with a condition of 24-hour-per-day electronic monitoring, and a condition of confinement to a designated residence during designated hours." Section 948.101, F.S., provides that the court must require 24 hour a day electronic monitoring and confinement to a designated residence during designated hours as a condition of criminal quarantine community control. However, no one has been sentenced to criminal quarantine community control since the statutes were enacted in 1993. Offenders who have been convicted of criminal transmission of HIV have historically been sentenced to regular probation.

Public Safety Coordinating Councils

Section 951.26, F.S., requires each county to establish a public safety coordinating council (PSCC).¹⁵ The purpose of the PSCCs is to assess the population status of all detention or correctional facilities owned or contracted by the county and to formulate recommendations to ensure that the capacities of such facilities are not exceeded. The recommendations must include assessment of the availability of pretrial intervention, probation, work release, and substance

¹⁴ Rule 3.986(e), Fla. R. Crim. P., is an example form for order of probation and Rule 3.986(f), Fla. R. Crim. P., is an example form for order of community control.

¹⁵ Section 951.26, F.S., also authorizes a board of county commissioners to join with a consortium of one or more other counties to establish a PSCC for the member counties.

abuse programs; gain-time and bail bond schedules; and the confinement status of inmates. PSCCs are also authorized to develop a local public safety plan for future construction needs that covers at least 5 years. If the county or consortium of counties receives community corrections funds under s. 948.51, F.S., the PSCC must develop a public safety plan that meets that section's requirements.

Youthful Offenders

The Florida Youthful Offender Act (ss. 958.011 through 958.15, F.S.) was passed in 1978 for the purpose of improving the chances of corrections and successful reentry to the community of youthful offenders sentenced to prison. The Act intended to accomplish this by providing youthful offenders enhanced programs and services, opportunities for further service, and preventing them from associating with older and more experienced criminals. It was also intended to provide a sentencing alternative for courts in dealing with an offender who could no longer be safely treated as a juvenile.¹⁶

A court may sentence a defendant as a youthful offender if the defendant:

- Is at least 18 years of age or was prosecuted as an adult pursuant to ch. 985, F.S., but is under 21 years old at the time of sentencing;
- Has been found guilty of or has pled nolo contendere or guilty to a felony that is not punishable by death or imprisonment for life; and
- Has not previously been classified as a youthful offender.¹⁷

The department must assign an inmate who is less than 18 years old to a youthful offender facility even if he or she was not sentenced as a youthful offender.¹⁸ The department is also required to screen for and may classify as a youthful offender any inmate who is under 25 years old and does not have a sentence in excess of 10 years if he or she has not previously been classified as a youthful offender and has not committed a capital or life felony. The department may classify any inmate 19 years of age or younger, except a capital or life felon, as a youthful offender if it determines that the inmate's mental or physical vulnerability would substantially or materially jeopardize his or her safety in a non-youthful offender facility.¹⁹

III. Effect of Proposed Changes:

Sections 1, 2, 3, 6, 18, 21 and 22 remove references to criminal quarantine community control. This form of community supervision has never been ordered by a sentencing court since its creation in 1993.

Currently under s. 775.0877, F.S., a person convicted of criminal transmission of HIV may be sentenced to serve a term of criminal quarantine community control. Section 2 of the bill removes criminal quarantine community control as a sentencing option and instead provides that persons convicted of criminal transmission of HIV must be sentenced as provided in ss. 775.082

¹⁶ Section 958.021, F.S.

¹⁷ Section 958.04(1), F.S.

¹⁸ Section 944.1905(5)(a), F.S.

¹⁹ Section 958.11(6), F.S.

(fine), 775.083 (imprisonment), or 775.084 (habitual offender), F.S. Conforming changes are also made in ss. 384.34, 796.08, 921.187, 948.001, 948.101, and 948.11, F.S.

Section 4 creates a new felony offense that applies to lewd actions by inmates in the presence of a correctional employee. The new statute addresses the same types of conduct as does s. 800.04(7), F.S., which prohibits lewd and lascivious exhibition in the presence of a person less than 16 years of age. The new s. 800.09, F.S., provides that it is a 3rd degree felony for a person detained in a facility to intentionally masturbate, intentionally expose the genitals in a lewd or lascivious manner, or intentionally commit any other sexual act in the presence of an employee. These other sexual acts include, but are not limited to, sadomasochistic abuse, sexual bestiality, or the simulation of any act involving sexual activity. The statute will not be applicable to cases in which the sexual act involves actual physical or sexual contact with the victim, since existing law already provides significant punishments for such conduct.

The new statute defines “employee” to include persons who are employed by or performing contractual services for the department, any entity that operates a private correctional facility for persons committed to the department’s custody, and PRIDE and other entities that operate correctional work programs under Part II of ch. 946, F.S. The term also includes Parole Commission parole examiners. Unlike s. 784.078, F.S. (battery on a facility employee by throwing, tossing, or expelling bodily fluids), the new statute does not include employees of county or municipal detention facilities within the definition of “employee.”

As described in the department’s bill analysis, the new offense is intended to create a credible deterrent to lewd actions by inmates. Currently, much of this activity is either not prosecutable or is only prosecutable as the misdemeanor crime of exposing the sexual organs in violation of s. 800.03, F.S.²⁰

Section 5 amends s. 907.043, F.S., to require that the register of defendants, currently prepared weekly by pretrial release programs, be prepared monthly instead. It is anticipated that this change will increase the amount of staff time available for provision of services to pretrial release defendants and other program activities.

Sections 7 and 8 of the bill address changes that have been made with regard to the process for requesting restoration of civil rights. Section 940.061, F.S., is amended and s. 944.293, F.S., is repealed to delete an obsolete requirement that the department obtain forms and assist inmates and offenders with completion of a restoration of civil rights application. Section 6 also amends s. 940.061, F.S., to codify the department’s current practice of sending the Parole Commission a monthly electronic list containing the names of offenders who are released from incarceration or terminated from supervision and who may be eligible for restoration of civil rights. This list serves as an application for restoration of civil rights.

Section 9 amends s. 944.35, F.S., to make it a 3rd degree felony for an employee of a private correctional facility to engage in sexual misconduct with an inmate. Consequently, private correctional facility employees will face criminal sanctions for sexual misconduct to the same extent as department employees.

²⁰ See Department of Corrections’ 2010 Bill Analysis, Senate Bill 960, pp. 2-3.

Section 10 amends s. 944.605(3), F.S., to specifically state that the department can use electronic means to submit information concerning inmates who have been convicted of armed robbery, sexual battery, home-invasion robbery, or carjacking to the sheriff and police chief where the inmate intends to reside after release. The existing statute does not specifically authorize or prohibit release of the information by electronic means.

Section 11 amends s. 944.804, F.S., to change the reference to a geriatric facility at River Junction Correctional Institution to a general reference, “geriatric facilities or geriatric dorms within a facility.” This is more consistent with the current state of geriatric housing within the department; however, the amended statute would no longer require the department to maintain RJCI as a geriatric facility.

The amendment also removes an obsolete requirement that modifications be made to RJCI prior to its reopening to ensure that the facility complied with the federal Americans with Disabilities Act (ADA).

Section 12 amends s. 944.8041, F.S., to change a requirement that the department and the Correctional Medical Authority (CMA) report specifically on RJCI to a general reference to “the department’s geriatric facilities and dorms.” This broader analysis is already included in the scope of CMA’s annual report. The section also amends another specific reference to RJCI to a general reference.

Section 13 amends s. 945.41(4), F.S., to remove the prohibition against placing a youthful offender at Florida State Prison or Union Correctional Institution for mental health treatment. This prohibition has been in effect since the Corrections Mental Health Act was enacted in 1982. Also, s. 945.41(5), F.S., is updated to reflect that the department has more than one mental health treatment facility.

Section 14 amends the definitions of “in immediate need of care and treatment” and “in need of care and treatment” in s. 945.42, F.S. The definitions currently require that an inmate who meets the criteria for involuntary placement must refuse voluntary placement after being given “sufficient and conscientious explanation and disclosure of the purpose of placement” or that the inmate is unable to determine for himself or herself whether placement is necessary. The amendment removes this requirement in both definitions.

Section 15 amends s. 945.43, F.S., to authorize the department to transport an inmate to a placement hearing if it is not conducted either at the facility where he or she is located or by electronic means.

Section 16 amends s. 945.46, F.S., to authorize the department to transport a mentally ill inmate who is being released from custody to a Baker Act receiving facility for involuntary examination or placement. The department may transport the inmate to the nearest receiving facility if a particular receiving facility is not designated by the Department of Children and Family Services. This amendment will remove the necessity for local sheriff’s offices to transport mentally ill inmates after release from the department.

Section 17 creates s. 946.42, F.S., to clearly specify the reasons for which inmate work squads can enter onto private property. Inmates who are eligible to perform service pursuant to s. 946.40, F.S., the inmate work squad statute, will be able to enter onto private property to perform public works or for the following purposes:

- (1) Accepting and collecting donations for the use and benefit of the department. A “donation” is a gift of tangible personal property, specifically including equipment, fixtures, construction materials, food items, and other tangible personal property of a consumable and non-consumable nature.
- (2) Assisting federal, state, local, and private agencies before, during, and after emergencies or disasters. An “emergency” is a natural, technological, or manmade occurrence or threat of occurrence which results in or may result in substantial injury or harm to the population or substantial damage to or loss of property. A “disaster” is a natural, technological, or civil emergency that results in a declaration of a state of emergency by a county, the governor, or the president.

Section 19 amends s. 948.03(1), F.S., to change an existing standard condition of probation and community control, and to add two new standard conditions as follows:

- The prohibition in s. 948.03(1)(l), F.S.,²¹ against possessing, carrying, or owning any firearm unless authorized by the court and consented to by the probation officer is amended to delete the language requiring court authorization and officer consent. As a result, an offender will be prohibited altogether from possessing a firearm, consistent with the strict prohibition in the Florida Rules of Criminal Procedure.²² The bill, however, authorizes an offender to possess a weapon with the prior consent of the probation officer.²³
- A standard condition is added to require the offender to live without violating any law. This requirement is already included in the Florida Rules of Criminal Procedure. As in the Rules, the statute clarifies that it is not necessary to prove a conviction for violating a law in order to show that the condition was violated.
- A standard condition is added to require the offender to submit to the taking of a digitized photograph by the department as part of the offender’s records. The department may display the photograph on its public website while the offender is on court-ordered supervision, unless the offender is on pretrial intervention supervision only or his or her identity is exempt from public records requirements under s. 119.07, F.S. Although the department currently takes such photographs and displays them on its website, it cannot mandate that a photograph be taken. The exception is in the case of sex offenders, who are required to submit to the taking of a photograph.

Section 20 corrects a cross-reference in s. 948.09(7), F.S., regarding payment of restitution.

²¹ The bill changes the designation of this paragraph to paragraph (m).

²² Florida Rule of Criminal Procedure 3.986 governs forms related to judgment and sentence. Among other provisions, the rule contains forms for orders of probation and community control. Both form orders in the rule provide that the offender “will not possess, carry, or own any firearm” and “will not possess, carry, or own any weapons without first procuring the consent of [the] officer.”

²³ Under ch. 790, F.S., governing weapons and firearms, the definition of “weapon” excludes “a firearm or common pocketknife, plastic knife, or blunt-bladed table knife.” Section 790.001(13), F.S.

Section 23 amends s. 951.26, F.S., to authorize a county Public Safety Coordinating Council to develop a comprehensive local reentry plan to assist offenders released from incarceration in successfully reentering the community. The bill requires the PSCCs to develop the plan in coordination with public safety officials and local community organizations who can provide offenders with reentry services such as assistance with housing, healthcare, education, substance abuse treatment, and employment.

Section 24 provides an effective date of July 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

In general, the provisions of the bill are either revenue neutral or may have a positive fiscal impact.

Section 4 creates a new third-degree felony for lewd and lascivious exhibition in the presence of an employee. Section 9 makes the existing felony prohibition against sexual activity between an inmate and a corrections employee applicable to employees of private prisons. On February 23, the Criminal Justice Impact Conference concluded that the bill will have an insignificant fiscal impact on the state.²⁴

²⁴ Office of Economic and Demographic Research, The Florida Legislature, *Criminal Justice Impact Conference 2010 Legislature* (Mar. 17, 2010), available at <http://edr.state.fl.us/conferences/criminaljustice/Impact/cjimpact.htm> (follow "2010 Conference Results" link) (last visited Apr. 6, 2010).

Section 16 authorizes the department to transport a mentally ill inmate who is being released to a receiving facility under the Baker Act. This could be more expensive than the current practice, but the department does not indicate whether or not it would have a fiscal impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS/CS by Judiciary on April 13, 2010:

The committee substitute:

- Revises the provision in the prior version of the bill which prohibits a probationer or offender in community control from possessing or owning any weapon without the prior approval of the correctional probation officer. The committee substitute additionally prohibits possessing or owning a firearm at all, without regard to approval from a probation officer.
- Prohibits the Department of Corrections from posting a photo of an offender on its website if the offender is on pretrial intervention supervision solely or his or her identity is exempt from disclosure under the Public Records Law.

CS/CS by Children, Families, and Elder Affairs on March 9, 2010:

The committee substitute requires that the register, currently prepared weekly by pretrial release programs, be prepared monthly instead.

CS by Criminal Justice on February 3, 2010:

The committee substitute:

- Revises the new felony offense of lewd and lascivious exhibition in the presence of facility employee to: (1) delete a clause that would have made it a felony to harass, annoy, threaten, or alarm a facility employee; (2) protect any person who is within the statute's definition of "employee," not just those who are employees of the facility; and (3) provide that the sexual acts by the inmate do not involve actual physical or sexual contact with the victim. Acts that involve physical or sexual contact with the victim can be charged under other statutes.
- Removes sections of the bill that would have modified and clarified statutory provisions relating to the department's involvement with the competency to stand trial process for inmates who are charged with new crimes.

- Revises the newly-created statute that authorizes the department to allow inmates who meet the criteria for a public works squad to clarify that the inmates may perform public works on private property. Removes sections of the bill that would have revised statutes relating to youthful offenders.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

This bill substantially amends the following sections of the Florida Statutes: 27.366, 775.082, 775.0843, 903.286, and 938.27. The bill also repeals the following sections of the Florida Statutes: 775.08401, 775.087(5), and 985.557(4).

II. Present Situation:

Explanation and Reporting Requirements for State Attorneys

In certain criminal prosecutions, if mandatory or enhanced sentences are not pursued, the state attorney must document why that decision was made and, in some instances, report those decisions. For example, current law sets forth the legislative intent that defendants who are eligible for enhanced minimum mandatory sentences under subsections 775.087(2) and (3), F.S., commonly known as the “10-20-Life” law, receive those sentences.¹ Current law also requires that prosecutors write memoranda for each case in which a defendant qualified for the minimum mandatory sentences under the 10-20-Life law but did not receive the sentence. The memorandum must explain the sentencing deviation.² In addition to keeping the memorandum in the defendant’s file, it is to be submitted quarterly to the Legislature and the Governor with a copy being retained for 10 years by the Florida Prosecuting Attorneys Association, Inc. (FPAA), and made available to the public upon request.³

The same statutory requirement of a sentencing deviation memoranda to the case file and the FPAA exists in cases where the defendant meets the criteria for being sentenced as a “prison releasee reoffender” under s. 775.082(9), F.S. In those cases, the memoranda are forwarded from the prosecutors to the FPAA on an annual basis.⁴ The FPAA must also retain these records for 10 years and make these documents available to the public.

Habitual Offender Requirements

Current law requires state attorneys to adopt criteria to be used by the state attorney’s office when deciding whether to pursue the enhanced sanctions provided in s. 775.084(4), F.S., for defendants who meet the statutory criteria for sentencing as “habitual felony offenders” and “habitual violent felony offenders.”⁵ The statute specifies that the criteria be designed to ensure fair and impartial application of those sentencing enhancements. Deviations from the criteria are to be memorialized for the case files.⁶

¹ Section 27.366, F.S.; *see also* s. 775.084(5), F.S.

² Section 775.084(5), F.S.

³ Section 27.366, F.S.

⁴ Section 775.082(9)(d)2., F.S.

⁵ Section 775.08401, F.S. The criteria for designation as a “habitual felony offender” and a “habitual violent felony offender” are set forth in s. 775.084(1)(a) and (b), F.S.

⁶ Section 775.08401(3), F.S.

Juvenile Cases in Adult Court

Current law requires the state attorneys to develop policies and guidelines for filing juvenile cases in adult court.⁷ It further requires that the state attorneys submit these policies and guidelines to the Legislature and the Governor no later than January 1 of each year.⁸

Cash Bonds

The clerk of the court is currently required to withhold unpaid court costs, court fees, and fines from returnable cash bonds.⁹ The costs, fees, and fines are to be withheld regardless of who (other than a licensed bail bond agent) posted the cash bond on behalf of the defendant. If sufficient funds are not available to pay all unpaid fees, costs, and fines, the clerk must obtain payment from the defendant or enroll the defendant in a payment plan.¹⁰

Costs of Prosecution and Investigative Costs

Courts are authorized to assess other costs against convicted defendants.¹¹ In all criminal and violation-of-probation or community-control cases, convicted persons are liable for payment of the costs of prosecution, including any investigative costs incurred by the investigating law enforcement agency.¹² Costs of prosecution may be imposed at the rate of \$50 in misdemeanor cases and \$100 in felony cases unless the prosecutor proves that costs are higher in the particular case before the court.¹³ Investigative costs must be separately and specifically requested by the investigating agency.¹⁴ Ultimately the costs of prosecution and investigative costs are deposited into agency and state attorney trust funds.¹⁵

If a dispute arises as to the proper amount or type of the costs of prosecution or the investigative costs, the court must resolve the dispute by a preponderance of the evidence.¹⁶ The burden of demonstrating the amount of costs incurred is on the state attorney. The defendant bears the burden of demonstrating his or her financial resources, as well as financial need.¹⁷ The burden of demonstrating such other matters as the court deems appropriate is upon the party designated by the court as justice requires.¹⁸

⁷ Section 985.557(4), F.S.

⁸ *Id.*

⁹ Section 903.286, F.S.

¹⁰ *Id.*

¹¹ Part IV of ch. 938, F.S.

¹² Section 938.27(1), F.S.

¹³ Section 938.27(8), F.S.

¹⁴ Section 938.27(1), F.S.

¹⁵ Section 938.27(7) and (8), F.S.

¹⁶ Section 938.27(4), F.S.

¹⁷ *Id.*

¹⁸ *Id.*

III. Effect of Proposed Changes:

Explanation and Reporting Requirements for State Attorneys

The bill eliminates the current reporting and record-keeping required of state attorneys and individual prosecutors in “10-20-Life” cases, prison releasee reoffender cases, habitual felony offender and habitual violent felony offender cases, and juvenile direct-file cases.

The bill eliminates the requirement that prosecutors write an explanation for each case in which a defendant qualified for the minimum mandatory sentences under the 10-20-Life law but did not receive the sentence. The bill further eliminates the requirement that the prosecutor retain the memorandum in the defendant’s file, as well as the reporting requirement that the state attorney submit quarterly reports to the Legislature and the Governor regarding the prosecution and sentencing of offenders under the 10-20-Life law, with a copy being retained for 10 years by the Florida Prosecuting Attorneys Association, Inc. (FPAA), and made available to the public upon request.

For those cases in which the defendant meets the criteria for being sentenced as a “prison releasee reoffender” but does not receive the mandatory minimum sentence, the bill eliminates the requirement for the state attorney to include a sentencing deviation memorandum in the case file and to transmit these memoranda to the FPAA.

Habitual Offender Requirements

The bill repeals the statute requiring the state attorney in each judicial circuit to adopt uniform criteria for determining when to pursue habitual felony offender and habitual violent felony offender sanctions. The requirement that any deviation from the criteria must be explained in writing and placed in the case file is also eliminated in the repeal.

Juvenile Cases in Adult Court

The bill repeals the requirement that the state attorneys in each judicial circuit develop policies and guidelines for filing juvenile cases in adult court, as well as the requirement that these policies and guidelines be submitted to the Legislature and the Governor no later than January 1 of each year.

Costs of Prosecution and Investigative Costs

Clerks of the court are required under the bill to withhold outstanding costs of prosecution from returnable cash bonds, in addition to other court costs, court fees, and fines.

The bill eliminates the requirement that law enforcement agencies, fire departments, or the Department of Financial Services and the Office of Financial Regulation of the Financial Services Commission must specifically request the recovery of investigative costs. However, current law does not provide a “default” amount of investigative costs to be recovered as it does with costs of prosecutions. Therefore, it is unclear what amount a court would assess as investigative costs without a request from an agency for a specific amount.

The bill eliminates the requirement that the defendant prove his or her financial need and resources if costs become a disputed issue. The bill also eliminates the language in current law providing that the burden of proving other matters related to the assessment of these costs is upon the party designated by the court.

The clerk of court is required under the bill to separately record each assessment and the payment of costs of prosecution. The bill specifies that costs of prosecution must be assessed by the court with respect to each case number in which the court orders costs of prosecution. Thereafter, the clerk must provide a monthly report to the state attorney's office regarding the assessments and payments recorded.

Cross-Reference to Repealed Statute

The bill deletes a cross-reference to s. 775.08401, F.S., relating to the establishment of criteria for prosecution of habitual offenders and habitual violent felony offenders, which is repealed under the bill.

Effective Date

The bill provides an effective date of July 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The public will no longer have access to certain records and reports by the offices of the state attorneys which are currently required by law and eliminated by the bill, because the records will no longer be created. This does not appear to be a deviation from the open records requirements of the Florida Constitution or statute because the agency is not denying access to existing records, but rather is no longer creating them.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Individuals who post a cash bond – whether they are the arrestee or someone acting on the arrestee’s behalf – will lose returnable bond money due to the bill’s requirement that the clerk of court withhold costs of prosecution from that returnable cash bond.

C. Government Sector Impact:

The operating budgets (grants and donations trust funds) of the state attorneys offices may see an increase due to the collection of costs of prosecution from returnable cash bonds as authorized by the bill. Current law authorizes no less than \$50 per misdemeanor case and no less than \$100 per felony case as costs of prosecution, unless greater costs are shown by the prosecutor.

Clerks of the court may experience an increase in workload related to the requirement that the clerk report the assessments and payments to the state attorney on a monthly basis.

State attorneys may experience a decrease in workload as a result of the elimination of the requirement to document certain information related to sentence deviations, as well as the elimination of the requirement to report this information to the Florida Prosecuting Attorneys Association, Inc, as well as, in some instances, to the Legislature and the Governor.

The Office of the State Courts Administrator reports that the bill will have a minimal, if any, judicial impact, although it does note that disputes may arise regarding an offender’s inability to pay assessed costs and whether the issuance of a judgment lien is appropriate.¹⁹

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on March 9, 2010:

The committee substitute:

- Makes a technical change to the catch line of s. 27.366, F.S., to eliminate the reference to the term “report;” and

¹⁹ Office of the State Courts Administrator, *Judicial Impact Statement: HB 761* (Feb. 5, 2010).

- Removes the provision in the bill which holds defendants whose cases are diverted liable for the costs of prosecution.

CS by Criminal Justice on January 13, 2010:

The committee substitute:

- Specifies that the cost-of-prosecution assessments and payments recorded by the clerk of court relate to costs that are *assessed by the court*, thereby clarifying language that may have raised concerns about improper delegation of power to the clerk of court; and
- Removes language from the bill (sections 7 and 8 of the original filed bill) which authorized the state attorneys' offices to collect processing fees from individuals seeking to have their criminal histories sealed or expunged.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.



529830

LEGISLATIVE ACTION

Senate

House

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**CRIMINAL AND CIVIL
JUSTICE APPROPRIATIONS**
DATE: 4-15-10
TIME: 9:25 A.M.

The Committee on Criminal and Civil Justice Appropriations
(Jones) recommended the following:

Senate Amendment (with title amendment)

Delete lines 102 - 115.

===== T I T L E A M E N D M E N T =====

And the title is amended as follows:

Delete lines 19 - 24

and insert:

specified offenses; amending s. 938.27, F.S.; deleting



711894

LEGISLATIVE ACTION

Senate

House

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**CRIMINAL AND CIVIL
JUSTICE APPROPRIATIONS**
DATE: 4-15-10
TIME: 9:25 A.M.

The Committee on Criminal and Civil Justice Appropriations
(Jones) recommended the following:

Senate Amendment (with title amendment)

Delete lines 167 - 172

and insert:

payments in any case.

===== T I T L E A M E N D M E N T =====

And the title is amended as follows:

Delete lines 26 - 31



711894

13 and insert:

14

15 financial resources of the defendant; repealing s.

16 985.557(4), F.S., relating to

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal and Civil Justice Appropriations Committee

BILL: SB 808

INTRODUCER: Senator Oelrich

SUBJECT: Murder/Unlawful Distribution of Methadone

DATE: April 14, 2010

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Favorable
2.	Anderson	Maclure	JU	Favorable
3.	Butler <i>(initials)</i>	Sadberry <i>(initials)</i>	JA	Pre-meeting
4.				
5.				
6.				

I. Summary:

The bill provides that first degree murder, a capital felony, includes the unlawful killing of a human being which resulted from the unlawful distribution of methadone by a person 18 years of age or older, when the drug is proven to be the proximate cause of the death of the user.

This bill substantially amends section 782.04, Florida Statutes.

II. Present Situation:

Methadone: Properties; Scheduling; and Medical Uses

Methadone is a “synthetic narcotic analgesic (pain killer) commonly associated with [h]eroin detoxification and maintenance programs, but it is also prescribed to treat severe pain. It has been increasingly prescribed in place of oxycodone for pain management.”¹ Methadone is a Schedule II controlled substance.² A Schedule II controlled substance is a substance that has “a high potential for abuse and has a currently accepted but severely restricted medical use in treatment in the United States, and abuse of the substance may lead to severe psychological or physical dependence.”³

¹ Florida Medical Examiners Commission, Florida Department of Law Enforcement, *Drugs Identified in Deceased Persons by Florida Medical Examiners, 2009 Interim Report*, 34 (Nov. 2009), available at <http://www.fdle.state.fl.us/Content/getdoc/7f31b3d3-cff8-4f25-a04d-51f11b018e32/MEC-2009-Interim-Drug-Report.aspx> (last visited Mar. 10, 2010).

² Section 893.03(2)(b)14., F.S.

³ Section 893.03(2), F.S.

A recent report from the United States Government Accountability Office (GAO) provides a brief profile on methadone and its properties, uses, and abuse:

Methadone has been approved by the Food and Drug Administration (FDA) for the treatment of opioid addiction and pain, and it is relatively inexpensive compared to other opioids. Methadone's unique pharmacologic properties make it different from other opioids, so it must be carefully administered. Particular vigilance is needed when starting treatment and increasing dosages, regardless of whether methadone is being used for addiction treatment or pain management. FDA reports that side effects can include slow or shallow breathing, dangerous changes in heartbeat, and death.

Until recently, methadone was primarily used in opioid treatment programs (OTP) to treat and rehabilitate people addicted to such opioids as heroin or certain prescription drugs. It works as a replacement for such drugs by preventing withdrawal symptoms. Its slow onset allows patients to be monitored as the drug takes effect, and its 24- to 36- hour duration of action suppresses opioid withdrawal symptoms with one daily dose....

Since the late 1990s, methadone has been increasingly prescribed by practitioners to treat their patients' pain. However, while a single dose suppresses opioid withdrawal symptoms for a day or more, it generally relieves pain for 4 to 8 hours despite remaining in the body much longer. Further, it may take 3 to 5 days to achieve full pain relief, so dosage increases must be done more slowly than with other opioids. As a result, patients may feel the need to take more methadone before the previous dose has left the body. However, if taken too often, in too high a dose, or with certain other medicines or supplements, it may build up in the body to a toxic level. Variability in methadone's absorption, metabolism, and relative pain relief potency among patients requires a highly individualized approach to prescribing....

Like many drugs, methadone can also be abused—that is, used for nontherapeutic purposes or for purposes other than those for which it was prescribed, and dangerous side effects or death can occur when methadone is combined with other drugs or alcohol....⁴

There are several Florida laws applicable to prescribing, administering, and dispensing Schedule II controlled substances. The prescribing of controlled substances is a privilege that is separate from the regulation of the practice of the prescribing practitioner.⁵ A practitioner, in good faith and in the course of his or her professional practice only, may prescribe, administer, dispense, mix, or otherwise prepare a controlled substance, or the practitioner may cause the same to be administered by a licensed nurse or an intern practitioner under his or her direction and supervision only.⁶

⁴ United States Government Accountability Office, *Methadone-Associated Overdose Deaths, Factors Contributing to Increased Deaths and Efforts to Prevent Them* (GAO-09-341), 1-3 (March 2009), available at <http://www.gao.gov/new.items/d09341.pdf> (last visited March 10, 2010).

⁵ Section 893.02(20), F.S., defines practitioner as a licensed medical physician, a licensed dentist, a licensed veterinarian, a licensed osteopathic physician, a licensed naturopathic physician, or a licensed podiatrist, if such practitioner holds a valid federal controlled substance registry number.

⁶ Section 893.05(1), F.S.

A pharmacist,⁷ in good faith and in the course of professional practice only, may dispense controlled substances upon a written or oral prescription under specified conditions. The proprietor of the pharmacy in which a prescription for controlled substances is filled must retain the prescription on file for a period of 2 years. The original container in which a controlled substance is dispensed must bear a label with specified information. A prescription for a Schedule II controlled substance may be dispensed only upon a written prescription of a practitioner, except that in an emergency situation, as defined by regulation of the Department of Health, such controlled substance may be dispensed upon oral prescription but is limited to a 72-hour supply. A prescription for a Schedule II controlled substance may not be refilled.⁸

Methadone and Overdose Deaths

Methadone-associated overdose deaths “can occur in a number of ways, including intentional overdoses, or suicide, and accidental overdoses due to improper dosing levels, abuse, or patient misuse, such as by combining methadone with other drugs.”⁹ In relation to its own report findings, the GAO notes that “[d]efining methadone’s role in a death is difficult because of inconsistencies in determining and reporting causes of death, the presence of other drugs in the deceased person’s system, and a lack of information about the deceased person’s level of opioid tolerance.”¹⁰ The GAO also notes that the Center for Disease Control reports “that it has been difficult to determine the extent to which increases in methadone-associated overdose deaths have resulted from specific prescribing practices, misuse by patients, diversion of the drug such as by illegal sale, or other means.”¹¹ It is likely that state agencies reporting methadone-associated deaths would experience data-collection issues similar to those noted by the GAO.¹²

The Florida Medical Examiner’s Commission (Commission) provides data on drug-associated deaths. According to the Commission’s 2009 interim report, for the first half of 2009 (January-June), the drugs that caused the most deaths were Oxycodone (499), all Benzodiazepines (470, which includes 348 deaths caused by Alprazolam), *Methadone* (364), Ethyl Alcohol (254), Cocaine (236), and Morphine (147).¹³

⁷ Section 893.02(17), F.S., defines “pharmacist” as a person who is licensed pursuant to ch. 465, F.S., to practice the profession of pharmacy in this state.

⁸ Section 893.04(1), F.S. A pharmacist may not dispense a Schedule II controlled substance to any patient or patient’s agent without first determining, in the exercise of his or professional judgment, that the order is valid. The pharmacist may dispense the controlled substance, in the exercise of his or professional judgment, when the pharmacist or pharmacist’s agent has obtained satisfactory patient information from the patient or the patient’s agent. Section 893.04(2)(a), F.S.

⁹ United States Government Accountability Office, *supra* note 4, at 3.

¹⁰ *Id.*

¹¹ *Id.* The GAO notes that “[d]iversion can involve illegal sales of prescription drugs by physicians, patients, or pharmacists, as well as obtaining controlled substances from Internet pharmacies without a valid prescription. Diversion can also involve such activities as ‘doctor shopping’ by individuals who visit numerous physicians to obtain multiple prescriptions, prescription forgery, and pharmacy theft.” *Id.* at n. 8.

¹² Florida Department of Law Enforcement, *Senate Bill 808 Analysis* (February 12, 2010) (on file with the Senate Committee on Judiciary). The Florida Department of Law Enforcement states: “It is worth noting that the manner of death (i.e. natural, homicide, suicide, accidental, undetermined) in cases of drug overdose is very often determined by the Medical Examiner to be accidental. Methadone is a drug that has both a currently accepted medical application as well as being a drug that is often obtained through diversion. It will be difficult to discern whether a medically supervised dosage or a diverted dosage was the ultimate cause of death.”

¹³ Florida Medical Examiners Commission, *supra* note 1, at ii. All Commission information in this subsection is from this report.

For January-June 2009, there were 469 total occurrences of methadone-associated deaths. The Commission attributes methadone as a “cause” in 364 of these deaths, and “present” in the remaining 132 deaths.¹⁴ Of the 364 deaths (methadone found at lethal levels), the largest age group of decedents consists of persons 35-50 years of age (153).

A comparison of data for January-June 2009 and July-December 2008 indicates that methadone occurrences increased by 6.9 percent and deaths caused by methadone increased by 8.3 percent.¹⁵

For January-June 2009, the Commission reports 57 deaths in which the only drug present was methadone. In 36 of these deaths, methadone is identified as a cause of death. The Commission also reports 439 deaths in which a combination of drugs, including methadone, was present. In 325 of these deaths, methadone is identified as a cause of death.

The Commission reports the following percentages for manner of death in methadone-associated cases reported: accident (84 percent); natural (7 percent); suicide (6 percent); undetermined (2 percent); and homicide (1 percent).

Prosecution of Methadone-Associated Deaths

Review of Florida case law indicates that unlawful distribution of a controlled substance in which death is attributed to that distribution has been prosecuted as manslaughter¹⁶ and third degree murder.¹⁷ In all of these cases, the death is related to the unlawful distribution, though the death is not always the result of the use of the substance distributed.¹⁸ Case law does not indicate that prosecutions for manslaughter or third degree murder are precluded if the controlled substance involved in the unlawful distribution is methadone. However, the Fourth District Court of Appeal recently supported a trial court’s dismissal of a first degree murder charge for unlawful distribution of methadone. The impetus for the bill appears to be this holding.

Currently the Florida Statutes state that it is first degree murder, a capital felony,¹⁹ for a person 18 years of age or older to unlawfully kill a human being as a result of unlawfully distributing

¹⁴ *Id.* at 19. Relevant to this statistical information, the Commission notes that many of the deaths were found to have several drugs contributing to the death, thus the count of specific drugs listed is greater than the number of cases.

¹⁵ *Id.* at ii. For July-December 2008, there were 464 total occurrences and 357 lethal dose occurrences; for January-June 2009, there were 469 total occurrences and 364 lethal dose occurrences.

¹⁶ Section 782.07(1), F.S.

¹⁷ Section 782.04(4), F.S.

¹⁸ *See, e.g., Howard v. State*, 545 So.2d 352 (Fla. 1st DCA 1989), *review denied*, 553 So.2d 1165 (Fla. 1989) (third degree murder conviction involving lethal dose of cocaine); *Blair v. State*, 481 So.2d 1279 (Fla. 3d DCA 1986) (*third degree murder conviction involving lethal dose of methadone*); *State v. Amaro*, 436 So.2d 1056 (Fla. 2d DCA 1983) (third degree murder charge involving death of a police officer during cannabis raid); *Jones v. State*, 360 So.2d 1293 (Fla. 3d DCA 1978) (manslaughter conviction involving lethal dose of heroin). In *Martin v. State*, 377 So.2d 706 (Fla. 1979), the Florida Supreme Court upheld a second degree murder conviction based on unlawful distribution involving a lethal dose of heroin because the appellant pled to the second degree murder charge and, therefore, admitted the facts necessary to sustain the charge. The Court held that since the facts of the case would have supported a conviction for first degree murder, the appellant’s plea to second degree murder precluded any consideration of whether the charge of second degree murder was sufficient.

¹⁹ Section 775.082(1), F.S. Generally, a capital felony is punishable by a death sentence or life imprisonment (without parole). The appropriate penalty is determined as provided in s. 921.137, F.S., s. 921.141, F.S., or s. 921.142, F.S., as applicable.

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, when such drug is proven to be the proximate cause of the death of the user.²⁰

The Florida Supreme Court has described this offense as “an unusual form of felony murder because the State does not need to prove that the defendant intended an act of homicide, that the defendant had knowledge of the drug overdose, or that the defendant was even present when the drug overdose occurred.”²¹

Persons have been prosecuted under s. 782.04(1)(a)3., F.S. (or earlier versions of this provision), for unlawfully distributing drugs listed in that provision.²² However, in *State v. McCartney*,²³ the Fourth District Court of Appeal upheld the dismissal of a charge of first degree murder under s. 782.04(1)(a)3., F.S., based on unlawful distribution of methadone.

The allegations supporting the charge were that the defendant sold methadone to a person whose death was attributed to the methadone. The defendant moved to dismiss, arguing that the methadone was not a Schedule I controlled substance under the reference to s. 893.03(1), F.S., in s. 782.04(1)(a)3., F.S. The State argued that methadone was a “synthetic” of opium. Testimony at an evidentiary hearing on the motion was that methadone is not a “synthetic” of opium, nor is it a synthetic salt, compound or salt, compound derivative, or preparation of opium. The State’s own expert acknowledged that information it had previously provided indicating that methadone is synthetic opium or a derivative of opium was scientifically incorrect. The trial court dismissed the charge.

The State appealed, arguing that methadone is synthetic opium. The appellate court disagreed. It noted that this argument was made in spite of the testimony of the State’s own expert to the contrary. It was also noted that that the Legislature specifically scheduled methadone as a Schedule II controlled substance, not a Schedule I controlled substances in s. 893.03(1), F.S.

III. Effect of Proposed Changes:

The bill amends s. 782.04(1)(a)3., F.S., to insert the word “methadone” into the list of drugs referenced in that provision in order to provide that first degree murder, a capital felony, includes the unlawful killing of a human being which resulted from the unlawful distribution of 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.

The bill also reenacts s. 775.0823(1) and (2), s. 782.065(1), 921.002(3)(i), and s. 947.146(3)(i), F.S., to incorporate the amendment to s. 782.04, F.S., in references to that section.

²⁰ Section 782.04(1)(a)3., F.S.

²¹ *Pena v. State*, 901 So.2d 781, 787 (Fla. 2005), citing *Pena v. State*, 829 So.2d 289, 294 (Fla. 2d DCA 2002).

²² *Id.* (first degree murder involving lethal doses of heroin and another drug). See also *Aumuller v. State*, 944 So.2d 1137 (Fla. 2d DCA 2006), review denied, 956 So.2d 455 (Fla. 2007) (first degree murder conviction involving lethal dose of heroin); *State v. McCutcheon*, 428 So.2d 788 (Fla. 2d DCA 1983) (first degree murder indictment involving lethal dose of opium or a synthetic, etc.).

²³ *State v. McCartney*, 1 So.3d 326 (Fla. 4th DCA 2009).

The effective date of the bill is October 1, 2010.

Other Potential Implications:

Section 782.04(1)(a)3., F.S., does not define “distribution” or define it by reference to a definition of that term in another statute.²⁴ It is unclear if “unlawful distribution” in s. 782.04(1)(a)3., F.S., if applied to unlawful distribution of methadone, would include unlawfully prescribing, administering, or dispensing methadone.

It is also unclear what constitutes “unlawful” distribution in the context of prescribing, administering, or dispensing methadone. Would the term “unlawful” cover only criminal acts, or would it also cover, for example, acts for which s. 458.331, F.S., authorizes licensure denial or disciplinary action? For example, would it cover the doctor who is disciplined as authorized by s. 458.331(1)(q), F.S., for inappropriately and excessively prescribing methadone, or the doctor who is disciplined as authorized by s. 458.331(1)(t), F.S., for medical malpractice or gross medical malpractice based on the doctor’s prescription or administration of methadone?

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

²⁴ For example, for purposes of ch. 893, F.S., the Florida Comprehensive Drug Abuse Prevention and Control Act, s. 893.02(8), F.S., defines “distribute” to mean delivery, other than by administering or dispensing, a controlled substance. Section 893.02(6), F.S., defines “deliver” or “delivery” to mean the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship. Section 893.02(7), F.S., defines “dispense” to mean the transfer of possession of one or more doses of a medicinal drug by a pharmacist or other licensed practitioner to the ultimate consumer thereof or to one who represents that it is his or her intention not to consume or use the same but to transfer the same to the ultimate consumer or user for consumption by the ultimate consumer or user.

C. Government Sector Impact:

The Criminal Justice Impact Conference (CJIC) provides the final, official estimate of the prison bed impact, if any, of legislation. The CJIC met on February 23, 2010, and projected that SB 808 will have an insignificant prison bed impact.²⁵

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

²⁵ Office of Economic and Demographic Research, The Florida Legislature, *Criminal Justice Impact Conference 2010 Legislature* (Updated through Mar. 17, 2010), available at <http://edr.state.fl.us/conferences/criminaljustice/Impact/cjimpact.htm> (follow the "2010 Conference Results" link) (last visited Apr. 5, 2010).

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal and Civil Justice Appropriations Committee

BILL: SB 870

INTRODUCER: Senator Aronberg and others

SUBJECT: Statutes of Limitation/Sexual Battery

DATE: April 14, 2010 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Favorable
2.	Daniell	Maclure	JU	Favorable
3.	Butler 	Sadberry 	JA	Pre-meeting
4.				
5.				
6.				

I. Summary:

This bill eliminates the civil and criminal statutes of limitation in cases of sexual battery when the victim is under the age of 16 at the time of the offense. The bill applies to all actions except those which would have been time barred on or before the effective date of the bill.

This bill substantially amends sections 95.11 and 775.15, Florida Statutes.

II. Present Situation:

Statutes of Limitation in Criminal Cases

Section 775.15, F.S., sets forth time limitations for commencing criminal prosecutions, commonly known as “statutes of limitation.”

There were no statutes of limitation at common law. Rather, statutes of limitation are a statutory creation.¹

In *State v. Hickman*, the court stated:

Statutes of limitation are construed as being acts of grace, and as a surrendering by the sovereign of its right to prosecute or of its right to prosecute at its discretion, and they are considered as equivalent to acts of amnesty. Such statutes are founded on the liberal theory that prosecutions should not be allowed to

¹ *State v. McCloud*, 67 So. 2d 242, 243 (Fla. 1953).

ferment endlessly in the files of the government to explode only after witnesses and proofs necessary to the protection of accused have by sheer lapse of time passed beyond availability. They serve, not only to bar prosecutions on aged and untrustworthy evidence, but also to cut off prosecution for crimes a reasonable time after completion, when no further danger to society is contemplated from the criminal activity.²

The time for prosecution of a criminal case starts to run on the day after the offense is committed.³ An offense is deemed to have been committed when either every element of the offense has occurred, or, if the legislative purpose is to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant’s duplicity therein is terminated.⁴

Section 775.15, F.S., provides the following general time limitations for initiating a criminal prosecution:⁵

Offense	Action must be Commenced
Capital felony, life felony, or felony resulting in death	There is no time limitation
First-degree felony	Within four years after crime is committed
Any other felony	Within three years after crime is committed
First-degree misdemeanor	Within two years after crime is committed
Second-degree misdemeanor	Within one year after crime is committed

Florida law also deviates from the general time limitations for specific crimes. For example, for prosecutions involving securities transaction violations (ch. 517, F.S.), Medicaid provider fraud (s. 409.920, F.S.), insurance fraud by an employer (s. 440.105, F.S.), filing a false insurance claim (s. 817.234, F.S.), felony abuse against elderly persons or disabled adults (s. 825.102, F.S.), and environmental control felony violations (ch. 403, F.S.), the action must be brought within five years after the crime was committed.⁶

Section 775.15, F.S., also provides separate statutes of limitation, in certain situations, for violations of the sexual battery statute, the lewd or lascivious behavior statute, the incest statute, or the computer pornography statute. Specifically, if a victim of one of these acts is under the age of 18, the applicable period of limitation does not begin to run until the victim has reached the age of 18 or the violation is reported to a law enforcement or governmental agency, whichever occurs first.⁷ Moreover, if the offense is a first-degree felony violation of the sexual battery statute, and the victim is under the age of 18 at the time the offense was committed, prosecution of the offense may be commenced at any time.⁸ For other victims of sexual battery, whether they are under the age of 18 or not, if the offense is a first- or second-degree felony and the victim

² *State v. Hickman*, 189 So. 2d 254, 262 (Fla. 2d DCA 1966).

³ Section 775.15(3), F.S.

⁴ *Id.*

⁵ See s. 775.15(1) and (2), F.S.

⁶ Section 775.15(8)-(11), F.S.

⁷ Section 775.15(13)(a), F.S.

⁸ Section 775.15(13)(b), F.S.

reports the offense within 72 hours after its commission, the prosecution may be commenced at any time.⁹

In addition to the time periods generally prescribed for an offense, if the offense is one of sexual battery or lewd or lascivious acts, an offender may be prosecuted within one year after the date on which his or her identity is established, or should have been established through the exercise of due diligence, through the analysis of DNA evidence.¹⁰

Similarly, an offender may be prosecuted *at any time* after the date on which his or her identity is established, or should have been established through the exercise of due diligence, through the analysis of DNA evidence if accused of the following crimes:

- Aggravated battery or any felony battery;
- Kidnapping or false imprisonment;
- Sexual battery;
- Lewd or lascivious behavior;
- Burglary;
- Robbery;
- Carjacking; or
- Aggravated child abuse.¹¹

Under current law, it appears that in many situations there is no time limitation for beginning a prosecution of sexual battery crimes where the victim is a minor.

Statutes of Limitation in Civil Cases

Section 95.031, F.S., provides that the time within which an action commences under any statute of limitation runs from the time that the cause of action accrues. A cause of action accrues when the last element constituting the cause of action occurs. Time limitations may be tolled under certain circumstances.¹² In an action for recovery of damages based upon a theory of intentional tort, the action must commence within four years.¹³

In a case where the action is specifically based upon abuse or incest,¹⁴ the action must commence within seven years of the victim reaching age 18, or within four years after the injured person leaves the dependency of the abuser or of the discovery by the injured person of both the injury and the causal relationship between the injury and the abuse, whichever occurs later.¹⁵ This time limitation is the statutory application of the “delayed discovery doctrine.” In *Hearndon v.*

⁹ Section 775.15(13)(a) and (14), F.S.

¹⁰ Section 775.15(15), F.S.

¹¹ Section 775.15(16), F.S.

¹² See s. 95.051, F.S.

¹³ Section 95.11(3)(o), F.S.

¹⁴ Incest is defined in s. 826.04, F.S., as sexual intercourse with a person to whom the perpetrator is related by lineal consanguinity, or a brother, sister, uncle, aunt, nephew, or niece. Abuse of a child is defined in ss. 39.01 and 984.03, F.S., as any willful act or threatened act that results in any physical, mental, or sexual injury or harm that causes or is likely to cause the child’s physical, mental, or emotional health to be significantly impaired.

¹⁵ Section 95.11(7), F.S.

Graham, 767 So. 2d 1179 (Fla. 2000), the Florida Supreme Court held that the delayed discovery doctrine applies in childhood sexual abuse or incest cases. This doctrine may be applied in other types of tort actions as well.

The delayed discovery doctrine provides that “a cause of action does not accrue until the plaintiff either knows or reasonably should know of the tortious act giving rise to the cause of action.”¹⁶ As the court noted, it is both the majority rule and the modern trend to apply the doctrine in cases of childhood sexual abuse followed by a temporary loss of memory.¹⁷

The court explained in *Hearndon* that there is a difference between tolling a statute of limitation and the delayed discovery doctrine. Simply, the statute of limitation begins to run from the time when the cause of action accrues. The tolling of the limitation period interrupts the running of the time limitation after the action has accrued. The application of the delayed discovery doctrine recognizes a delay in the accrual of the cause of action.¹⁸

Sexual Battery

Sexual battery is generally defined as “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.”¹⁹

It is a capital felony for a person 18 years or older to commit a sexual battery on, or in an attempt to commit a sexual battery injures the sexual organs of, a person less than 12 years of age.²⁰ It is also a capital felony (or life felony) for a person who is in a position of familial or custodial authority to a person under the age of 18 to engage in any act with that person while the person is less than 12 years of age.²¹

If a person under the age of 18 commits a sexual battery on, or in an attempt to commit a sexual battery injures the sexual organs of, a person less than 12 years of age, it is a life felony. It is also a life felony for any person to commit a sexual battery on a person 12 years of age or older and in the process use or threaten to use a deadly weapon or use actual physical force likely to cause serious personal injury.²²

It is a first-degree felony for a person to commit a sexual battery on a person 12 years of age or older when:

- The victim is physically helpless to resist;
- The offender coerces the victim to submit by threatening to use force or violence likely to cause serious personal injury on the victim;

¹⁶ *Hearndon*, 767 So. 2d at 1184.

¹⁷ *Id.* at 1186.

¹⁸ *Id.* at 1184-85.

¹⁹ Section 794.011(1)(h), F.S.

²⁰ Section 794.011(2)(a), F.S.

²¹ Section 794.011(8)(c), F.S.

²² Section 794.011(2)(b) and (3), F.S.

- The offender coerces the victim to submit by threatening to retaliate against the victim, or any other person;
- The offender, without the prior knowledge or consent of the victim, administers or has knowledge of someone else administering to the victim any narcotic, anesthetic, or other intoxicating substance which mentally or physically incapacitates the victim;
- The victim is mentally defective and the offender has reason to believe this or has actual knowledge of this fact;
- The victim is physically incapacitated; or
- The offender is a law enforcement officer, correctional officer, or correctional probation officer.²³

It is also a first-degree felony for a person who is in a position of familial or custodial authority to a person under the age of 18 to engage in any act with that person while the person is between the ages of 12 and 18.²⁴ If the offender only solicits the person under the age of 18 to engage in an act that would constitute sexual battery it is a third-degree felony.²⁵

Finally, a person who commits sexual battery upon a person 12 years of age or older and in the process does not use physical force and violence likely to cause serious person injury commits a felony of the second degree.²⁶

III. Effect of Proposed Changes:

This bill eliminates the civil statute of limitation in cases involving acts that constitute sexual battery on a minor when the victim is under the age of 16 at the time of the act. By eliminating the statute of limitations in civil causes of action, it appears that the bill will not only permit a victim to bring a lawsuit against the perpetrator at any time, but also against other entities, such as the perpetrator's employer, under the theory of respondeat superior.²⁷

The statutes of limitation applicable in criminal cases for sexual battery upon a victim under the age of 16 are also eliminated by the bill.

Finally, the bill applies to all actions except those which would have been time barred on or before the effective date of the bill.

The bill takes effect on July 1, 2010.

²³ Section 794.011(4), F.S.

²⁴ Section 794.011(8)(b), F.S.

²⁵ Section 794.011(8)(a), F.S.

²⁶ Section 794.011(5), F.S.

²⁷ Respondeat superior means "let the superior make answer" and is the doctrine that holds "an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." BLACK'S LAW DICTIONARY 609 (2d pocket ed. 1996).

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

“The purpose of statutes of limitations is to allow a plaintiff a reasonable time to realize the nature and extent of his injuries and file a lawsuit and, after that time passes, to bar actions and thereby relieve potential defendants of the anxiety of litigation. The appropriate length of statutes of limitations is governed by the kinds of injuries which particular causes of action protect and the speed at which they become apparent to the plaintiff.”²⁸ The statute of limitations in effect at the time the crime is committed controls.²⁹ Although it may be more difficult to prove a case after the passage of time, a defendant is still entitled to notice and a right to be heard, so there should not be any due process violations because of this bill.

The Legislature can extend the limitations period without violating ex post facto laws if it does so before prosecution is barred by the old statute and clearly indicates that the new statute is to apply to cases pending when it becomes effective.³⁰ The bill clearly provides that it applies only to actions that would not otherwise be time barred on or before the effective date of the bill, so it appears that the bill will not violate the ex post facto clause of the Florida Constitution.³¹

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Although it is difficult to quantify, there may be a financial impact upon a defendant for a civil suit that is brought because of the elimination of the time limitations by the bill.

²⁸ *Gannett Co., Inc. v. Anderson*, 947 So. 2d 1, 9 (Fla. 1st DCA 2006).

²⁹ *State ex rel Manucy v. Wadsworth, in and for St. Johns County*, 293 So. 2d 345, 347 (Fla. 1974).

³⁰ *See U.S. v. Richardson*, 512 F.2d 105, 106 (3rd Cir. 1975).

³¹ FLA. CONST. art. I, s. 10.

C. Government Sector Impact:

The Criminal Justice Impact Conference (conference), which provides the final, official estimate of the prison bed impact of criminal legislation, met on March 17, 2010, to consider HB 525, which is identical to this bill. According to the conference, this bill has an insignificant impact on state prison beds.³²

According to the Office of the State Courts Administrator (OSCA), the bill may increase judicial workload due to an increased number of actions being filed. Additionally, the bill may produce a positive fiscal impact due to the filing fees for the additional cases filed. However, according to OSCA, the fiscal impact is likely to be minimal for both revenue and expenditures.³³

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

³² Office of Economic and Demographic Research, The Florida Legislature, *Criminal Justice Impact Conference 2010 Legislature* (Mar. 17, 2010), available at <http://edr.state.fl.us/conferences/criminaljustice/Impact/cjimpact.htm> (follow the "2010 Conference Results" link) (last visited Apr. 2, 2010).

³³ Office of the State Courts Administrator, *Judicial Impact Statement HB 525* (Jan. 13, 2010) (on file with the Senate Committee on Judiciary). House bill 525 is identical to SB 870.

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal and Civil Justice Appropriations Committee

BILL: CS/SB 874

INTRODUCER: Criminal Justice Committee and Senator Aronberg

SUBJECT: Substantial Assistance

DATE: April 14, 2010 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Fav/CS
2.	Anderson	Maclure	JU	Favorable
3.	Hendon <i>CH</i>	Sadberry <i>RSW</i>	JA	Pre-meeting
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

This bill provides that the state attorney may file a motion requesting that the sentencing court reduce or suspend the sentence of a defendant convicted of a felony charge if the defendant provides substantial assistance in the identification, arrest, or conviction of any accomplice, accessory, coconspirator, or principal of the defendant, or of any other person engaged in felonious criminal activity. The bill provides that the motion may be filed and heard in camera (privately, generally in the judge's chambers). The bill also provides for the arresting agency to be heard on the motion. This bill takes effect on July 1, 2010.

This bill creates section 921.186, Florida Statutes.

II. Present Situation:

Substantial Assistance under Florida Law

Prosecutors use the ability to offer a defendant their help by asking that the sentencing judge recognize that the defendant has provided substantial assistance to law enforcement or the prosecutor. This substantial assistance can be in the form of information but is just as likely to

require sworn testimony, perhaps at the trial of a person who has been arrested and charged with a crime, based in part on the assistance given. Substantial assistance is often used in cases in which a “little fish” assists in the netting of “bigger fish.”

Currently state attorneys are authorized by statute to file a motion requesting that a court suspend or reduce the sentence of a person convicted of a felony if he or she provides substantial assistance to law enforcement or the prosecutor in one or more other felony specific types of cases. Substantial assistance in the identification, arrest, or conviction of the person’s coconspirator, accomplice, accessory, or principal in the crime he or she has been convicted of committing is what is required in order for the state attorney to file the motion on behalf of the convicted person.

Current law limits the authority of the state attorney to cases in which the person offering the assistance has been convicted of drug trafficking,¹ planting a hoax bomb,² or identity theft.³ There is no apparent time limitation for filing the motion in the current statutes. For good cause, the motion may be filed and heard in camera, and the arresting agency is given an opportunity to be heard in aggravation or mitigation. If the court finds that substantial assistance was in fact rendered by the convicted person, it may reduce or suspend his or her sentence.

Substantial Assistance under Federal Law

Federal criminal law is somewhat different in that the procedures relating to substantial assistance are governed by the Federal Rules of Criminal Procedure (FRCP). The FRCP provides the court authority to reduce the sentence of a defendant if the government makes a motion within one year of sentencing, if the defendant provides substantial assistance in investigating or prosecuting another person.⁴

The FRCP provides that the government may make a motion to reduce the sentence more than one year after sentencing if the defendant’s substantial assistance involves:

- Information not known to the defendant until one year or more after sentencing;
- Information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until one year after sentencing;
- Information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.⁵

Also, the FRCP provides that a court may consider substantial assistance rendered by the defendant before and after sentencing.⁶ The FRCP provides the court authority to reduce the defendant’s sentence to a level below federal statutory guidelines.⁷

¹ Section 893.135(4), F.S.

² Section 790.165(3), F.S.

³ Section 817.568(11), F.S. Also note that in cases of drug trafficking and identity theft, the convicted person may offer substantial assistance not only with regard to other people involved in the case for which he or she was convicted, but also as to any other drug trafficking or identity theft.

⁴ Fed. R. Crim. P. 35(b)(1).

⁵ Fed. R. Crim. P. 35(b)(2).

III. Effect of Proposed Changes:

The bill creates s. 921.186, F.S., to provide that the state attorney may move the sentencing court to reduce or suspend the sentence of a defendant convicted of a felony charge if the defendant provides substantial assistance in the identification, arrest, or conviction of any accomplice, accessory, coconspirator, or principal of the defendant, or of any other person engaged in felonious criminal activity. The bill provides the motion may, for good cause shown, be held in camera. It also provides that the arresting agency may be heard in mitigation or aggravation on the motion.

This bill proposes an extension of current practice, in that it allows the state attorney to request leniency of the court on behalf of all persons convicted of any type of felony if they provide substantial assistance in the prosecution of anyone in any type of felony case.

This bill takes effect on July 1, 2010.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill will assist state attorneys in prosecutions. To the extent that this results in additional guilty dispositions for felony cases, the state would see an increase in the prison population. To the extent that state attorneys move that the court reduce sentences of current inmates who cooperate with other cases, the state would see a decrease in the

⁶ Fed. R. Crim. P. 35(b)(3).

⁷ Fed. R. Crim. P. 35(b)(4).

prison population. The Criminal Justice Impact Conference considered the identical House bill (CS/HB 615) at its meeting on February 23, 2010, and decided that the prison bed impact was indeterminate.⁸

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on March 18, 2010:

- The committee substitute deletes the language that specified that the state attorney may file the motion with the court at any time.
- The committee substitute inserts a provision allowing for the arresting agency to be heard in support of or against the motion for the court to suspend or reduce a defendant's sentence for providing substantial assistance.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

⁸ Office of Economic and Demographic Research, The Florida Legislature, *Criminal Justice Impact Conference 2010 Legislature* (Updated through Mar. 17, 2010), available at <http://edr.state.fl.us/conferences/criminaljustice/Impact/cjimpact.htm> (follow the "2010 Conference Results" link) (last visited Mar. 30, 2010).

- The person carefully checked the buyer or recipient's identification card, acted in good faith, and relied upon the representation and appearance of the buyer or recipient in the belief that the buyer or recipient was 21 years of age or older.

The effective date of the bill is July 1, 2010.

This bill substantially amends section 562.11, Florida Statutes.

II. Present Situation:

Section 562.11(1)(a)1., F.S., provides that it is unlawful to sell, give, serve, or permit to be served alcoholic beverages to a person under 21 years of age or to permit a person under 21 years of age to consume alcoholic beverages on the licensed premises.¹

Anyone convicted of a violation of these provisions is guilty of a misdemeanor of the second degree, punishable by a term of imprisonment not to exceed 60 days and a fine not to exceed \$500.

The courts are required to order the Department of Highway Safety and Motor Vehicles to withhold the issuance of, or suspend or revoke, the driver's license or driving privilege pursuant to s. 322.057, F.S., of any person who violates the sale to persons under 21 years of age prohibition in s. 562.11(1), F.S. This penalty does not apply to alcoholic beverage licensees and any employees or agents of a licensee who violate s. 562.11(1), F.S., while engaged within the scope of his or her license, employment, or agency.²

Section 562.11(1)(b), F.S., prohibits a licensee or his or her agents from providing alcoholic beverages to an employee younger than 21 years of age except as provided in ss. 562.111 and 562.13, F.S.,³ or allowing an underage employee to consume alcoholic beverages on the premises while in the scope of employment. A licensee⁴ or his or her agent convicted of violating this provision is guilty of a misdemeanor of the first degree punishable by a term of imprisonment not exceeding one year and a fine not to exceed \$1,000.

Section 562.11(1)(c), F.S., provides a complete defense for any alcoholic beverage licensee who violates the prohibitions in s. 562.11(1)(a), F.S. The defense also does not apply to any criminal prosecution. The defense is limited to civil action for the violation. The defense does not apply to any administrative action by the division under the Beverage Law. The defense applies, if:

¹ Section 561.01(11), F.S., defines licensed premises to include "not only rooms where alcoholic beverages are stored or sold by the licensee, but also all other rooms in the building which are so closely connected therewith as to admit of free passage from drink parlor to other rooms over which the licensee has some dominion or control and shall also include all of the area embraced within the sketch, appearing on or attached to the application for the license involved and designated as such on said sketch . . ."

² Section 562.11(1)(a)2., F.S.

³ These sections provide exceptions for employment and for tastings of alcoholic beverages by students during class who are at least 18 years of age and the tasting is part of the educational curriculum.

⁴ Section 561.01(14), F.S., defines licensee "as legal or business entity, person, or persons that hold a license issued by the division and meet the qualifications set forth in s. 561.15."

- At the time the alcoholic beverage was sold, given, served, or permitted to be served, the person to whom the alcoholic beverage was sold, given, or served falsely provided false evidence that he or she was of legal age to purchase or consume the alcoholic beverage;
- The appearance of the person must also have been such that an ordinarily prudent person would believe him or her to be of legal age to purchase or consume the alcoholic beverage;
- The licensee must have carefully checked one of the specified forms of identification; and
- The licensee must have acted in good faith and relied upon the representation and appearance of the person in the belief that he or she was of legal age to purchase or consume the alcoholic beverage.

Section 562.11(1)(c), F.S., specifies the following forms of identification which the alcoholic beverage licensee may rely upon for the sale or service of alcoholic beverages:

a driver's license, an identification card issued under the provisions of s. 322.051 or, if the person is physically handicapped as defined in s. 553.45(1), a comparable identification card issued by another state which indicates the person's age, a passport, or a United States Uniformed Services identification card...

Section 553.45, F.S., was repealed by s. 4, ch. 93-183, L.O.F., and the term "physically handicapped" does not appear to be defined in the Florida Statutes.

The prohibition in s. 562.11(1), F.S., is limited to violations that occur on alcoholic beverage licensed premises. The prohibition does not apply to instances in which a person furnishes an alcoholic beverage to a person under legal age at locations that are not licensed to serve alcoholic beverages.⁵ However, this interpretation of the prohibition in s. 562.11(1), F.S., is not consistently or uniformly applied throughout the state.⁶

If an alcoholic beverage licensee sells or gives an alcoholic beverage to a person under the age of 21, the alcoholic beverage licensee may be fined and the license suspended, or revoked.⁷ Fines may not exceed \$1,000 for violations arising out of a single transaction.⁸

Section 562.11(2), F.S., prohibits a person from misrepresenting or misstating his or her age or the age of another person for the purpose of inducing any alcoholic beverage licensee or his or her agents or employees to sell, give, serve, or deliver any alcoholic beverages to a person under 21 years of age. It also prohibits any person under 21 years of age to purchase or attempt to purchase alcoholic beverages. Any person convicted of violating this subsection is guilty of a misdemeanor of the second degree. Any person under the age of 17 years is within the jurisdiction of the circuit court and is treated as a juvenile delinquent.

⁵ See *United Services Automobile Association v. Butler*, 359 So.2d 498 (Fla. 4th DCA 1978).

⁶ See *Underage Drinking and Alcohol Abuse on University and College Campuses*, Interim Report 2007-135, Florida Senate Committee on Regulated Industries, November 2006.

⁷ Section 561.29(1)(a), F.S.

⁸ Section 561.29(3), F.S.

Section 562.111(1), F.S., prohibits a person under 21 years of age from having an alcoholic beverage in his or her possession. Section 562.111, F.S., exempts persons employed under the provisions of s. 562.13, F.S., and acting in the scope of his or her employment. Any person under the age of 21 years convicted of violating this section is guilty of a misdemeanor of the second degree. A subsequent conviction is a misdemeanor of the first degree.

III. Effect of Proposed Changes:

The bill amends s. 562.11(1), F.S., to provide a first degree misdemeanor penalty for a subsequent violation of s. 562.11(1)(a)1., F.S., within one year of a prior conviction. A first-degree misdemeanor carries a jail sentence not exceeding one year as well as a fine not exceeding \$1,000.

The bill provides a complete defense for any person charged with a violation of s. 562.11(1)(a)1., F.S. The complete defense described in the bill is identical to the defense that may be used by alcoholic beverage licensees in any civil action, as provided in s. 562.11(1)(c), F.S. However, the defense provided by the bill is not limited to civil actions.

The bill includes similar forms of identification specified in s. 562.11(1)(c), F.S., but the bill does not reference s. 553.45(1), F.S., which was repealed by s. 4, ch. 93-183, L.O.F., and it also does not reference identification cards for persons who are physically handicapped.

The first degree misdemeanor penalty in the bill for an offense within one year of a prior conviction is also similar to the current first degree misdemeanor penalty for delivering tobacco products to an underage person (under 18 years of age) within one year of a prior offense.

The bill provides an effective date of July 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

There could be an indeterminate fiscal impact upon county jails as a result of the increased misdemeanor penalty.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on April 7, 2010:

Provides that the enhanced penalty will apply one year after a previous “conviction,” rather than a previous “violation.”

B. Amendments:

None.

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal and Civil Justice Appropriations Committee

BILL: CS/SB 1824

INTRODUCER: Commerce Committee; Senators Gelber, Oelrich, and others

SUBJECT: Misrepresentation of Military Status

DATE: April 14, 2010 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Cooper	CM	Fav/CS
2.	Cellon	Cannon	CJ	Favorable
3.	Butler <i>JB</i>	Sadberry <i>RS</i>	JA	Pre-meeting
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

The bill makes it unlawful for a person to solicit funds by falsely stating or representing that he or she is a member or representative of the United States Armed Forces or the National Guard. It is already unlawful to do the same under the guise of being a member of law enforcement or an emergency service organization.

In addition, the bill prohibits a person from wearing the uniform of, or any medal or insignia authorized for use by members or veterans of, the United States Armed Forces or the National Guard, and misrepresenting himself or herself as a member or veteran of the United States Armed Forces or the National Guard while soliciting for charitable contributions.

Any person who commits a prohibited act in the bill commits a felony of the third degree except that a second or subsequent offense punishable under s. 496.417, F.S., is a second degree felony.

The bill amends section 496.415, Florida Statutes. The bill creates section 817.312, Florida Statutes.

II. Present Situation:

United States Armed Forces

Article I, s. 8 of the United States (U.S.) Constitution, grants Congress the power to:

- Raise and support Armies, provide and maintain a Navy, and call forth a Militia to execute the Laws of the Union and suppress insurrections and repel invasions.
- Provide for organizing, arming, and disciplining, the Militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the Officers.
- Train the Militia according to the discipline prescribed by Congress.

Article II, s. 2 of the U.S. Constitution, provides that the President shall be the “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”

The five military branches that exist within the United States Armed Forces are the Army, Marine Corps, Navy, Air Force, and the Coast Guard.¹ These branches often work together, especially in times of war, to facilitate troop movements, equipment, food, armaments, and medical supplies.²

Army

The Army is the oldest military branch, established in the U.S. during the Continental Congress on June 14, 1775.³ The Army is also the largest U.S. military branch.⁴ The Army consists of approximately 675,000 soldiers; approximately 488,000 are on active duty and 189,000 are in the Army Reserve.⁵ The primary duty of the Army is to protect and defend not only the U.S., but also its interests around the world through the use of ground troops, artillery, and tactical weapons.⁶

Marine Corps

The Marine Corps was also established by the Continental Congress on November 10, 1775.⁷ The Marine Corps is one of the smallest branches of the U.S. military having approximately 200,000 marines.⁸ The primary function of the Marine Corps is to act as an assault force to control beachheads and prepare the way for landing forces of the U.S. Navy, as well as Army

¹ Soldier.net Land-based armed forces, *Five Branches of the Military*, available at <http://www.soldier.net/five-branches-of-the-military/>.

² *Id.*

³ *Id.* See also, GoArmy.com, *About the Army: Commissioned Officer*, available at <http://www.goarmy.com/about/officer.jsp>.

⁴ *Id.*

⁵ GoArmy.com, *About the Army: Personnel*, available at <http://www.goarmy.com/about/personnel.jsp>.

⁶ *Supra* fn. 1.

⁷ *Id.* See also, Marines: The Few. The Proud., *1775: Founding of the Marine Corps*, available at http://www.marines.com/main/index/winning_battles/history/missions/founding_of_the_marine_co.

⁸ Navy.org, *Which Military Branch: 5 Branches of the US Military – Which One Do You Like?*, available at http://www.navy.org/which_branch/.

personnel.⁹ Because the Marine Corps works closely with the Navy in times of war, they are able to rapidly deploy through the use of their own air power.¹⁰

Navy

Like the Army and the Marine Corps, the Continental Congress established the U.S. Navy in 1775.¹¹ The Navy has approximately 330,000 active duty personnel and 104,000 reservists.¹² The Navy is primarily assigned the duty of maintaining and ensuring freedom on the open seas.¹³ Naval ships, including aircraft carriers and destroyers, couple their efforts with the Air Force to transport combat personnel over the open seas.¹⁴

Air Force

The Air Force is the youngest branch of the U.S. Armed Forces. The National Security Act of 1947 was passed on July 26, 1947, and became effective on September 18, 1947.¹⁵ The act created the Department of the Air Force, headed by a Secretary of the Air Force.¹⁶ Prior to 1947, it was known as the Army Air Forces and was designed to support Army ground forces.¹⁷ Following World War II, the Air Force was created to defend the United States in the air as well as in outer space.¹⁸ There are approximately 330,000 individuals on active duty in the Air Force.¹⁹

Coast Guard

The Coast Guard is created in Title 14 of the U.S. Code, which states: “The Coast Guard as established January 28, 1915, shall be a military service and a branch of the Armed Forces of the United States at all times.”²⁰ The Coast Guard has approximately 42,000 individuals serving on active duty.²¹ Upon the declaration of war or when the President directs, the Coast Guard operates under the authority of the Department of the Navy.²² Otherwise, the Coast Guard is to provide law enforcement support as well as rescue services in peacetime.²³

⁹ *Supra* fn. 1.

¹⁰ *Id.*

¹¹ *Id.* See also, Naval History & Heritage Command, *Navy Birthday Information – 13 October 1775*, available at <http://www.history.navy.mil/birthday.htm>.

¹² Navy.mil, Official Website of the UNITED STATES NAVY, *Status of the Navy*, available at http://www.navy.mil/navydata/navy_legacy_hr.asp?id=146.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ The official web site of the U.S. Air Force, *Air Force History Overview*, available at <http://www.af.mil/information/heritage/overview.asp>. See also, The official web site of the U.S. Air Force, *The U.S. Air Force*, available at <http://www.af.mil/information/factsheets/factsheet.asp?id=2>.

¹⁶ *Id.*

¹⁷ *Id.* See also, *supra* fn. 1.

¹⁸ *Supra*, fn. 1. See also, Air Force Space Command, *Heritage 1940s-1950s*, available at <http://www.afspc.af.mil/heritage/1940s-1950s.asp>.

¹⁹ Air Force Personnel Center, *Air Force Demographics*, available at <http://www.afpc.randolph.af.mil/library/airforcepersonnelstatistics.asp>.

²⁰ United States Coast Guard U.S. Department of Homeland Security, *About Us*, available at <http://www.uscg.mil/top/about/>.

²¹ *Id.*

²² *Id.*

²³ *Supra* fn. 1.

The Florida National Guard

The Florida National Guard (FNG) is the state's modern "organized" militia. The FNG is composed of

...members of the militia enlisted therein and of commissioned officers and warrant officers who are citizens of the United States, organized, armed, equipped, and federally recognized, in accordance with the laws of the state and the laws and regulations of the Department of the Army and the Department of the Air Force.²⁴

The FNG is an essential reserve component of the national defense force.²⁵ Its organization, arms, and training correspond to that of the federal military. The National Guard Bureau of the Department of Defense (DOD) determines the number of units and positions for the FNG, consistent with the force structure requirements of the DOD's overall national military strategy.

The FNG is also the governor's primary military force to "preserve the public peace, execute the laws of the state, suppress insurrection, or repel invasion."²⁶ Over its history, the Governor has mobilized the FNG primarily in response to natural disasters.

Military Charitable Organizations

The conflicts in Afghanistan and Iraq have brought renewed attention to the men and women serving in the Armed Forces and to their families.²⁷ Many Americans, wishing to show their support for those serving or who have served in the military, are donating to charities.²⁸

There are many charitable organizations that provide assistance to members or veterans of the military or to those member's or veteran's families. However, it has been reported that not all charitable organizations effectively provide assistance to military members or veterans or their families. An investigative report conducted by Matthew Kauffman of the *Hartford Courant* found that:

... 'veterans' groups are more than twice as likely as other charities to use professional solicitors, which typically keep 70 to 90 cents of every dollar they raise. As a result, 'veterans' charities overall spend a vastly greater percentage of their budgets on fundraising, leaving less money available to help ex-GIs struggling with health care, housing or financial problems.²⁹

Federal Regulation

On December 20, 2006, the "Stolen Valor Act of 2005" was signed into law. The act includes the following Congressional findings.

²⁴ Section 250.07, F.S.

²⁵ 10 U.S.C.A., 261.

²⁶ Article IV, s. 1, Fla. Const.

²⁷ Heck, Andrew; Charity Navigator; *Supporting America's Heroes- How to Select a Police, Firefighters or Veterans Charity*; available at <http://www.charitynavigator.org/index.cfm?bay=content.view&cpid=280>.

²⁸ *Id.*

²⁹ *Id.* Investigatory report by Matthew Kauffman, staff writer at the Hartford Courant, available at <http://www.charitynavigator.org/index.cfm/bay/content.view/catid/64/cpid/351.htm>.

- Fraudulent claims surrounding the receipt of the Medal of Honor, the distinguished-service cross, the Navy Cross, the Air Force Cross, the Purple Heart, and other decorations and medals awarded by the President or the Armed Forces of the United States damage the reputation and meaning of such decorations and medals.
- Federal law enforcement officers have limited ability to prosecute fraudulent claims of receipt of military decorations and medals.
- Legislative action is necessary to permit law enforcement officers to protect the reputation and meaning of military decorations and medals.³⁰

Section 704, 18 U.S.C., provides that whoever knowingly wears or purchases any decoration or medal authorized by Congress for the U.S. Armed Forces, or any of the service medals or badges awarded to the members of such forces, including imitations, except when authorized under regulations made pursuant to law, shall be fined or imprisoned up to six months, or both.

In addition, whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for U.S. Armed Forces, any of the service medals or badges awarded to the members of such forces, or imitation of such item, shall be fined or imprisoned up to 6 months, or both. If a person makes such representations with a Congressional Medal of Honor, or an imitation, an offender may be fined or imprisoned up to 1 year, or both. Enhanced penalties are also provided for misrepresentation using a distinguished-service cross, a Navy Cross, an Air Force Cross, a silver star, a Purple Heart, or any replacement or duplicate medal for such medals as authorized by law.

State Regulation of Military Charitable Organizations

According to the National Conference of State Legislatures, at least 13 states have proposed legislation or passed legislation to prohibit the impersonation of a member or veteran of the military and provide a penalty for such impersonation.³¹

In Florida, it is unlawful for any person in connection with the planning, conduct, or execution of any solicitation or charitable or sponsor sales promotion to falsely state that the person is a member of, or a representative of, a charitable organization or sponsor, or falsely state or represent that the person is a member of or represents a law enforcement or emergency service organization.³² Any person who commits such an act commits an unfair or deceptive act or practice or unfair method of competition in violation of ch. 501, part II, F.S., and is subject to the penalties there under.³³ In addition, a person who commits such a misrepresentation commits a felony of the third degree, or for a second or subsequent conviction, a felony of the second degree.³⁴

³⁰ 18 U.S.C. 704.

³¹ National Conference of State Legislatures; *2003-2009 Legislation Regarding Impersonating the Military or Veterans or Unauthorized Use or Display of Uniforms or Medals*; October 14, 2009; on file with the Commerce Committee. Note: The 13 states include NY, CA, KY, OK, CT, NJ, PA, UT, OR, IL, GA, ID, and WA.

³² Section 496.415(6), F.S.

³³ Section 496.416, F.S. *See also*, s. 501.2075, F.S., providing that a person in violation of the Florida Deceptive and Unfair Trade Practices Act, is liable for a civil penalty of up to \$10,000 for each violation.

³⁴ Section 496.417, F.S.

Section 250.43, F.S., make it unlawful for any person, other than a person authorized by law, to wear a uniform or insignia of rank worn by officers of the National Guard or wear the uniform of the United States Army, Navy, Marine Corps, Air Force, National Guard, Naval Militia, or Marine Corps or any part of such uniform, or imitation uniform. Such an offense is a misdemeanor of the first degree. However, the Fifth District Court of Appeals recently held in *State v. Montas*, 993 So.2d 1127 (Fla. 5th DCA 2008), that s. 250.43, F.S., was unconstitutional because of its overbreadth, which implicated 1st Amendment freedom of expression rights.

Current law also provides that it is a misdemeanor to wear a badge or insignia of certain organizations or societies if the person does so to obtain aid or assistance within this state or if the person is not authorized by law to wear the badge.³⁵

III. Effect of Proposed Changes:

Section 1 amends s. 496.415(6), F.S., to prohibit a person, who is engaged in the planning, conduct, or execution of the solicitation of funds for charitable or sales promotions, from misrepresenting that he or she is a member or representative of the United States Armed Forces or the National Guard.

Any person who willfully and knowingly commits unlawful conduct under s. 496.415(6), F.S., is subject to the penalties provided for in ss. 496.416 and 496.417, F.S. Specifically, s. 496.416, F.S., provides for the application of a civil penalty of up to \$10,000 per violation under the Florida Deceptive and Unfair Trade Practices Act, part II, ch. 501, F.S. Section 496.417, F.S., provides that the criminal penalty for such conduct is a felony of the third degree and for a second conviction, a felony of the second degree.

Section 2 creates s. 817.312, F.S., to prohibit a person from wearing the uniform of, or any medal or insignia authorized for use by members or veterans of, the United States Armed Forces or the National Guard and to misrepresent himself or herself as a member or veteran of the United States Armed Forces or the National Guard while soliciting for charitable contributions.

Any person, who commits an act prohibited in this section, commits a felony of the third degree.

Section 3 provides an effective date of October 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

³⁵ See s. 817.30, F.S., pertaining to badges of the Grand Army of the Republic, the Military Order of the Loyal Legion of the U.S., the Military Order of Foreign Wars of the U.S., the Patrons of Husbandry, the Benevolent and Protective Order of Elks of the U.S.A., the Woodmen of the World, or of any society, order or organization of 5 years' standing in the state; s. 817.31, F.S., pertaining to a badge of the American Legion; and s. 817.311, F.S., pertaining to any badge or use of any name or claim to be a member of any benevolent, fraternal, social, humane, or charitable organization, which organization is entitled to the exclusive use of such name and such badge, button, insignia or emblem.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

First Amendment Freedom of Expression³⁶

Although the First Amendment of the U.S. Constitution protects speech, some conduct may be deemed a form of communication that falls within the ambit of the First Amendment speech. To determine whether conduct is speech protected by the First Amendment, one must look at the conduct that actually occurred and the context in which it occurred.

Conduct is expressive when the actor intends to communicate a particular message by his or her actions and that message will be understood by those who observe it because of the surrounding circumstances. The First Amendment perception and intent analysis to determine whether certain “speech” is constitutionally protected is not necessary when printed or spoken words, as opposed to symbolic expressions, are used. In determining whether conduct was “expressive conduct,” a court must ask whether a reasonable person would interpret it as some sort of message, not whether an observer would necessarily infer a specific message. Conduct that is ordinarily expressive may not be intended to express any message in some circumstances and therefore, would not be entitled to First Amendment protection.

The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word, but it may not prohibit particular conduct because it has expressive elements. A law directed at the communicative nature of conduct must, like laws directed at speech itself, be justified by a substantial showing of need for that restriction, as required by the First Amendment.

Symbolic expression may be forbidden or regulated only if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech. A governmental regulation is sufficiently justified, despite its incidental impact upon expressive conduct protected by the First Amendment, if it is within the constitutional power of the government; it furthers an important or substantial governmental interest; the governmental interest is unrelated to the suppression of free speech; and the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

³⁶ This section of the analysis, concerning First Amendment implications, is synthesized from information provided in 16A Am. Jur. 2d Constitutional Law § 528.

The court held in the case of *State v. Montas*, 993 So.2d 1127 (Fla. 5th DCA 2008), that s. 250.43, F.S., which prohibits a person who is not a member of the National Guard or U.S. Armed Forces from wearing the uniform or insignia of the National Guard or U.S. Armed Forces, was unconstitutionally overbroad and a violation of due process, because the law could implicate lawful behavior, including a person's free speech rights under the 1st Amendment of the U.S. Constitution. In *Montas*, Mr. Montas, who was arrested for violating s. 250.43, F.S., alleged that he was wearing the military uniform as an act of patriotism and to support members of his family in the military. The State alleged that Mr. Montas was wearing the uniform to circumvent security. The court noted that even if Mr. Montas' actions were not innocent, "where the asserted overbreadth of a law may have a chilling effect on the exercise of first amendment freedoms, a challenge will be permitted even by one who does not show that his own conduct is innocent and not subject to a narrowly drawn statute."³⁷

The bill, should it become law, could be challenged under the 1st Amendment of the U.S. Constitution, or under article 1, section 4 of the Florida Constitution, as violation of free speech rights.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Should this bill become law, some charitable organizations may see a decrease in profits if their employees or volunteers are no longer able to misrepresent that they are members of the military or are no longer able to impersonate a military person by wearing military uniforms or insignia to solicit donations if that has been the organization's practice in the past.

C. Government Sector Impact:

Because the bill creates a new felony, the Criminal Justice Impact Conference reviewed its companion bill (House Bill 1455) for fiscal impact. On March 17, 2010, the conference determined the impact on prison population to be insignificant.³⁸ The House and Senate bills are identical except for minor drafting differences.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

³⁷ *Matos*, 993 So. 2d at 1130, FN2, citing *Bigelow v. Virginia*, 421 U.S. 809 (1975).

³⁸ Criminal Justice Impact Conference, March 17, 2010. <http://edr.state.fl.us/conferences/criminaljustice/Impact/cjimpact.htm>

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Commerce on March 10, 2010:

- Replaces the term “organized militia” with “National Guard” in sections 1 and 2, to clarify the restriction;
- Narrows the restriction from “commercial purposes” to “soliciting for charitable contributions”; and
- Deletes section 3, which provided an exemption from the penalties proposed by the bill.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal and Civil Justice Appropriations Committee

BILL: SB 2260
INTRODUCER: Senator Crist
SUBJECT: Faith and Character Based Correctional Institution Programs
DATE: April 14, 2010 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	Favorable
2.	Butler <i>MB</i>	Sadberry <i>RJD</i>	JA	Pre-meeting
3.			WPSC	
4.				
5.				
6.				

I. Summary:

This bill adds character-based programs to the current statute that regulates faith-based programs offered in state and private correctional facilities. It also removes staffing and inmate eligibility requirements.

This bill substantially amends section 944.803 of the Florida Statutes.

II. Present Situation:¹

The Department of Corrections (department or DOC) offers faith and character-based programs² for all inmates at specified institutions and for inmates who live in specific dormitories at certain other institutions. As of November 2009, approximately 4,947 inmates were participating in a faith and character institution or dormitory program.

In 1999, the department partnered with Kairos Horizon³ to open a dormitory at Tomoka Correctional Institution. This program emphasized faith and character programming and was based on models operating in a few other states. Beginning in 2000, several faith-based dormitories were opened around the state beginning with youthful offender females at Hillsborough Correctional Institution. Since that time, the department has continued to add faith and character programs throughout the prison system.

¹ Much of the background information is derived from the Department of Corrections' analysis of the bill.

² Although s. 944.803, F.S., refers only to faith-based programs, the department currently operates faith and character-based programs.

³ Additional information about Kairos Horizon can be found at www.kairoshorizon.org.

Section 944.803, F.S., provides that: (1) participation in a faith or character-based program is voluntary; (2) priority must be given to inmates who have shown an indication for substance abuse; and (3) at least 80 percent of the inmates assigned to the dormitory program must be within 36 months of release. The 80 percent requirement does not apply to entire institutions that are faith and character-based. Eligible inmates volunteer for participation in the program without regard to religion and can choose among secular or religious programming.

In addition to the statutory eligibility requirements that participation must be voluntary and that priority is given to inmates with substance abuse problems, department procedures require that the inmate:

- Have received no disciplinary reports that resulted in disciplinary confinement during the previous 90 days;
- Be in general population housing status, and not in work release, reception, transit, or other status; and
- Fits the profile for the institution’s population, such as medical and psychological grade, custody level, youthful offender status, escape level, and length of sentence.

The department can remove an inmate from the program for purposes of population management, conduct that may result in disciplinary confinement or loss of gain-time, physical or mental health concerns, or security and safety concerns.

The chart below lists information about the department’s faith and character-based programs:

Location	Capacity	Gender	Date Became Faith and Character Based Dormitory or Institution
<i>Dormitories</i>			
Tomoka C.I. (F Dorm)	132	Male	November 1999
Polk C.I. (A Dorm)	128	Male	November 2001
Lowell C.I. (A Dorm)	32	Female	January 2002
Gulf – Annex (J Dorm)	128	Male	January 2002
Everglades C.I. (B Dorm)	128	Male	February 2002
Lancaster C.I. (I Dorm)	37	Male (over 21)	January 2003
Union C.I. (J Dorm)	96	Male (over 50)	February 2003
<i>Total Dorms</i>	681		
<i>Prison</i>			
Lawtey C.I.	835	Male	December 2003
Hillsborough C.I.	292	Female	April 2004
Wakulla C.I.	1,756	Male	November 2005
Glades C.I.	1,808	Male	March 2009
<i>Total Prison</i>	4,961		
TOTAL CAPACITY	5,372		

The department reports that there are an appropriate number of faith and character beds for the pool of eligible inmates. There is currently a turnover rate of 1.9 inmates per bed each year, which allows for inmates to move from the eligible pool to a program slot in a reasonable amount of time.

Volunteers provide most of the programming in the faith and character-based programs. Participating inmates have the opportunity to take classes on writing, marriage and parenting, money management, interviewing and job skills, computer literacy, and personal faith along with other faith and secular programs. These programs contribute to positive adjustment while the inmate is incarcerated and also prepare him or her for re-entry into society.

In May 2007, DOC revised its mission statement to include assisting offenders with reentry into society in order to reduce recidivism and to lower crime rates. Successfully reaching the department's goal of reducing recidivism from its current 32 percent rate to a 20 percent rate by 2012 could avoid \$85 million of costs annually to the correctional system. There would be additional cost savings to law enforcement agencies and the court system, and both financial and social benefits for those citizens who would not become victims of crime.

The department has established the Reentry Advisory Council to address issues of offender reentry and to assist in the formation of a statewide strategy to reduce recidivism within the correctional system. It also created the Office of Re-Entry with the task of implementing effective strategies and programs for the inmate population. The emphasis is on improving the success of inmates and offenders in returning to crime-free living once criminal sanctions have been completed. While these strategies target those inmates who are nearing release, the department's re-entry philosophy focuses re-entry best practices on inmates beginning at reception and continuing through incarceration.

In October 2009, the Office of Program Policy Analysis and Governmental Accountability (OPPAGA) reviewed the faith and character-based programs. OPPAGA found that the institutional programs have a "positive effect on inmate institutional adjustment and institutional security, and a modest but positive effect on reducing the likelihood that inmates will reoffend." The dormitory programs also have a positive effect on institutional adjustment and security, but did not have an demonstrated effect on recidivism.⁴

III. Effect of Proposed Changes:

The bill adds a reference to character-based programs wherever s. 944.803, F.S., currently refers to faith-based programs. It also makes other changes that reflect this addition, such as referring to volunteers from secular institutions as well as faith-based institutions.

The bill removes requirements regarding chaplain assignments, including:

- A general requirement that the department fund an adequate number of chaplains and staff to operate faith-based programs in correctional institutions.

⁴ "Faith- and Character-Based Prison Initiative Yields Institutional Benefits; Effect on Recidivism Modest." OPPAGA Report No. 09-38, October 2009.

- A specific requirement that a chaplain and a full-time clerical support person be assigned to each faith-based dormitory. The department states that each institution has one assigned chaplain. Dedicated full-time clerical support staff have been eliminated through budget reductions over the years.
- A specific requirement that chaplains be assigned to community correctional centers, or work release centers, authorized pursuant to s. 945.091(1)(b), F.S. Chaplain duties included recruiting community volunteers, assisting inmates with transition, and placing inmates who requested assistance in a mentoring program. Chaplains were also required to work with the institutional transition assistance specialist to help place inmates who requested assistance in a contracted substance abuse housing program upon release. Institutional transition assistance specialist positions were eliminated by the Legislature in 2003, and there is currently insufficient funding to place a chaplain in each community correctional center, or work release center.

The bill removes a requirement that preference for admission into the program be given to inmates who have shown an indication for substance abuse.

The bill deletes a requirement that there be six new operational programs, similar to and in addition to the original pilot program. The department currently operates 11 faith and character-based programs.

The bill removes a requirement that 80 percent of program participants be within 36 months of release. By removing the requirement, potentially more inmates may be able to be placed in the faith and character-based programs available.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal and Civil Justice Appropriations Committee

BILL: SB 2276

INTRODUCER: Senator Negron

SUBJECT: Judiciary

DATE: April 14, 2010 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	JU	Favorable
2.	Hendon <i>CH</i>	Sadberry <i>RJ</i>	JA	Pre-meeting
3.				
4.				
5.				
6.				

I. Summary:

This bill repeals multiple provisions related to the judiciary which appear to be obsolete. The repealed provisions relate to:

- Regular terms of court for the Florida Supreme Court;
- Compensation of the Florida Supreme Court marshal;
- Commissions for taking a census of the population of judicial circuits;
- Term of the circuit courts;
- A judge's attendance at the first day of a term;
- A judge's stated reason for nonattendance;
- The penalty for nonattendance of a judge;
- Adjournment of court upon nonattendance of a judge;
- Calling the docket at end of a term;
- Identification of the sheriff as the executive officer of the circuit court;
- Requiring the clerk of circuit court, or his or her deputy clerk, to reside at the county seat or within two miles of the county seat;
- Regular terms of court for the district courts of appeal;
- Compensation of the marshals for the district courts of appeal; and
- Guardians of incapacitated world war veterans.

The bill provides an effective date of July 1, 2010.

This bill repeals the following sections of the Florida Statutes: 25.051, 25.281, 26.011, 26.21, 26.22, 26.23, 26.24, 26.25, 26.26, 26.27, 26.28, 26.29, 26.30, 26.31, 26.32, 26.33, 26.34, 26.35,

26.36, 26.361, 26.362, 26.363, 26.364, 26.365, 26.37, 26.38, 26.39, 26.40, 26.42, 26.49, 28.08, 35.10, 35.27, and 744.103.

II. Present Situation:

Article V of the Florida Constitution establishes the judicial branch of government, including prescribing the various courts in which the judicial power is vested. The Florida State Courts System consists of all officers, employees, and divisions of the entities noted below.¹

- The Supreme Court, the highest state appellate court, has seven justices and statewide jurisdiction. The Chief Justice is the administrator of the state courts system. The court also regulates admission of lawyers to The Florida Bar and the discipline of judges and lawyers.
- The district courts of appeal, the state appellate courts, have jurisdiction within the limits of their five geographic districts and are served by approximately 60 judges.
- The circuit courts, the highest level trial court in each of the 20 judicial circuits, are served by approximately 600 judges. The circuit courts hear, for example, felony cases, family law matters, and civil cases over \$15,000.
- The county courts, the lowest level trial courts, with at least one judge in each county, are served by approximately 320 judges. The county courts hear, for example, misdemeanor cases, small claims cases, and civil cases under \$15,000.

Some of the other entities that also have a role in the judicial system include:

- Office of the State Courts Administrator, created by the Supreme Court to assist in administering the state courts system;
- Judicial nominating commissions, which recommend persons to fill judicial vacancies;
- Judicial Qualifications Commission, which investigates and recommends discipline of judges;
- Clerks of court, who have multiple responsibilities, including keeping a docket for court cases, reporting case filings and dispositions, and collecting court costs and fees;
- State attorneys, who prosecute or defend on behalf of the state, all suits, applications, or motions, civil or criminal, in which the state is a party;
- Attorney General, who represents the state in criminal appeals and other issues related to state agency legal actions;
- Statewide Prosecutor, who prosecutes on behalf of the state for crimes that include multiple jurisdictions;
- Public defenders, who represent indigent persons charged with a felony or certain misdemeanors, alleged delinquents, and other persons, such as alleged mentally ill persons, who are being involuntarily placed (usually for health care reasons);
- Capital Collateral Regional Counsels, who represent indigent persons in death row appeals; and
- Sheriffs, who are responsible for executing all processes of the courts and for the provision of bailiffs.

¹ Office of Program Policy Analysis and Government Accountability, Fla. Legislature, Government Program Summaries, *State Courts System* (last updated Jan. 28, 2010), <http://www.oppaga.state.fl.us/profiles/1072/> (last visited Apr. 2, 2010).

This bill repeals a number of statutory provisions related to the judiciary. The present situation for each of the relevant provisions is discussed in the “Effect of Proposed Changes” section of this bill analysis, below.

III. Effect of Proposed Changes:

Regular Terms of Supreme Court

Present Situation: Enacted in 1957, s. 25.051, F.S., requires the Supreme Court to hold two terms in each year, in the Supreme Court Building, commencing respectively on the first day of January and July, or the first day thereafter if that is a Sunday or holiday.

Effect of the Bill: Section 1 repeals s. 25.051, F.S., as obsolete.

Compensation of Supreme Court Marshal

Present Situation: Enacted in 1957, s. 25.281, F.S., requires the compensation of the Florida Supreme Court marshal to be provided by law.

Effect of the Bill: Section 1 repeals s. 25.281, F.S., as obsolete.

Census Commission; Judicial Circuits

Present Situation: Enacted in 1956, s. 26.011, F.S., provides the methods through which the Legislature can have the Governor appoint commissioners to take a census of the population of a judicial circuit and gives those findings, as proclaimed by the Governor, the force of law.

Effect of the Bill: Section 1 repeals s. 26.011, F.S., as obsolete.

Terms of Circuit Courts

Present Situation: Sections 26.21-26.365, F.S., require at least two regular terms of the circuit court to be held in each county each year and allow for special terms as needed. There is a separate statute for each of the 20 circuits which provides for the starting day of each term.

Effect of the Bill: Section 1 repeals ss. 26.21-26.365, F.S., as obsolete.

Judge to Attend First Day of Term

Present Situation: Enacted in 1849, s. 26.37, F.S., requires every judge of a circuit court, unless prevented by sickness or other providential causes, to attend the first day of each term of the circuit court. If the judge fails to attend, he or she is subject to a \$100 deduction from his or her salary.

Effect of the Bill: Section 1 repeals s. 26.37, F.S., as obsolete.

Judge's Reason for Nonattendance

Present Situation: Enacted in 1849, s. 26.38, F.S., requires a judge who misses the first day of each term to state the reasons of such failure in writing to be handed to the clerk of the court.

Effect of the Bill: Section 1 repeals s. 26.38, F.S., as obsolete.

Penalty for Nonattendance of Judge

Present Situation: Enacted in 1849, s. 26.39, F.S., requires the clerk of court to notify the Chief Financial Officer of the state when a judge fails to attend the first day of the term of court. The CFO is then directed to deduct \$100 from the judge's pay for every such default.

Effect of the Bill: Section 1 repeals s. 26.39, F.S., as obsolete.

Adjournment of Court upon Nonattendance

Present Situation: Enacted in 1828, s. 26.40, F.S., requires that, whenever a judge does not attend on the first day of any term, the court shall stand adjourned until 12 o'clock on the second day. If the judge does not attend court at that time, the clerk must continue all causes and adjourn the court to such time as the judge may appoint or to the next regular term.

Effect of the Bill: Section 1 repeals s. 26.40, F.S. as obsolete.

Calling Docket at End of Term

Present Situation: Enacted in 1828, s. 26.42, F.S., requires a judge, after other court business of the term has been completed, to call the remaining cases on the docket and make such orders and entries as necessary.

Effect of the Bill: Section 1 repeals s. 26.42, F.S., as obsolete.

Executive Officer of Circuit Court

Present Situation: Enacted in 1845, s. 26.49, F.S., identifies the sheriff of the county as the executive officer of the circuit court of the county.

Effect of the Bill: Section 1 repeals s. 26.49, F.S., as obsolete.

Place of Residence

Present Situation: Enacted in 1851, s. 28.08, F.S., requires that the clerk of the circuit court or a deputy clerk must reside at the county seat or within two miles of the county seat.

Effect of the Bill: Section 1 repeals s. 28.08, F.S., as obsolete.

Regular Terms of District Courts of Appeal

Present Situation: Enacted in 1957, s. 35.10, F.S., requires the district courts of appeal to hold two regular terms each year at their headquarters. The terms shall commence on the second Tuesday in January and July.

Effect of the Bill: Section 1 repeals s. 35.10, F.S., as obsolete.

Compensation of District Court of Appeal Marshal

Present Situation: Enacted in 1957, s. 35.27, F.S., establishes that the salaries of the marshals of the district courts of appeal shall be provided by law.

Effect of the Bill: Section 1 repeals s. 35.27, F.S., as obsolete.

Guardians of Incapacitated World War Veterans

Present Situation: Enacted in 1974, s. 744.103, F.S., provides that the provisions of the guardianship law shall extend to incapacitated world war veterans, provided for in chapters 293 and 294, F.S. The statute further provides that the provisions of this law are cumulative to those chapters. However, chapters 293 and 294, F.S., have both been repealed in previous legislative sessions or had provisions transferred to part VIII of chapter 744, F.S. (governing veterans' guardianship). Former s. 293.16, F.S., setting forth the procedure for placing veterans with a federal agency such as United States Department of Veterans Affairs, was transferred and renumbered as s. 394.4672, F.S.

Effect of the Bill: Section 1 repeals s. 744.103, F.S., as obsolete.

Effective Date

The bill provides an effective date of July 1, 2010.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Office of the State Courts Administrator reports no fiscal, workload, or legal impact from or concerns with the bill.²

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

² Office of the State Courts Adm'r, *Judicial Impact Statement: HB 7031 (amended)* (Feb. 15, 2010) (on file with the Senate Committee on Judiciary).

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal and Civil Justice Appropriations Committee

BILL: CS/CS/SB 1050

INTRODUCER: Judiciary Committee; Criminal Justice Committee; Senator Baker and others

SUBJECT: Methamphetamine Pharmaceutical Products/Sale

DATE: April 14, 2010

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Fav/CS
2.	Stovall	Wilson	HR	Fav/1 amendment
3.	Treadwell	Maclure	JU	Fav/CS
4.	Butler <i>(PB)</i>	Sadberry <i>WJA</i>	JA	Pre-meeting
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill amends the section of law relating to the retail sale of ephedrine and related compounds to do the following:

- Define “ephedrine or related compounds” as ephedrine, pseudoephedrine, phenylpropanolamine, or any of their salts, optical isomers, or salts of optical isomers;
- Revise requirements relating to retail over-the-counter (OTC) sales of any nonprescription compound, mixture or preparation containing ephedrine or related compounds;
- Require a person purchasing, receiving, or acquiring any nonprescription compound, mixture, or preparation to meet certain requirements;
- Require the Florida Department of Law Enforcement (FDLE) to approve an electronic recordkeeping system for the purpose of recording and monitoring the real time purchase of products containing ephedrine or related compounds and for the purpose of monitoring this information in order to prevent or investigate illegal purchases of these products;
- Require this system to be provided to a pharmacy or retailer at no additional cost or expense;

- Authorize a pharmacy or retailer to request an exemption from the electronic reporting if certain criteria are met;
- Specify what information must be recorded in the system and the capabilities of the system;
- Require a pharmacy or retailer distributing a product containing ephedrine or related compounds to Florida consumers to submit required information to the system (as specified in the bill) before completing the transaction;
- Require data that is submitted to the system to be retained for no less than two years from the date of entry;
- Specify entities that are exempt from the requirements of the section;
- Require information that is contained in the system to be disclosed in a manner authorized by state or federal law;
- Restrict the use of information collected by a retailer or entity to law enforcement purposes or to facilitate a product recall;
- Provide that a person who sells any product containing ephedrine or related compounds who in good faith complies with the requirements of the section is immune from civil liability for the release of the information unless the release constitutes gross negligence or intentional, wanton, or willful misconduct;
- Require FDLE to contract with a private third-party administrator to implement the electronic recordkeeping system; and
- Require FDLE to adopt rules necessary to implement the section.

This bill substantially amends section 893.1495, Florida Statutes.

II. Present Situation:

Use of Chemicals Referenced in the Bill

While some uses of products containing ephedrine, pseudoephedrine, and phenylpropanolamine are legal,¹ these chemicals are also unlawfully used in the production of methamphetamine,² a

¹ Asthma treatment (ephedrine): Jennifer Smith, *Nonprescription Asthma Treatment Trends*, US PHARM. 33(3): 4-7 (2008), available at http://www.uspharmacist.com/content/t/respiratory_disorders/c/10133/ (last visited Apr. 2, 2010).

Section 499.033, F.S., provides, with some exceptions, that any product that contains any quantity of ephedrine or its salts, optical isomers, or salts of its optical isomers may be dispensed only upon a prescription of a duly licensed practitioner authorized by the state to prescribe prescription drugs. Decongestant (pseudoephedrine): Linda Bren, *Some Cold Medicines Move Behind Counter*, FDA CONSUMER 40(4): 18-19 (July-Aug. 2006). Veterinary use (phenylpropanolamine): "The Food and Drug Administration issued a voluntary recall of this ingredient as being unsafe for human consumption. Veterinary use is by prescription only." U.S. Drug Enforcement Administration, *General Information Regarding The Combat Methamphetamine Epidemic Act of 2005*, available at <http://www.deadiversion.usdoj.gov/meth/cma2005.htm> (last visited Apr. 2, 2010).

² "An estimated 34 different chemicals can be used to produce methamphetamine. Among the most common are ephedrine, pseudoephedrine, phenylpropanolamine, red phosphorous, iodine, hydrochloric acid, ether, hydriodic acid, and anhydrous ammonia. Some of these chemicals are also used to produce other illicit drugs. The United States does not manufacture ephedrine, pseudoephedrine, and phenylpropanolamine. Rather, all supplies of these chemicals originate in other countries. Michael S. Scott and Kelly Dedel, Office of Community Oriented Policing Services, U.S. Department of Justice, *Clandestine Methamphetamine Labs 2nd Edition*, Problem-Oriented Guides for Police Series, Problem-Specific Guide Series, No. 16, 10 (2006).

Schedule II controlled substance under state and federal law.³ Accordingly, sales and purchases of products containing these chemicals are regulated and restricted.

Ephedrine, pseudoephedrine, and phenylpropanolamine are listed precursor chemicals under Florida law.⁴ A “listed precursor chemical” is a chemical that may be used in manufacturing a controlled substance in violation of ch. 893, F.S., and is critical to the creation of the controlled substance, and includes any salt, optical isomer, or salt of an optical isomer, whenever the existence of such salt, optical isomer, or salt of optical isomer is possible within the specific chemical designation. These chemicals are also listed chemicals. A “listed chemical” is any precursor chemical or essential chemical named or described in s. 893.033, F.S.⁵

Ephedrine, pseudoephedrine, and phenylpropanolamine are also list 1 chemicals under federal law.⁶ A list 1 chemical is a chemical specified by regulation of the U.S. Attorney General as a chemical that is used in manufacturing a controlled substance in violation of federal drug abuse prevention and control laws and is important to the manufacture of controlled substances, and includes (until otherwise specified by regulation of, or upon petition to, the U.S. Attorney General) ephedrine, pseudoephedrine, and phenylpropanolamine, and other listed chemicals.⁷ These chemicals, including their salts, optical isomers, and salts of optical isomers, are also designated methamphetamine precursor chemicals.⁸

Federal Regulation of Sales and Purchases

Under federal law,⁹ sales and purchases of products containing ephedrine, pseudoephedrine, or phenylpropanolamine are regulated and restricted as follows:

Definitions

A “scheduled listed chemical product” is defined as a product that:

- Contains ephedrine, pseudoephedrine, or phenylpropanolamine, and the salts, optical isomers, and salts of optical isomers of these chemicals; and
- May be marketed or distributed lawfully in the United States under the Federal Food Drug and Cosmetic Act as a nonprescription drug.

³ Section 893.03(2)(c)(4), F.S., and 21 C.F.R. s. 1308.12(d)(2). The drug “has limited medical uses for the treatment of narcolepsy, attention deficit disorders, and obesity.” U.S. Drug Enforcement Administration, *Methamphetamine*, available at <http://www.justice.gov/dea/concern/meth.html> (citing by footnote to the National Institute on Drug Abuse, Research Report - Methamphetamine Abuse and Addiction, www.drugabuse.gov/) (last visited Apr. 2, 2010).

⁴ Section 893.033(1)(f),(v), and (z), F.S.

⁵ Section 893.02(13), F.S. The inclusion of a chemical as a listed precursor chemical does not bar, prohibit, or punish legitimate use of the chemical.

⁶ 21 U.S.C. s. 802(34)(c)(I) and (K). Many of the federal list 1 chemicals are also precursor chemicals under s. 893.033, F.S.

⁷ *Id.*

⁸ 6 U.S.C. s. 220(c).

⁹ “The Combat Methamphetamine Epidemic Act of 2005 (Title VII of the USA PATRIOT Improvement and Reauthorization Act of 2005, P.L. 109-177) was signed into law March 9, 2006. All changes go into effect on March 9, 2006, (date the legislation was signed) unless a later effective date is specifically stated.” Office of Diversion Control, U.S. Drug Enforcement Administration, available at <http://www.deadiversion.usdoj.gov/meth/cma2005.htm> (last visited Apr. 3, 2010). All information pertaining to federal regulation of sales and purchase is from this webpage, which describes the provisions of the Act.

The term “regulated seller” is defined as a retail distributor (including a pharmacy or a mobile retail vendor), but does not include an employee or agent of that distributor. “Retail distributor” is defined as a grocery store, general merchandise store, drug store, or other entity or person whose activities as a distributor relating to pseudoephedrine or phenylpropanolamine products are limited almost exclusively to sales for personal use, both in number of sales and volume of sales, either directly to walk-in customers or in face-to-face transactions by direct sales.

Sales Limits

For regulated sellers and persons required to submit mail order reports under 21 U.S.C. s. 830(b)(3), daily sales are limited to 3.6 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base per purchaser, regardless of the number of transactions.

All non-liquid forms (including gel caps) must be in 2-unit blister packs (when a blister pack is not technically feasible, the product may be in unit dosage packets or pouches). Mail-order sales are limited to 7.5 grams per customer during a 30-day period. Mobile retail vendor sales are limited to not more than 7.5 grams per customer during a 30-day period, and the vendor must confirm the identity of the purchaser prior to shipping the product.¹⁰

Unlawful Purchase

It is unlawful for any person to knowingly or intentionally purchase at retail more than 9 grams during a 30-day period (of which no more than 7.5 grams can be imported by private or commercial carrier or the U.S. Postal Service).¹¹

Product Placement

A regulated seller must place the product so that customers do not have direct access before the sale is made (“behind the counter” placement) or in a locked cabinet that is located in an area of the facility to which customers do have direct access. A regulated seller must deliver the product directly into the custody of the purchaser. A mobile retail vendor must place the product in a locked cabinet.

Logbook Provisions

A seller:

- Must maintain a written or electronic list (logbook) of sales that identifies:
 - Products by name;
 - Quantity sold;
 - Names and addresses of purchasers; and
 - Date and time of the sales;

¹⁰ 21 U.S.C. s. 830.

¹¹ 21 U.S.C. s. 844(a).

- May not sell the product unless the prospective purchaser presents a photographic identification card issued by a state or the federal government, or a document considered acceptable for purposes of 8 C.F.R. s. 274a.2(b)(1)(v)(A) or (B);
- Must determine that the name entered into the logbook corresponds to the name provided on such identification and that the date and time entered are correct;
- Must enter into the logbook the name of the product and the quantity sold; and
- Must maintain each entry in the logbook for not fewer than two years after the date on which the entry is made.

The logbook requirement does not apply to any purchase by an individual of a single sales package that contains not more than 60 mg. of pseudoephedrine. A purchaser must sign the logbook and enter his or her name, address, and date and time of sale. The logbook must contain a notice to purchasers that entering false statements or misrepresentations in the logbook may subject the purchaser to criminal penalties under 18 U.S.C. s. 1001 and such notice must specify the maximum fine (\$250,000) and term of imprisonment (five years).

The U.S. Attorney General is required to issue regulations establishing restrictions on disclosure of information in logbooks. Disclosure to the U.S. Attorney General and to state and local law enforcement agencies is authorized. Accessing, using, or sharing the logbook information for any purpose other than to comply with the Controlled Substances Act or to facilitate a product recall to protect public health and safety is prohibited. A regulated seller who in good faith releases logbook information to federal, state, or local law enforcement authorities is immune from civil liability for such release unless the release constitutes gross negligence or intentional, wanton, or willful misconduct.

Self-Certification and Training

A seller must self-certify to the U.S. Attorney General that each individual who is responsible for delivering such products into the custody of purchasers, or who deals directly with purchasers by obtaining payment for the products, has undergone training provided by the seller to ensure that the individual understands the requirements that apply to the sale of these products. A regulated seller may not sell any scheduled listed chemical product at retail unless the self-certification has been submitted to the U.S. Attorney General.

A seller must maintain a copy of this self-certification and records demonstrating that individuals have undergone such training. Certification is not effective unless, in addition to provisions regarding the training of individuals, the certification includes a statement that the seller understands the certification applies to the requirements regarding transactional limits, blister-packs, “behind the counter” placement, photo identification, and logbook and agrees to comply with these requirements.

The U.S. Attorney General is required to:

- Issue regulations to establish the criteria for self-certifications and employee training. Separate certification is required for each place of business at which a regulated seller sells such products at retail;
- Establish a program that:

- Is carried out through an internet site of the U.S. Department of Justice;
- Informs regulated sellers that 18 U.S.C. s. 1001 applies to these certifications;
- Makes available to sellers the criteria for certification and training;
- Permits submission of certifications through the internet site; and
- Is designed to automatically provide the explanation of the criteria for certification and training and an acknowledgment that the U.S. Department of Justice has received a certification, without requiring direct interaction of regulated sellers with staff of the U.S. Department of Justice; and
- Make copies of certifications available to appropriate state and local officials.

Florida Regulation of Sales

Section 893.1495, F.S., regulates and restricts retail sale of ephedrine, pseudoephedrine, phenylpropanolamine, and any of their salts, optical isomers, or salts of optical isomers. Persons are prohibited from:

- Knowingly delivering in any single retail OTC sale any number of packages of any drug containing a sole active ingredient that contains a combined total of more than 9 base grams of ephedrine, pseudoephedrine, phenylpropanolamine, or any of their salts, optical isomers, or salts of optical isomers, or more than three packages in any single retail OTC sale, regardless of weight, containing any such sole active ingredient; or
- Knowingly displaying and offering for retail sale packages of any drug having a sole active ingredient of ephedrine, pseudoephedrine, phenylpropanolamine, or any of their salts or optical isomers 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.

The owner or primary operator of a retail outlet where ephedrine, pseudoephedrine, or phenylpropanolamine products are available for sale is prohibited from knowingly allowing an employee to engage in the retail sale of these products unless the employee has completed an employee training program that includes, at a minimum, basic instruction on state and federal regulations relating to the sale and distribution of such products.¹²

The requirements of this section relating to the marketing, sale, or distribution of ephedrine, pseudoephedrine, or phenylpropanolamine products supersede any local ordinance or regulation passed by a county, municipality, or other local governmental authority.¹³

Precursor Monitoring

Restrictions of purchases of methamphetamine precursors and requirements for point-of-sale documentation of these purchases are circumvented when those involved in methamphetamine production purchase the maximum amount of products containing ephedrine, pseudoephedrine, or phenylpropanolamine from different retail sellers (this activity is referred to as “smurfing”).¹⁴

¹² Section 893.1495(3), F.S.

¹³ Section 893.1495(4), F.S.

¹⁴ According to the FDLE, “Federal law was effective in impacting the production of methamphetamine until meth cooks began using groups of individuals to travel from pharmacy to pharmacy to purchase products containing ephedrine base, pseudoephedrine base, or phenylpropanolamine base to use in the production of methamphetamine which, because of the lack

Several states require active tracking and monitoring of the sale of these products. A 2009 legislative update to a 2008 report on methamphetamine precursor monitoring systems by the National Alliance for Model State Drug Laws (NAMSDL)¹⁵ provides the following information:

- Arkansas, Hawaii, Iowa, Kansas, Kentucky, Louisiana, Oklahoma, and West Virginia are identified by the NAMSDL as states that have passed laws providing for active tracking and monitoring systems that are not pilot programs.¹⁶
- Illinois, Indiana, Iowa, and Washington are identified by the NAMSDL as passing laws providing for a pilot program.¹⁷
- Tennessee, through the Tennessee Methamphetamine Intelligence System (TMIS), which was created in 2005, allows the Tennessee Methamphetamine Task Force (Task Force) to receive, manage, and monitor substantial criminal justice information data, which includes data on methamphetamine precursor purchases. The NAMSDL does not identify any Tennessee laws that specifically address this system but indicates that the yearly operating budget allows for operation of this system. The NAMSDL also indicates that the TMIS has a statewide scope, and that the Task Force provides the TMIS software, free of charge, to officials in Arizona, Illinois, Indiana, and New Mexico. Alaska, California, Hawaii, Nevada, Oregon, and Washington also have access to the TMIS through the Western States Information Network, and the Task Force is expanding the exchange to include Georgia, Mississippi, North Carolina, and South Carolina.¹⁸

Precursor monitoring may be provided “in-house” without a private contractor (e.g., Tennessee), provided through the TMIS (e.g., California, which modified the TMIS software), with contractor involvement (e.g., Arkansas contracts with LeadsOnlabs), or by a memorandum of understanding (MOU) that allows access to the NPLeX (National Precursor Log Exchange), a “real-time electronic logging system used by pharmacies and law enforcement to track sales of over-the-counter (OTC) cold and allergy medications containing precursors to the illegal drug, methamphetamine.”

According to officials with Appriss, the technology vendor for the NPLeX, Kentucky has been using MethCheck, an Appriss product, and now the NPLeX, since June of 2008. Louisiana and Illinois both passed legislation and signed the NPLeX agreements last year, and the NPLeX is currently being implemented in those states. Missouri recently awarded their RFP to the NPLeX and an MOU will soon be made final. Kansas also recently selected the NPLeX and is drafting an MOU. Iowa is finalizing their regulations and MOU to join the NPLeX. Alabama and

of centrally available sale/purchase data, has made it difficult to identify persons who purchase excessive amounts of precursor ephedrine and/or related compounds.” Florida Department of Law Enforcement, *SB 1050 Analysis* (Mar. 10, 2010).

¹⁵ National Alliance for Model State Drug Laws, *Electronic Tracking Systems for Methamphetamine Precursors/Legislative and Policy Update to 2008 Report* (October 2009), available at <http://www.namsdl.org/documents/2009CongressionalReportFinal.pdf> (last visited Apr. 2, 2010). This report will be cited in further references as the “NAMSDL report.”

¹⁶ *Id.* at 11-13, 16-21, 33, 35-36, 41-45, and 47. Statutes or legislation: ARK. CODE ANN. ss. 5-64-1104-1112 (West 2009); HAW. REV. STAT. s. 329-75 (2009); S.B. 33, 83rd Leg., Reg. Sess. (KS. 2009); KY. REV. STAT. ANN. s. 218A.1446 (West 2009); LA. REV. STAT. ANN. ss. 40: 1049, 1 through 1049.11 (2009); OKLA. STAT. ANN., Title 63, ss. 2-210 and 309A-H (West 2009) and Title 63, s. 2-309C (West 2009); and W. VA. CODE ANN. ss. 60A-9-4 and 60A-10-8 (West 2009).

¹⁷ *Id.* at 14-17, 33, 37-40, and 46. Statutes: 720 ILL. COMP. STAT. ANN. s. 648/36-40 (West 2009); IND. CODE ANN. ss. 5-2-6-20 (West 2009) and 35-48-414.7 (West 2009); and WASH. REV. CODE ANN. s. 69.43.170 (West 2009).

¹⁸ *Id.* at pp. 22-32 and 48-54.

Washington (state) have passed NPLeX legislation, which awaits the governors' signatures. In addition to Florida, electronic tracking legislation is pending in California, Georgia, New Jersey, Pennsylvania, South Carolina, and Virginia. The FDLE has indicated that it contracted with Appriss to use their web-accessed database to conduct a 23-county pilot project.

The NAMSDL indicates that two states have adopted alternatives to precursor monitoring systems. Oregon requires a prescription for products containing ephedrine, pseudoephedrine, or phenylpropanolamine.¹⁹ Alabama law prohibits the sale of any product containing ephedrine or pseudoephedrine unless it is manufactured in such a manner that these chemicals cannot be extracted so as to be used in the production of methamphetamine.²⁰ The NAMSDL states that it is unaware of any product that has been “chemically engineered to prevent its conversion into a methamphetamine precursor[.]”²¹

III. Effect of Proposed Changes:

The bill amends s. 893.1495, F.S., governing the retail sale of ephedrine and related compounds as follows:

Definition

The bill defines the term “ephedrine or related compounds” as ephedrine, pseudoephedrine, phenylpropanolamine, or any of their salts, optical isomers, or salts of optical isomers.

Regulating Sales and Purchases

Currently, s. 893.1495(1), F.S., provides that no person shall knowingly deliver in any single retail over-the-counter (OTC) sale any number of packages of any drug containing a sole active ingredient that contains a combined total of more than 9 base grams of ephedrine, pseudoephedrine, phenylpropanolamine, or any of their salts, optical isomers, or salts of optical isomers, or more than three packages in any single retail OTC sale, regardless of weight, containing any such sole active ingredient.

The bill amends this subsection to provide 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 OTC sale, three packages, regardless of weight, containing ephedrine or related compounds; or
- In any 30-day period, in any number of retail OTC sales, a total of 9 grams or more of ephedrine or related compounds.

¹⁹ *Id.* at 56; *see also* OR. REV. STAT. ANN. s. 475.973 (West 2009) and OR. ADMIN. R. 855-080-0023 (2009).

²⁰ ALA. CODE s. 20-2-190 (2009).

²¹ NAMSDL report, *supra* note 11, at 57.

The bill revises language in current s. 893.1495(2), F.S. (requiring retail sales of ephedrine behind the counter or inaccessible to the general public), current s. 893.1495(3), F.S. (requiring employee training), and current s. 893.1495(4), F.S. (providing section requirements supersede local ordinances or regulations), to conform to the definition of “ephedrine or related compounds” and adds language used in the amendment of current s. 893.1495(1), F.S., to these subsections. The bill also makes a subsection referencing change in current s. 893.1495(5), F.S. (penalties), to conform the reference to changes in the numbering of subsections.

The bill provides that any person purchasing, receiving, or otherwise acquiring any nonprescription compound, mixture, or preparation containing any detectable quantity of ephedrine or related compounds must:

- Be at least 18 years of age;
- Produce a government-issued photo identification showing his or her name, date of birth, address, and photo identification number or, in the alternative, a form of identification acceptable under federal regulation 8 C.F.R. s. 274a.2(b)(1)(v)(A) and (B);²² and
- Sign his or her name on a record of the purchase, either on paper or on an electronic signature capture device.

Electronic Recordkeeping System

The bill requires the FDLE to approve an electronic recordkeeping system (“system”) for the purpose of recording and monitoring the real-time purchase of products containing ephedrine or related compounds and for the purpose of monitoring this information in order to prevent or investigate illegal purchases of these products. The approved system must be provided to a pharmacy or retailer without any additional cost or expense.

A pharmacy or retailer may request an exemption from electronic reporting from FDLE if the pharmacy or retailer lacks the technology to access the system and maintains a sales volume of less than 72 grams of ephedrine or related compounds in a 30-day period.

The system must record the following:

- Date and time of the transaction;
- Name, date of birth, address, and photo identification number of the purchaser, as well as the type of identification and the government of issuance;
- The number of packages purchased, total grams per package, and name of the compound, mixture, or preparation containing ephedrine or related compounds; and
- The signature of the purchaser, or a unique number relating the transaction to a paper signature maintained at the retail premises.

The system must provide for:

- Real-time tracking of nonprescription OTC sales under s. 893.1495, F.S.; and

²² Some of the types of identification included in the federal provision include: passports, voter registration cards, school identification cards, U.S. military card or draft record, or Native American tribal documents.

- Blocking of nonprescription OTC sales in excess of those allowed by the laws of this state or federal law.

Every OTC sale of a nonprescription compound, mixture, or preparation containing any quantity of ephedrine or related compounds must be reported to the electronic system approved by the FDLE unless the pharmacy or retailer has received an exemption from FDLE. It also provides that, prior to completing a transaction, a pharmacy or retailer distributing products containing ephedrine or related compounds to consumers in Florida must submit all required data into the system approved by the FDLE either at the point of sale or through an interface with the system, unless granted an exemption by the FDLE.

Data submitted to the system must be retained within the system for no less than two years from the date of entry. Information contained within the system must be disclosed in a manner authorized by state or federal law. Any retailer or entity that collects information on behalf of a retailer as required by the Combat Methamphetamine Act of 2005 and s. 893.1495, F.S., as amended by the bill, may not access or use that information, except for:

- Law enforcement purposes under state or federal law; or
- Facilitation of a product recall for public health and safety.

A person who sells any product containing ephedrine or related compounds who in good faith complies with the requirements of s. 893.1495, F.S., is immune from civil liability for the release of the information unless the release constitutes gross negligence or intentional, wanton or willful misconduct.

The FDLE is required to contract or enter into memorandum of understanding with a private third-party administrator to implement the system. The FDLE is also required to adopt rules necessary to implement s. 893.1495, F.S.

Exceptions to Application

The bill provides that s. 893.1495, F.S., does not apply to:

- Licensed manufacturers manufacturing and lawfully distributing products in the channels of commerce;
- Wholesalers lawfully distributing products in the channels of commerce;
- Health care facilities licensed under ch. 395, F.S. (hospitals, ambulatory surgical centers, and mobile surgical facilities);
- Licensed long-term care facilities;
- Government-operated health departments;
- Physicians' offices;
- Publicly operated prisons, jails, or juvenile correctional facilities or private adult or juvenile correctional facilities under contract with the state;
- Public or private educational institutions maintaining health care programs; and
- Government-operated or industry-operated medical facilities serving employees of the government or industry operating them.

Effective and Implementation Dates

The effective date of the bill is July 1, 2010. The date for implementation of the bill is January 1, 2011.

Other Potential Implications:

The FDLE states:

- SB 1050 follows the federal 2005 Combat Methamphetamine Act, which establishes most of the key provisions within this bill that relate to the restricted sale of any product containing an ephedrine base, pseudoephedrine base, or phenylpropanolamine base and the required use of a purchaser logbook. Law enforcement already has access to the logbooks and purchaser information.
- In addition, the federal Methamphetamine Production Prevention Act of 2008 recognized the use of electronic logbooks in lieu of written logbooks. Real-time electronic record-keeping systems that capture and/or block point of sale transactions of products containing ephedrine based or related compounds have been in existence in other states for a couple of years. Thus far, the courts have found no constitutional violation with these systems.²³

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The bill provides that information contained within the electronic recordkeeping system must be disclosed in a manner authorized by state or federal law.

Federal law provides that the disclosure of information in logbooks is restricted as follows:

- The information shall be disclosed as appropriate to the DEA and to state and local law enforcement agencies, and
- The information in the logbooks shall not be accessed, used, or shared for any purpose other than to ensure compliance with Title 21 of the Code of Federal Regulations or to facilitate a product recall to protect public health and safety.²⁴

Additionally, if this private information is maintained by a criminal justice agency or accessed from a private source and retained by a criminal justice agency to monitor possible criminal activity, the information would probably constitute criminal intelligence

²³ Florida Department of Law Enforcement, *supra* note 14 at 4.

²⁴ 21 C.F.R. s. 314.45(c).

information, which is exempt from public records inspection as long as the information is active.²⁵

Additionally, disclosure limitations mirroring federal law are typically a condition of a contract or memorandum of understanding between a private third-party administrator of an electronic recordkeeping system that contains logbooks information and a state agency that will access that information.

Florida law does not limit private entities (third-party administrators and retailers and sellers who have this logbook information) from disclosing logbook information. Records pertinent to Florida's public records law are records made or received pursuant to law or ordinance or in connection with the transaction of official business by a public agency. However, many private records (e.g., bank account information, credit card information, and personal medical records) are not disclosed to the public because of federal law and/or the private entities' commitment or contractual obligation to the consumer not to disclose the records to the public.

There is case law that indicates that private records are public records when accessed electronically by public agents for "a public purpose." However, the records discussed in those cases did not appear to be restricted from public disclosure by federal law. In *National Collegiate Athletic Ass'n v. Associated Press*, the court held that NCAA documents were public records because they were examined by lawyers for a public agency, Florida State University, and used in the course of the agency's official business.²⁶ Similarly, in *Times Publishing Co. v. City of St. Petersburg*, the court held that documents of negotiations between the Chicago White Sox and the City of St. Petersburg for the use of the Suncoast Dome were public records.²⁷ These documents were prepared and maintained by the White Sox, but were examined by agents for the city under a confidentiality agreement and used in the course of its business.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

²⁵ Sections 119.011(3)(a) and (d), and (4) and 119.071(2), F.S. It is uncertain if the limited exemption for data processing software would also be applicable. Sections 119.011(6) and 119.071(1)(f), F.S.

²⁶ *National Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201 (Fla. 1st DCA 2009).

²⁷ *Times Publishing Co. v. City of St. Petersburg*, 558 So. 2d 487 (Fla. 2d DCA 1990).

B. Private Sector Impact:

Depending on the third-party administrator chosen, there may or may not be costs for technology purchases (software, hardware, etc.), system administration, training, etc. incurred by retailers or pharmacists. However, many large retailers and pharmacies already utilize an electronic “logbook” in an effort to comply with federal requirements.

C. Government Sector Impact:

The bill requires the FDLE to contract with a private third-party administrator to implement the electronic recordkeeping system required by the bill.

There appear to be at least three private third-party administrators providing “real-time” tracking/monitoring: NPLeX, MethShield,²⁸ and LeadsOnlabs.²⁹ System requirements and costs vary depending on the private vendor or administrator.

The NPLeX’s website states that “NPLeX is provided free of charge on a permanent basis to state governments that pass appropriate legislation and regulations.”³⁰

“[M]anufacturers of the medicines are the sponsors for NPLeX, and pay for the entire cost of the service.”³¹ MethShield’s website indicates some involvement in county pilot projects in Kansas and Missouri but does not indicate any current contract with a state agency. The NASMSDL reports that start-up costs for Arkansas’ system (Arkansas contracts with LeadsOnlabs) were \$350,000 for the first two years, and annual operating costs/FTE’s are \$300,000/1 FTE.³² It is unknown how much of start-up costs and annual operating costs are costs for contractual services.

At the present time, it appears that the NPLeX is the only private third-party administrator able to meet the electronic recordkeeping system capability requirements of the bill and provide the system to a pharmacy or retailer without any additional cost or expense (as represented by Appriss).

Because the bill creates new felonies, the Criminal Justice Impact Conference reviewed the bill for fiscal impact. On March 17, 2010, the conference reported that that the bill has an indeterminate prison bed impact. Further discussion with staff preparing the financial determination indicate that any impact would likely be insignificant based on FDLE reports that there were zero convictions in FY 08-09 for existing misdemeanor offenses related to selling items with ephedrine.

²⁸ MethShield, <https://www.methshield.com/> (last visited Apr. 2, 2010).

²⁹ LeadsOnlabs, <http://www.leadsonlabs.com/main/> (last visited Apr. 2, 2010).

³⁰ National Precursor Log Exchange (NPLeX), <http://www.nplexservice.com/faq.html> (last visited Apr. 2, 2010).

³¹ *Id.* Appriss officials verbally communicated to Senate professional staff of the Committee on Criminal Justice that Appriss’ financial benefit comes from increased volume (per contract with the drug manufacturers funding NPLeX).

³² NASMSDL report *supra* note 11, at 12.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Judiciary on April 7, 2010:

The committee substitute:

- Allows a purchaser of ephedrine to provide an alternative form of identification acceptable under federal regulation 8 C.F.R. s. 274a.2(b)(1)(v)(A) and (B);
- Specifies that the provision barring the sale of ephedrine or a related compound over the counter unless reported to an electronic recordkeeping does not apply if the pharmacy or retailer has received an exemption from the Department of Law Enforcement;
- Restricts the use of information collected by a retailer or entity to law enforcement purposes or to facilitate a product recall; and
- Clarifies that a person who sells ephedrine and who releases the collected information to a law enforcement officer is immune from civil liability unless the release constitutes gross negligence or intentional, wanton, or willful misconduct.

CS by Criminal Justice on March 18, 2010:

The committee substitute:

- Defines “ephedrine or related compounds” as ephedrine, pseudoephedrine, phenylpropanolamine, or any of their salts, optical isomers, or salts of optical isomers.
- Revises requirements in s. 893.1495, F.S., relating to retail OTC sales of any nonprescription compound, mixture or preparation containing ephedrine or related compounds.
- Requires a person purchasing, receiving or acquiring any nonprescription compound, mixture or preparation to meet certain requirements.
- Requires the FDLE to approve an electronic recordkeeping system for the purpose of recording and monitoring the real time purchase of products containing ephedrine or related compounds and for the purpose of monitoring this information in order to prevent or investigate illegal purchases of these products.
- Requires that this system be provided to a pharmacy or retailer at no additional cost or expense.
- Provides that a pharmacy or retailer may request an exemption from the electronic reporting if certain criteria are met.

- Specifies what information must be recorded in the system and the capabilities of the system.
- Requires a pharmacy or retailer distributing a product containing ephedrine or related compounds to Florida consumers to submit required information to the system (as specified in the bill) before completing the transaction.
- Specifies that data submitted to the system must be retained for no less than 2 years from the date of entry.
- Specifies entities exempt from the application of s. 893.1495, F.S.
- Specifies that information contained in the system must be disclosed in a manner authorized by state or federal law.
- Provides that a person who sells any product containing ephedrine or related compounds who in good faith complies with the requirements of s. 893.1495, F.S., is immune from civil liability for the release of the information.
- Requires FDLE to contract with a private third-party administrator to implement the electronic recordkeeping system.
- Requires FDLE to promulgate rules necessary to implement s. 893.1495, F.S.

B. Amendments:

None.

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal and Civil Justice Appropriations Committee

BILL: CS/SB 2584

INTRODUCER: Criminal Justice Committee and Senator Altman

SUBJECT: Handbill Distribution

DATE: April 14, 2010 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Fav/CS
2.	Brink	Imhof	RI	Favorable
3.	Butler <i>(B)</i>	Sadberry <i>RJA</i>	JA	Pre-meeting
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

Currently, s. 509.144, F.S., prohibits delivering, distributing, or placing a handbill at or in a public lodging establishment without the expressed written or oral permission of the owner, manager, or agent of the owner or manager of the establishment where a sign is posted prohibiting advertising or solicitation as specified in the statute.

The bill does the following:

- Amends the definition of “handbill” to indicate the term does not include communication protected by the First Amendment to the United States Constitution.
- Amends the definition of the term “without permission” to remove “oral permission.” Only written permission would indicate expressed permission.
- Increases the fine for persons who unlawfully direct another to distribute handbills from \$500 to \$1,000.
- Provides the following fines for subsequent violations of the handbill statute:
 - For a second violation, a minimum fine of \$2,000.
 - For a third or subsequent violation, a minimum fine of \$3,000.

- Provides that property (as specified in the bill) that was used as an instrumentality in the commission of a person's third or subsequent violation of the handbill distribution statute is subject to seizure and forfeiture.
- Adds another exception to the general rule that officers must witness a misdemeanor offense in order to make a warrantless arrest by authorizing an officer to arrest a person without a warrant:
 - If there is probable cause to believe that a violation of s. 509.144, F.S., has been committed; and
 - Where the owner or manager of the public lodging establishment in which the violation occurred signs an affidavit containing information that supports the probable cause determination.
- Provides that the terms and provisions of the act do not affect or impede provisions of s. 790.251, F.S. (rights to keep and bear arms in motor vehicles for self-defense and other lawful purposes), or any other protection or right guaranteed by the Second Amendment to the United States Constitution.

The effective date of the bill is October 1, 2010.

This bill substantially amends sections 509.144, 901.15, and 932.701 of the Florida Statutes.

This bill includes unnumbered sections of the Florida Statutes.

II. Present Situation:

Unlawful Handbilling

Section 509.14(2), F.S., provides that any individual, agent, contractor, or volunteer who is acting on behalf of an individual, business, company, or food service establishment and who, without permission,¹ delivers, distributes, or places, or attempts to deliver, distribute, or place, a handbill² at or in a public lodging establishment³ commits a first degree misdemeanor.

Section 509.14(3), F.S., provides that any person who, without permission, directs another person to deliver, distribute, or place, or attempts to deliver, distribute, or place, a handbill at or in a public lodging establishment commits a first degree misdemeanor. Any person sentenced under this subsection shall be ordered to pay a minimum fine of \$500 in addition to any other penalty imposed by the court.

While the statute does restrict handbilling, which may involve speech or commercial speech, Senate professional staff did not find any case challenging the statute. It appears that in order to

¹ Section 509.14 (1)(a), F.S., defines "handbill" to mean "a flier, leaflet, pamphlet, or other written material that advertises, promotes, or informs persons about an individual, business, company, or food service establishment, but shall not include employee communications permissible under the National Labor Relations Act."

² Section 509.14(1)(b), F.S., defines "without permission" to mean "without the expressed written or oral permission of the owner, manager, or agent of the owner or manager of the public lodging establishment where a sign is posted prohibiting advertising or solicitation in the manner provided in subsection (4)." Subsection (4) of s. 509.14, F.S., provides that a public lodging establishment that intends to prohibit advertising or solicitation, as described in the statute, must comply with specified requirements in this subsection regarding posting and accessibility of the sign.

³ Section 509.14(1)(c), F.S., defines "at or in a public lodging establishment" to mean "any property under the sole ownership or control of a public lodging establishment."

determine that restrictions on handbilling at a public lodging establishment implicate constitutional protections involving speech or political activity, a court would have to determine that a public lodging establishment, which is generally open only to paying patrons, is really the “functional equivalent” of a “town center.”

In *Publix Supermarkets, Inc. v. Tallahasseeans for Practical Law Enforcement*, a case which involved a citizen and political action committee soliciting signatures for a political petition on the private property of a Publix supermarket in Tallahassee, the Second Judicial Circuit Court held that “there is no right under the First Amendment to the United States Constitution to engage in free speech or other political activity on private property without the property owner’s permission.”⁴ The circuit court noted U.S. Supreme Court cases which held that protections of the First Amendment “[cannot] be invoked in the absence of State action,”⁵ but the circuit court found no evidence of governmental control over the Publix supermarket property.⁶ While the circuit court indicated it was aware of cases which found “something generally analogous to ‘State action’ by concluding that large malls have, in some cases, become the functional equivalent of ‘town centers’ where people gather to socialize,”⁷ the circuit court:

could not find any decisions holding that a smaller shopping center or a free standing supermarket is the functional equivalent of a “town center.” Indeed, every decision reviewed by the Court involving a supermarket has held that individuals have no constitutional right to solicit, or to engage in free speech or political activity over the store owner’s objection.⁸

Florida Contraband Forfeiture Act

Sections 932.701 – 932.706, F.S., otherwise known as “The Florida Contraband Forfeiture Act,” provide that any contraband article, vessel, motor vehicle, aircraft, other personal property, or real property used in violation of any provision of the Act, or in, upon, or by means of which any violation of the Act has taken or is taking place, may be seized and shall be forfeited subject to the provisions of the Act.

Section 932.701, F.S., defines the term “contraband” to include:

⁴ 2005 WL 3673662 (Fla.Cir.Ct. 2005) (not reported in So.2d).

⁵ *Id.*, at p. 3 (citing cases).

⁶ *Id.*, at p. 4.

⁷ *Id.* (citing cases).

⁸ *Id.*, at p. 4. In another Florida case, which involved a person collecting signatures on the property of a shopping mall in order to get his name on a ballot for a political office, the Circuit Court of Bay County held that Art. I, § 5, Fla. Const., which contains protections similar to those afforded under the First Amendment, “prohibits a private owner of a ‘quasi-public’ place from using state trespass laws to exclude peaceful political activity.” *Wood v. State*, 2003 WL 1955433, p. 3 (Fla.Cir.Ct. 2003) (not reported in So.2d). The court stated that “[c]ourts in this state have recognized this generally accepted principle that malls and other shopping centers are still private property, but have a ‘quasi-public’ nature.” *Id.* However, the only case cited in support of its holding is *State v. Woods*, 624 So.2d 739 (Fla. 5th DCA 1993), which had nothing to do with protected speech or political activity but rather involved a policy of a police department that limited access to a shopping mall in a manner not authorized by the state trespass law. The Florida Supreme Court case quoted by the 5th DCA in regards to the “quasi-public” nature of the mall, *Corn v. State*, 332 So.2d 4 (Fla.1976), did not involve protected speech or political activity but rather involved an equal protection challenge to the trespass law.

- Any controlled substance as defined in chapter 893 or any substance, device, paraphernalia, or currency or other means of exchange that was used, was attempted to be used, or was intended to be used in violation of any provision of chapter 893, if the totality of the facts presented by the state is clearly sufficient to meet the state's burden of establishing probable cause to believe that a nexus exists between the article seized and the narcotics activity, whether or not the use of the contraband article can be traced to a specific narcotics transaction.
- Any gambling paraphernalia, lottery tickets, money, currency, or other means of exchange which was used, was attempted, or intended to be used in violation of the gambling laws of the state.
- Any equipment, liquid or solid, which was being used, is being used, was attempted to be used, or intended to be used in violation of the beverage or tobacco laws of the state.
- Any motor fuel upon which the motor fuel tax has not been paid as required by law.
- Any personal property, including, but not limited to, any vessel, aircraft, item, object, tool, substance, device, weapon, machine, vehicle of any kind, money, securities, books, records, research, negotiable instruments, or currency, which was used or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, whether or not comprising an element of the felony, or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act.
- Any real property, including any right, title, leasehold, or other interest in the whole of any lot or tract of land, which was used, is being used, or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act.
- Any personal property, including, but not limited to, equipment, money, securities, books, records, research, negotiable instruments, currency, or any vessel, aircraft, item, object, tool, substance, device, weapon, machine, or vehicle of any kind in the possession of or belonging to any person who takes aquaculture products in violation of s. 812.014(2)(c), F.S.
- Any motor vehicle offered for sale in violation of s. 320.28., F.S.
- Any motor vehicle used during the course of committing an offense in violation of s. 322.34(9)(a), F.S.
- Any photograph, film, or other recorded image, including an image recorded on videotape, a compact disc, digital tape, or fixed disk, that is recorded in violation of s. 810.145, F.S., and is possessed for the purpose of amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person.
- Any real property, including any right, title, leasehold, or other interest in the whole of any lot or tract of land, which is acquired by proceeds obtained as a result of Medicaid fraud under s. 409.920, F.S., or s. 409.9201, F.S.; any personal property, including, but not limited to, equipment, money, securities, books, records, research, negotiable instruments, or currency; or any vessel, aircraft, item, object, tool, substance, device, weapon, machine, or vehicle of any kind in the possession of or belonging to any person which is acquired by proceeds obtained as a result of Medicaid fraud under s. 409.920, F.S., or s. 409.9201, F.S.

The current definition of the term "contraband" does not include property that was used as an instrumentality in the commission of a violation of s. 509.144, F.S., relating to handbill distribution.

Relevant to the bill, there are indications that forfeitures may or do occur in some misdemeanor cases. For example, one Florida court has indicated (in dicta) that the definition of “contraband” in s. 932.701(2)(a), F.S., would apparently apply to the seizure of “money as suspected contraband connected with narcotics activity, regardless of whether the crimes constitute felonies.”⁹ Additionally, the Florida Supreme Court has held that the Contraband Forfeiture Act “does not preempt to the Legislature the field of vehicle seizure and forfeiture, much less impoundment, for misdemeanor offenses.”¹⁰ Therefore, a municipality may adopt “an ordinance that authorizes the seizure and impoundment of vehicles used in the commission of certain misdemeanors.”¹¹

Warrantless Arrest

Section 901.15, F.S., sets forth the instances in which a law enforcement officer can arrest a person without a warrant. For misdemeanor offenses, the general rule is that law enforcement officers must witness the occurrence of the offense in order to make an arrest without a warrant. If the officer does not witness the offense, the officer must obtain an arrest warrant.

In certain instances the Legislature has deemed particular misdemeanor offenses to be of such a nature that they should be exceptions to the above rule. Those crimes, which are listed in s. 901.15, F.S., are:

- Violations of injunctions for protection in domestic violence, repeat violence, sexual violence, and dating violence situations.
- Violations of pretrial release conditions in domestic and dating violence cases.
- Acts of domestic or dating violence.
- Luring or enticing a child.
- Aggravated assault upon a law enforcement officer, firefighter and other listed persons.
- Battery.
- Criminal mischief or graffiti-related offenses.
- Violations of certain naval vessel protection zones or trespass in posted areas in airports.

For these offenses, an officer does not have to witness the crime in order to make a warrantless arrest - they only need to have probable cause to believe the person committed the crime.

Relevant to the bill, there are currently exceptions to the requirement for an arrest warrant for some non-violent misdemeanor crimes, e.g., criminal mischief and graffiti-related offenses.

III. Effect of Proposed Changes:

Currently, s. 509.144, F.S., prohibits delivering, distributing, or placing a handbill at or in a public lodging establishment without the expressed written or oral permission of the owner, manager, or agent of the owner or manager of the establishment where a sign is posted prohibiting advertising or solicitation as specified in the statute.

⁹ *Shuler v. State*, 984 So.2d 1274,1275 (Fla. 2d DCA 2008) (citation omitted).

¹⁰ *City of Hollywood v. Mulligan*, 934 So.2d 1238, 1246 (Fla.2006).

¹¹ *Id.*

The bill amends s. 509.144, F.S., as follows:

- Modifies the definition of “handbill” to indicate that the term does not include communication protected by the First Amendment to the United States Constitution.
- Modifies the definition of the term “without permission” to remove “oral permission.” Thus, a person who distributes handbills must have the written permission of the public lodging establishment’s owner or manager.
- Increases the fine for persons who unlawfully direct another to distribute handbills from \$500 to \$1,000.
- Provides the following fines for subsequent violations of the handbill statute:
 - For a second violation, a minimum fine of \$2,000.
 - For a third or subsequent violation, a minimum fine of \$3,000.
- Provides for seizure and forfeiture of any personal property, including, but not limited to, any vehicle of any kind, item, object, tool, device, weapon, machine, money, securities, books, or records, which was used or was attempted to be used as an instrumentality in the commission of, or aiding and abetting in the commission of, a person’s third or subsequent violation of s. 509.144, F.S., whether or not comprising an element of the offense.

The bill amends s. 901.15, F.S., to add another exception to the general rule that officers must witness a misdemeanor offense in order to make a warrantless arrest. Specifically, the bill provides that an officer may arrest a person without a warrant:

- If there is probable cause to believe that a violation of s. 509.144, F.S., has been committed; and
- Where the owner or manager of the public lodging establishment in which the violation occurred signs an affidavit containing information that supports the probable cause determination.

The bill also amends the definition of the term “contraband” in s. 932.701, F.S., to indicate the term also includes the property specified in s. 509.144, F.S., which is subject to seizure and forfeiture.

The bill also provides that the terms and provisions of the act do not affect or impede provisions of s. 790.251, F.S. (rights to keep and bear arms in motor vehicles for self-defense and other lawful purposes), or any other protection or right guaranteed by the Second Amendment to the United States Constitution.

The effective date of the bill is October 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Under Florida law, in order for restrictions on handbilling at a public lodging establishment to implicate constitutional protections involving speech or political activity, a court likely would have to determine that a public lodging establishment, which is generally open only to paying patrons, is the “functional equivalent” of a “town center.”¹²

The bill amends paragraph 1(a) of s. 509.144 to specify that a “handbill” does not include communication protected by the First Amendment to the United States Constitution. As a result, if a court or law were to hold that sliding pizza delivery pamphlets under hotel room doors without permission is constitutionally protected free speech, the bill’s provisions would not apply to such activity.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of legislation, has not met to determine the prison bed impact of CS/SB 2584. However, the bill does not create any new misdemeanor or felony, or enhance an existing misdemeanor or felony. It is unknown at this time if the provisions relevant to warrantless arrest and forfeiture would result in more prosecutions and convictions for the current misdemeanor offenses.

VI. Technical Deficiencies:

None.

¹² See *Supermarkets, Inc. v. Tallahasseeans for Practical Law Enforcement*, 2005 WL 3673662 (Fla.Cir.Ct. 2005) (not reported in So.2d); *supra* at Present Situation, Unlawful Handbilling.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on April 7, 2010:

- Amends the definition of “handbill” to indicate the term does not include communication protected by the First Amendment to the United States Constitution.
- Amends the definition of the term “without permission” to remove “oral permission.”
- Increases the fine for persons who unlawfully direct another to distribute handbills from \$500 to \$1,000.
- Provides the following fines for subsequent violations of the handbill statute:
 - For a second violation, a minimum fine of \$2,000.
 - For a third or subsequent violation, a minimum fine of \$3,000.
- Provides that property (as specified in the bill) that was used as an instrumentality in the commission of a person’s third or subsequent violation of the handbill distribution statute is subject to seizure and forfeiture.
- Adds another exception to the general rule that officers must witness a misdemeanor offense in order to make a warrantless arrest by authorizing an officer to arrest a person without a warrant:
 - If there is probable cause to believe that a violation of s. 509.144, F.S., has been committed; and
 - Where the owner or manager of the public lodging establishment in which the violation occurred signs an affidavit containing information that supports the probable cause determination.
- Provides that the terms and provisions of the act do not affect or impede provisions of s. 790.251, F.S. (rights to keep and bear arms in motor vehicles for self-defense and other lawful purposes), or any other protection or right guaranteed by the Second Amendment to the United States Constitution.
- Changes the effective date of the bill.

B. Amendments:

None.

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal and Civil Justice Appropriations Committee

BILL: SB 2750
 INTRODUCER: Senator Dean
 SUBJECT: Career Offenders
 DATE: April 14, 2010 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Favorable
2.	Anderson	Maclure	JU	Favorable
3.	Butler <i>(PB)</i>	Sadberry <i>RS</i>	JA	Pre-meeting
4.				
5.				
6.				

I. Summary:

The bill provides that it is first degree misdemeanor for a person to:

- Withhold information from, or fail to notify, a law enforcement agency about a career offender's noncompliance with the requirements of the Florida Career Offender Registration Act (s. 775.261, F.S.) and, if known, the whereabouts of the career offender;
- Harbor or attempt to harbor, or assist another in harboring or attempting to harbor, the career offender;
- Conceal or attempt to conceal, or assist another in concealing or attempting to conceal, the career offender; or
- Provide information to the law enforcement agency regarding the career offender which the person knows to be false.

Each specified act is only unlawful if the person has reason to believe that a career offender is not complying, or has not complied, with the requirements of s. 775.261, F.S., and commits the act with the intent to assist the career offender in eluding a law enforcement agency that is seeking to find the career offender to question the career offender about, or to arrest the career offender for, his or her noncompliance with the requirements of s. 775.261, F.S.

This bill substantially amends section 775.261, Florida Statutes.

II. Present Situation:

Florida Career Offender Registration Act

Section 775.261, F.S., the Florida Career Offender Registration Act, requires an offender who meets the definition of “career offender” in the statute to register as such. A “career offender” is a person who is designated as a habitual violent felony offender,¹ a violent career criminal,² a three-time violent felony offender,³ or a prison releasee reoffender.⁴ These sentencing statutes have different criteria but, in general, impose enhanced penalties upon offenders who have been convicted on multiple occasions of certain felony offenses.

A career offender released on or after July 1, 2002, from a sanction⁵ imposed in Florida is required to register with the Florida Department of Law Enforcement (FDLE) or the sheriff’s office in the county in which the career offender establishes or maintains a permanent or temporary residence within 2 working days after establishing this residence. A career offender must also register with FDLE or the sheriff within 2 working days after being released from the custody, control, or supervision of the Department of Corrections (DOC) or from the custody of a private correctional facility. The career offender is required to provide specified, identifying information to the sheriff such as the offender’s name, social security number, age, race, date of birth, and address. If the career offender registers with the sheriff, the sheriff must provide the information obtained to FDLE. If the career offender registers with FDLE, FDLE must notify the sheriff and, if applicable, the police chief of the municipality, where the career offender maintains a residence within 48 hours after the career offender registers with FDLE.⁶

Within 2 working days after registering with FDLE or the sheriff, the career offender (not incarcerated and residing in the community) must register in person at a driver’s license office of the Department of Highway Safety and Motor Vehicles (DMSMV or department), secure a driver’s license or state identification card, and provide specified, identifying information.⁷ Each time the career offender’s driver’s license or state identification card is subject to renewal, and within 2 working days after any change of career offender’s residence or name, the career offender must report in person to a driver’s license office and is subject to the previously noted requirements relevant to reporting to DHSMV. The department must forward the information provided by the career offender to FDLE and DOC.⁸

The statute also provides reporting requirements relevant to career offenders who:

- Intend to establish a residence in a state or jurisdiction other than Florida;⁹ or

¹ Section 775.084(1)(b), F.S.

² Section 775.084(1)(d), F.S.

³ Section 775.084(1)(c), F.S.

⁴ Section 775.082(9), F.S.

⁵ Section 775.261(3), F.S. provides that a “sanction” includes, but is not limited to, a fine, probation, community control, parole, conditional release, control release, or incarceration in a state prison, private correctional facility, or local detention facility.

⁶ Section 775.261(4), F.S.

⁷ Section 775.261(4)(c), F.S.

⁸ Section 775.261(4)(d), F.S.

⁹ Section 775.261(4)(f), F.S.

- Indicate an intent to establish a residence in a state or jurisdiction other than Florida but decide to remain in Florida.¹⁰

Registration information is a public record, and FDLE maintains a statewide database and a searchable public website with this information.¹¹

Failure to comply with the requirements of the section is a third degree felony.¹²

Florida Sexual Predators Act

Currently, the Florida Sexual Predators Act punishes acts involving withholding certain information from law enforcement agencies about registration-eligible sexual predators and sexual offenders and harboring and concealing the whereabouts of these sexual predators and sexual offenders.¹³ The act provides that it is a third degree felony for any person who has reason to believe that a sexual predator is not complying, or has not complied, with the requirements of this section, and with the intent to assist the sexual predator in eluding a law enforcement agency that is seeking to find the sexual predator to question the sexual predator about, or to arrest the sexual predator for, his or her noncompliance with the requirements of the act, to:

- Withhold information from, or not notify, the law enforcement agency about the sexual predator's noncompliance with the requirements of this section, and, if known, the whereabouts of the sexual predator.
- Harbor, or attempt to harbor, or assist another person in harboring or attempting to harbor, the sexual predator.
- Conceal or attempt to conceal, or assist another person in concealing or attempting to conceal, the sexual predator.
- Provide information to the law enforcement agency regarding the sexual predator which the person knows to be false information.¹⁴

There is no similar provision relating to career offenders.

III. Effect of Proposed Changes:

The bill amends s. 775.261, F.S., the Florida Career Offender Registration Act, to provide that it is first degree misdemeanor for a person to:

- Withhold information from, or fail to notify, a law enforcement agency about a career offender's noncompliance with the requirements of s. 775.261, F.S., and, if known, the whereabouts of the career offender;

¹⁰ Section 775.261(4)(g), F.S.

¹¹ Florida Department of Law Enforcement, *Career Offender Search*, <http://www.fdle.state.fl.us/coflyer/home.asp> (last visited Apr. 1, 2010).

¹² Section 775.261(8)(a), F.S.

¹³ Section 775.21(10)(g), F.S.

¹⁴ *Id.* Similar provisions are provided in statutes applicable to sexual offender registration. See ss. 943.0435(13), 944.607(12), and 985.4815(12), F.S.

- Harbor or attempt to harbor, or assist another in harboring or attempting to harbor, the career offender;
- Conceal or attempt to conceal, or assist another in concealing or attempting to conceal, the career offender; or
- Provide information to the law enforcement agency regarding the career offender which the person knows to be false.

Each specified act is only unlawful if the person has reason to believe that a career offender is not complying, or has not complied, with the requirements of s. 775.261, F.S., and commits the act with the intent to assist the career offender in eluding a law enforcement agency that is seeking to find the career offender to question the career offender about, or to arrest the career offender for, his or her noncompliance with the requirements of s. 775.261, F.S.

The effective date of the bill is July 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Section 18(d) of Article VII of the State Constitution exempts laws that have insignificant fiscal impacts on cities and counties from the requirements of subsection (1). Because the bill creates a new misdemeanor, the bill could impact county jails. The impact is unknown but is anticipated to be insignificant.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

On March 17, 2010, the Criminal Justice Impact Conference determined the identical House Bill 1493 would not have an impact on prison population because the bill creates a

misdemeanor.¹⁵ Misdemeanors are less-serious crimes. They are generally punishable by a fine or incarceration in the county jail for less than one year. The impact on county jails is not known; however, it is anticipated that any impact would be insignificant.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

¹⁵ Office of Economic and Demographic Research, The Florida Legislature, *Criminal Justice Impact Conference 2010 Legislature* (Updated through Mar. 17, 2010), available at <http://edr.state.fl.us/conferences/criminaljustice/Impact/cjimpact.htm> (follow the "2010 Conference Results" link) (last visited Apr. 8, 2010).

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal and Civil Justice Appropriations Committee

BILL: CS/SB 300
INTRODUCER: Criminal Justice Committee and Senators Bennett and Richter
SUBJECT: Pretrial Proceedings
DATE: April 14, 2010 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Fav/CS
2.	Hendon <i>JK</i>	Sadberry <i>PTN</i>	JA	Pre-meeting
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:	
A. COMMITTEE SUBSTITUTE.....	<input checked="" type="checkbox"/> Statement of Substantial Changes
B. AMENDMENTS.....	<input type="checkbox"/> Technical amendments were recommended
	<input type="checkbox"/> Amendments were recommended
	<input type="checkbox"/> Significant amendments were recommended

I. Summary:

The bill provides that when the person before a court for First Appearance on a new law violation is under community supervision the court may determine the likelihood of a prison sanction on a violation of community supervision based on the new law violation arrest. The court may then grant pretrial release or order pretrial detention on a presumptive violation of community supervision.

The bill also provides that the court may order the arrest and return of the person under community supervision to the court that originally granted the community supervision sanction for further proceedings.

The bill provides time limitations on the filing of an affidavit alleging a violation when the court has ordered detention or release on a presumptive violation. It provides for dismissal of the court's detention or release order when an affidavit is not timely filed.

When an affidavit is timely filed, the bill requires a hearing be set within 10 days of the filing of the affidavit for the court to determine whether to dismiss its detention or release order in the matter.

Probable cause for the arrest on the new offense must be found by the court in order for the provisions of the bill to apply.

The bill does not apply in cases where the offender is subject to the special requirements for hearings as to his or her dangerousness to the community under s. 948.06(4) and (8)(e), F.S.

The bill is named in honor of Officer Andrew Widman, a Fort Myers police officer who was killed during the exchange of gunfire with an offender who had not yet been arrested on a violation warrant issued after his First Appearance on a new law violation in Lee County.

The bill would become effective October 1, 2010.

This bill substantially amends the following section of the Florida Statutes: 948.06.

II. Present Situation:

Section 948.01, F.S., provides the circumstances under which the trial court can place a person on probation¹ or community control² (community supervision). Any person who is found guilty by a jury, the court sitting without a jury, or enters a plea of guilty or nolo contendere may be placed on probation or community control regardless of whether adjudication is withheld.³

The Department of Corrections supervises all probationers sentenced in circuit court.⁴ Section 948.03, F.S., provides a list of standard conditions of probation. In addition to the standard conditions of probation, the court may add additional conditions to the probation that it deems proper.⁵ The condition requiring the probationer to not commit any new criminal offenses is a standard condition.⁶

If a person who has been sentenced to probation commits a new criminal offense, that person thereby commits a violation of the terms of probation. In such instances, upon being informed of the new law violation, the probation officer files an affidavit with the sentencing court alleging a violation of probation based upon the existence of the new law violation.⁷ The court evaluates the facts as alleged in the affidavit to determine if sufficient probable cause of a violation exists and may then issue a warrant for the probationer's arrest.⁸ The existence of the arrest warrant

¹ "Probation" is defined as a form of community supervision requiring specified contacts with parole and probation officers and other terms and conditions as provided in s. 948.03, F.S. Section 948.001(5), F.S.

² "Community control" is defined as a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, administered by officers with restricted caseloads. Community control is an individualized program in which the freedom of an offender is restricted within the community, home, or noninstitutional residential placement and specific sanctions are imposed and enforced. Section 948.001(3), F.S.

³ Section 948.01(1), F.S.

⁴ Id.

⁵ Section 948.03(2), F.S.

⁶ Fl. R. Crim. Pro. 3.790 (2010).

⁷ Section 948.06(1)(b), F.S.

⁸ Id.

issued by the court evidences the probable cause necessary to arrest and hold the probationer for an appearance before the sentencing court on the violation of probation.

It is not uncommon for the sentencing court to set a condition of “no bond” in the case until the probationer has appeared before that particular judge who has jurisdiction over the probationer’s case. If a different judge sees the probationer at First Appearance on the violation case, he or she generally honors the trial court judge’s “no bond” requirement. This is the common course of local practice.

Under limited circumstances listed in s. 903.0351, F.S., the First Appearance judge *must* order pretrial detention without bail until the resolution of the probation violation or community control violation hearing. These violators fall into certain categories:

- Violent felony offenders of special concern as defined in s. 948.06, F.S.
- A violator arrested for committing a qualifying offense set forth in s. 948.06(8)(c), F.S.
- A violator who has previously been found to be a habitual violent felony offender, a three-time violent felony offender, or a sexual predator, and who has been arrested for committing one of the qualifying offenses set forth in s. 948.06(8)(c), F.S.

Section 903.046, F.S., provides that the court may consider the defendant’s past or present conduct and record of convictions in determining the bail amount for a new criminal offense. A defendant before the court for First Appearance on a new criminal law violation whose criminal history reflects his or her community supervision status should have that current status weighed as a bond-related factor by the First Appearance judge according to s. 903.046, F.S., even though a violation may not yet have been filed nor warrant issued.

The Case of Abel Arango and the Death of Officer Andrew Widman⁹

In 1999, Abel Arango (A/K/A Abel Arrango) was sentenced on a split-sentence to 5 years in prison with 15 years of probation following his release for convictions of grand theft, burglary of an unoccupied structure or conveyance, carrying a concealed firearm, and armed robbery. The offenses occurred in Collier County, he was sentenced by the Circuit Court in and for Collier County, therefore the Collier court had continuing jurisdiction over the case (the successful completion of 15 years probation) upon Arango’s release from prison in 2004.¹⁰

Arango reported to the probation office as required by the sentencing court until his arrest on Friday, May 16, 2008, in Lee County. On that day he was arrested on five cocaine-related charges: two possession charges, two sale charges, and one trafficking of more than 28 grams but less than 150 kilograms.

⁹ The facts relayed in this Staff Analysis have been gathered from a Memo prepared by FDLE Commissioner Gerald Bailey at the request of the Governor’s office, telephone conversations with FDLE personnel, Arango’s Department of Corrections Release Information posted on the Department’s website, a telephone conversation with a gentleman with the South Florida Detention and Removal Office of U.S. Immigration and Customs Enforcement, as well as newspaper accounts of the death of Officer Widman. The referenced information is on file with the Senate Committee on Criminal Justice.

¹⁰ Although there was a federal detainer for Arrango and he spent several months after his prison release at the Krome’s Detention Center, ICE was unable to deport him to Cuba because the U.S. has no formal diplomatic ties or agreement for repatriation with Cuba, so Arrango was released in July, 2008.

By the time Arango appeared at First Appearance in Lee County the next day his criminal history, probationary status, and wants and warrants (of which there were none) were made available to the court by court services personnel. The First Appearance judge set a total of \$100,000 bond in the Lee County (new law violation) cases which Arango was able to make, therefore he was released from the Lee County jail. It should be noted that in setting the bond at \$100,000, the First Appearance judge set the bond at more than double the amount on the standard bond schedule, therefore although there was no active warrant for a violation of probation, it appears that Arango's probation status was taken into account by the judge.¹¹

In the meantime, Arango's probation officer received a message on Monday, May 19, sent by FDLE on Friday night. This "Florida Administrative Message" informed the probation officer that law enforcement had arrested Arango on Friday. She attempted to contact Arango by telephone and when he did not answer the probation officer left a message for him to call her immediately. The call was not returned.

On Friday, May 23, the probation officer delivered a sworn affidavit to the Collier County Circuit Court (the sentencing court in the probation cases) alleging the violation of probation in the Collier County cases, based upon the new arrest, and requesting a warrant be issued for Arango's arrest. The warrant was issued with a "no bond" provision and was entered into the Florida Crime Information Center (FCIC) on Monday, June 2, 2008.

Arango appeared at the Lee County Circuit Court for arraignment on the cocaine charges on Monday, June 16. Although the violation of probation warrant was active and in the FCIC system, no system queries were made on Arango prior to or during the time of his arraignment. It is unknown whether court personnel or the bailiffs had knowledge of the warrant at that time. Presumably they did not as it is unlikely that an updated criminal history would be run on a defendant between First Appearance and the arraignment a month later. Arango came to and left arraignments without being arrested on the active violation of probation warrant.

On June 23, Arango's probation officer attempted to contact him at his house but was unable to locate anyone at the residence. The Collier County Sheriff's Office ran warrant queries in the FCIC system twice in July, both of which showed the active warrant. It is unknown why this was done.

On Friday, July 18, 2008, Fort Myers Police officers responded to a domestic dispute between Arango and his girlfriend. Gunshots were exchanged between Arrango and the officers. Officer Andrew Widman and Arango were killed during the gunfire.

Section 1 of the bill names the bill "The Officer Andrew Widman Act" in his honor.

¹¹ See the Presentment by the Fall Term 2008 Lee County Grand Jury, In re: Death of Fort Myers Police Officer Andrew Widman on July 18, 2008, filed with the Circuit Court of the Twentieth Judicial Circuit on September 11, 2008.

III. Effect of Proposed Changes:

The bill provides that a First Appearance court may reach beyond the matter of pretrial release or detention on a new law violation arrest for which the court finds probable cause. Under the provisions of the bill if the person before the court is on probation or community control, the court may determine whether it is more likely than not that a prison sanction would be handed down for a violation of community supervision based upon the new arrest.

If the court so finds, the bill allows the court to hold the offender to await further hearing to determine the outcome of a violation hearing, or release the offender with or without bail on the violation.

In effect, the bill allows a court to hold an offender on a violation that is *likely forthcoming* (based upon the new law violation) *prior to* the request for a warrant by the Department of Corrections or the arrest of the offender on the violation.

The bill requires that if no affidavit alleging a violation of probation or community control is filed by the Department of Corrections within 10 days, the order of pretrial detention or pretrial release relating to the violation shall be dismissed. It is presumed that the court will either act upon its own volition to dismiss the Order or will be prompted by the Department of Corrections if no affidavit is filed.

If an affidavit alleging a violation of community supervision is timely filed and made known to the court, a hearing must be scheduled within 10 days to determine whether the court's order of detention or release should remain in effect.

The bill also clarifies the ability of any law enforcement officer to arrest, without a warrant, an offender who the officer has "reasonable grounds to believe" has violated community supervision "in a material respect" and "return him or her to the court granting such probation or community control" as provided in s. 948.06(1), F.S. The bill provides that the First Appearance judge may order the arrest and return of the offender to the court that granted community supervision.

The bill does not apply to those offenders who are subject to the "danger to the community" hearings required by s. 948.06(4), F.S., or the "violent felony offender of special concern" hearings required by s. 948.06(8)(e), F.S.

As previously stated, the bill is named in honor of Officer Andrew Widman.

The bill would become effective October 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The setting of pretrial detention/release conditions for a *potential* violation of probation case, before the affidavit alleging a violation of probation is actually filed and an arrest warrant requested, may raise due process concerns.

In the early 1980s, ss. 949.10 and 949.11, F.S., contained language that is similar to that of the bill. One clear difference however is that the statutes applied to offenders who were the subject of an active violation warrant and subsequent arrest.

These sections provided that the arrest of any person who was on probation (for committing a new crime) was prima facie evidence of a violation of the terms and conditions of such probation. Upon such arrest, probation was immediately temporarily revoked, and such person had to remain in custody until a hearing by the Parole and Probation Commission or the court. The statutes required the hearing to be held within 10 days from the date of the arrest and provided that the failure of the commission or the court to hold the hearing within 10 days from the date of arrest resulted in the immediate release of such person from incarceration on the temporary revocation.

Although these sections of statute were repealed in 1982, they were analyzed by various courts. In *Miller v. Toles*, 442 So.2d 177 (Fla. 1983), an offender alleged that his due process rights were violated because he was not given a hearing until the eleventh day after being placed in custody. The Florida Supreme Court agreed and stated that:

Without provision for expedited final hearings for a parolee or a probationer arrested for alleged commission of a felony, statutes governing subsequent felony arrest of felony parolee or probationer which deny the parolee or probationer arrested a preliminary probable cause hearing would be subject to constitutional attack as imposing an automatic forfeit of liberty interests upon arrest, not conviction, for a felony.

The Court acknowledged that probationers could be afforded lesser due process rights but stated that the quid pro quo for doing so was the expedited final hearing. The Court stated that without that provision, the statute would be subject to constitutional attack as imposing an automatic forfeit of liberty interests upon arrest, rather than conviction, for a felony.

The bill may raise due process concerns because it does not require an arrest on a violation before the offender's liberty is subject to being taken, nor does it require an expedited *final* hearing on the violation of community supervision. It does, however,

provide a prompt mechanism by which the offender can be released from custody or from any conditions of release. The bill is also crafted to carve out a small, readily identifiable pool of offenders whose liberty could be affected by limiting the application of the bill to those who are more likely than not to receive a prison sanction for a violation of supervision.

Additionally, there may be an issue of separation of powers to the extent that it could be said that the court is assuming the role of the executive branch (Department of Corrections) by initiating the violation of probation process. Probation officers may feel obligated to file violation of probation affidavits at the direction of the court or because the court has already made an initial determination by ordering pretrial detention/release conditions. Also, the issue of separation of powers may arise to the extent that the provisions of the bill may be viewed as procedural (the courts' power) rather than substantive (within the prerogative of the Legislature).

It should be noted that in the case of Abel Arango, this was not a person who met the statutory criteria for special scrutiny at First Appearance in existence at the time. He did not qualify as a "violent felony offender of special concern" nor as an offender who required a special hearing as to his potential danger to the community (*see s. 948.06(4) and (8)(e), F.S.*).

However, Arango was not a typical community supervision offender either, due to the fact that *he was on probation following a prison sentence* and therefore was *more likely* than a typical offender *to be sentenced to prison on a violation* of his probation.

Although human behavior cannot always be predicted, it could be argued that an offender such as Arango who is surely facing a return to prison if found to be in material violation of his probation, could pose an increased danger to society if he is released from custody at First Appearance, regardless of whether the violation affidavit had been filed or a warrant secured. Just as in the Arango case, an offender who is facing a return to prison may feel he or she has "nothing to lose" as it relates to future unlawful behavior pending resolution of the violation.

Perhaps due process and separation of powers concerns will be eliminated, or at least diminished, if a reviewing court gives great weight to the public safety issue brought to the attention of the legislature by the Arango case and addressed by this bill.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None noted.

C. Government Sector Impact:

The bill potentially increases the length of time a probationer arrested for a new offense must remain in jail. This may result in an increase in the local jail population and costs to the counties. In the past, high jail populations have coincided with increased sentences to state prison. If this is the case, the bill may impact the state's prison population.

VI. Technical Deficiencies:

None.

VII. Related Issues:

In the Arango case, subsequent to his arrest on the new law violation (drug charges in Lee County), the Lee County Sheriff's Office ran a warrants check for Arango. Later that night the Lee County Jail ran a second warrants check. Neither query provided probation information on Arango due to inaccurate identifiers having been entered during the queries, such as incorrect spelling of the last name, incorrect race, and the incorrect date of birth.¹² Had the correct information been entered into the database, it is possible that the Lee County Sheriff's Office could have arrested Arango at that time, prior to First Appearance, for a violation of probation based upon the new law violation. Statutory authority for such an action is found in ch. 948, F.S.

Section 948.06(1), F.S., states:

(1)(a) Whenever within the period of probation or community control there are reasonable grounds to believe that a probationer or offender in community control has violated his or her probation or community control in a material respect, any law enforcement officer who is aware of the probationary or community control status of the probationer or offender in community control or any parole or probation supervisor may arrest or request any county or municipal law enforcement officer to arrest such probationer or offender without warrant wherever found and return him or her to the court granting such probation or community control.

The correct probation status report was supplied to the First Appearance court the next morning by the Lee County Pretrial Service in Arango's case. Therefore, it appears that an arrest on the violation could have been made by Lee County law enforcement just prior to or soon after the First Appearance proceedings on the drug arrest.

It is equally possible that, if Department of Corrections or law enforcement personnel were assigned specifically to arrest defendants with active warrants at arraignments or other court appearances, Arango may have been arrested on the active violation warrant (at arraignments in Lee County on the drug cases) a full month before Officer Widman's death.

¹² Commissioner Bailey, FDLE, August 11, 2008 Memo to the Governor's Office regarding the events leading up to Officer Widman's death. Memo on file with Senate Criminal Justice Committee.

Additionally, technology is now available through FDLE to provide rapid identification of persons who come into contact with the criminal justice system. The devices connect through a personal computer to the Florida Criminal Justice Network. The individual places two fingers on a platen and within 35-45 seconds critical information about the individual is transmitted. If the Network indicates a "hit," the database can be queried regarding identification, active warrants, criminal history and whether the individual has previously provided a DNA sample for the DNA database.

The rapid identification devices were in limited use at the time of the Arango case. Currently, however, all probation offices throughout the state utilize this technology to confirm the identity and current status of reporting probationers, some Sheriff's offices use the device, the Pinellas County jail uses it at intake, there are approximately 150 mobile units in patrol cars, and the Collier County Courthouse has a device available in an anteroom should identification become an issue in one of the courtrooms.

VIII. Additional Information:

- A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on March 4, 2010:

- Narrows the pool of offenders to which the provisions of the bill apply by limiting the scope of the bill to those offenders who are, in the court's view, more likely than not to receive a prison sentence if they are found to be in violation of community supervision.
- Adds the suggestion that if a First Appearance court determines that an offender is under community supervision at the time of the arrest on a new law violation, the court may order his or her arrest and return to the original sentencing court on a violation, under current law.
- Provides for a hearing by the court, no later than 10 days after a violation affidavit is filed, to determine if its detention or release order shall remain intact. In effect, this increases the time, by up to 10 days, during which the offender may remain in custody (*after* a violation is filed) or at liberty on the court's release conditions.

- B. Amendments:

None.



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LEGISLATIVE ACTION

Senate

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House

CRIMINAL AND CIVIL
JUSTICE APPROPRIATIONS
DATE: 4-16-10
TIME: 10:29 A.M.

The Committee on Criminal and Civil Justice Appropriations
(Crist) recommended the following:

Senate Amendment

Delete lines 51 - 56
and insert:
made known to the court within 5 days after the arrest on the
new violation of law, the order detaining or releasing the
probationer or offender shall be dismissed.

b. If an affidavit alleging a violation is filed within 5
days after the arrest and made known to the court, the court
shall schedule a hearing no later than 5 days after the filing