

STORAGE NAME: h0103s1.jud

DATE: January 14, 1999

**HOUSE OF REPRESENTATIVES
COMMITTEE ON JUDICIARY
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: CS/HB 103

RELATING TO: Husband and Wife

SPONSOR(S): Rep. Fasano

COMPANION BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUDICIARY YEAS 9 NAYS 0
 - (2) FAMILY LAW & CHILDREN
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

CS/HB 103 would create s. 741.2105, F.S. It would prohibit death row inmates from marrying another person, unless the marriage is authorized by a county court judge.

The United States Supreme Court has struck marriage prohibitions for inmates on grounds which do not necessarily apply to inmates on death row or those incarcerated for the rest of their lives. The Department of Corrections does not believe it has authority to ban marriage by rule, and has permitted condemned inmates to marry in some instances since the early 1990's. The bill as originally filed would impose a ban by law with discretionary exceptions to be permitted by a county court judge.

The amendment adopted by the Judiciary Committee removes any exceptions to the ban and permits the Department of Corrections to adopt rules necessary to enforce the ban with relation to state inmates.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

The United States Supreme Court has held marriage to be a fundamental right under the United States Constitution. See *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L.Ed.2d 1010 (1967) and *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978). States may only impose reasonable regulations on marrying parties "that do not significantly interfere with decisions to enter into the marital relationship." *Zablocki* at 434 U.S. 186.

Where states have sought to regulate the right of inmates to marry or the rights of non-inmates to marry them, the Court has held that such regulation can only be allowed where the restriction can be reasonably related to legitimate penological objectives. *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). In *Turner*, inmates challenged, among other things, Missouri inmate regulations that prohibited marriages by women inmates unless approved by the prison superintendent for a compelling reason. *Id.* at 96. Missouri officials defending the regulations cited security and rehabilitative concerns, including risks of violence and spousal abuse. *Id.* at 97. The Court concluded that the state's concerns did not warrant the exaggerated regulatory responses. *Id.* at 97-98. Though the Court could foresee legitimate security concerns that could "require placing reasonable restrictions upon an inmate's right to marry, and may justify requiring approval of the superintendent," it held that absent a reasonable relation to penological interests, such regulations could not be permitted and the regulations were unconstitutional. *Id.* at 98.

The Court in *Turner* found that in spite of the limitations imposed by incarceration, marriage which was only ceremonial retained attributes making it worthy of protection under the Constitution. These included marriage providing emotional support and public commitment, marriage as an expression of personal dedication, marriage as an exercise of religious faith, marriage as economically beneficial in the areas of government benefits, property rights and inheritance, and in the legitimation of children conceived prior to the incarceration or criminal wrongdoing. One important attribute which the Court cited was relevant to that case, but not the case of an inmate who is to be executed:

Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be consummated.

482 U.S. at 96. (The Court also noted that it had let stand a New York law forbidding marriage of inmates as a part of punishment under a life sentence. See *Johnson v. Rockefeller*, 365 F.Supp. 377 (S.D.N.Y. 1973), *aff'd sum nom. Butler v. Wilson*, 415 U.S. 953, 94 S.Ct. 1479, 39 L.Ed.2d 569 (1974).) The Court did not discuss the sovereign authority of a legislature to regulate marriage, only the discretion of corrections officials to approve or disapprove of an otherwise lawful marriage.

Prior to 1982, the rules of the Florida Department of Corrections prohibited marriage of inmates to non-inmates during the period of incarceration. Rule 33-3.13, F.A.C., prohibited marriage by inmates who were under a sentence of death, under a sentence of life imprisonment with a minimum mandatory time of service of twenty-five years before becoming eligible for parole, or marriage of inmates to prisoners as defined in s. 944.02(5), F.S. (defining prisoner as a person incarcerated as a result of arrest or conviction and in

the custody of a local or state law enforcement officer). *Dept. of Corrections v. Roseman*, 390 So.2d 394, 395 (Fla. 1st DCA 1980). Under the rule, inmates were permitted to marry to legitimize an expected or existing child, or when the inmate's release date could be definitely determined to be within one year and the inmate was participating in a community release and furlough program. *Id.* In *Roseman*, the court sustained a DOAH administrative law judge finding that 33-3.13 F.A.C. (now 33-3.013 F.A.C.) had "a rational basis in service of a legitimate state interest and that it [was] constitutionally valid." *Id.*

The year following *Roseman*, the First District Court of Appeals overruled the Department of Corrections determination that s. 944.292, F.S. (suspending civil rights in conformity with Art. IV, s.8(a), Fl. Const.), did not automatically suspend an inmate's right to marry. *Holden v. Department of Corrections*, 400 So.2d 142 (Fla. 1st DCA 1981). In that case, a non-inmate (who had been a party to the rules challenge in *Roseman*) challenged the Department's final order denying she and an inmate the opportunity to marry. *Id.* at 143. The court noted that it had previously held in *Roseman, supra*, that "inmates ha[d] no fundamental right to marry and the non-inmates ha[d] no fundamental right to marry inmates while they are yet in prison" and that the marriage rules were constitutional and were authorized under s. 20.315 and s. 944.09, Fl. Stat. *Holden* at 143; see also *Roseman*, 390 So.2d at 397. The court sustained the Department's decision to deny the marriage request in *Holden* because there was competent, substantial evidence upon which the Department based its findings of fact. 143-44. In response to the *Holden* case, the Department amended the rule to permit inmate marriages provided certain procedural and security requirements were met. See Rule 33-3.013, F.A.C. (1997).

Apparently in response to the *Turner* case, the administrative prohibition on death row marriages was eliminated in the early 1990's. Under the current rule, all inmates, including capital felons sentenced to death, are allowed to marry under certain circumstances. An inmate is required to submit a request to the superintendent in writing by both parties to the marriage.

The written request to marry must include a statement of desire to marry from both parties; a statement of approval of the parent or guardian of any party under the age of eighteen; and a statement from the Chaplain or other staff member stating that the parties have been apprised of the parameters placed on marriage within an institutional setting. In addition to the written letter from both parties, a number of procedures must be followed. These include a psychological and security evaluation; a written recommendation must be submitted by the staff psychologist and chief correctional officer to the superintendent; review of the documents by the chaplaincy administrator; if the documents are compliant, they are forwarded to the secretary for final decision of whether the marriage should be approved in light of the penological interest of the institution.

Between 1993 and 1998, 17 of 380 death row inmates requested to marry. Five inmates have married while on death row. As of 1998, four inmates had been approved but had not married. Six were approved, but did not complete the post approval procedures necessary to marry. One was approved and in process and another was pending approval. Apparently, none of the 17 were denied in that time period.

B. EFFECT OF PROPOSED CHANGES:

CS/HB 103 creates s. 741.2105, F.S. The bill prohibits those persons convicted of a capital felony and for whom a death sentence has been imposed with respect to such capital felony from marrying another person.

A county court judge may, at that judge's discretion, issue a marriage license to a couple where one of the marrying parties is a convicted capital felon for whom a death sentence has been imposed. This provision provides no guidelines for the county judges, so if any judge was willing to approve, the marriage would be permitted. It is not clear how this would effectively restrict death row marriage more than the present Departmental regulations. It may in fact supersede those regulations and make such marriages easier to obtain.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

The bill may remove from the Department of Corrections the authority to regulate the marriage of an inmate under a sentence of death. The responsibility to permit such marriages is shifted to county court judges.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

No agency or program is eliminated or reduced

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

There are no identified individual beneficiaries of the legislation.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No. The bill prohibits any individual from marrying an inmate sentenced to death.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Some presently lawful marriages are prohibited.

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5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

Passage of the bill would prohibit the formation of some families through marriage of an inmate under a death sentence.

(2) Who makes the decisions?

The final decision is made by the legislature.

(3) Are private alternatives permitted?

No.

(4) Are families required to participate in a program?

No marriage license could be issued to an inmate under a sentence of death.

(5) Are families penalized for not participating in a program?

No family could be formed by the marriage of an inmate under a sentence of death.

b. Does the bill directly affect the legal rights and obligations between family members?

See answers to a. above.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

The bill does not create or change a program providing services, except that present pre-marriage screening and counseling provided to condemned inmates would be unnecessary.

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

The bill would create Section 741.2105, Florida Statutes.

E. SECTION-BY-SECTION RESEARCH:

See II. B. Effect of Propose Changes, above.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

The bill has no impact on state or state agency revenues and expenditures.

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

The bill has no fiscal impact on local governments.

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill has no economic impact on the private sector.

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

There are no fiscal impacts in the bill.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Not applicable.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

None.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

None.

V. COMMENTS:

The U.S. Supreme Court in *Turner v. Safley* (discussed extensively above) noted that in another case, *Butler v. Wilson*, 415 U.S. 953, 94 S.Ct. 1479, 39 L.Ed.2d 569 (1974), it had summarily affirmed a holding of the court of appeals for the Southern District of New York, which upheld the constitutionality of a state statute prohibiting marriage only for inmates sentenced to life imprisonment. *Turner*, 107 S.Ct. at 2255. In *Turner* the Court noted that the New York law was part of the punishment for crime and that punishing crime was a legitimate basis for denying a right. Should this bill be interpreted as punishment for crime, it would raise *ex post facto* concerns as it applies to present inmates on death row. However, since it is primarily a

regulation of marriage, applicable to certain proposed marriages where the death sentence creates a legal impediment to any legitimate "expectation that they ultimately will be consummated," and because it applies equally to anyone (not just Florida convicts) under a sentence of death, it should withstand such challenge.

Until the present time, the Department of Corrections has received no specific grant of power to proscribe, by rule, the marriages addressed by CS/HB 103. The bill directly grants this rulemaking authority, but only to carry out the legislated decision.

A bill (HB 3039) identical to HB 103, as filed, passed the House in 1998 but died on the Senate Calendar. A 1998 Senate Companion retained the Department's regulatory authority in the marriage decision to preserve existing regulations in addition to adding judicial oversight. The Senate bill (SB 1742) also died on the Senate calendar.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The House Judiciary Committee adopted an amendment which removed the proposed discretionary authority of county judges contained in the original bill. The amendment also adds rulemaking authority for the Department of Corrections to enforce the ban within the Department's institutions. The rulemaking authority is to guarantee to the Department that authority which it did not believe it had under its existing grants of rulemaking authority.

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

Prepared by:

Staff Director:

Don Rubottom

Don Rubottom