Criminal & Civil Justice Policy Council

Monday March 22, 2010

1:00 PM

404 HOB

Larry Cretul
Speaker

William Snyder
Chair

Council Meeting Notice

HOUSE OF REPRESENTATIVES

Criminal & Civil Justice Policy Council

Start Date and Time:	Monday, March 22, 2010 01:00 pm
End Date and Time:	Monday, March 22, 2010 03:00 pm
Location:	404 HOB
Duration:	2.00 hrs

Consideration of the following bill(s):

CS/HB 285 Parental Authority by Civil Justice & Courts Policy Committee, Horner
HB 595 Open House Parties by Fitzgerald
CS/HB 829 Local Government by Military & Local Affairs Policy Committee, Bovo
CS/HB 1101 Misdemeanor Pretrial Substance Abuse Programs by Public Safety & Domestic Security Policy Committee, Waldman
HB 1517 Criminal Trials by Eisnaugle, Porth

NOTICE FINALIZED on 03/18/2010 16:15 by Jones.Missy

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 285 Parental Authority
SPONSOR(S): Civil Justice & Courts Policy Committee; Horner and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1578

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee	10 Y, 3 N	De La Paz	De La Paz
2)	Criminal & Civil Justice Policy Council		De La Paz	Havlicak RH
3)				
4)				
5)				

SUMMARY ANALYSIS

The United States Supreme Court and the Florida Supreme Court have both recognized that the right of parents to make decisions concerning care, custody and control of their children is a fundamental liberty interest protected by the constitution.

In Kirton v. Fields, decided December 11, 2008, the Florida Supreme Court held that "a parent does not have the authority to execute a pre-injury release [of liability] on behalf of a minor child when the release involves participation in a commercial activity." In Kirton, the Florida Supreme Court acknowledged that "[t]he absence of a statute governing parental pre-injury releases demonstrates that the Legislature has not precluded enforcement of such releases on behalf of a minor child." Nevertheless, the Court later declared ". . .we find that public policy concerns cannot allow parents to execute pre-injury releases on behalf of minor children."

CS/HB 285 expressly authorizes natural guardians, on behalf of any of their minor children, to waive and release, in advance, any claim cause of action that would accrue to any of their minor children to the same extent that any adult may do so on his or her own behalf. The bill prohibits such waivers and releases from relieving a party of liability for acts of intentional misconduct and expressly provides that sexual misconduct is included among acts of intentional misconduct that may not be waived. The bill also prohibits parental waivers from relieving a party of liability for gross negligence against a minor if such gross negligence can be established by clear and convincing evidence. In addition, the bill specifies circumstances when an employer may be liable for intentional misconduct or gross negligence of an employee.

The bill also amends s. 549.09, F.S., to make conforming changes to the current statute specifically addressing motorsport nonspectator liability releases. The bill provides that a release signed by a minor is valid if it is also signed by the minor's parent or guardian.

This bill appears to have a positive fiscal impact by avoiding an increase in the judicial workload and litigation costs that are a foreseeable result of continued application of the Kirton decision.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Kirton v. Fields

In Kirton v. Fields, decided December 11, 2008, the Florida Supreme Court held that "a parent does not have the authority to execute a pre-injury release on behalf of a minor child when the release involves participation in a commercial activity."[1] In its opinion the Court identified two compelling concerns regarding the enforceability of pre-injury liability releases: the right of parents in raising their children and the interest of the state in protecting children.[2]

The United States Supreme Court and the Florida Supreme Court have both recognized that the right of parents to make decisions concerning care, custody and control of their children is a fundamental liberty interest protected by the constitution.[3] It is "perhaps the oldest fundamental liberty interest recognized by [the United States Supreme Court]."[4] Under the federal constitution, the Fourteenth Amendment's Due Process Clause provides heightened protection against government interference with certain fundamental rights and liberty interests, including parents' fundamental right to make decisions concerning the care, custody, and control of their children.[5] In fact, in Troxel v. Granville, a decision cited by the Florida Supreme Court in Kirton, the United States Supreme Court reiterated its recognition that there is a presumption that fit parents act in their children's best interests.[6] "Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there is normally no reason for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children."[7]

In Kirton, the Florida Supreme Court acknowledged that "[t]he absence of a statute governing parental pre-injury releases demonstrates that the Legislature has not precluded enforcement of such releases on behalf of a minor child."[8] Nevertheless, the Court later declared ". . .*we find* that public policy

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[1] Kirton v. Fields, 997 So.2d 349 (Fla. 2008) The Kirton decision was a 4 to 1 decision. Justices Quince, Anstead, Lewis and Pariente were in the majority. Justice Wells dissented. Justices Polston and Canady did not participate in the opinion.
[2] Id. at 352.
[3] See, Troxel v. Granville, 530 U.S. 57, 60 (2000); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Beagle v. Beagle, 678 So.2d 1271, 1275 (Fla. 1996).
[4] Troxel, supra at 65, citing Meyer v. Nebraska, 262 U.S. 390 (1923).
[5] Washington v. Glucksberg, 521 U.S. 702 (1997).
[6] Troxel, supra at 69. See also, Parham v. J.R., 442 U.S. 584, 602 (1979).
[7] Troxel, supra at 69 & 70. See also e.g., Reno v. Flores, 507 U.S. 292 (1993).
[8] Kirton, supra at 354.

concerns cannot allow parents to execute pre-injury releases on behalf of minor children" (emphasis added).[9]

The Court explained further:

> Although parents undoubtedly have a fundamental right to make decisions concerning the care, custody, upbringing, and control of their children, Troxel [v. Granville], 530 U.S. 57, 67 (2000), the question of whether a parent should be allowed to waive a minor child's future tort claims implicates wider *public policy* concerns. See Hojnowski [v. Vans Skate Park], 901 A.2d 381, 390. While a parent's decision to allow a minor child to participate in a particular activity is part of the parent's fundamental right to raise a child, this does not equate with a conclusion that a parent has a fundamental right to execute a pre-injury release of a tortfeasor on behalf of a minor child. *It cannot be presumed that a parent who has decided to voluntarily risk a minor child's physical wellbeing is acting in the child's best interest.* Furthermore, we find that there is injustice when a parent agrees to waive the tort claims of a minor child and deprive the child of the right to legal relief when the child is injured as a result of another party's negligence. When a parent executes such a release and a child is injured, the provider of the activity escapes liability while the parent is left to deal with the financial burden of an injured child. If the parent cannot afford to bear that burden, the parties who suffer are the child, other family members, and the people of the State who will be called on to bear that financial burden. Therefore, when a parent decides to execute a pre-injury release on behalf of a minor child, the parent is not protecting the welfare of the child, but is instead protecting the interests of the activity provider. Moreover, a "parent's decision in signing a pre-injury release impacts the minor's estate and the property rights personal to the minor." Fields, 961 So. 2d at 1129-30. *For this reason, the state must assert its role under parens patriae to protect the interests of the minor children* (emphasis added).

In Troxel v. Granville, when the United States Supreme Court had before it a Washington state statute allowing any person to petition for forced visitation of a child at any time with the only requirement being that visitation serve the best interests of the child, they said of the statute:

> [The statute] contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests.[10]

The U. S. Supreme Court in Troxel, while refraining from invalidating the statute on its face, found the application of the statute against the parent's wishes in her case to be an unconstitutional violation of her due process right to make decisions concerning the care, custody and control of her daughters.[11] The effect of the Kirton decision is much broader in its application than the statute the U.S. Supreme Court had before it in Troxel. Under the Kirton decision, rather than having the validity of waivers evaluated on a case by case basis on their own facts and circumstances, the Florida Supreme Court preemptively invalidated all parental liability waivers for all commercial activities as a matter of statewide public policy.

While the decision in Kirton is limited to pre-injury releases for participation in commercial activities, its rationale may not be. The Court said in a footnote:

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[9] Kirton, supra at 354.

[10] Troxel v. Granville, 530 U.S. 57 (2000).

[11] Troxel, supra at 76.

> We answer the certified question as to pre-injury releases in commercial activities because that is what this case involves. Our decision in this case should not be read as limiting our reasoning only to pre-injury releases involving commercial activity; however, any discussion on pre-injury releases in noncommercial activities would be dicta and it is for that reason we do not discuss the broader question posed by the Fifth District.[12]

Justice Wells in a dissenting opinion pointed out several issues concerning the effect of the Court's new public policy edict. Justice Wells stated in part:

> The importance of this issue cannot be overstated because it affects so many youth activities and involves so much monetary exposure. Bands, cheerleading squads, sports teams, church choirs, and other groups that often charge for their activities and performances will not know whether they are a commercial activity because of the fees and ticket sales. How can these groups carry on their activities that are so needed by youth if the groups face exposure to large damage claims either by paying defense costs or damages? Insuring against such claims is not a realistic answer for many activity providers because insurance costs deplete already very scarce resources. The majority's decision seems just as likely to force small-scale activity providers out of business as it is to encourage such providers to obtain insurance coverage.
>
> If pre-injury releases are to be banned or regulated, it should be done by the Legislature so that a statute can set universally applicable standards and definitions. When the Legislature acts, all are given advance notice before a minor's participation in an activity as to what is regulated and as to whether a pre-injury release is enforceable. In contrast, *the majority's present opinion will predictably create extensive and expensive litigation attempting to sort out the bounds of commercial activities on a case-by-case basis.*
>
> The majority opinion also does not explain the reason why after years of not finding pre-injury releases to be against public policy, it today finds a public policy reason to rule pre-injury releases unenforceable when the Legislature has not done so.[13] (emphasis added).

Effect of CS/HB 285

CS/HB 285 amends s. 744.301, F.S., to expressly authorize natural guardians, on behalf of any of their minor children, to waive and release, in advance, any claim or cause of action that would accrue to any of their minor children to the same extent that any adult may do so on his or her own behalf.

Intentional Misconduct

The bill prohibits such waivers and releases from relieving a party of liability for acts of intentional misconduct. The bill defines "intentional misconduct" to mean that ". . . the released party had actual knowledge of the wrongfulness of the conduct and the high probability that injury to the minor child would result and, despite that knowledge, pursued a course of conduct resulting in injury." The bill also expressly provides that sexual misconduct is included among acts of intentional misconduct that may not be waived.

Gross Negligence

The bill also prohibits such waivers from relieving a party of liability for gross negligence against a minor if such gross negligence can be established by clear and convincing evidence. The bill defines gross negligence to mean ". . . conduct by act or omission so reckless or wanting in care that it constituted a conscious disregard or indifference to the life or safety of the minor child."

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[12] Kirton, supra at n2.

[13] Wells dissenting, Kirton, supra at 363.

Under the bill, actions for gross negligence are permitted where there is, along with the initial pleading, a reasonable showing by evidence in the record or proffered by the claimant that would provide a reasonable basis for stating a cause of action for gross negligence.

Employer Liability

Under the bill, liability that has been established for intentional misconduct or gross negligence against a minor by conduct of an employee or agent may be imposed on an employer, principal, corporation, or other legal entity if it is established by clear and convincing evidence that:

- The employer, principal, corporation, or other legal entity actively and knowingly participated in the employee's or agent's conduct;
- The officers or directors of the employer, principal, corporation, or other legal entity knowingly condoned, ratified, or consented to the employee's or agent's conduct; or
- The employer, principal, corporation, or other legal entity engaged in conduct that constituted intentional misconduct or gross negligence and contributed to the injuries suffered by the minor child.

Under this section of the bill, liability attaches to an employer due to the unenforceability of the waiver based on the nature of the employee's conduct and the employer's participation in it or knowledge of it.

Motorsport Nonspectator Releases

The bill also amends s. 549.09, F.S., to make conforming changes to the current statute specifically addressing motorsport nonspectator liability releases. The bill provides that a release signed by a minor is valid if it is also signed by the minor's parent or guardian.

Enforceability of Waivers

With respect to the extent to which an adult may waive liability on his or her own behalf, courts generally disfavor exculpatory clauses and strictly construe such clauses against the party claiming to be relieved of liability.[14] "Such clauses are enforceable only where and to the extent that the intention to be relieved was made clear and unequivocal in the contract, and the wording must be so clear and understandable that an ordinary and knowledgeable party will know what they are contracting away."[15]

With regard to simple negligence specifically, a waiver may release a party from liability for negligence, but to do so the waiver must be written in such a manner that it "clearly state[s] that it releases the party from liability for [its] own negligence."[16]

Absent statutory language to the contrary expressing a different legislative policy with respect to child waivers, it is a foregone conclusion that child waivers will be subject to the same disfavor, the same scrutiny, and the same application to simple negligence that courts apply to adult waivers. They will not, however, be totally prohibited as required under the Florida Supreme Court decision in Kirton.

B. SECTION DIRECTORY:

Section 1. Amends s. 549.09, F.S., relating to motorsport nonspectator releases.

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[14] See, Murphy v. Young Men's Christian Association of Lake Wales, 974 So.2d 565, 567 (Fla. 2nd DCA, 2008) ; Theis v. J&J Racing Promotions, 571 So.2d 92, 94 (Fla. 2nd DCA, 1990); Southworth & McGil, P.A. v. S. Bell Tel. & Tel. Co., 580 So.2d 628, 634 (Fla. 1st DCA, 1991).

[15] Southworth, *supra* note 19 at 634.

[16] Goyings v. Jack & Ruth Eckerd Foundation, 403 So.2d 1144, 1146 (Fla. 2nd DCA, 1981).

Section 2. Amends s. 744.301, F.S., to provide parents with authority to waive liability on behalf of their children and providing limitations on such waivers.

Section 3. Provides an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See Fiscal Comments.

D. FISCAL COMMENTS:

This bill will have a positive fiscal impact if it operates to reduce or avoid litigation costs and court operating expenses associated with negligence claims brought on behalf of minors against commercial providers of activities for children due to the enforceability of parental pre-injury liability releases. Increases in litigation costs and the judiciary's workload are foreseeable without passage of CS/285 due to the continued application of the Kirton decision and any possible subsequent extension of Kirton to non-commercial activities as alluded to by the Court in footnote 2 of its decision. Liability insurance rates for commercial activity providers may also be adversely impacted by the statewide invalidation of all parental liability waivers resulting from the Kirton opinion.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On February 2, 2010, the Civil Justice and Courts Policy Committee adopted a strike-all amendment that amended the bill to prohibit parental waivers from waiving liability for acts of intentional misconduct and gross negligence. The amendment also specified circumstances where an employer could be held liable for conduct of an employee.

A bill to be entitled

An act relating to parental authority; amending s. 549.09, F.S.; providing that a motorsport liability release signed by a minor is valid if the release is also signed by the minor's parent or guardian; amending s. 744.301, F.S.; authorizing natural guardians to waive and release, in advance, any claim or cause of action that would accrue to any of their minor children to the same extent that any adult may do so on his or her own behalf; providing that such waiver and release shall not relieve a party of liability for any acts of intentional misconduct committed against the minor child; providing that such waiver and release shall not relieve a party of liability for gross negligence against a minor child; specifying circumstances under which an employer, principal, corporation, or other legal entity may be liable for injuries sustained by a minor child by conduct of an employee or agent; providing an effective date.

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

Section 1. Paragraph (g) of subsection (1) and subsection (3) of section 549.09, Florida Statutes, are amended to read:

549.09 Motorsport nonspectator liability release.—

(1) As used in this section:

(g) "Nonspectators" means event participants who have signed a motorsport liability release, including a minor if the minor's parent or guardian has also signed the release.

(3)(a) A motorsport liability release may be signed by more than one person if ~~so long as~~ the release form appears on each page, or side of a page, which is signed. A motorsport liability release shall be printed in 8 point type or larger.

(b) A release signed by a minor is valid if the release is also signed by the minor's parent or guardian.

Section 2. Subsection (2) of section 744.301, Florida Statutes, is amended to read:

744.301 Natural guardians.—

(2)(a) Natural guardians are authorized, on behalf of any of their minor children, to:

1.~~(a)~~ Settle and consummate a settlement of any claim or cause of action accruing to any of their minor children for damages to the person or property of any of said minor children;

2.~~(b)~~ Collect, receive, manage, and dispose of the proceeds of any such settlement;

3.~~(c)~~ Collect, receive, manage, and dispose of any real or personal property distributed from an estate or trust;

4.~~(d)~~ Collect, receive, manage, and dispose of and make elections regarding the proceeds from a life insurance policy or annuity contract payable to, or otherwise accruing to the benefit of, the child; and

5.~~(e)~~ Collect, receive, manage, dispose of, and make elections regarding the proceeds of any benefit plan as defined by s. 710.102, of which the minor is a beneficiary, participant, or owner,

without appointment, authority, or bond, when the amounts received, in the aggregate, do not exceed $15,000.

(b) In addition to the authority granted in paragraph (a), natural guardians are authorized, on behalf of any of their minor children, to waive and release, in advance, any claim or cause of action that would accrue to any of their minor children to the same extent that any adult may do so on his or her own behalf.

1. No waiver and release under this paragraph shall relieve a released party of liability for injuries sustained by a minor child for the released party's intentional misconduct, including any act of sexual misconduct committed against the minor child. As used in this paragraph, the term "intentional misconduct" means that the released party had actual knowledge of the wrongfulness of the conduct and the high probability that injury to the minor child would result and, despite that knowledge, pursued a course of conduct resulting in injury.

2. No waiver and release under this paragraph shall relieve a released party of liability for injuries sustained by a minor child for the released party's gross negligence if such gross negligence is established by clear and convincing evidence. As used in this paragraph, the term "gross negligence" means conduct by act or omission so reckless or wanting in care that it constituted a conscious disregard or indifference to the life or safety of the minor child. In any civil action, no claim or cause of action under this subparagraph shall be permitted unless there is, along with the initial pleading, a reasonable showing by evidence in the record or proffered by the claimant

that would provide a reasonable basis for stating a cause of action for gross negligence.

3. Liability that has been established for injuries sustained by a minor child under the circumstances described in subparagraph 1. or subparagraph 2. may not be imposed against an employer, principal, corporation, or other legal entity for the conduct of its employee or agent unless the claimant establishes, by clear and convincing evidence, that:

a. The employer, principal, corporation, or other legal entity actively and knowingly participated in the employee's or agent's conduct;

b. The officers or directors of the employer, principal, corporation, or other legal entity knowingly condoned, ratified, or consented to the employee's or agent's conduct; or

c. The employer, principal, corporation, or other legal entity engaged in conduct that constituted intentional misconduct or gross negligence and contributed to the injuries suffered by the minor child.

Section 3. This act shall take effect July 1, 2010.

Amendment No. 1

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Criminal & Civil Justice Policy Council

Representative(s) Horner offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Paragraph (g) of subsection (1) and subsection (3) of section 549.09, Florida Statutes, are amended to read:

549.09 Motorsport nonspectator liability release.—

(1) As used in this section:

(g) "Nonspectators" means event participants who have signed a motorsport liability release, including a minor if the minor's parent or guardian has also signed the release.

(3)(a) A motorsport liability release may be signed by more than one person if ~~so long as~~ the release form appears on each page, or side of a page, which is signed. A motorsport liability release shall be printed in 8 point type or larger.

(b) A release signed by a minor is valid if the release is also signed by the minor's parent or guardian.

Section 2. Section 768.38, Florida Statutes is created to read:

768.38 Liability waivers executed on behalf of minor children. -

(1) LEGISLATIVE FINDINGS AND INTENT - The Legislature finds and declares that it is the policy of this state that:

(a) Children of this state should have the maximum opportunity to participate in sporting, recreational, educational, and other activities despite the fact that certain risks may exist when participating in these activities.

(b) Public, private, and non-profit entities providing these activities to children in Florida need a measure of protection against lawsuits, and these entities may be unwilling or unable to provide the activities without such protection.

(c) Parents have a fundamental right and responsibility to make decisions concerning the care, custody, and control of their children and the law has long presumed that parents act in the best interest of their children.

(d) Parents make conscious choices every day on behalf of their children concerning the risks and benefits of participation in activities.

(e) These are proper parental choices on behalf of children that should not be ignored, and so long as a parent's decision is voluntary and informed, the decision should be given the same

dignity as decisions regarding schooling, medical treatment, and religious education.

(f) It is the intent of this state to encourage the affordability of youth activities in this state by permitting a parent of a child to release a prospective negligence claim of the child against certain persons and entities involved in providing the opportunity to participate in the activities.

(2) DEFINITIONS - As used in this section the term:

(a) "Child" means a person less than eighteen years of age.

(b) "Parent" means a child's biological mother or father, adoptive mother or father, or legal guardian.

(3) A parent of a child may, on behalf of the child, release or waive the child's prospective claim for negligence.

(4) Nothing in this section shall be construed to permit a parent acting on behalf of his or her child to waive the child's prospective claim against a person or entity for intentional misconduct or for a grossly negligent act or omission.

Section 3. This act shall take effect upon becoming a law.

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

Remove the entire title and insert:

An act relating to parental authority; amending s. 549.09, F.S.; providing that a motorsport liability release signed by a minor is valid if the release is also signed by the minor's parent or guardian; creating s. 768.38, F.S.; authorizing a parent to waive and release a negligence claim on behalf of their child; providing an exclusion for

Amendment No. 1

intentional misconduct and gross negligence; providing an effective date.

Amendment No. 1a

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Criminal & Civil Justice Policy Council

Representative(s) Eisnaugle offered the following:

Amendment to Amendment (1) by Representative Horner (with title amendment)

Remove line(s) 62 and insert:

misconduct, sexual misconduct, or for a grossly negligent act or omission.

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

Remove line(s) 74 and insert:

intentional misconduct, including sexual misconduct, and gross negligence; providing an

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 595 Open House Parties
SPONSOR(S): Fitzgerald
TIED BILLS: **IDEN./SIM. BILLS:** SB 1066

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Public Safety & Domestic Security Policy Committee	12 Y, 0 N	Krol	Cunningham
2)	Policy Council	17 Y, 0 N	Varn	Ciccone
3)	Criminal & Civil Justice Policy Council		Krol TK	Havlicak
4)				
5)				

SUMMARY ANALYSIS

Section 856.015, F.S., states that a person in control of an open house party commits a second degree misdemeanor if they know a minor has possession of or consumed any alcoholic beverage or drug at their residence and the person had failed to take responsible steps to prevent the possession or consumption of the alcoholic beverage or drug by the minor.

This bill amends present law to make a second or subsequent violation of s. 856.015(2), F.S., a first degree misdemeanor.

This bill also provides that any violation of s. 856.015(2), F.S., which results in serious bodily injury or death, will be punishable by a first degree misdemeanor.

The bill does not appear to have a fiscal impact on state government; however, the bill could have a minimal effect on county jails.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

In Florida, it is unlawful for any person younger than 21 years of age to possess alcoholic beverages.[1]

Section 856.015, F.S., states that a person[2] in control of an open house party[3] commits a second degree misdemeanor[4] if they know a minor[5] has possession of or consumed any alcoholic beverage[6] or drug[7] at their residence and the person had failed to take responsible steps to prevent the possession or consumption of the alcoholic beverage or drug by the minor.

This statute exempts the use of alcoholic beverages at legally protected religious observances or activities.[8]

The Florida Department of Law Enforcement reported as of February 1, 2010, the following arrests for a violation of s. 856.015, F.S.: 158 in 2008, 232 in 2009 and 22 for 2010.[9] Forty of Florida's sixty-seven counties reported arrest charges based on this statute for these years as cited.

There have been instances of young, underage drivers attending open house parties, drinking alcoholic beverages and being allowed to drive home. Many of these parties have resulted in death or severe injury to the underage participants under a variety of circumstances, including drunk driving and physical altercations. In one instance in Sarasota a fight erupted and a child was killed when two rival high school groups attended the same open house party and a fight, using baseball bats, broke out.

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[1] Section 562.111, F.S.

[2] Section 856.015(1)(f), F.S., defines "person" as "an individual 18 years of age or older."

[3] Section 856.015(1)(e), F.S., defines "open house party" as "a social gathering at a residence."

[4] Sections 775.082 and 775.083, F.S., state that a second degree misdemeanor is punishable by potential incarceration up to 60 days in jail and/or a fine not exceeding $500.

[5] Section 856.015(1)(d), F.S., defines "minor" as "an individual not legally permitted by reason of age to possess alcoholic beverages pursuant to chapter 562."

[6] Section 856.015(1)(a), F.S., defines "alcoholic beverage" as "distilled spirits and any beverage containing 0.5 percent or more alcohol by volume. The percentage of alcohol by volume shall be determined in accordance with the provisions of s. 561.01(4)(b)."

[7] Section 856.015(1)(c), F.S., defines "drug" as "a controlled substance, as that term is defined in ss. 893.02(4) and 893.03, F.S."

[8] Section 856.015(3), F.S.

[9] Statistics thru January, 2010 only.

Both groups were underage and had been drinking and the adults at the party appeared to be aware of the underage drinking.[10]

Proposed Changes

HB 595 amends present law to make a second or subsequent violation of s. 856.015(2), F.S., a first degree misdemeanor, which is punishable by a fine not to exceed $1000 and/or up to 1 year in jail.[11]

This bill also provides that any violation of s. 856.015(2), F.S., which results in serious bodily injury, as defined in s. 316.1933, F.S.,[12] or death, is punishable as a first degree misdemeanor.

B. SECTION DIRECTORY:

Section 1. Amends s. 856.015, F.S., relating to open house parties.

Section 2. Provides an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   See "Fiscal Comments."

2. Expenditures:

   See "Fiscal Comments."

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   See "Fiscal Comments."

2. Expenditures:

   See "Fiscal Comments."

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See "Fiscal Comments."

D. FISCAL COMMENTS:

The bill creates the penalty of a first degree misdemeanor for a second or subsequent violation of s. 856.015(2). The change in penalty for a second or subsequent violation would increase the potential fine from $500 to $1000 and the potential jail time from 60 days to 1 year.

The bill also creates a penalty of a first degree misdemeanor if a violation of 856.015(2), F.S., results in seriously bodily injury or death.

This bill could have an impact on local jails.

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[10] Sarasota Herald-Tribune, July 31, 2008, news article on file with the Policy Council

[11] Sections 775.082 and 775.083, F.S., respectively.

[12] Section 316.1933(b), F.S., defines the term "serious bodily injury" as "an injury to any person, including the driver, which consists of a physical condition that creates a substantial risk of death, serious personal disfigurement, or protracted loss or impairment of the function of any bodily member or organ."

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to open house parties; amending s. 856.015, F.S.; providing that a person who violates the open house party statute a second or subsequent time commits a misdemeanor of the first degree; providing that a person commits a misdemeanor of the first degree if the violation of the open house party statute results in serious bodily injury or death; providing criminal penalties; providing an effective date.

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

Section 1. Subsections (2) and (4) of section 856.015, Florida Statutes, are amended, and subsection (5) is added to that section, to read:

856.015 Open house parties.—

(2) A ~~No~~ person having control of any residence may not ~~shall~~ allow an open house party to take place at the ~~said~~ residence if any alcoholic beverage or drug is possessed or consumed at the ~~said~~ residence by any minor where the person knows that an alcoholic beverage or drug is in the possession of or being consumed by a minor at the ~~said~~ residence and where the person fails to take reasonable steps to prevent the possession or consumption of the alcoholic beverage or drug.

(4) Any person who violates any of the provisions of subsection (2) commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. A person who violates subsection (2) a second or subsequent time commits a

misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(5) If a violation of subsection (2) results in serious bodily injury, as defined in s. 316.1933, or death, it is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Section 2. This act shall take effect July 1, 2010.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 829 Local Government
SPONSOR(S): Military & Local Affairs Policy Committee and Bovo
TIED BILLS: **IDEN./SIM. BILLS:** SB 1004

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Military & Local Affairs Policy Committee	12 Y, 0 N, As CS	Rojas	Hoagland
2)	Criminal & Civil Justice Policy Council		Thomas	Havlicak
3)	Criminal & Civil Justice Appropriations Committee			
4)	Economic Development & Community Affairs Policy Council			
5)				

SUMMARY ANALYSIS

The bill:

- Authorizes boards of county commissioners to negotiate the lease of county property for a term not to exceed 5 years rather than going through the competitive bidding process.
- Allows government entities to transfer title to a road by recording a deed with the county or counties in which the right-of-way is located.

This bill has no fiscal impact to the state and should have a positive impact on counties.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

County Leasing Authority

Section 1, Art. VIII of the Florida Constitution provides, in part, that noncharter counties "shall have such power of self-government as is provided by general or special law" and counties operating under county charters "shall have all powers of local self-government not inconsistent with general law." This constitutional provision is statutorily implemented in s. 125.01, F.S.[1] Counties are specifically authorized "to employ personnel, expend funds, enter into contractual obligations, and purchase or *lease* and sell or exchange any *real* or personal *property*."[2]

Section 125.35(a), F.S., authorizes the board of county commissioners to "lease real property, belonging to the county." To lease property, the board of county commissioners must determine that it is in the best interest of the county to do so and must use the competitive bidding process. The board may use its discretion when setting the terms and conditions of the lease.[3]

The board of county commissioners is authorized to negotiate the lease of an airport or seaport facility under the terms and conditions negotiated by the board.[4] This section of the statute has been interpreted as allowing the board of county commissioners to negotiate this type of lease without going through the competitive bidding process.[5]

[1] Fla. Atty Gen. Op. 88-34 (Aug. 25, 1988) (citing *Speer v. Olson*, 367 So.2d 207, 210 (Fla. 1978) (finding that chapter 125, F.S., implements s. 1(f), Art. VIII, Fla. Const.
[2] *Id.* (emphasis in original).
[3] Section 125.35(1)(a), F.S.
[4] Section 125.35(1)(b), F.S.
[5] Fla. Atty.Gen. Op., 99-35 (June 8, 1999).

A county may by ordinance prescribe disposition standards and procedures to be used by the county in leasing real property owned by the county. The standards and procedures must:

- Establish competition and qualification standards upon which disposition will be determined.
- Provide reasonable public notice.
- Identify how an interested person may acquire county property.
- Set the types of negotiation procedures.
- Set the manner in which interested persons will be notified of the board's intent to consider final action and the time and manner for making objections.
- Adhere to the governing comprehensive plan and zoning ordinances.[6]

Competitive Bidding

The competitive bidding process is used throughout the Florida statutes to ensure that goods and services are being procured at the lowest possible cost.[7] The First District Court of Appeal explained the public benefit of competitive bidding:

> The principal benefit flowing to the public authority is the opportunity of purchasing the goods and services required by it at the best price obtainable. Under this system, the public authority may not arbitrarily or capriciously discriminate between bidders, or make the award on the basis of personal preference. The award must be made to the one submitting the lowest and best bid, or all bids must be rejected and the proposal re-advertised.[8]

Section 125.35(1)(a), F.S., requires the board of county commissioners to use the competitive bidding process when selling and conveying real or personal property or leasing real property belonging to the county. Unlike the competitive bidding process for goods and services, where the state is trying to find the lowest and best bid, when a county is trying to sell or lease real property under s. 125.35, F.S., the board must sell or lease to the "highest and best bidder." Temporary leases may be appropriate in certain situations, such as in the event of a natural disaster or for short-term, revenue-generating ventures or replacing vendors such as coffee shops in government buildings. However, counties have no discretion to bypass the bidding process.[9]

Despite the numerous benefits, the competitive bidding process can often be time consuming and expensive. Currently, local governments have no discretion to bypass the bidding process.

Road Mapping

The mapping of Florida's roads is done at both the state and local levels. County general highway maps are a statewide series of maps depicting the general road system of each county. The Florida Department of Transportation maintains an Official Transportation Map for the state as well as maps of each of the Department of Transportation's districts. Right-of-way maps contain maps of local and state roads specific enough to show how they delineate the boundaries between the public right-of-way

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[6] Section 125.35(3), F.S.

[7] *See*, e.g., ss. 112.313(12)(b), 253.54, 337.02, 379.3512, and 627.64872(11), F.S.

[8] *Hotel China & Glassware Co. v. Board of Public Instruction,* 130 So.2d 78, 81 (Fla. 1st DCA 1961).

[9] *See Outdoor Media of Pensacola, Inc. v. Santa Rosa County*, 554 So. 2d 613, 615 (Fla. 1st DCA 1989); *Rolling Oaks Homeowner's Ass'n, Inc. v. Dade County*, 492 So. 2d 686, 689 (Fla. 3d DCA 1986); *Randall Industries, Inc. v. Lee County*, 307 So. 2d 499, 500 (Fla. 2d DCA 1975).

and abutting properties.[10] Right-of-way maps are kept by the Department of Transportation's eight surveying and mapping offices[11] and by each county circuit court clerk.[12]

Section 337.29, F.S., states that title to all roads designated in the State Highway System or State Park Road System is in the state. Transfer of title must be done in accordance with s. 335.0415, F.S. Section 337.29, F.S. also requires local governments to record a deed or right-of-way map when:

- Title vests for highway purposes in the state, or
- The Department of Transportation acquires lands.

Section 335.0415, F.S., sets the jurisdiction of public roads and creates a process by which they may be transferred. It specifically directs that public roads may be transferred between jurisdictions only by mutual agreement of the affected governmental entities.

The title to roads transferred between jurisdictions is held by the governmental entity to which the roads have been transferred. However the process cannot be completed until the receiving government entity records road information on the right-of-way map with the county in which such rights-of-way are located. Therefore, unlike state acquisition of roadways, local government acquisition cannot be accomplished by deed.

Effect of the Bill

This bill allows the county commission to lease county property for less than five years without going through the competitive bidding process. The change would provide greater flexibility in addressing issues that may be time sensitive. Expanding the use of temporary leases would provide greater flexibility in dealing with emergencies, short term revenue generating ventures, and replacing vendors in government buildings.

Furthermore, the bill allows government entities to transfer title to a road by recording a deed with the county or counties in which the right-of-way is located. This change would decrease the length of time that the transfer of title process requires under current law.

B. SECTION DIRECTORY:

Section 1 amends s. 125.35, F.S., relating to county authorized to sell real and personal property and to lease real property.

Section 2 amends s. 337.29, F.S., relating to vesting of title to roads; liability for torts.

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

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

[10] DEPARTMENT OF TRANSPORTATION, SURVEYING & MAPPING OFFICE – MAPS, http://www.dot.state.fl.us/surveyingandmapping/maps.shtm

[11] DEPARTMENT OF TRANSPORTATION, SURVEYING & MAPPING OFFICE – RIGHT OF WAY MAPS, http://www.dot.state.fl.us/surveyingandmapping/rowmap.shtm.

[12] Section 177.131, F.S.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

This bill will decrease county expenditures by allowing county commissions to negotiate specified short term leases of county land rather than requiring use of a competitive bidding process.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill will allow private entities to negotiate certain leases of county land directly with county commissions.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 3, 2010, HB 829 was amended in the Military & Local Affairs Policy Committee upon adoption of a proposed committee substitute. The proposed committee substitute removed provisions from the bill as filed that addressed prohibiting a person from falsely personating a firefighter. This analysis reflects the bill as amended.

A bill to be entitled

An act relating to local government; amending s. 125.35, F.S.; authorizing a board of county commissioners to negotiate the lease of certain county property for a limited period; amending s. 337.29, F.S.; authorizing transfers of right-of-way between local governments by deed; providing an effective date.

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

Section 1. Subsection (1) of section 125.35, Florida Statutes, is amended to read:

125.35 County authorized to sell real and personal property and to lease real property.—

(1)(a) The board of county commissioners may ~~is expressly authorized to~~ sell and convey any real or personal property, and to lease real property, belonging to the county, whenever the board determines that it is to the best interest of the county to do so, to the highest and best bidder for the particular use the board deems to be the highest and best, for such length of term and such conditions as the governing body may in its discretion determine.

(b) Notwithstanding ~~the provisions of~~ paragraph (a), the board of county commissioners is expressly authorized to:

1. Negotiate the lease of an airport or seaport facility;

2. Negotiate the lease of county property, other than an airport or seaport facility, for a term not to exceed 5 years;

3.~~2.~~ Modify or extend an existing lease of real property

for an additional term not to exceed 25 years, where the improved value of the lease has an appraised value in excess of $20 million; or

4.~~3.~~ Lease a professional sports franchise facility financed by revenues received pursuant to s. 125.0104 or s. 212.20;

under such terms and conditions as negotiated by the board.

(c) A ~~No~~ sale of any real property may not ~~shall~~ be made unless notice thereof is published once a week for at least 2 weeks in some newspaper of general circulation published in the county, calling for bids for the purchase of the real estate so advertised to be sold. In the case of a sale, the bid of the highest bidder complying with the terms and conditions set forth in such notice shall be accepted, unless the board of county commissioners rejects all bids because they are too low. The board of county commissioners may require a deposit to be made or a surety bond to be given, in such form or in such amount as the board determines, with each bid submitted.

Section 2. Subsection (3) of section 337.29, Florida Statutes, is amended to read:

337.29 Vesting of title to roads; liability for torts.—

(3) Title to all roads transferred in accordance with the provisions of s. 335.0415 shall be in the governmental entity to which such roads have been transferred, upon the recording of a deed or a right-of-way map by the appropriate governmental entity in the public land records of the county or counties in which such rights-of-way are located. To the extent that

sovereign immunity has been waived, liability for torts shall be in the governmental entity having operation and maintenance responsibility as provided in s. 335.0415. Except as otherwise provided by law, a municipality shall have the same governmental, corporate, and proprietary powers with relation to any public road or right-of-way within the municipality which has been transferred to another governmental entity pursuant to s. 335.0415 that the municipality has with relation to other public roads and rights-of-way within the municipality.

Section 3. This act shall take effect July 1, 2010.

Amendment No.

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Criminal & Civil Justice Policy Council

Representative(s) Bovo offered the following:

Amendment (with title amendment)

Remove line 26 and insert:

2. Negotiate the lease of real property, other than an

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

Remove line 4 and insert:

negotiate the lease of certain real property for a

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1101 Misdemeanor Pretrial Substance Abuse Programs
SPONSOR(S): Public Safety & Domestic Security Policy Committee and Waldman
TIED BILLS: **IDEN./SIM. BILLS:** SB 1694

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Public Safety & Domestic Security Policy Committee	13 Y, 0 N, As CS	Cunningham	Cunningham
2)	Criminal & Civil Justice Policy Council		Cunningham	Havlicak
3)				
4)				
5)				

SUMMARY ANALYSIS

Section 948.16, F.S., specifies that a person who is charged with a misdemeanor for possession of a controlled substance or drug paraphernalia under chapter 893, F.S., and who has not previously been convicted of a felony nor been admitted to a pretrial program, is eligible for voluntary admission into a misdemeanor pretrial substance abuse education and treatment intervention program.

The bill expands the pool of people who are eligible for admission into a misdemeanor pretrial substance abuse education and treatment intervention program by removing the requirement that a person not have previously been admitted into a pretrial program in order to participate in such programs.

The bill expands the pool of people who are eligible for admission into a misdemeanor pretrial substance abuse education and treatment intervention program. Persons who successfully complete such programs have their criminal charges dismissed. This may have a positive fiscal impact on local governments. Counties may need to expand their pretrial substance abuse education and treatment programs if more people are eligible to participate.

This bill takes effect July 1, 2010.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Section 948.16, F.S., specifies that a person who is charged with a misdemeanor for possession of a controlled substance or drug paraphernalia under ch. 893, F.S.,[1] and who has not previously been convicted of a felony nor been admitted to a pretrial program, is eligible for voluntary admission into a misdemeanor pretrial substance abuse education and treatment intervention program, including a treatment-based drug court program,[2] for a period based on the program requirements and the treatment plan for the offender. Admission to such a program may be based upon the motion of either party or the court's own motion.[3]

Participants in the program are subject to a coordinated strategy[4] developed by a drug court team under s. 397.334(4), F.S., which may include a protocol of sanctions that may be imposed upon the participant for noncompliance with program rules. The protocol of sanctions may include, but is not limited to, placement in a substance abuse treatment program offered by a licensed service provider[5] or in a jail-based treatment program or serving a period of incarceration within the time limits established for contempt of court.

At the end of the pretrial intervention period, the court must:

- Consider the recommendation of the treatment program;
- Consider the recommendation of the state attorney as to disposition of the pending charges; and

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[1] Chapter 893, F.S., is the Florida Comprehensive Drug Abuse Prevention and Control Act.
[2] *See* s. 397.334, F.S.
[3] Admission may be based upon motion of either party or the court except, if the state attorney believes the facts and circumstances of the case suggest the defendant is involved in dealing and selling controlled substances, the court shall hold a preadmission hearing. If the state attorney establishes, by a preponderance of the evidence at such hearing, that the defendant was involved in dealing or selling controlled substances, the court shall deny the defendant's admission into the pretrial intervention program.
[4] The coordinated strategy must be provided in writing to the participant before the participant agrees to enter into a pretrial treatment-based drug court program or other pretrial intervention program. Section 948.16(1)(b), F.S.
[5] The term "licensed service provider" is defined in s. 397.311(17), F.S., as "a public agency under this chapter, a private for-profit or not-for-profit agency under this chapter, a physician or any other private practitioner licensed under this chapter, or a hospital that offers substance abuse services through one or more licensed service components."

- Determine, by written finding, whether the defendant successfully completed the pretrial intervention program.[6]

If the court finds that the defendant has not successfully completed the pretrial intervention program, the court may order the person to continue in education and treatment or return the charges to the criminal docket for prosecution. The court must dismiss the charges upon finding that the defendant has successfully completed the pretrial intervention program.[7]

Effect of the Bill

As noted above, only persons who have been charged with a misdemeanor for possession of a controlled substance or drug paraphernalia under ch. 893, F.S., and who have not previously been convicted of a felony *nor been admitted to a pretrial program*, are eligible for voluntary admission into a misdemeanor pretrial substance abuse education and treatment intervention program.

The bill expands the pool of people who are eligible for admission into a misdemeanor pretrial substance abuse education and treatment intervention program by removing the requirement that a person not have previously been admitted into a pretrial program in order to participate in such programs.

B. SECTION DIRECTORY:

Section 1. Amends s. 948.16, F.S., relating to misdemeanor pretrial substance abuse education and treatment intervention program.

Section 2. This bill takes effect July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   See "Fiscal Comments."

2. Expenditures:

   See "Fiscal Comments."

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

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[6] Section 948.16(2), F.S.

[7] Any person whose charges are dismissed after successful completion of the treatment-based drug court program, if otherwise eligible, may have his or her arrest record and plea of nolo contendere to the dismissed charges expunged under s. 943.0585, F.S. *See* s. 948.16(1)(b), F.S.

D. FISCAL COMMENTS:

The bill expands the pool of people who are eligible for admission into a misdemeanor pretrial substance abuse education and treatment intervention program. Persons who successfully complete such programs have their criminal charges dismissed. This may have a positive fiscal impact on local governments. Counties may need to expand their pretrial substance abuse education and treatment programs if more people are eligible to participate.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 9, 2010, the Public Safety & Domestic Security Policy Committee adopted a strike-all amendment to the bill. The strike-all amendment removed language in the bill that would have allowed persons who have been charged with *any* misdemeanor violation of ch. 893, F.S., and who have not been previously convicted of a felony to participate in pretrial substance abuse education and treatment programs.

The bill was reported favorably as a committee substitute. This analysis reflects the committee substitute.

A bill to be entitled

An act relating to misdemeanor pretrial substance abuse programs; amending s. 948.16, F.S.; providing that a person who has previously been admitted to a pretrial program may qualify for the program; providing an effective date.

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

Section 1. Paragraph (a) of subsection (1) of section 948.16, Florida Statutes, is amended to read:

948.16 Misdemeanor pretrial substance abuse education and treatment intervention program.—

(1)(a) A person who is charged with a misdemeanor for possession of a controlled substance or drug paraphernalia under chapter 893, and who has not previously been convicted of a felony ~~nor been admitted to a pretrial program~~, is eligible for voluntary admission into a misdemeanor pretrial substance abuse education and treatment intervention program, including a treatment-based drug court program established pursuant to s. 397.334, approved by the chief judge of the circuit, for a period based on the program requirements and the treatment plan for the offender, upon motion of either party or the court's own motion, except, if the state attorney believes the facts and circumstances of the case suggest the defendant is involved in dealing and selling controlled substances, the court shall hold a preadmission hearing. If the state attorney establishes, by a preponderance of the evidence at such hearing, that the

defendant was involved in dealing or selling controlled substances, the court shall deny the defendant's admission into the pretrial intervention program.

Section 2. This act shall take effect July 1, 2010.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1517 Criminal Trials
SPONSOR(S): Eisnaugle and others
TIED BILLS: **IDEN./SIM. BILLS:**

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Criminal & Civil Justice Policy Council		De La Paz	Havlicak
2)				
3)				
4)				
5)				

SUMMARY ANALYSIS

Florida Rule of Criminal Procedure 3.191 issued by the Florida Supreme Court provides speedy trial rights to defendants arrested for crimes. Under this rule a defendant arrested or served with a notice to appear must be brought to trial within 175 days for a felony offense and 90 days for a misdemeanor offense.

Under current law, if a defendant has been arrested for any crime pertaining to a particular criminal episode and the speedy trial period on the charge for which he was arrested has expired, a permanent discharge dismissing the charge against the defendant operates to dismiss any and all charges that arose out of the same episode forever.

The United States Supreme Court has expressly stated that there is "no constitutional basis for holding that the speedy trial right can be quantified into a specific number of days or months." The current rule of procedure is far stricter than the state or federal constitutions require. While the rule serves as a procedural mechanism to implement a defendant's constitutional right to speedy trial, the constitutional right to speedy trial has never been held to compel a permanent dismissal of charges due solely to the passage of a specific number of days.

HB 1517 creates a tiered system of requiring defendants formally charged with a crime to be brought to trial within specific time frames based on the most serious charge filed against the defendant. Unlike the current rule, the mere passage of this time period will not automatically result in a permanent dismissal of all charges. Under the bill, failure to try the defendant within the required time period will result in a dismissal without prejudice, which allows the state to re-file the charges within the applicable statute of limitations periods of s. 775.15, F.S. If, however, the defendant had successfully triggered the compressed time frames provided in the bill, the delay was substantially beyond the required time frames and is able to establish that his or her defense was prejudiced, the court may dismiss the charges with prejudice which would prohibit the state from re-filing charges.

HB 1517 creates a simplified tiered system for speedy trial time periods applicable in juvenile court proceedings. Its provisions are parallel to the provisions the bill creates for handling re-filed charges in the adult court portion of the bill.

HB 1517 repeals Florida Rule of Criminal Procedure 3.191 relating to a defendant's right to speedy trial. This section of the bill requires a two thirds vote of the membership of each house of the Legislature in order to pass.

This bill appears to have an indeterminate fiscal impact.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Florida Rule of Criminal Procedure 3.191 issued by the Florida Supreme Court provides speedy trial rights to defendants arrested for crimes. Under this rule a defendant arrested or served with a notice to appear must be brought to trial with a 175 days for a felony offense and 90 days for a misdemeanor offense.[1] A person arrested for a crime is entitled to the benefits of the rule regardless of whether the person is in physical custody or at liberty on some form of pretrial release.[2]

In addition to the above time frames, the defendant may file a "demand" for speedy trial to bring a felony or misdemeanor case to trial within 60 days of the filing of the demand.[3] When a demand for speedy trial is filed, a calendar call is held within five days of the filing of the demand and the court must set the case for trial within five to forty-five days from the calendar call.[4]

Under the rule, if the defendant is not brought to trial within the required time period, the defense files a "Notice of Expiration of Speedy Trial."[5] Within five days of the filing of the notice the court holds a hearing and, except in limited circumstances,[6] orders the defendant brought to trial within ten days of the hearing.[7] If the defendant is not brought to trial within the ten day period the defendant is "forever discharged" from the crime.[8] This fifteen day period is commonly referred to as the "recapture" period.

The recapture period does not operate to extend the speedy trial period, but is solely a grace period within which to bring a defendant to trial before a court may permanently discharge a defendant for his or her crime.[9] Under current law, the state may not file charges after the speedy trial period has

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[1] Fla. R. Crim. P. 3.191(a).
[2] Id.
[3] Fla. R. Crim. P 3.191(b).
[4] Fla. R. Crim. P 3.191(b).(2).
[5] Fla. R. Crim. P. 3.191(h) & (p)(2).
[6] Fla. R. Crim. P. 3.191(j). The limited circumstances where a court would deny a motion are 1) that the court ordered a time extension which has not expired, 2) the failure to hold trial is attributable to the defendant, 3) the accused was unavailable for trial, or 4) a demand for speedy trial is invalid.
[7] Fla. R. Crim. P. 3.191(p)(1),(3) & (j).
[8] Fla. R. Crim. P. 3.191(p)(3).
[9] See, Walden v State, 979 So.2d 1206 (4th DCA 2008).

expired regardless of whether the state declined to file charges after the initial arrest or whether the state entered a nolle prosequi dropping existing charges.[10]

Under current law, if a defendant has been arrested for any crime pertaining to a particular criminal episode and the speedy trial period on the charge for which he was arrested has expired, a permanent discharge dismissing the charge against the defendant operates to dismiss any and all charges that arose out of the same episode forever even in circumstances when such crimes were unknown at the time of arrest.[11] One example of this situation occurred in the case of Reed v. State.[12]

In Reed, the defendant was arrested on January 4, 1991, for armed robbery and several traffic offenses. According to the arrest report, Reed and another man robbed a convenience store and in the course of fleeing became involved in an automobile accident. The following is the timeline of events after his arrest:

- January 24, 1991 - the State filed an information charging Reed with two counts of leaving the scene of an accident involving personal injury.
- June 27, 1991 - the State entered a nolle prosequi on the charges.
- July 15, 1991 - 192 days after his arrest, Reed filed a motion for discharge pursuant to the speedy trial rule.
- September 6, 1991 - 245 days after Reed's arrest, the State filed an information charging him with numerous felonies arising out of the convenience store robbery.
- December 13, 1991 - the court denied Reed's motion for discharge.
- May 6, 1992, - the State filed an information adding additional felony charges arising out of the robbery and recharging Reed with the two counts of leaving the scene of an accident involving personal injury.

Following a trial, the defendant was found guilty of two counts of robbery with a firearm, two counts of kidnapping with a firearm, and two counts of leaving the scene of an accident involving personal injury. On review to the Florida Supreme Court the issue was whether Reed was entitled to a discharge for violation of the speedy trial rule. The Court, relying on an earlier case of State v. Agee,[13] granted a discharge on all charges, including the kidnapping charge which he was not arrested for, based on a strict application of the rule and a determination that the speedy trial period under the rule began to run even on a charge he was not arrested for.[14]

Justice Shaw, who wrote the majority opinion in Agee, dissented in Reed saying:

> . . . It seems that State v. Agee, (citation omitted), has taken on a Frankenstein-like role I never envisioned or intended when I authored that opinion. As I understand the majority's holdings in (case references omitted), and the present case, once a suspect is arrested and the speedy trial period runs on a particular charge, the suspect gains total immunity from prosecution for any crime arising from that incident, no matter when the collateral crime is discovered or becomes prosecutable.[15]

Justice Wells also dissented saying in part:

> I am concerned that this decision is another substantial evisceration of the statutes of limitation in criminal-law prosecutions . . .
>
> The majority's opinion has the effect of ignoring the practical reality that the police and the state attorney are totally different agencies performing different functions.[16]

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[10] Fla. R. Crim. P. 3.191(o). See, Genden v. Fuller, 648 So.2d 1183, 1183 (Fla. 1995), and State v. Agee, 622 So.2d 473 (Fla. 1993).

[11] Fla. R. Crim. P. 3.191(n).

[12] Reed v. State, 649 So.2d 227 (Fla. 1995).

[13] State v. Agee, 622 So.2d 473 (Fla. 1993)

[14] Id. at 229.

[15] Shaw dissenting, Reed, *supra* at 230.

[16] Wells dissenting, Reed *supra* at 230.

Juvenile rule of procedure 8.090 is the speedy trial rule applicable to juveniles accused of committing delinquent acts and is virtually identical in its operation to juvenile proceedings except that the speedy trial period begins to run 90 days from the earlier of:

1) The date the child was taken into custody, or
2) The date of service of the summons that is issued when a delinquency petition is filed.[17]

A demand for speedy trial in juvenile court has a 60 day time period and operates in generally the same manner as the adult rule.[18]

To determine constitutional violations of speedy trial, Florida courts have applied the same four part test articulated by the United States Supreme Court interpreting the right to speedy trial under the federal constitution.[19] The four factors are:

- the length of the delay,
- the reason for the delay,
- the defendant's assertion of his right, and
- the prejudice to the defendant.

The United States Supreme Court has expressly stated that there is "no constitutional basis for holding that the speedy trial right can be quantified into a specific number of days or months."[20] The current rule of procedure is far stricter than the state or federal constitutions require. While the rule serves as a procedural mechanism to implement a defendant's constitutional right to speedy trial, the constitutional right to speedy trial has never been held to compel a permanent dismissal of charges due solely to the passage of a specific number of days.

The Speedy Trial Rule and Statutes of Limitation

Section 775.15, F.S., provides the statute of limitations for criminal offenses. This section provides, for example, that capital felonies, life felonies and any felony that resulted in a death may be commenced at any time. Felonies of the first degree generally must be commenced within four years, and all other felonies, except in specific circumstances, must be commenced in three years. Misdemeanors must be commenced within two years.[21] The time period to commence a prosecution begins to run from the day after the crime has been committed.[22]

Under the current speedy trial rule, once a person is arrested or served with a notice to appear in court, the statute of limitations periods provided in s. 775.15, F.S., are immediately rendered nullities and every conceivable charge that could arise out of the same course of conduct that was subject of the defendant's arrest, must be filed within the time periods provided in the speedy trial rule.[23]

A Sample Timeline

The following time-line comes from the case of Landry v. State and shows some of the potential inequities that may arise from the current rule of procedure.[24]

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[17] Fla. R. Juv. P. 8.090(a).
[18] Fla. R. Juv. P. 8.090(h).
[19] See, State v. Polk, 993 So.2d 581, 583 (1st DCA, 2008) *citing* Barker v. Wingo, 407 U.S. 514, 530 (1972). See also, C.D. v. State, 865 So.2d 605 (4th DCA 2004) and Seymour v. State, 738 So.2d 984 (2nd DCA 1999).
[20] Barker v. Wingo, 407 U.S. 514, 523 (1972).
[21] Section 775.15, F.S., also contains special extended limitations periods for certain specified offenses .
[22] Section 775.15(3), F.S.,
[23] Fla. R. Crim. P. 3.191(n), provides: "Discharge from a crime under this rule shall operate to bar prosecution of the crime charged and of all other crimes on which trial has not commenced nor conviction obtained nor adjudication withheld and that were or might have been charged as a result of the same conduct or criminal episode as a lesser degree or lesser included offense."
[24] Landry v. State, 666 So.2d 212 (Fla. 1996).

- May 02, 1992 Armed burglary of a residence and murder of the resident committed.
- May 03, 1992 Landry arrested.
- May 05, 1992 Counsel appointed to represent Landry.
- May 20, 1992 Landry indicted.
- May 22, 1992 Landry files a demand for speedy trial (trial must occur within 50 days of the demand).[25]
- June 25 1992 The trial court denied the demand for speedy trial on the grounds that the defendant could not truly be ready for a capital murder trial and the trial court's belief counsel may have been preparing for an ineffective assistance of counsel claim in the event of Landry's conviction.[26]
- July 17, 1992 Landry files motion to discharge (requires trial within 15 days)
- July 21, 1992 Trial court denies motion for discharge.

Landry was convicted by a jury of first-degree premeditated murder, first-degree felony murder, and armed burglary. The jury recommended the death penalty and the court imposed the death penalty.

- Sept. 21, 1995 The Florida Supreme Court reversed Landry's convictions and ordered him discharged based on a violation of the speedy trial rule.[27]

Landry walked free and cannot be subjected to a new trial. For other murder and attempted murder cases dismissed based on violations of the speedy trial rule see Section III, C, "Drafting Issues and Other Comments."

HB 1517 Repeals

HB 1517 repeals Florida Rule of Criminal Procedure 3.191 relating to a defendant's right to speedy trial.

Effect of HB 1517 on Adult Criminal Trials

Time Periods

HB 1517 creates a tiered system of requiring defendants formally charged with a crime to be brought to trial within specific time frames based on the most serious charge filed against the defendant. The defendant has the option under the bill of seeking to have a compressed time frame applied to his or her case or the standard time frames attached to the case.

Under the standard time frames of the bill, a defendant charged with a crime must be brought to trial as follows:

- 90 days from the filing of a misdemeanor.
- 180 days from the filing of a first, second or third degree felony.[28]

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[25] Fla. R. Crim. P. 3.191(b) provides a defendant with a right to demand a trial within 60 days from filing of a demand, but this provision conflicts with (b)(4) which requires defendants tried within 50 days. In Landry, the court referred to the 50 day provision when discussing the applicable speedy trial period. Landry, *supra* at 126.

[26] Landry *supra* at 124 & n. 4. Counsel had not reviewed several hundred pages available for discovery, had not interviewed the sole eye witness, and had not deposed any witnesses. The state was seeking the death penalty in the case. Under subsection (g) of the rule "[a] demand for speedy trial shall be considered a pleading that the accused is available for trial, has diligently investigated the case, and is prepared or will be prepared for trial within 5 days."

[27] Fla. R. Crim. P. 3.191(g) provides in part " [a] demand filed by an accused who has not diligently investigated the case or who is not timely prepared for trial shall be *stricken as invalid on motion of the prosecuting attorney*." The Supreme Court found the trial court erred because it "denied" the defendant's demand for speedy trial on its own motion rather after a motion by the state and because "the mere fact that a defendant charged with first degree murder decides to forgo discovery in exchange for a speedy trial cannot serve as a basis for striking a demand as invalid . . ." With respect to the trial court's concern over the apparent attempt to prepare an ineffective assistance of counsel claim the Supreme Court noted "[r]ule 3.191 makes no provision for denying or striking as invalid a demand for speedy trial based on such concerns." Landry, *supra* at 126.

- 275 days from the filing of a first degree felony punishable by life.
- 365 days from the filing of a capital felony.

Under the compressed time frames a defendant must be brought to trial within:

- 60 days from the filing of a misdemeanor.
- 120 days from the filing of a first, second or third degree felony
- 190 days from the filing of a first degree felony punishable by life.
- 275 days from the filing of a capital felony.

In order to activate the compressed time periods the defendant must file a "Motion for Demand for Speedy Trial" and have the motion granted. A trial court must grant the motion unless the court finds:

1. No document constituting a formal charge has been filed with the court;
2. The defendant is not or will not be prepared for trial within 20 days after filing the motion; or
3. The factual circumstances, seriousness, or complexity of the case are such that the applicable time period provided under this paragraph is insufficient to allow the state or defense adequate time to prepare the case for trial.

Motions for a demand for speedy trial which are denied may be re-filed after 30 days.

The only exceptions or qualification to the application of standard or compressed time frames are that in the event a defendant is charged with a misdemeanor and a felony, the applicable period will be the time period that attaches to the felony offense. In addition, the periods will not begin to run for prisoners charged and held outside of the jurisdiction of the state, or a political subdivision of the state, until the prisoner returns to the jurisdiction where the charges are pending.

Extensions

HB 1517 provides grounds for the state to seek extensions of the speedy trial time periods which are substantially similar to the grounds provided in the current court rule of procedure. The exceptions are largely based on the existence of exceptional circumstances, unexpected illnesses, unavailability of testimony or evidence, unforeseeable developments, or that the defendant has caused delay or disruption, and that the case is so unusual and complex that it is unreasonable to expect adequate investigation or preparation within the prescribed time periods. Other grounds for extension include stipulation of the parties, or to allow time to accommodate appeals and other proceedings. Finally, the bill allows the defendant to seek an extension without waiving his or her right to speedy trial when good cause is shown. Ordinarily, without good cause shown, a defendant's request to delay trial is in the form of a "motion for a continuance" which are considered waivers of a defendant's right to trial within the applicable time frame.

Expiration of Trial Periods and the Motion for Speedy Trial

If the applicable time period expires without the defendant being brought to trial, the defendant may file a "motion for speedy trial." Once filed, the motion must be heard within 5 days and the case set for trial within 10 days of the hearing if the motion is granted. The court must grant the motion unless it finds that:

1. The failure to hold the trial is attributable to the defendant, a codefendant in the same trial, or their counsel;
2. The defendant was unavailable for trial;

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[28] A first degree felony is punishable by imprisonment of up to 30 years. S. 775.082(3)(b), F.S. A second degree felony is punishable by imprisonment of up to 15 years. S. 775.082(3)(c), F.S. A third degree felony is punishable by imprisonment of up to 5 years. S. 775.082(3)(d), F.S.

3. The applicable time period or extension granted by the court has not expired; or
4. The defendant is not prepared to proceed to trial within 10 days after the hearing on the motion for speedy trial.

In granting the motion the court has discretion to order a trial of up to 30 days, rather than 10 days, from the hearing.

Motion for Dismissal

If the state fails to bring the defendant to trial within time frame ordered by the court pursuant to a motion for speedy trial, the defendant may file a motion to dismiss the charges. Unlike the current rule, the mere passage of this time period will not automatically result in a permanent dismissal of all charges. Under the bill, failure to try the defendant within the required time period will result in a dismissal without prejudice, which allows the state to re-file the charges within the applicable statute of limitations periods of s. 775.15, F.S. If, however, the defendant had successfully triggered the compressed time frames, the delay was substantially beyond the required time frames and the defendant is able to establish that his or her defense was prejudiced; the court may dismiss the charges with prejudice which would prohibit the state from re-filing charges. "Prejudice" can be established by showing by clear and convincing evidence that an essential witness has died or become unavailable or that exculpatory evidence has been destroyed, substantially degraded, or become unavailable.

A dismissal with prejudice may also be entered if the delay otherwise constituted a substantive violation of the defendant's constitutional right to a speedy trial.

Refiled Charges

In cases where a dismissal has been ordered without prejudice, or where the state has dropped the initial charges by filing a "nolle prosequi" with the court after the expiration of the standard or compressed trial periods, any re-filed charges may not include any added or enhanced charge that was not the subject of the dismissal or the nolle prosequi. The speedy trial periods for charges re-filed under these circumstances are 60 days for a misdemeanor offense and 120 days for any felony offense.

If the state fails to bring a defendant to trial within the 60/120 day trial period for refiled charges, the judge may dismiss the charges without prejudice or dismiss the charges with prejudice based on the following factors:

1. The length of the delay.
2. The circumstances and reason for the delay.
3. The seriousness of the charge.
4. The degree of prejudice to the defense.

An order granting a dismissal with prejudice on refiled charges must be supported by findings that the length of the delay was unreasonable, and that the prejudice to the defendant diminished his or her defense in a material way.

HB 1517 treats situations where the state drops charges before the expiration of the speedy trial time period differently than when the charges are dropped after they expire. For charges dropped before the speedy trial time period expires, the state may include new or enhanced charges against the defendant if they decide to re-file charges. Further, the speedy trial period for re-filed charge is the balance of days remaining on the speedy trial period applicable to the charges that were dropped. Under this provision, the speedy trial period restarts from the point the case was dropped. Presumably, failure to bring the defendant to trial within this restarted time period would result in a motion for speedy trial remedy that applies to originally filed charges.

Mistrials

Time periods for mistrials under the bill are subject to a 60 day time period for misdemeanor offenses and a 120 day time period for felony offenses. Failure to bring the defendant to trial under these time periods would enable the defendant to avail himself of remedies under a motion for speedy trial.

Effect of HB 1517 on Juvenile Court Proceedings

HB 1517 creates a simplified tiered system for speedy trial time periods applicable in juvenile court proceedings. Its provisions are parallel to the provisions the bill created for handling re-filed charges in the adult court portion of the bill. The bill created only a standard speedy trial time period in juvenile proceedings and did not create an additional time schedule establishing compressed time periods.

Time Periods

Speedy trial periods for juvenile proceedings are 90 days from the earlier of:

- The date the juvenile is taken into custody, or
- The date of service of the summons issued when the petition is filed.

Extensions

HB 1517 provides same grounds for the state to seek extensions of the speedy trial time periods that apply in adult cases.

Expiration of Trial Periods and the Motion for Speedy Trial

A juvenile has the same remedy available under a motion for speedy trial as discussed previously with the adult court system. In juvenile proceedings, the judge must order the trial commenced within 10 days and has no discretion to order trial to be held up to 30 days from the hearing.

Motion for Dismissal

If the state fails to bring the defendant to trial within the 10 day time frame, the juvenile may file a motion to dismiss the delinquency petition.[29] At the hearing on the motion the judge may dismiss the petition without prejudice or dismiss the petition with prejudice based on the following factors:

1. The length of the delay.
2. The circumstances and reason for the delay.
3. The seriousness of the charge.
4. The degree of prejudice to the defense.

An order granting a dismissal with prejudice on re-filed charges must be supported by findings that the length of the delay was unreasonable, and that the prejudice to the juvenile diminished his or her defense in a material way.

Refiled Charges

In cases where a dismissal has been ordered without prejudice, or where the state has dropped the initial charges by filing a "nolle prosequi" with the court after the expiration speedy trial periods, any re-filed charges may not include any added or enhanced charge that was not the subject of the dismissal or the nolle prosequi. The speedy trial periods for charges re-filed under these circumstances are 60 days.

[29] "Delinquency petition" is the name of the charging document in juvenile delinquency proceedings.

HB 1517 treats situations where the state drops charges against a juvenile before the expiration of the speedy trial time period in the same manner as it does in the adult court provision restarting the time period from the point the case was dropped.

If the state fails to bring a juvenile to trial within the 60 day trial period for re-filed charges, the judge may dismiss the petition without prejudice or dismiss the charges with prejudice based on the following factors:

1. The length of the delay.
2. The circumstances and reason for the delay.
3. The seriousness of the charge.
4. The degree of prejudice to the defense.

Mistrials

The speedy trial time period for mistrials in juvenile cases is 60 days.

B. SECTION DIRECTORY:

Section 1. Amends s. 918.015, F.S., relating to the right to speedy trial.

Section 2. Amends s. 985.35, F.S., relating to adjudicatory hearings.

Section 3. Creates s. 985.36, F.S., relating to the juvenile right to speedy trial.

Section 4. Repeals Florida Rule of Criminal Procedure 3.191.

Section 5. Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   Indeterminate. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   Indeterminate. See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Additional state costs associated with this bill would arise to the extent persons who would have been forever discharged for their crime under the current rule of procedure, would be prosecuted under the provisions of this bill.

Local government may expend funds holding persons in the custody of local jails awaiting trial under the bill's longer speedy trial periods in those cases where the accused remains in custody, does not pursue with success a motion for demand for speedy trail, and who while remaining in custody, would not have waived his or her right to a speedy trial by moving for a continuance of the case under the existing court rule.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

   Substantive Rights v. Court Rules of Practice and Procedure

   Section 2(a) of Article V of the Florida Constitution provides in part:

   > The supreme court shall adopt rules for the practice and procedure in all courts . . . Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

   Section 2 of Article II of the Florida Constitution provides:

   > The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

   Generally, the Legislature has the power to enact substantive law, while the Supreme Court has the power to enact procedural law.[30] Because this bill substitutes by general law what is currently a court rule of procedure it could be argued that the bill is an unconstitutional encroachment on the Supreme Court's authority to adopt rules of practice and procedure and therefore a violation of the separation of powers provision of the Florida Constitution. The supreme court has described the distinction between *practice and procedure* and *substantive law* as follows:

   > Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof.
   >
   > Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules

[30] Allen v. Butterworth, 756 So.2d 52, 59 (Fla. 2000) *citing* Justice Adkins concurring In re Rules of Criminal Procedure, 272 So.2d 65,66 (Fla. 1972).

> governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.[31]

The Supreme Court has acknowledged that "the distinction between substantive and procedural law is neither simple nor certain. . ."[32] Recently, the Supreme Court has articulated how statutes containing a mixture of substance and procedure are analyzed in order to determine their constitutional validity when measured against the Supreme Court's procedural rulemaking authority:

> Of course, statutes at times may not appear to fall exclusively into either a procedural or substantive classification. We have held that where a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not impermissibly intrude on the practice and procedure of the courts in a constitutional sense, causing a constitutional challenge to fail. (citations omitted). If a statute is clearly substantive and "operates in an area of legitimate legislative concern," this Court will not hold that it constitutes an unconstitutional encroachment on the judicial branch. (citations omitted) However, where a statute does not basically convey substantive rights, the procedural aspects of the statute cannot be deemed "incidental," and that statute is unconstitutional.(emphasis added).[33]

The Supreme Court's rulemaking power is exclusively procedural and does not authorize adoption of court rules that "abridge, enlarge or modify the substantive rights of any litigant."[34] Rule 3.191 currently operates to guarantee defendants certain rights that could be considered substantive in nature and beyond those which the United States Supreme Court and the Florida Supreme Court have found to be within a defendant's constitutional right to speedy trial. For example, the court rule entitles a person arrested (including someone who was merely booked, released and never formally charged) to a permanent discharge for all crimes arising out of the same episode giving rise to the arrest if that person is not brought to trial within a specific number of days without requiring a showing that the defendant was prejudiced by the delay. To grant a permanent dismissal for all such charges forever, irrespective of the fact that a violation of the *speedy trial rule* does not rise to the level of a violation of the *constitutional right to speedy trial*, appears to be a substantive expansion of a right by a court rule of procedure.

HB 1517 provides legislative findings that the court rule is substantive in a number of ways and therefore is the proper subject of a legislative enactment modifying a defendant's right to speedy trial. Only the Legislature has the constitutional authority to expand or enlarge substantive rights.[35] The constitutionality of HB 1517 will rise and fall on whether, or to what extent, the Supreme Court finds the bill procedural or substantive or a combination of both.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Examples of other cases dismissed for violations of the speedy trial rule:

Walden v. State, first degree murder.[36]

State v. Agee, attempted first degree murder.[37]

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[31] Id.
[32] Caple v. Tuttle's Design-Build Inc., 753 So.2d 49, 53 (Fla. 2000).
[33] Massey v. David, 979 So.2d 931, 937 (Fla. 2008).
[34] State v. Furen, 118 So.2d 6, 12 (Fla. 1960).
[35] Section 1, Article III, Fla. Const.
[36] Walden v. State, 979 So.2d 1206 (4th DCA 2008).

Zarifian v. State, attempted second degree murder.[38]

Dorian v. State, first degree murder.[39]

State v. McDonald, first degree murder.[40]

Thigpen v. State, second degree murder.[41]

HB 1517 repeals the rule of criminal procedure relating to adult court proceedings, but does not repeal the rule with respect to juvenile proceedings.

Section 4 of the bill repealing the court rule of procedure requires a two thirds vote of the membership of each house of the Legislature in order to pass.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

[37] State v. Agee, 622 So.2d 473 (Fla. 1993).
[38] Zarifian v. State, 581 So.2d 925 (2nd DCA 1991).
[39] Dorian v. State, 642 So.2d 1359 (Fla. 1994).
[40] State v. McDonald, 425 So.2d 1380 (5th DCA 1983).
[41] Thigpen v. State, 350 So.2d 1078 (4th DCA 1977).

A bill to be entitled

An act relating to criminal trials; amending s. 918.015, F.S.; providing legislative findings and intent concerning speedy trial requirements; specifying periods for commencement of a trial absent a demand for a speedy trial; specifying periods for commencement of a trial when a demand for a speedy trial is made; providing grounds for denial of such a motion; providing for vacation of such a motion upon good cause; providing for extensions of time; providing requirements for a speedy trial motion; providing for dismissal of charges if a defendant is not brought to trial within the time period prescribed by the court; providing requirements for motions for dismissal; providing limitations on refiling of charges following a dismissal without prejudice; providing requirements for orders dismissing charges with prejudice; providing factors to be considered in determining whether charges should be dismissed with prejudice; providing for determination of whether a defendant is available for trial for purposes of speedy trial provisions; providing for application of provisions to prisoners outside the jurisdiction; providing for applicability when a defendant is charged with both felony and misdemeanor offenses; providing for the effect of appeals; providing for retrial after declaration of a mistrial; providing for application to new or refiled charges after timely nolle prosequi; deleting reference to a rule of the Supreme Court concerning speedy trials; amending s. 985.35, F.S.;

providing that adjudicatory hearings for juveniles must be held in accordance with a specified statute relating to speedy trials rather than according to specified court rules; creating s. 985.36, F.S.; providing a time period for juvenile adjudicatory hearings; providing for extensions of time; providing for waiver of speedy trial period; providing for motions for speedy trial; providing for motions for dismissal; providing for dismissal of charges if a juvenile is not brought to trial within the time period prescribed by the court; providing requirements for motions for dismissal; providing limitations on refiling of charges following a dismissal without prejudice; providing requirements for orders dismissing charges with prejudice; providing factors to be considered in determining whether charges should be dismissed with prejudice; providing for determination of whether a juvenile is available for trial for purposes of speedy trial provisions; providing of tolling of speedy trial period during the determination of a juvenile's competency; providing for the effect of a declaration of a mistrial, an appeal, or an order for a new trial; providing for application to new or refiled charges after timely nolle prosequi; repealing Rule 3.191, Florida Rules of Criminal Procedure, relating to speedy trials; providing a contingent effective date.

WHEREAS, Section 16, Article I of the State Constitution and the Sixth Amendment to the United States Constitution

provide persons accused of crimes a right to speedy trial, and

WHEREAS, the United States Supreme Court has explicitly stated that there is "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." (*Barker v. Wingo*, 407 U.S. 514, 523 (1972)), and

WHEREAS, the Legislature finds that there is no basis in the State Constitution or the United States Constitution to permanently and forever discharge a defendant for a crime based solely upon the expiration of strict time limits for criminal prosecutions when no substantive violation of the constitutional right to speedy trial has occurred, and

WHEREAS, the Legislature finds that Rule 3.191, Florida Rules of Criminal Procedure, creates time periods for a speedy trial far stricter than necessary and that require courts to dismiss prosecutions against accused criminals who have suffered neither a violation of a constitutional right nor an unfair trial, and

WHEREAS, the Legislature finds that Rule 3.191, Florida Rules of Criminal Procedure, is substantive in character by expanding a criminal defendant's right to speedy trial to a right to be forever discharged from his or her crime if not tried within a specific number of days and to attach that right upon a person's arrest even where the state attorney declines to file formal charges pending further investigation, NOW, THEREFORE,

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

Section 1. Section 918.015, Florida Statutes, is amended to read:

918.015 Right to speedy trial.—

(1) RIGHT.—In all criminal prosecutions the state and the defendant shall each have the right to a speedy trial.

(2) FINDINGS; INTENT.—The Legislature finds that Rule 3.191, Florida Rules of Criminal Procedure, is substantive in character in every respect where it compels strict enforcement of time periods for prosecutions of persons accused of crimes, where it grants the benefits of its provisions to persons upon arrest or service of a notice to appear, regardless of whether formal charges are filed, where it continues application of the time limitations where the state enters a nolle prosequi of the charge, and where it operates to circumvent and preclude the filing for formal charges within the statute of limitations periods for appropriate offenses. To the extent that these and all other substantive effects of rules of court regarding the speedy trial of persons charged with crimes expand, alter, or enlarge the substantive right to speedy trial, the Legislature adopts the provisions of this section to govern a defendant's right to speedy trial. This section shall govern unless the Supreme Court declares this section or a provision thereof to be procedural. In the event the Supreme Court adopts a rule of procedure to replace this section, or any portion of this section, such rule shall neither abridge, enlarge, or modify the constitutional right to a speedy trial nor require a dismissal of the charge with prejudice where no substantive violation of

the constitutional right to a speedy trial has occurred. It is the intent of the Legislature that the principles and findings described in this subsection similarly apply with respect to juveniles charged with delinquent acts and to the provisions of s. 985.36.

(3) SPEEDY TRIAL WITHOUT DEMAND.—Except as otherwise provided, and subject to the limitations imposed under subsections (10) and (11), a person charged with a felony by indictment or information, or in the case of a misdemeanor by whatever document constitutes a formal charge, shall be brought to trial within the following time periods:

(a) Ninety days after the filing of a misdemeanor;

(b) One hundred eighty days after the filing of a first, second, or third degree felony;

(c) Two hundred seventy five days after the filing of a first degree felony punishable by imprisonment for a term of years not exceeding life; or

(d) Three hundred sixty five days if the crime charged is a capital felony.

This subsection ceases to apply whenever a motion for demand for speedy trial has been granted under subsection (4) or when the state files a no information indicating its intent not to file formal charges.

(4) SPEEDY TRIAL UPON DEMAND.—Except as otherwise provided in this section, and subject to the limitations imposed under subsections (10) and (11), a person charged with a felony by indictment or information, or in the case of a misdemeanor by

whatever document constitutes a formal charge, may file a motion with the trial court for demand for speedy trial.

(a) An order granting a motion for demand for speedy trial requires the defendant to be brought to trial within the following time periods:

1. Sixty days after the filing of a misdemeanor;

2. One hundred twenty days after the filing of a first, second or third degree felony;

3. One hundred ninety days after the filing of a first degree felony punishable by imprisonment for a term of years not exceeding life; or

4. Two hundred seventy five days if the crime charged is a capital felony.

(b) A motion for demand for speedy trial shall be considered a pleading that the defendant is available for trial, has diligently investigated the case, and is prepared or will be prepared for trial within 20 days after filing the motion. If granted, a motion for demand for speedy trial binds the defendant and the state. No motion for demand for speedy trial shall be filed or served unless the defendant has a bona fide desire to obtain a trial sooner than otherwise might be provided.

(c) A motion for demand shall be granted by the court unless the court determines:

1. No document constituting a formal charge has been filed with the court;

2. The defendant is not or will not be prepared for trial within 20 days after filing the motion; or

3. The factual circumstances, seriousness, or complexity of the case are such that the applicable time period provided under this paragraph is insufficient to allow the state or defense adequate time to prepare the case for trial.

(d) A motion for demand for speedy trial may be refiled after 30 days after a denial of a previous motion for demand for speedy trial.

(e) An order granting a motion for a demand for speedy trial may only be vacated with consent of the state or for good cause shown. Good cause for vacating a demand order and granting subsequent requests for continuances on behalf of the defendant thereafter shall not include nonreadiness for trial, except as to matters that may arise after the motion for demand for speedy trial was filed and that reasonably could not have been anticipated by the defendant or counsel for the defendant.

(5) EXTENSIONS OF TIME.—Extension of the time periods under subsections (3) and (4) may be granted under the following circumstances:

(a) Unexpected illness, unexpected incapacity, or unforeseeable and unavoidable absence of a person whose presence or testimony is uniquely necessary for a full and adequate trial;

(b) A showing by the state that the case is so unusual and so complex, because of the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate investigation or preparation within the prescribed time periods;

(c) A showing by the state that specific evidence or

testimony is not available despite diligent efforts to secure it, but will become available at a later time;

(d) A showing by the defendant or the state of necessity for delay grounded on developments that could not have been anticipated and that materially will affect the trial;

(e) A showing that a delay is necessary to accommodate a codefendant, when there is reason not to sever the cases to proceed promptly with trial of the defendant;

(f) A showing by the state that the defendant has caused major delay or disruption of preparation of proceedings, such as by preventing the attendance of witnesses or otherwise;

(g) Other exceptional circumstances exist which, as a matter of substantial justice to the defendant or the state or both, require an extension;

(h) The state and defense have signed a stipulation for an extension;

(i) The defendant establishes good cause to grant an extension without waiving his or her right to speedy trial; or

(j) The court determines there exists a reasonable and necessary period of delay resulting from proceedings including but not limited to an examination and hearing to determine the mental competency or physical ability of the defendant to stand trial, for hearings on pretrial motions, for appeals by the state, for DNA testing ordered on the defendant's behalf upon defendant's motion specifying the physical evidence to be tested under s. 925.12(2), and for trial of other pending criminal charges against the defendant.

(6) WAIVER OF SPEEDY TRIAL PERIODS.—The time periods of

this section shall be deemed waived by the defendant when any of the following occurs:

(a) A defendant who has not filed a motion for a demand for speedy trial moves for a continuance.

(b) A defendant who has filed a motion for demand for speedy trial moves for a continuance and the motion is granted.

(c) The defendant is unavailable for trial.

(d) The defendant agrees to provide substantial assistance to the state or law enforcement while his or her case is pending.

(e) The state proves by clear and convincing evidence that the defendant has caused major delay or disruption of preparation of proceedings, such as by preventing the attendance of witnesses or otherwise.

(7) MOTION FOR SPEEDY TRIAL.—

(a) A motion for speedy trial may be filed after the time periods under subsections (3) or (4), or any period of extension granted by the court, have expired.

(b) For purposes of calculating the time periods of this section, the filing date of the initial formal charging document shall be the only event which commences the running of speedy trial periods except as provided in subsection (10). No later than 5 days after the date of filing the motion for speedy trial, the court shall hold a hearing on the motion.

(c) A motion for speedy trial shall be granted unless it is shown that:

1. The failure to hold the trial is attributable to the defendant, a codefendant in the same trial, or their counsel;

2. The defendant was unavailable for trial;

3. The applicable time period or extension granted by the court has not expired; or

4. The defendant is not prepared to proceed to trial within 10 days after the hearing on the motion for speedy trial.

If the court finds that none of the reasons set forth in this paragraph exist, it shall grant the motion and order the defendant brought to trial within 10 days unless the court in its discretion authorizes a longer time period of up to 30 days.

(d) A defendant not brought to trial within the 10-day period or other time period prescribed by the court, through no fault of the defendant or the defendant's counsel, may file a motion for dismissal under subsection (8). A person will be considered to have been brought to trial if the trial commences within the required time period. For purposes of this paragraph, a trial is considered commenced when the jury panel for that specific trial has been sworn after voir dire examination and selection or, on waiver of a jury trial, when the proceedings begin before the judge.

(8) MOTION FOR DISMISSAL.—

(a) A defendant whose motion for speedy trial has been granted and who has not been brought to trial pursuant to subsection (7) may file a motion for dismissal of all charges pending before the court and any uncharged crime arising out the same criminal episode as that before the court. A dismissal granted solely due to the failure to bring the defendant to trial before the expiration of the applicable time periods shall

be without prejudice. A motion for dismissal with prejudice may be ordered if the defendant filed a motion for demand for speedy trial under subsection (4) and such motion was granted, and:

1. The length of delay was substantially beyond the applicable time periods and has prejudiced the defendant in his or her defense. Prejudice may be established where the defendant can show by clear and convincing evidence that while outside applicable time period, or during any extended period authorized by the court, an essential witness has died or has become unavailable through no fault of the defendant, the defendant's counsel, or anyone acting on behalf of the defendant or his or her counsel. An essential witness means a witness possessing exculpatory information that cannot be provided by another witness of comparable credibility, or a witness who is essential to explain, identify, or introduce admissible evidence the defendant intended to introduce at trial. Prejudice may also be established where the defendant can show by clear and convincing evidence that exculpatory evidence known to the defense during the applicable time periods has been destroyed, substantially degraded, lost, or become unavailable through no fault of the defendant, the defendant's counsel, or anyone acting on behalf of the defendant or his or her counsel; or

2. The delay has otherwise constituted a substantive violation of the defendant's constitutional right to a speedy trial.

An order granting a dismissal with prejudice under this paragraph must specify factual findings in support of its

conclusion.

(b)1. Charges filed by the state subsequent to a dismissal without prejudice arising out the same criminal episode that was the subject of dismissal may not include a new or enhanced charge that was not previously dismissed. This subparagraph does not prohibit amendment of the charging document as necessary to correct errors or deficiencies which do not add a new charge or alter the severity or substance of the charged offense.

2. If a nolle prosequi is filed after the expiration of the applicable time period under subsection (3) or subsection (4) or provided in any court-prescribed extension, charges based on the same criminal episode filed subsequent to such nolle prosequi may not include any new or enhanced charge that was not previously the subject of the nolle prosequi. This subparagraph does not prohibit amendment of the charging document as necessary to correct errors or deficiencies which do not add a new charge or alter the severity or substance of the charged offense.

3. Refiled charges arising out of the same criminal episode filed subsequent to a dismissal without prejudice or subsequent to a nolle prosequi entered as described in subparagraph 2. must be commenced within 60 days for a misdemeanor offense and 120 days for a felony offense. If the state fails to bring the defendant to trial on such refiled charges as required under this subparagraph through no fault of the defendant, the defendant's counsel, or anyone acting on behalf of the defendant or his or her counsel, the court may in its discretion dismiss the charge without prejudice or with

prejudice if the court finds good cause exists that warrants permanent dismissal of the charge based on consideration of the following factors:

a. The length of the delay.

b. The circumstances and reason for the delay.

c. The seriousness of the charge.

d. The degree of prejudice to the defense.

An order dismissing a charge with prejudice under this subparagraph must be in writing and supported by facts which support findings that the length of the delay was unreasonable and the prejudice to the defendant diminished his or her defense in a material way.

(9) AVAILABILITY FOR TRIAL.—A defendant is unavailable for trial if the defendant or his or her counsel fails to attend a proceeding at which either's presence is required by this section or the defendant or his or her counsel is not ready for trial on the date trial is scheduled. No presumption of unavailability attaches, but if the state objects to a motion for speedy trial and presents any evidence tending to show the defendant's unavailability, the defendant must establish, by competent proof, availability during the applicable time period.

(10) PRISONERS OUTSIDE JURISDICTION.—A person who is in federal custody or incarcerated in a jail or correctional institution outside the jurisdiction of this state or a subdivision thereof and who is charged with a crime by indictment or information issued or filed under the laws of this state is not entitled to the benefit of this section until that

person returns or is returned to the jurisdiction of the court within which the charge in this state is pending and until written notice of the person's return is filed with the court and served on the prosecutor. For these persons, the time period under subsection (3) commences on the date the last act required under this subsection occurs and the time period under subsection (4) commences on the date an order granting a motion for demand for speedy trial is entered following the completion of all acts required under this subsection. If the acts required under this subsection do not precede the issuance of an order granting a motion for demand for speedy trial, the order granting the motion for demand for speedy trial is a nullity.

(11) CONSOLIDATION OF FELONY AND MISDEMEANOR.—When a felony and a misdemeanor are consolidated for disposition in circuit court, the misdemeanor shall be governed by the time period applicable to the felony.

(12) EFFECT OF MISTRIAL; APPEAL; ORDER OF NEW TRIAL.—A person who is to be tried again or whose trial has been delayed by an appeal by the state or the defendant shall be brought to trial within 60 days in the case of a misdemeanor and within 120 days in the case of a felony after the date of declaration of a mistrial by the trial court, the date of an order by the trial court granting a new trial, the date of an order by the trial court granting a motion in arrest of judgment, or the date of receipt by the trial court of a mandate, order, or notice of whatever form from a reviewing court that makes possible a new trial for the defendant, whichever is last in time. If a defendant is not brought to trial within the prescribed time

period, the defendant may file a motion for speedy trial under subsection (7).

(13) PERIOD FOR NEW OR REFILED CHARGES AFTER TIMELY NOLLE PROSEQUI.—This section does not prohibit the state from filing any criminal charge subsequent to the entry of a no information at any time within the statute of limitations period for such offense. This section does not prohibit the refiling of any original charges or any new charges subsequent to the entry of a nolle prosequi when such charges are filed within the statute of limitations period for such offense, if the nolle prosequi was filed prior to the expiration of the time periods provided in subsection (3) or subsection (4) or, in the case of an extension granted by the court, prior to the expiration of the court's extended time period. Filing or refiling of charges after a nolle prosequi prior to the expiration of the applicable time period on the previous charge shall restart the applicable speedy trial time period from the same day at which it ceased due to the filing of the nolle prosequi. The speedy trial period for such new or refiled charges shall be the balance of days remaining on the speedy trial period of the charge or charges that were the subject of the nolle prosequi ~~The Supreme Court shall, by rule of said court, provide procedures through which the right to a speedy trial as guaranteed by subsection (1) and by s. 16, Art. I of the State Constitution, shall be realized~~.

Section 2. Subsection (1) of section 985.35, Florida Statutes, is amended to read:

985.35 Adjudicatory hearings; withheld adjudications; orders of adjudication.—

(1) The adjudicatory hearing must be held as soon as practicable after the petition alleging that a child has committed a delinquent act or violation of law is filed and in accordance with s. 985.36 ~~the Florida Rules of Juvenile Procedure~~; but reasonable delay for the purpose of investigation, discovery, or procuring counsel or witnesses shall be granted. If the child is being detained, the time limitations in s. 985.26(2) and (3) apply.

Section 3. Section 985.36, Florida Statutes, is created to read:

985.36 Juvenile right to speedy trial.—

(1) TIME.—If a petition has been filed alleging a juvenile to have committed a delinquent act, the juvenile shall be brought to an adjudicatory hearing within 90 days after the earlier of the following:

(a) The date the juvenile was taken into custody; or

(b) The date of service of the summons that is issued when the petition is filed.

(2) EXTENSIONS OF TIME.—Extension of the time period under subsection (1) may be granted under the following circumstances:

(a) Unexpected illness, unexpected incapacity, or unforeseeable and unavoidable absence of a person whose presence or testimony is uniquely necessary for a full and adequate trial;

(b) A showing by the state that the case is so unusual and so complex, because of the number of persons charged or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate investigation or preparation within the

prescribed time period;

(c) A showing by the state that specific evidence or testimony is not available despite diligent efforts to secure it, but will become available at a later time;

(d) A showing by the defense or the state of necessity for delay grounded on developments that could not have been anticipated and that materially will affect the trial;

(e) A showing that a delay is necessary to accommodate a codefendant, when there is reason not to sever the cases to proceed promptly with trial of the juvenile;

(f) A showing by the state that the juvenile has caused major delay or disruption of preparation of proceedings, such as by preventing the attendance of witnesses or otherwise.

(g) Other exceptional circumstances exist which, as a matter of substantial justice to the juvenile or the state or both, require an extension;

(h) The state and defense have signed a stipulation for an extension;

(i) The juvenile establishes good cause to grant an extension without waiving his or her right to speedy trial; or

(j) The court determines there exists a reasonable and necessary period of delay resulting from proceedings including but not limited to an examination and hearing to determine the mental competency or physical ability of the juvenile to stand for the adjudicatory hearing, for hearings on pretrial motions, for appeals by the state, and for adjudicatory hearings of other pending charges against the juvenile.

(3) WAIVER OF SPEEDY TRIAL PERIODS.—The time periods of

this section shall be deemed waived by the juvenile when any of the following occurs:

(a) The juvenile moves for a continuance.

(b) The juvenile is unavailable for trial.

(c) The juvenile agrees to provide substantial assistance to the state or law enforcement while his or her case is pending.

(d) The state proves by clear and convincing evidence that the juvenile has caused major delay or disruption of preparation of proceedings, such as by preventing the attendance of witnesses or otherwise.

(4) MOTION FOR SPEEDY TRIAL.—A motion for speedy trial may be filed after the time period under subsection (1) or any period of extension granted by the court has expired. No later than 5 days after the date of filing the motion for speedy trial, the court shall hold a hearing on the motion. A motion for speedy trial shall be granted unless it is shown that:

(a) The failure to hold the adjudicatory hearing is attributable to the juvenile, a codefendant in the same case, or their counsel;

(b) The juvenile was unavailable for trial;

(c) The time period or extension granted by the court has not expired; or

(d) The juvenile is not prepared to proceed to trial within 10 days after the hearing on the motion for speedy trial.

If the court finds that none of the reasons set forth in this subsection exist, it shall grant the motion and order the

juvenile to be brought to an adjudicatory hearing within 10 days. A juvenile not brought to his or her adjudicatory hearing within the 10-day period, through no fault of the juvenile or the juvenile's counsel, may file a motion for dismissal under subsection (5). A juvenile will be considered to have been brought to his or her adjudicatory hearing if the hearing commences within the required time period. For purposes of this subsection, the adjudicatory hearing is considered commenced when the proceedings begin before the judge.

(5) MOTION FOR DISMISSAL.—

(a) A juvenile whose motion for speedy trial has been granted and who has not been brought to an adjudicatory hearing under subsection (4) may file a motion for dismissal of the petition pending before the court and any uncharged delinquent act arising out the same criminal episode as that before the court. If the state failed to bring the juvenile to an adjudicatory hearing as required under subsection (4) through no fault of the juvenile or the juvenile's counsel, the court may in its discretion dismiss the charge without prejudice or with prejudice if the court finds good cause exists which warrants permanent dismissal of the charge based on consideration of the following factors:

1. The length of the delay.

2. The circumstances and reason for the delay.

3. The seriousness of the charge.

4. The degree of prejudice to the defense.

An order dismissing a charge with prejudice under this paragraph

must be in writing and supported by facts which support findings that the length of the delay was unreasonable and the prejudice to the defendant diminished his or her defense in a material way.

(b)1. Charges filed by the state subsequent to a dismissal without prejudice arising out the same criminal episode that was the subject of dismissal may not include any new or enhanced charge that was not previously dismissed. This subsection does not prohibit amendment of the petition as necessary to correct errors or deficiencies which do not add a new charge or alter the severity or substance of the charged offense.

2. If a nolle prosequi is filed after the expiration of the time period specified in subsection (1), charges based on the same criminal episode filed subsequent to such nolle prosequi may not include any new or enhanced charge that was not previously the subject of the nolle prosequi. This subsection does not prohibit amendment of the petition as necessary to correct errors or deficiencies which do not add a new charge or alter the severity or substance of the charged offense.

3. Refiled charges arising out the same criminal episode filed subsequent to a dismissal without prejudice or subsequent to a nolle prosequi entered as described in subparagraph 2. must be commenced within 60 days. If the state fails to bring the juvenile to trial on such refiled charges as required under this subparagraph through no fault of the juvenile or juvenile's counsel, the court may in its discretion dismiss the charge without prejudice or with prejudice if the court finds good cause exists that warrants permanent dismissal of the charge

based on consideration of the following factors:

a. The length of the delay.

b. The circumstances and reason for the delay.

c. The seriousness of the charge.

d. The degree of prejudice to the defense.

An order dismissing a petition with prejudice under this paragraph must be in writing and supported by facts which support findings that the length of the delay was unreasonable and the prejudice to the juvenile diminished his or her defense in a material way.

(6) AVAILABILITY FOR TRIAL.—A juvenile is unavailable for trial if the juvenile or his or her counsel fails to attend a proceeding at which either's presence is required by this section, or the juvenile or his or her counsel is not ready for the adjudicatory hearing on the date it is scheduled. No presumption of unavailability attaches, but if the state objects to a motion for speedy trial and presents any evidence tending to show the juvenile's unavailability, the juvenile must establish, by competent proof, availability during the time period.

(7) INCOMPETENCY OF JUVENILE.—Upon the filing of a motion to declare the juvenile incompetent, the speedy trial period shall be tolled until a subsequent finding of the court that the child is competent to proceed.

(8) EFFECT OF MISTRIAL; APPEAL; ORDER OF NEW TRIAL.—A juvenile who is to have another adjudicatory hearing or whose adjudicatory hearing has been delayed by an appeal by the state

or the defense shall be brought to an adjudicatory hearing within 60 days after the date of declaration of a mistrial by the trial court, the date of an order by the trial court granting a new trial, the date of an order by the trial court granting a motion in arrest of judgment, or the date of receipt by the trial court of a mandate, order, or notice of whatever form from a reviewing court that makes possible a new trial for the respondent, whichever is last in time. If a juvenile is not brought to an adjudicatory hearing within the prescribed time period, the juvenile may file a motion for speedy trial under subsection (5).

(9) PERIOD FOR NEW OR REFILED CHARGES AFTER TIMELY NOLLE PROSEQUI.—This section does not prohibit the state from filing a petition subsequent to the entry of a no petition at any time within the statute of limitations period for such offense if the person who is the subject of the petition remains under the jurisdiction of the juvenile court the day a new petition is filed. This section does not prohibit the refiling of any original charges or any new charges subsequent to the entry of a nolle prosequi when such charges are filed within the statute of limitations period for such offense, if the nolle prosequi was filed prior to the expiration of the time period provided in subsection (1) and if the person who is the subject of the new charges in the petition remains under the jurisdiction of the juvenile court the day a new petition is filed. Filing or refiling of charges after a nolle prosequi prior to the expiration of the applicable time period on the previous charge shall restart the speedy trial time period from the same day at

which it ceased due to the filing of the nolle prosequi. The speedy trial period for such new or refiled charges shall be the balance of days remaining on the speedy trial period of the charge or charges that were the subject of the nolle prosequi.

Section 4. Rule 3.191, Florida Rules of Criminal Procedure, is repealed.

Section 5. This act shall take effect October 1, 2010, but section 4 of this act shall take effect only if this act is enacted by a two-thirds vote of the membership of each house of the Legislature.