Justice Appropriations Subcommittee

Monday, April 17, 2017
4:00 PM – 5:30 PM

Meeting Packet

Richard Corcoran
Speaker

Bill Hager
Chair

The Florida House of Representatives

Appropriations Committee

Justice Appropriations Subcommittee

Richard Corcoran
Speaker

Bill Hager
Chair

Meeting Agenda

Monday, April 17, 2017
Morris Hall (17 HOB)
4:00 PM – 5:30 PM

I. **Call to Order / Roll Call**

II. **Opening Remarks**

III. **Consideration of the following bill(s):**

CS/HB 345 - Criminal Justice Standards and Training Commission by Criminal Justice Subcommittee, Asencio

CS/HB 393 - Compensation of Victims of Wrongful Incarceration by Criminal Justice Subcommittee, DuBose

CS/HB 641 - Sentencing for Possession of a Controlled Substance by Criminal Justice Subcommittee, Shaw

HB 879 - Unlawful Acquisition of Utility Services by Burgess

CS/HB 1091 - Arrest Warrants for State Prisoners by Criminal Justice Subcommittee, Plakon

IV. **Closing Remarks / Meeting Adjourned**

221 The Capitol, 402 South Monroe Street, Tallahassee, F 32399-1300
(850) 717-4810

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 345 Criminal Justice Standards and Training Commission
SPONSOR(S): Criminal Justice Subcommittee; Asencio and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 350

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	14 Y, 0 N, As CS	White	White
2) Justice Appropriations Subcommittee		Welty	Gusky
3) Judiciary Committee			

SUMMARY ANALYSIS

The Criminal Justice Standards and Training Commission (Commission), within the Florida Department of Law Enforcement (FDLE), is required to ensure that applicants entering into a criminal justice basic recruit program have successfully passed a Commission-approved basic abilities examination. This examination is formally referred to as the Basic Abilities Test (BAT).

To implement this responsibility, the Commission currently contracts with two out-of-state vendors and Miami Dade College to develop and administer the BAT. Each vendor administers a different test and training and selection centers for officers have the discretion to choose which test to administer. The FDLE reports the current system has resulted in inconsistency throughout the state with respect to the difficulty levels of the BATs and fees assessed for the exam. Currently, fees for the BAT range from $18 for tests administered at state correctional facilities to $75 for tests administered at other locations, with a statewide average of $46.

The federal Department of Justice reviewed BAT test scores from 2010 to 2015, and found that the tests had an adverse impact on minority test takers. With respect to this finding, the FDLE reports that changes to the BAT have been implemented and lower passage rates for the BAT have been retroactively applied. If the state does not correct the deficiencies identified by the OCR, there is a risk that the state may lose all or a portion of federal funding received from the Justice Assistance Grant (JAG) Program (also known as "Byrne Grants") and Residential Substance Abuse Treatment for State Prisoners Program.

The bill amends s. 943.12, F.S., to require the Commission, on or before January 1, 2019, to implement, administer, maintain, and revise a BAT for all applicants for basic recruit training in law enforcement and corrections. The Commission must adopt rules establishing procedures for the BAT administration, and must establish standards for acceptable performance on the test.

The bill also authorizes the Commission to establish a nonrefundable fee not to exceed $50 for one scheduled BAT attempt. Fees collected for the BAT must be deposited in the Criminal Justice Standards and Training Trust Fund (CJSTTF). Revenues from the fee will generate approximately $1 million per year, and will cover anticipated expenditures. The bill provides that the fee shall take effect upon the implementation of the revised BAT on or before January 1, 2019.

Individuals who seek entrance into a criminal justice basic recruit program will have to pay a fee of up to $50 to take the BAT, which may be an increase or decrease from the fee currently charged by a vendor.

The bill does not appear to have any impact on local government revenues or expenditures.

The bill provides an effective date of July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The Criminal Justice Standards and Training Commission (Commission),[1] is established within the Florida Department of Law Enforcement (FDLE). The Commission is statutorily-assigned responsibilities relating to the training, certification, and discipline of full-time, part-time, and auxiliary law enforcement officers,[2] correctional officers,[3] and correctional probation officers,[4] which include:

- Certifying, and revoking the certification of, officers, instructors, including agency in-service training instructors, and criminal justice training schools.[5]
- Establishing uniform minimum employment standards for the various criminal justice disciplines.
- Establishing uniform minimum training standards for the training of officers in the various criminal justice disciplines.
- Establishing minimum curricular requirements for criminal justice training schools.
- Making, publishing, or encouraging studies on any aspect of criminal justice education and training or recruitment, including the development of defensible and job-related psychological, selection, and performance evaluation tests.
- Implementing, administering, maintaining, and revising a job-related officer certification examination for each criminal justice discipline.[6]

Basic Abilities Test

Section 943.17, F.S., requires the Commission, in relevant part, to ensure that applicants entering into a criminal justice basic recruit program have successfully passed a Commission-approved basic abilities test (BAT).[7] The BAT must be administered in Florida and tailored to the applicable discipline for which the recruit is seeking program admission.[8]

Currently, the Commission contracts with three vendors for the development and administration of the BAT. Two of the providers, I/O Solutions and Morris & McDaniel, are out-of-state vendors. The third provider is Miami Dade College. Each of the vendors administers a different test. Training centers and selection centers have the discretion to choose which test to administer.[9]

---

[1] *See* s. 943.11(1)(a), F.S. (providing that the commission must consist of 19 members, including: the Secretary of Corrections or a designated assistant; the Attorney General or a designee; the Director of the Division of the Florida Highway Patrol; and 16 members appointed by the Governor who are employed in specified law enforcement roles.).

[2] Section 943.10(1), F.S., defines "law enforcement officer" to mean any person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof; who is vested with authority to bear arms and make arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state.

[3] Section 943.10(2), F.S., defines "correctional officer" to mean any person who is appointed or employed full time by the state or any political subdivision thereof, or by any private entity which has contracted with the state or county, and whose primary responsibility is the supervision, protection, care, custody, and control, or investigation, of inmates within a correctional institution.

[4] Section 943.10(3), F.S., defines "correctional probation officer" to mean a person who is employed full time by the state whose primary responsibility is the supervised custody, surveillance, and control of assigned inmates, probationers, parolees, or community controllees within institutions of the Department of Corrections or within the community.

[5] Section 943.10(16), F.S., defines "criminal justice training school" to mean any private or public criminal justice training school certified by the Commission.

[6] s. 943.12, F.S.

[7] s. 943.17(1)(g), F.S. and Rule 11B-35.0011(1), F.A.C.

[8] Rule 11B-35.0011(1), F.A.C. The rule includes references to law enforcement, correctional, or correctional probation disciplines.

[9] FDLE, Agency Analysis of HB 345 (2017), pp. 2-3 (July 1, 2017) (on file with the Justice Appropriations Subcommittee).

As a result of the current system, the difficulty levels among the BATs lack consistency across the state. There is also inconsistency across the state as to the fee a student is responsible to pay for taking the BAT. Fees for the BAT currently range from $18 to $75 with a statewide average of $46 Additionally, some testing administration sites charge an additional surcharge of $25. All fees and surcharges collected are retained by the three providers and test administration sites.[10]

Department of Justice Review of the BAT

In 2015, the Office of Civil Rights (OCR) within the Department of Justice reviewed test results from each of the three providers for 2010-2015, for the law enforcement BAT. Subsequently, in October 2015, the OCR sent a letter to the FDLE indicating that each of the three law enforcement BATs had a statistically significant adverse impact[11] on minority test takers; however, the OCR further indicated that the I/O Solutions' test exhibited a higher degree of adverse impact to minority test takers compared to the other two law enforcement BATs provided by Morris & McDaniel and Miami Dade College. Due to this finding, the OCR recommended that the FDLE discontinue use of the I/O Solutions' test and expand use of the BAT offered by the other two providers.[12]

Fiscal Year 2016-2017 Proviso Language

During the 2016 Regular Session, proviso language was adopted, as follows:

> From the funds in Specific Appropriations 1267 through 1276, the Department of Law Enforcement shall report on the status of development of the basic abilities test for all applicants for basic recruit training in law enforcement and corrections. The report shall include recommendations regarding statutory language necessary for implementation of the basic abilities test, including establishment of a standardized fee structure that does not deter low-income and middle-income persons from taking the test. The report and recommendations shall be provided to the Governor, President of the Senate, and Speaker of the House of Representatives by January 1, 2017.[13]

In its report on December 30, 2016, the FDLE indicated with respect to the issue raised by OCR that:

> OCR recommended FDLE discontinue using I/O Solutions; however, this would have left a large void in service throughout the state. After several communications with OCR and I/O Solutions, the parties agreed I/O Solution would change its test and lower the passing rate. FDLE also agreed to retroactively apply the new passing rate to applicants who had taken the test during the previous five years. OCR is aware of the proposal for FDLE to develop a single test and sees this as a major part of the solution to address adverse impact. They continue to monitor the situation.[14]

The report further indicated that FDLE will develop a single BAT to be administered throughout the state. Specifically, the report stated:

> FDLE will assume the role of content development for the BAT and evaluate each question's validity based on the performance of the test takers. ... FDLE also determined Miami Dade College, a current provider, is capable of fulfilling the requirements for administration of the BAT statewide. ... FDLE has been in formal discussion with college representatives and has

---

[10] *Id.*

[11] Adverse impact means "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact." 29 C.F.R. 1607.4 D.

[12] Letter from the U.S. Department of Justice, Office of Justice Programs, Office for Civil Rights to the FDLE (October 23, 2015) (on file with the Florida House of Representatives, Criminal Justice Subcommittee).

[13] HB 5001 (2016), Specific Appropriations 1267-1276.

[14] FDLE, *Report on the Status of Development of the Basic Abilities Test*, pp. 2-3 (December 30, 2016) (on file with the Florida House of Representatives, Criminal Justice Subcommittee).

> a tentative agreement with them through a proposed Memorandum of Understanding .... Under the agreement, Miami Dade College assumes sole responsibility for administration of the BAT ... and will ensure the test is consistently and fairly administered.[15]

With regard to fees for the BAT, the report proposed a test fee capped at $50, which includes an allowance for up to a $10 administrative fee. The report stated, "The fee is structured to allow all parties responsible for the development and administration of the BAT to recover some, if not all, of their costs. It is based on expected costs for both Miami Dade College and FDLE. Miami Dade College has proposed a fee of $20 per test to cover their costs and the department estimates its costs will also be covered by receiving $20 per test."[16]

Finally, the report proposed draft legislation that is substantively the same as this bill.[17]

Effect of Bill

The bill amends s. 943.12, F.S., which specifies the Commission's powers and duties, to require the Commission, on or before January 1, 2019, to implement, administer, maintain, and revise a BAT for all applicants for basic recruit training in law enforcement and corrections. The Commission must adopt rules establishing procedures for the administration of the BAT, and must establish standards for acceptable performance on the test.

The bill also amends s. 943.17(1), F.S., to authorize the Commission to establish a fee up to $50 for one scheduled BAT attempt. The fee is not refundable. Fees collected for the BAT must be deposited in the Criminal Justice Standards and Training Trust Fund (CJSTTF).[18]

Finally, the bill: (a) reenacts and amends s. 943.25, F.S., to change a cross-reference so that it allows expenditures from the CJSTTF for the BAT; and (b) reenacts s. 943.173, F.S., to incorporate the amendments made by the bill to s. 943.17, F.S.

B. SECTION DIRECTORY:

Section 1. Amends s. 943.12, F.S., relating to powers, duties, and functions of the Commission.

Section 2. Amends s. 943.17, F.S., relating to basic recruit, advanced, and career development training programs.

Section 3. Provides an effective date for the fee authorized in the bill.

Section 4. Reenacts s. 943.173, F.S., relating to examinations.

Section 5. Reenacts and amends s. 943.25, F.S., relating to criminal justice trust funds.

Section 6. Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

---

[15] *Id.* at 3-4.

[16] *Id.* at 4.; FDLE, Agency Analysis of HB 345 (2017) at p. 4.

[17] *Id.* at 5.

[18] Section 943.25, F.S., establishes the Criminal Justice Standards and Training Trust Fund within the FDLE for purposes that include providing for the payment of: (a) necessary and proper expenses incurred by the operation of the Commission and the Criminal Justice Professionalism Program; and (b) commission-approved criminal justice advanced and specialized training and criminal justice training school enhancements.

1. Revenues:

   The FDLE projects that 20,000 individuals will take the BAT annually, which would result in $1,000,000 of new revenue to the state if the fee is set at the statutory maximum amount of $50. Of this amount, FDLE estimates that $400,000 will be provided to Miami Dade College to administer the BAT, $400,000 will be retained by FDLE for the cost to develop the BAT, and $100,000 will be provided to the individual training centers for the cost to proctor the test.

2. Expenditures:

   The FDLE states that $20 per test will pay for the FDLE's cost for the Commission to develop and maintain the BAT, which includes standard setting, form development, validation and interfacing with the current testing system. The $20 per test will offset Miami-Dade College's cost to administer the BAT, which includes updating software for the test, training on the software and ensuring the security of the test.[19] The $10 fee collected by the individual testing centers will be used to cover the cost of proctoring the test.[20]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: The bill does not appear to have any impact on local government revenues.

2. Expenditures: The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: Individuals who seek entrance into a criminal justice basic recruit program will have to pay a fee of up to $50 to take the BAT, which may be an increase or decrease from the fee currently charged by a vendor. Two of the current test vendors, I/O Solutions and Morris and McDaniel, will no longer receive fees for developing the BAT once the Commission assumes that responsibility.

D. FISCAL COMMENTS:

The Office of Civil Rights (OCR) expressed concerns regarding the Basic Abilities Test in Florida for is disparate impact on Blacks and Hispanics.[21] Recipients of federal funding under the Safe Streets Act may not use a selection device that is inconsistent with the federal guidelines for selection. If the state does not correct the deficiencies identified by the OCR, there is a risk that the state may lose all or a portion of federal funding from the Justice Assistance Grant (JAG) Program (also known as "Byrne Grants") and Residential Substance Abuse Treatment for State Prisoners Program.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other: None.

---

[19] *Id.* at 4.
[20] FDLE, HB 345- Additional Information, (2017), (March 30, 2017) (on file with Justice Appropriations Subcommittee).
[21] Michael L. Alston, Director Office of Civil Rights. Concerns and Recommendations Regarding Fla. Dep't of Law Enforcement's Law Enforcement Basic Abilities Test (15-OCR-0783) October 23, 2015. (on file with Justice Appropriations Subcommittee).

B. RULE-MAKING AUTHORITY: The bill requires the Commission to adopt rules establishing procedures for the administration of the BAT.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 15, 2017, the Criminal Justice Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute (CS). The CS differs from the bill as filed in that the CS:

- Extended the deadline for the CJSTC's requirement to implement, administer, maintain, and review the BAT from January 1, 2018, to January 1, 2019.
- Provides that the BAT fee is nonrefundable; whereas, the bill provided that it was nonrefundable if the applicant does not appear for the examination or does not achieve an acceptable score on the exam.
- Provides that the fees collected for the BAT are to be deposited in the CJSTTF; whereas, the bill provided that the fees would be disbursed according to CJSTC rule.

This analysis is drafted to the CS as passed by the Criminal Justice Subcommittee.

A bill to be entitled

An act relating to the Criminal Justice Standards and Training Commission; amending s. 943.12, F.S.; requiring the Criminal Justice Standards and Training Commission to implement, administer, maintain, and revise a basic abilities examination by a specified date; requiring the commission to establish specified procedures and standards; amending s. 943.17, F.S.; requiring the commission to set a fee for the basic abilities examination; requiring a nonrefundable fee for each examination attempt; requiring that examination fees be deposited in the Criminal Justice Standards and Training Trust Fund; providing a condition for when the examination fee takes effect; reenacting s. 943.173(3), F.S., relating to examinations, administration, and materials not being public records, to incorporate the amendment made to s. 943.17, F.S., in a reference thereto; reenacting and amending s. 943.25(2), F.S., relating to criminal justice trust funds; conforming a provision to changes made by the act; providing an effective date.

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

Section 1. Subsection (18) is added to section 943.12,

Florida Statutes, to read:

943.12 Powers, duties, and functions of the commission.—The commission shall:

(18) On or before January 1, 2019, implement, administer, maintain, and revise a basic abilities examination for all applicants for basic recruit training in law enforcement and corrections. The commission shall establish by rule procedures for the administration of the basic abilities examination. The commission shall also establish standards for acceptable performance on the examination.

Section 2. Paragraph (g) of subsection (1) of section 943.17, Florida Statutes, is amended, and paragraph (h) is added to that subsection, to read:

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

(1) The commission shall:

(g) Assure that entrance into the basic recruit training program for law enforcement and correctional officers be limited

to those who have passed a basic abilities ~~skills~~ examination ~~and assessment instrument~~, based on a job task analysis in each discipline and adopted by the commission.

(h) Set a fee, not to exceed $50, for the basic abilities examination. The fee applies to one scheduled examination attempt and is not refundable. Fees collected pursuant to this paragraph shall be deposited in the Criminal Justice Standards and Training Trust Fund.

Section 3. Paragraph (h) of subsection (1) of s. 943.17, Florida Statutes, as created by this act, shall take effect upon the implementation of the revised basic abilities examination on or before January 1, 2019, as specified in s. 943.12(18), Florida Statutes.

Section 4. For the purpose of incorporating the amendment made by this act to section 943.17, Florida Statutes, in a reference thereto, subsection (3) of section 943.173, Florida Statutes, is reenacted to read:

943.173 Examinations; administration; materials not public records; disposal of materials.—

(3) All examinations, assessments, and instruments and the results of examinations, other than test scores on officer certification examinations, including developmental materials and workpapers directly related thereto, prepared, prescribed, or administered pursuant to ss. 943.13(9) or (10) and 943.17 are exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I

of the State Constitution. Provisions governing access to, maintenance of, and destruction of relevant documents pursuant to this section shall be prescribed by rules adopted by the commission.

Section 5. Subsection (2) of section 943.25, Florida Statutes, is reenacted and amended to read:

943.25 Criminal justice trust funds; source of funds; use of funds.—

(2) There is created, within the Department of Law Enforcement, the Criminal Justice Standards and Training Trust Fund for the purpose of providing for the payment of necessary and proper expenses incurred by the operation of the commission and the Criminal Justice Professionalism Program and providing commission-approved criminal justice advanced and specialized training and criminal justice training school enhancements and of establishing the provisions of s. 943.17 and developing the specific tests provided under s. 943.12 ~~943.12(9)~~. The program shall administer the Criminal Justice Standards and Training Trust Fund and shall report the status of the fund at each regularly scheduled commission meeting.

Section 6. This act shall take effect July 1, 2017.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 345 (2017)

Amendment No. 1

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

Committee/Subcommittee hearing bill: Justice Appropriations Subcommittee

Representative Asencio offered the following:

Amendment

Remove lines 54-55 and insert:

(h) Set a basic abilities examination fee in rule that solely offsets department costs to design, implement, maintain, revise, and administer the examination. The fee shall not exceed $23 per examination as to not cause an undue financial burden on those individuals seeking to enter the law enforcement or corrections professions. The Fee applies to one scheduled examination

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 393 Compensation of Victims of Wrongful Incarceration
SPONSOR(S): Criminal Justice Subcommittee; DuBose
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 556

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N, As CS	Aziz	White
2) Justice Appropriations Subcommittee		Welty	Gusky
3) Judiciary Committee			

SUMMARY ANALYSIS

In 2008, the Legislature passed the "Victims of Wrongful Incarceration Compensation Act" (Act) which establishes an administrative process to compensate a person who is determined to have been wrongfully incarcerated. Under current law, a person is not eligible for compensation for wrongful incarceration if he or she has a criminal history that includes any felony.[1] This is commonly known as the "clean hands" provision of Florida's wrongful incarceration compensation law.

The bill amends the above-described eligibility requirements to narrow the types of felonies which disqualify a person from receiving compensation for a wrongful incarceration. The bill provides a definition of the term "disqualifying felony" to mean, "any felony other than one or more felonies of the third degree that arise from a single criminal act, transaction, or episode." Accordingly, only persons who have a first or second degree felony conviction or who have a third degree felony conviction arising from a second or subsequent criminal act, transaction, or episode will be disqualified from receiving compensation under the Act.

The bill has an indeterminate fiscal impact on state government as it is unknown how many applicants would be eligible under the expanded criteria. The bill does not appear to have a fiscal impact on local governments.

The bill provides an effective date of October 1, 2017.

[1] Section 961.04, F.S.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Victims of Wrongful Incarceration Compensation Act

In Florida, 13 people have been exonerated or released from incarceration since 2000 as a result of post-conviction DNA testing.[2] The Victims of Wrongful Incarceration Compensation Act (Act) has been in effect since July 1, 2008. The Act provides a process by which persons whose conviction and sentence has been vacated based upon exonerating evidence may petition the court to seek and obtain compensation as a "wrongfully incarcerated person"[3] who is "eligible for compensation."[4]

Petition Process

To receive compensation under the Act, a person must return to the court where the judgment and sentence were vacated and file a petition seeking status as a "wrongfully incarcerated person." Section 961.03(1)(a), F.S., requires that a petition must:

- State that verifiable and substantial evidence of actual innocence exists and state with particularity the nature and significance of the verifiable and substantial evidence of actual innocence; and
- State that the person is not disqualified, under the provisions of s. 961.04, F.S., from seeking compensation under the Act.

A copy of the petition must be provided to the prosecuting authority of the felony for which the petitioner was incarcerated. In response to the petition, the prosecuting authority may either:

- Stipulate to the petitioner's innocence and eligibility for compensation;
- Contest the evidence of actual innocence; or
- Contest the eligibility of the petitioner to compensation.[5]

Without a stipulation from the prosecuting authority of the petitioner's innocence and eligibility, the original sentencing court, based on the pleadings and the supporting documents, must determine whether the petitioner's eligibility for compensation has been established by a preponderance of the evidence. If the court finds the petitioner is not eligible for compensation, it must dismiss the petition.[6]

If the court finds the petitioner is eligible for compensation and the prosecuting authority contests the actual innocence of the petitioner, the court must set forth its findings and transfer the petition to the Division of Administrative Hearings (DOAH) for a hearing before an administrative law judge (ALJ). The ALJ must make factual findings regarding the petitioner's actual innocence and draft a recommended order on the determination of whether the petitioner has established by clear and convincing evidence that he or she is a wrongfully incarcerated person.[7] The ALJ must file its findings and recommended order within 45 days of the hearing's adjournment.[8] The original sentencing court must review the

---

[2] Frank Lee Smith, Jerry Townsend, Wilton Dedge, Luis Diaz, Alan Crotzer, Orlando Boquete, Larry Bostic, Chad Heins, Cody Davis, William Dillon, James Bain, Anthony Caravella, and Derrick Williams are the thirteen people released from prison or exonerated in this state based on DNA testing. Florida Innocence Project, http://floridainnocence.org/content/?page_id=34. (last visited on March 22, 2017).

[3] Section 961.02(4), F.S., defines a "wrongfully incarcerated person" as a "person whose felony conviction and sentence have been vacated by a court of competent jurisdiction and, with respect to whom pursuant to the requirements of s. 961.03,F.S., the original sentencing court has issued its order finding that the person neither committed the act nor the offense that served as the basis for the conviction and incarceration and that the person did not aid, abet, or act as an accomplice or accessory to a person who committed the act or offense."

[4] Section 961.02(5), F.S., defines "eligible for compensation" to mean "a person who meets the definition of 'wrongfully incarcerated person' and is not disqualified from seeking compensation under the criteria prescribed in s. 961.04." The Act does not currently provide a definition of "actual innocence"; instead some provisions of the Act repeat a lengthy description of a concept of actual innocence. *See* ss. 961.02(4), 961.03(3), and (7), F.S.

[5] s. 961.03(2)(a) and (b), F.S.

[6] s. 961.03(4)(a), F.S.

[7] s. 961.03(4)(b), F.S.

[8] s. 961.03 (5)(c) and (d), F.S.

findings and recommendation of the ALJ and issue its own order declining or adopting the recommended order within 60 days.[9]

Eligibility
To be eligible for compensation, a wrongfully incarcerated person must not have a disqualifying felony, which means the person:

- Was convicted or pled guilty or nolo contendere to a felony offense in this state, a federal offense that is a felony, or to an offense in another state that would be a felony in this state before his or her wrongful conviction or incarceration.
- Was convicted of, or pled guilty or nolo contendere to, a felony offense while wrongfully incarcerated;
- Was serving a concurrent sentence for another felony for which the person was not wrongfully convicted while wrongfully incarcerated; or
- Committed a felony while serving on parole or community supervision for the wrongful conviction. [10]

These eligibility requirements are commonly referred to as the "Clean Hands" requirements.

Application Process
A petitioner who is found to be a "wrongfully incarcerated person" has two years to initiate an application for compensation with the Department of Legal Affairs after the original sentencing court enters its order.[11] Only the petitioner, not his or her estate or personal representative of the estate, may apply for compensation.[12] Section 961.05(4), F.S., lists the content requirements of an application for compensation. In part, it requires that the application include:

- A certified copy of the order vacating the conviction and sentence;
- A certified copy of the original sentencing court's order finding the claimant to be a wrongfully incarcerated person who is eligible for compensation under the Act;
- Certified copies of the original judgment and sentence; and
- Documentation demonstrating the length of the sentence served, including documentation from the Department of Corrections regarding the person's admission into and release from the custody of the Department of Corrections.[13]

Compensation
Under s. 961.06, F.S., a "wrongfully incarcerated person" is entitled to:

- Monetary compensation, at the rate of $50,000 for each year of wrongful incarceration;
- A waiver of tuition and fees for up to 120 hours of instruction at a public career center, community college, or state university;
- A refund of fines, penalties, and court costs imposed and paid;
- Reasonable attorney's fees and expenses incurred and paid; and
- Immediate expunction, including administrative expunction, of the person's criminal record of the wrongful arrest, conviction, and incarceration.[14]

Total compensation awarded may not exceed $2 million.[15]

Wrongful Incarceration Claims in Florida
To date, four persons have been compensated under the administrative process for a total of $4,276,901. Six other claimants had their claims denied, based on either ineligibility or incomplete applications.[16]

---

[9] s. 961.03(5)(d), F.S.
[10] ss. 961.04 and 961.06(2), F.S.
[11] s. 961.05(1) and (2), F.S.
[12] s. 961.05(2), F.S.
[13] s. 961.05(4), F.S.
[14] s. 961.06(1), F.S.
[15] *Id.*

Claim Bills
Since the Act's inception, a number of claim bills have been filed on behalf of wrongfully incarcerated persons who are ineligible for compensation under the Act due to a felony conviction before or during the wrongful incarceration. At least two such persons have received compensation for a wrongful incarceration through the claim bill process. For example in 2012, a claims bill was adopted for the wrongful incarceration of William Dillon. Due to a prior felony conviction for a single Quaalude, Dillon was barred from seeking compensation under the Act.[17, 18]

Other States - Clean Hands Requirements
Currently, there are 29 states that have a process to compensate wrongfully incarcerated individuals. Of this number, nine states have some form of clean hands provision that prohibits compensation for convictions.[19] Three of the nine states revoke compensation if the person is later convicted of a felony.[20] Florida, however, is the only state that bars applicants for a prior felony conviction.

Effect of the Bill
The bill amends the eligibility requirements of the Act in ss. 961.04 and 961.06, F.S., to narrow the types of felonies which disqualify a person from receiving compensation for a wrongful incarceration. The bill defines the term "disqualifying felony" to mean, "any felony other than one or more felonies of the third degree which arise from a single criminal act, transaction, or episode."[21] Accordingly, only persons with a first[22] or second degree felony[23] conviction or with a third degree felony[24] conviction arising from a *second or subsequent* criminal act, transaction, or episode will be disqualified from receiving compensation under the Act.

The bill reenacts ss. 961.03, 961.05, 961.055, and 961.056, F.S., to incorporate the amendments made by the act.

The bill provides an effective date of October 1, 2017.

B. SECTION DIRECTORY:

Section 1. Amends s. 961.02, F.S., relating to definitions.

Section 2. Amends s. 961.04, F.S., relating to eligibility for compensation for wrongful incarceration.

Section 3. Amends s. 961.06, F.S., relating to compensation for wrongful incarceration.

Section 4. Reenacts s. 961.03, F.S., relating to determination of status as a wrongfully incarcerated person; determination of eligibility for compensation.

---

[16] Email correspondence with the Office of the Attorney General (Jan. 14, 2016 and March 1, 2017) (on file with House of Representatives Criminal Justice Subcommittee). Persons whose claims have been successful are Leroy McGee (2010), James Bain (2011), Luis Diaz (2012), and James Richardson (2015). Jarvis McBride's claim was denied (2012). Three persons had their claims rejected based on incomplete applications. These are Robert Lewis (2011), Edwin Lampkin (2012), and Robert Glenn Mosley (2014). Two other claimants were determined to be ineligible for compensation (Ricardo Johnson (2013) and Joseph McGowan (2015)).
[17] Chapter 2012-229, L.O.F. (compensating William Dillon for wrongful incarceration despite ineligibility for compensation under the Act).
[18] *See also* ch. 2008-259, L.O.F. (compensating Alan Crotzer for wrongful incarceration despite ineligibility for compensation under the Act).
[19] 50 State Survey of Wrongful Incarceration Compensation Law, June 2014 (on file with the House of Representatives Criminal Justice Subcommittee).
[20] Alabama, Texas, and Virginia. *Id.*
[21] To determine whether offenses arose out of the same criminal episode, a reviewing court must consider whether: (a) there are multiple victims; (b) the offenses occurred in multiple locations, and (c) there has been a 'temporal break' between offenses. *State v. Paul*, 934 So. 2d 1167, 1173 (Fla.2006) (overruled on other grounds by *Valdes*, 3 So. 3d 1067).
[22] A first degree felony is punishable by up to 30 years imprisonment and a $10,000 fine. Sections 775.082 and 775.083, F.S.
[23] A second degree felony is punishable by up to 15 years imprisonment and a $10,000 fine. Sections 775.082 and 775.083, F.S.
[24] A third degree felony is punishable by up to five years imprisonment and a $5,000 fine. Sections 775.082 and 775.083, F.S.

Section 5. Reenacts s. 961.05, F.S., relating to application for compensation or a wrongful incarceration; administrative expunction; determination of entitlement to compensation.

Section 6. Reenacts s. 961.055, F.S., relating to application for compensation for a wrongfully incarcerated person; exemption from application by nolle prosequi.

Section 7. Reenacts s. 961.056, F.S., relating to alternative application for compensation for a wrongful incarcerated person.

Section 8. Provides an effective date of October 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: The bill does not appear to have any impact on state revenues

2. Expenditures: The bill expands the pool of persons eligible for compensation due to wrongful incarceration, which could increase state expenditures to provide such compensation. The increase is indeterminate because data regarding the number of wrongfully incarcerated persons who may now qualify for compensation under the Act is unavailable. The Act is funded through a continuing appropriation.[25]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: The bill does not appear to have any impact on local government revenues.

2. Expenditures: The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other: None.

B. RULE-MAKING AUTHORITY: The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

[25] s. 961.07, F.S.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 28, 2017, the Criminal Justice Subcommittee adopted a proposed committee substitute (PCS) and reported the bill favorably as a committee substitute (CS). The PCS substituted the newly defined term "disqualifying felony" for the term "violent felony" in the original bill.

This analysis is drafted to the CS as passed by the Criminal Justice Subcommittee.

A bill to be entitled

An act relating to compensation of victims of wrongful incarceration; amending s. 961.02, F.S.; making technical changes; defining the term "disqualifying felony"; amending s. 961.04, F.S.; revising the circumstances under which a wrongfully incarcerated person is ineligible for compensation under the Victims of Wrongful Incarceration Compensation Act; amending s. 961.06, F.S.; providing that a wrongfully incarcerated person who commits a disqualifying felony, rather than any felony law violation, which results in revocation of parole or community supervision is ineligible for compensation; reenacting s. 961.03(1)(a), (2), (3), and (4), F.S., relating to determination of status as a wrongfully incarcerated person and of eligibility for compensation, to incorporate the amendment made to s. 961.04, F.S., in references thereto; reenacting ss. 961.05(6), 961.055(1), and 961.056(4), F.S., relating to determination of entitlement to compensation, application for compensation for a wrongfully incarcerated person, and an alternative application for compensation for a wrongfully incarcerated person, respectively, to incorporate the amendments made to s. 961.06, F.S., in references thereto; providing an

effective date.

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

Section 1. Section 961.02, Florida Statutes, is amended to read:

961.02 Definitions.—As used in ss. 961.01-961.07, the term:

(1) "Act" means the Victims of Wrongful Incarceration Compensation Act.

(2) "Department" means the Department of Legal Affairs.

(3) "Disqualifying felony" means any felony other than one or more felonies of the third degree that arise from a single criminal act, transaction, or episode.

(4) ~~(3)~~ "Division" means the Division of Administrative Hearings.

(5) "Eligible for compensation" means that a person meets the definition of the term "wrongfully incarcerated person" and is not disqualified from seeking compensation under the criteria prescribed in s. 961.04.

(6) "Entitled to compensation" means that a person meets the definition of the term "eligible for compensation" and satisfies the application requirements prescribed in s. 961.05, and may receive compensation pursuant to s. 961.06.

(7) ~~(4)~~ "Wrongfully incarcerated person" means a person

whose felony conviction and sentence have been vacated by a court of competent jurisdiction and who is the subject of an order issued by the original sentencing court pursuant to s. 961.03~~, with respect to whom pursuant to the requirements of s. 961.03, the original sentencing court has issued its order~~ finding that the person did not commit ~~neither committed~~ the act or ~~nor the~~ offense that served as the basis for the conviction and incarceration and that the person did not aid, abet, or act as an accomplice or accessory to a person who committed the act or offense.

Section 2. Section 961.04, Florida Statutes, is amended to read:

961.04 Eligibility for compensation for wrongful incarceration.—A wrongfully incarcerated person is not eligible for compensation under the act if:

(1) Before the person's wrongful conviction and incarceration, the person was convicted of, or pled guilty or nolo contendere to, regardless of adjudication, any disqualifying felony ~~offense~~, or a crime committed in another jurisdiction the elements of which would constitute a disqualifying felony in this state, or a crime committed against the United States which would constitute ~~is designated~~ a disqualifying felony, excluding any delinquency disposition;

(2) During the person's wrongful incarceration, the person was convicted of, or pled guilty or nolo contendere to,

regardless of adjudication, any disqualifying felony ~~offense~~; or

(3) During the person's wrongful incarceration, the person was also serving a concurrent sentence for another felony for which the person was not wrongfully convicted.

Section 3. Subsection (2) of section 961.06, Florida Statutes, is amended to read:

961.06 Compensation for wrongful incarceration.—

(2) In calculating monetary compensation under paragraph (1)(a), a wrongfully incarcerated person who is placed on parole or community supervision while serving the sentence resulting from the wrongful conviction and who commits anything less than a disqualifying felony ~~law violation~~ that results in revocation of the parole or community supervision is eligible for compensation for the total number of years incarcerated. A wrongfully incarcerated person who commits a disqualifying felony ~~law violation~~ that results in revocation of the parole or community supervision is ineligible for any compensation under subsection (1).

Section 4. For the purpose of incorporating the amendment made by this act to section 961.04, Florida Statutes, in references thereto, paragraph (a) of subsection (1) and subsections (2), (3), and (4) of section 961.03, Florida Statutes, are reenacted to read:

961.03 Determination of status as a wrongfully incarcerated person; determination of eligibility for

compensation.—

(1)(a) In order to meet the definition of a "wrongfully incarcerated person" and "eligible for compensation," upon entry of an order, based upon exonerating evidence, vacating a conviction and sentence, a person must set forth the claim of wrongful incarceration under oath and with particularity by filing a petition with the original sentencing court, with a copy of the petition and proper notice to the prosecuting authority in the underlying felony for which the person was incarcerated. At a minimum, the petition must:

1. State that verifiable and substantial evidence of actual innocence exists and state with particularity the nature and significance of the verifiable and substantial evidence of actual innocence; and

2. State that the person is not disqualified, under the provisions of s. 961.04, from seeking compensation under this act.

(2) The prosecuting authority must respond to the petition within 30 days. The prosecuting authority may respond:

(a) By certifying to the court that, based upon the petition and verifiable and substantial evidence of actual innocence, no further criminal proceedings in the case at bar can or will be initiated by the prosecuting authority, that no questions of fact remain as to the petitioner's wrongful incarceration, and that the petitioner is not ineligible from

seeking compensation under the provisions of s. 961.04; or

(b) By contesting the nature, significance, or effect of the evidence of actual innocence, the facts related to the petitioner's alleged wrongful incarceration, or whether the petitioner is ineligible from seeking compensation under the provisions of s. 961.04.

(3) If the prosecuting authority responds as set forth in paragraph (2)(a), the original sentencing court, based upon the evidence of actual innocence, the prosecuting authority's certification, and upon the court's finding that the petitioner has presented clear and convincing evidence that the petitioner committed neither the act nor the offense that served as the basis for the conviction and incarceration, and that the petitioner did not aid, abet, or act as an accomplice to a person who committed the act or offense, shall certify to the department that the petitioner is a wrongfully incarcerated person as defined by this act. Based upon the prosecuting authority's certification, the court shall also certify to the department that the petitioner is eligible for compensation under the provisions of s. 961.04.

(4)(a) If the prosecuting authority responds as set forth in paragraph (2)(b), the original sentencing court shall make a determination from the pleadings and supporting documentation whether, by a preponderance of the evidence, the petitioner is ineligible for compensation under the provisions of s. 961.04,

regardless of his or her claim of wrongful incarceration. If the court finds the petitioner ineligible under the provisions of s. 961.04, it shall dismiss the petition.

(b) If the prosecuting authority responds as set forth in paragraph (2)(b), and the court determines that the petitioner is eligible under the provisions of s. 961.04, but the prosecuting authority contests the nature, significance or effect of the evidence of actual innocence, or the facts related to the petitioner's alleged wrongful incarceration, the court shall set forth its findings and transfer the petition by electronic means through the division's website to the division for findings of fact and a recommended determination of whether the petitioner has established that he or she is a wrongfully incarcerated person who is eligible for compensation under this act.

Section 5. For the purpose of incorporating the amendment made by this act to section 961.06, Florida Statutes, in a reference thereto, subsection (6) of section 961.05, Florida Statutes, is reenacted to read:

961.05 Application for compensation for wrongful incarceration; administrative expunction; determination of entitlement to compensation.—

(6) If the department determines that a claimant meets the requirements of this act, the wrongfully incarcerated person who is the subject of the claim becomes entitled to compensation,

subject to the provisions in s. 961.06.

Section 6. For the purpose of incorporating the amendment made by this act to section 961.06, Florida Statutes, in a reference thereto, subsection (1) of section 961.055, Florida Statutes, is reenacted to read:

961.055 Application for compensation for a wrongfully incarcerated person; exemption from application by nolle prosequi.—

(1) A person alleged to be a wrongfully incarcerated person who was convicted and sentenced to death on or before December 31, 1979, is exempt from the application provisions of ss. 961.03, 961.04, and 961.05 in the determination of wrongful incarceration and eligibility to receive compensation pursuant to s. 961.06 if:

(a) The Governor issues an executive order appointing a special prosecutor to review the defendant's conviction; and

(b) The special prosecutor thereafter enters a nolle prosequi for the charges for which the defendant was convicted and sentenced to death.

Section 7. For the purpose of incorporating the amendment made by this act to section 961.06, Florida Statutes, in a reference thereto, subsection (4) of section 961.056, Florida Statutes, is reenacted to read:

961.056 Alternative application for compensation for a wrongfully incarcerated person.—

(4) If the department determines that a claimant making application under this section meets the requirements of this chapter, the wrongfully incarcerated person is entitled to compensation under s. 961.06.

Section 8. This act shall take effect October 1, 2017.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 641 Criminal Justice
SPONSOR(S): Criminal Justice Subcommittee; Shaw and others
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N, As CS	White	White
2) Justice Appropriations Subcommittee		Smith	Gusky
3) Judiciary Committee			

SUMMARY ANALYSIS

CS/HB 641 requires that certain offenders convicted of simple possession of a controlled substance receive a nonstate prison sanction unless such sentence could present a danger to the public.

Section 775.082(10), F.S., currently provides that a court must sentence a defendant to a nonstate prison sanction if the defendant is sentenced for a third degree felony that is not a forcible felony and total sentence points under the Criminal Punishment Code (Code) are 22 points or fewer, unless the court determines that such sentence could present a danger to the public.

The bill amends s. 775.082, F.S., to provide that if a defendant is sentenced for a primary offense of possession of a controlled substance committed on or after October 1, 2017, and if the total sentence points under the Code are 60 points or fewer, the court must sentence the offender to a nonstate prison sanction. However, if the court makes written findings that a nonstate prison sanction could present a danger to the public, the court may sentence the offender to a term of incarceration in a state correctional facility.

The bill defines "possession of a controlled substance" as possession of a controlled substance in violation of s. 893.13, F.S., but does not include possession with intent to sell, manufacture, or deliver a controlled substance or possession of a controlled substance in violation of s. 893.135, F.S., which punishes drug trafficking.

The Criminal Justice Impact Conference (CJIC) met on March 29, 2017, and determined that the bill could reduce the need for prison beds by 155 beds in Fiscal Year (FY) 2017-2018 and by a cumulative total of 1,001 beds through FY 2021-2022. According to CJIC, assuming that 50 percent of eligible inmates will be diverted, the bill could result in savings of $468,720 for prison operating costs in FY 2017-2018, and a cumulative savings of up to $9,827,925 for prison operating costs through FY 2021-2022.

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

The bill provides an effective date of October 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Criminal Punishment Code

In 1997, the Legislature enacted the Criminal Punishment Code[1] (Code) as Florida's "primary sentencing policy."[2] Noncapital felonies sentenced under the Code receive an offense severity level ranking (Levels 1-10).[3] Points are assigned on a CPC scoresheet and accrue based upon the level ranking assigned to the primary offense, additional offenses, and prior offenses.[4] Sentence points escalate as the level escalates. Points may also be added or multiplied for other factors such as victim injury. The lowest permissible sentence is any nonstate prison sanction in which total sentence points equal or are less than 44 points, unless the court determines that a prison sentence is appropriate. If total sentence points exceed 44 points, the lowest permissible sentence in prison months is calculated by subtracting 28 points from the total sentence points and decreasing the remaining total by 25 percent. Absent mitigation,[5] the permissible sentencing range under the Code is generally the lowest permissible sentence scored up to and including the maximum penalty provided under s. 775.082, F.S.[6]

Departure from a Code Sentence

Multiple exceptions to typical Code sentencing exist. Nonstate prison sanctions are sometimes required or allowed in cases where a sentence of imprisonment in a state correctional facility would have otherwise been required or authorized under the Code. For each of the following examples, the defendant must have committed his or her offense on or after July 1, 2009:

- Under s. 775.082(10), F.S., a defendant who is sentenced for a third degree felony that is not a forcible felony,[7] and whose total sentence points pursuant to s. 921.0024, F.S., are 22 points or fewer, *must be sentenced to a nonstate prison sanction*. However, if the court makes written findings that a nonstate prison sanction could present a danger to the public, the court may sentence the offender to state prison.
- Under s. 921.00241, F.S., a defendant who would otherwise receive a prison sentence *may be sentenced to a nonstate prison sanction* if:
  - The offender's primary offense is a third degree felony.
  - The offender's total scoresheet points are not more than 48 points, or are 54 points and six of those points are for a violation of probation, community control, or other community supervision, and do not involve a new violation of law.
  - The offender has not been convicted or previously convicted of a forcible felony.
  - The offender's primary offense does not require a mandatory minimum sentence.
- Under s. 948.01(7), F.S., a defendant *may be placed into a postadjudicatory treatment-based drug court program* if:
  - His or her scoresheet result is 60 points or fewer;

---

[1] Sections 921.002-921.0027, F.S. *See* chs. 97-194 and 98-204, L.O.F. The Code is effective for offenses committed on or after October 1, 1998.

[2] *Florida's Criminal Punishment Code: A Comparative Assessment (FY 2012-2013)* (Executive Summary), Florida Department of Corrections, available at http://www.dc.state.fl.us/pub/sg_annual/1213/executives.html (last visited on March 26, 2017).

[3] Offenses are either ranked in the offense severity level ranking chart in s. 921.0022, F.S., or are ranked by default based on a ranking assigned to the felony degree of the offense as provided in s. 921.0023, F.S.

[4] Section 921.0024, F.S. Unless otherwise noted, information on the Code is from this source.

[5] The court may **"mitigate" or "depart downward"** from the scored lowest permissible sentence if the court finds a mitigating circumstance. Section 921.0026, F.S., provides a list of mitigating circumstances.

[6] If the scored lowest permissible sentence exceeds the maximum penalty in s. 775.082, F.S., the sentence required by the Code must be imposed. If total sentence points are greater than or equal to 363 points, the court may sentence the offender to life imprisonment.

[7] Section 776.08, F.S., defines a "forcible felony" as treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.

- He or she is amenable to substance abuse treatment; and
- He or she otherwise qualifies under s. 397.334(3), F.S.[8]

Effect of Bill

The bill amends s. 775.082, F.S., to provide that if a defendant is sentenced for a primary offense of possession of a controlled substance committed on or after October 1, 2017, and if the total sentence points under the Code are 60 points or fewer, the court must sentence the offender to a nonstate prison sanction. However, if the court makes written findings that a nonstate prison sanction could present a danger to the public, the court may sentence the offender to a term of incarceration in a state correctional facility.

The bill defines "possession of a controlled substance" as possession of a controlled substance in violation of s. 893.13, F.S., but does not include possession with intent to sell, manufacture, or deliver a controlled substance or possession of a controlled substance in violation of s. 893.135, F.S., which punishes drug trafficking.

This diversion provision could apply to a defendant who has a prior record, which might include a prior violent offense. For example, a defendant with a current offense of possession of a controlled substance and a prior offense of aggravated assault would score fewer than 60 total points. However, under the bill, the court may choose not to divert such defendant from prison if the court finds that the nonstate prison sanction could present a danger to the public.

The bill provides an effective date of October 1, 2017.

B. SECTION DIRECTORY:

Section 1: Amends s. 775.082, F.S., relating to penalties.

Section 2: Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: The bill does not appear to have a fiscal impact on state government revenues.

2. Expenditures: The Criminal Justice Impact Conference (CJIC) met on March 29, 2017, and determined that the bill could reduce the need for prison beds by 155 beds in Fiscal Year (FY) 2017-2018 and by a cumulative total of 1,001 beds through FY 2021-2022. According to CJIC, assuming that 50 percent of eligible inmates will be diverted, the bill could result in savings of $468,720 for prison operating costs in FY 2017-2018, and a cumulative savings of up to $9,827,925 for prison operating costs through FY 2021-2022. To the extent that inmates are sentenced to probation or community control, there will be an increase in the costs of supervision. However, the costs of supervision are significantly lower than the costs of incarceration. While the net fiscal impact is indeterminate, it is anticipated that there will be significant savings.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: The bill does not appear to have a fiscal impact on local government revenues.

2. Expenditures: The bill does not appear to have a fiscal impact on local government expenditures.

[8] Section 397.334(3)(a), F.S., provides that entry into any post-adjudicatory treatment-based drug court program as a condition of probation or community control pursuant to s. 948.01, F.S., s. 948.06, F.S., or s. 948.20, F.S., must be based upon the sentencing court's assessment of the defendant's criminal history, substance abuse screening outcome, amenability to the services of the program, total sentence points, the recommendation of the state attorney and the victim, if any, and the defendant's agreement to enter the program.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: This bill appears to be exempt from the requirements of article VII, section 18 of the Florida Constitution because it is a criminal law.

2. Other: None.

B. RULE-MAKING AUTHORITY: The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 28, 2017, the Criminal Justice Subcommittee adopted a proposed committee substitute (PCS) and reported the bill favorably as a committee substitute (CS). The PCS removed language in the original filed version of HB 641 that:

- Authorizes a court to depart from a mandatory minimum term of imprisonment for a nonviolent felony or misdemeanor if the court finds that specified criteria are met;
- Reestablishes a sentencing commission to provide recommendations to the Governor, the Supreme Court, and the Legislature regarding the appropriate offense severity level rankings for noncapital felonies;
- Authorizes a court to sentence a defendant to a nonstate prison sanction within a prison diversion program if the defendant is convicted of a nonviolent second degree felony and meets other criteria;
- Restores a mitigating circumstance based on substance abuse or addiction and amenability to treatment and creates a new mitigating circumstance for certain nonviolent felony offenders; and
- Requires a court to place certain nonviolent felony offenders who are amendable to substance abuse treatment into postadjudicatory treatment-based drug court program, into residential drug treatment, or on drug offender probation.

This analysis is drafted to the CS as passed by the Criminal Justice Subcommittee.

A bill to be entitled

An act relating to sentencing for possession of a controlled substance; amending s. 775.082, F.S.; requiring that a court sentence a defendant who is convicted of a primary offense of possession of a controlled substance committed on or after a specified date to a nonstate prison sanction under certain circumstances; defining the term "possession of a controlled substance"; providing an effective date.

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

Section 1. Subsection (11) of section 775.082, Florida Statutes, is renumbered as subsection (12), and a new subsection (11) is added to that section to read:

775.082 Penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison.—

(11) If a defendant is sentenced for a primary offense of possession of a controlled substance committed on or after October 1, 2017, and if the total sentence points pursuant to s. 921.0024 are 60 points or fewer, the court must sentence the offender to a nonstate prison sanction. However, if the court makes written findings that a nonstate prison sanction could present a danger to the public, the court may sentence the

offender to a state correctional facility pursuant to this section. As used in this subsection, the term "possession of a controlled substance" means possession of a controlled substance in violation of s. 893.13, but does not include possession with intent to sell, manufacture, or deliver a controlled substance or possession of a controlled substance in violation of s. 893.135.

Section 2. This act shall take effect October 1, 2017.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 879 Unlawful Acquisition of Utility Services
SPONSOR(S): Burgess, Jr.
TIED BILLS: None. **IDEN./SIM. BILLS:** CS/CS/SB 776

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Energy & Utilities Subcommittee	14 Y, 0 N	Voyles	Keating
2) Justice Appropriations Subcommittee		Smith	Gusky
3) Commerce Committee			

SUMMARY ANALYSIS

Section 812.14, F.S., establishes a variety of crimes involving the theft of utility services. A violation of any of the provisions in s. 812.14, F.S., triggers the criminal penalties in the general theft statute, s. 812.014, F.S.

This bill revises s. 812.14, F.S., by:

- Providing that certain willful violations are considered grand theft;
- Providing that the proof of certain facts creates a "permissive inference" of specified violations; and
- Clarifying terms.

The bill establishes mechanisms for determining a defendant's liability for civil damages or criminal restitution for the theft or diversion of electricity.

The term "permissive inference" is not defined anywhere in Florida Statutes, and it is currently only used in one other place in the Florida Statutes. Without the reference to case law, it might be difficult to understand what burden this places on each of the parties unless they are familiar with the case or the legal terminology in general.

The bill creates a presumption, through the use of the phrase "prima facie showing," that appears to favor the calculations of losses by a utility if the utility relies on a methodology detailed in the bill or any other methodology reasonably relied upon by utilities. Once the amount of the loss is established, the burden shifts to the defendant to demonstrate that the loss is something other than the amount calculated by the utility. The bill appears to provide utilities with broad discretion to establish the basis for a prima facie showing of the amount of damages, though a utility must demonstrate that the methodology used for its calculations, if not detailed in the bill, is one reasonably relied upon by utilities.

The Criminal Justice Impact Conference (CJIC) met on March 31, 2017 and determined the bill would have a positive insignificant impact on prison beds.

The bill does not appear to impact local government revenues or expenditures.

This bill provides an effective date of July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Theft of Utility Services

Section 812.14, F.S., establishes a variety of crimes involving the theft of utility services. In particular, it is unlawful for a person to:

- Willfully tamper with any meter or other device belonging to a utility to cause loss or damage, prevent any meter installed for registering electricity, gas, or water from properly registering service, or knowingly use electricity or gas or water passing through any such meter or other device after it has been tampered with;
- Connect with any wire, main, service pipe or other pipes, appliance, or appurtenance without the consent of the utility and to take any service or any electricity, gas, or water, without such service being measured or reported for payment; or
- Use, or receive the direct benefit from the use of, a utility service with the knowledge, or under circumstances that would induce a reasonable person to believe, that such use resulted from tampering with any connection, wire, conductor, meter, pipe, conduit, line, cable, transformer, amplifier, or other device owned, operated, or controlled by the utility, for the purpose of avoiding payment.[1]

Section 812.14, F.S., applies the criminal penalties in the general theft statute, s. 812.014, F.S., to these offenses. The offenses involving property valued at $300 or more are considered grand theft.[2] Section 812.014, F.S., provides that if the stolen property is valued at:

- $100,000 or more, the offense is a first degree felony;[3]
- $20,000 and $100,000, the offense is a second degree felony;[4]
- $300 and $20,000, the offense is a third degree felony;[5]
- $100 and $300, the offense is a first degree misdemeanor;[6] and
- $100 or not otherwise specified in s. 812.014(2), the offense is a second degree misdemeanor.[7]

Section 812.14, F.S., establishes criminal liability for a person or entity that owns, leases, or subleases a property and permits a tenant or occupant to use utility services while knowing, or under such circumstances as would induce a reasonable person to believe, that the utility services have been connected in violation of any of the above stated provisions.[8] The law establishes certain elemental facts that provide prima facie evidence of a violation by the owner, lessor, or sublessor.

---

[1] s. 812.14(2)(a)-(c), F.S.

[2] Section 812.014(2)(d), F.S., establishes that it is a third degree felony if the property stolen is valued at $100 or more, but less than $300, and is taken from a dwelling or from the unenclosed curtilage of a dwelling. If the stolen property is valued between $100 and $300, the offender commits petit theft of the first degree. Theft of any property not specified in s. 812.014(2), F.S., is considered petit theft of the second degree and a second degree misdemeanor. ss. 812.014(2)-(3), F.S.,

[3] s. 812.014(2)(a), F.S. A first degree felony is punishable by up to 30 years imprisonment and a $10,000 fine. ss. 775.082 and 775.083, F.S.

[4] s. 812.014(2)(b), F.S. A second degree felony is punishable by up to 15 years imprisonment and a $10,000 fine. ss. 775.082 and 775.083, F.S.

[5] s. 812.014(2)(c), F.S. A third degree felony is punishable by up to five years imprisonment and a $5,000 fine. ss. 775.082 and 775.083, F.S.

[6] s. 812.014(2)(e), F.S. A second degree misdemeanor is punishable by up to 60 days in county jail and a $500 fine. ss. 775.082 and 775.083, F.S.

[7] s. 812.14(3)(a), F.S.

[8] s. 812.14(5) and (7), F.S.

Section 812.14(8), F.S., provides that theft of utility services for the purpose of facilitating the manufacture of a controlled substance is a first degree misdemeanor.[9]

Calculation of Damages

In a civil action, if a person is found in violation of s. 812.14, F.S., they are liable to the utility involved for an amount equal to 3 times the amount of services unlawfully obtained or $3,000, whichever is greater.[10] The law does not provide a methodology for calculating the amount of service unlawfully obtained.

For purposes of providing an administrative remedy, the Public Service Commission's rules state that "[i]n the event of unauthorized or fraudulent use, or meter tampering, the utility may bill the customer on a reasonable estimate of the energy used."[11] The rule allows the utility to retroactively charge the customer for a reasonable estimate of the electricity used but not metered due to meter tampering. The utility need not demonstrate who tampered with the meter, only that the meter was tampered with, and that the customer of record benefitted from the electricity. An estimation of the energy used is dependent on the retroactive billing period and the estimated average use during that period.

Effect of Proposed Changes

Theft of Utility Services Punishable as Grand Theft

The bill provides that any violation of s. 812.14(2), F.S., results in a person committing grand theft, punishable as provided in s. 812.014, F.S. This change reflects the nature of degree of theft for certain circumstances detailed in s. 812.014, F.S.

In specifying grand theft, this bill limits the violations of s. 812.14(2), F.S., to exclude the current portion of the statute detailing when stolen property is valued between $100 and $300, resulting in the offender committing petit theft of the first degree,[12] in addition to the portion of the statute detailing theft of any property not specified in s. 812.014(2), F.S., which is considered petit theft of the second degree and a second degree misdemeanor.[13] This change in the bill effectively limits theft of utility services to be classified at a minimum as a third degree felony.

Permissive Inference of Violations

Current law provides that proof of certain facts is prima facie evidence of certain violations of s. 812.14, F.S. First, the presence on a property of any device or alteration which diverts or uses the utility services in a way that avoids meter registration and reporting for payment is considered prima facie evidence of the theft of utility services if the recipient of the services has received the direct benefit of a reduced cost for the services for at least one billing cycle.[14] The bill replaces the term "prima facie evidence" with a "permissive inference" that the establishment of such facts constitutes theft of utility services.[15]

---

[9] s. 893.02(4), F.S., defines "controlled substance" as any substance named or described in Schedules I-V of s. 893.03, F.S.
[10] s. 812.14(10), F.S.
[11] Rule 25-6.104, F.A.C.
[12] s. 812.014(2)(e), F.S.
[13] s. 812.014(3)(a), F.S.
[14] s. 812.14(3), F.S.
[15] A permissive inference allows, but does not require, the trier of fact to infer an elemental fact upon proof of a basic fact and place no burden on the defendant. *Marcolini v. State*, 673 So. 2d. 3, 5 (Fla. 1996) (citing *County Court of Ulster County, N.Y. v. Allen*, 442 U.S. 140, 157 (1979)). The Florida Supreme Court has found that the "prima facie evidence" provision in s. 812.14(3), F.S., establishes a permissive inference, rather than a mandatory rebuttable presumption. *Id.* The court noted that the constitutionality of a permissive inference is determined as applied, rather than facially. *Id.* For a permissive inference to withstand constitutional challenge in an as-applied analysis, a rational connection must exist between the facts in the record and the ultimate fact to be presumed. *Id.* (citing *Allen*, 442 U.S. at 165).

Second, a person or entity that owns, leases, or subleases a property is not allowed to permit a tenant or occupant to use utility services while knowing, or under such circumstances as would induce a reasonable person to believe, that such utility services have been illegally connected.[16] The statute identifies the following three factors as prima facie evidence of a person's intent to violate this prohibition[17]:

- A controlled substance and materials for manufacturing the controlled substance intended for sale or distribution to another were found in a dwelling or structure;
- The dwelling or structure has been visibly modified to accommodate the use of equipment to grow marijuana indoors, including, but not limited to, the installation of equipment to provide additional air conditioning, equipment to provide high-wattage lighting, or equipment for hydroponic cultivation; and
- The person or entity that owned, leased, or subleased the dwelling or structure knew of, or did so under such circumstances as would induce a reasonable person to believe in, the presence of a controlled substance and materials for manufacturing a controlled substance in the dwelling or structure, regardless of whether the person or entity was involved in the manufacture or sale of a controlled substance or was in actual possession of the dwelling or structure.

The bill replaces the term "prima facie evidence" with a "permissive inference" that the establishment of these factors demonstrates the intent of the owner, lessor, or sublessor to violate this prohibition.

Third, theft of utility services for the purpose of facilitating the manufacture of a controlled substance is theft, punishable as provided in s. 812.014.[18] The statute identifies the following three factors as prima facie evidence of a person's intent to violate this law[19]:

- The theft of utility services resulted in a dwelling or structure receiving unauthorized access to utility services;
- A controlled substance and materials for manufacturing the controlled substance were found in the dwelling or structure; and
- The person knew of the presence of the controlled substance and materials for manufacturing the controlled substance in the dwelling or structure, regardless of whether the person was involved in the manufacture of the controlled substance.

The bill replaces the term "prima facie evidence" with a "permissive inference" that the establishment of these factors demonstrates a person's intent to violate this prohibition.

The bill amends s. 812.14(9)(c), F.S., adding that a permissive inference of a person's intent to violate s. 812.14(8), F.S., exists if a person "should have known" of a presence of the controlled substance and materials for manufacturing the controlled substance in the dwelling or structure. The additional language potentially lowers the standard of proof in determining a person's intent to violate the statute.

Damages Recovered in a Civil Action

The bill establishes mechanisms for determining a defendant's liability for civil damages or criminal restitution for the theft or diversion of electricity. The bill first identifies criteria and elements that must be included when determining a defendant's liability and requires the amount of civil damages or a restitution order to include all of the following:

---

[16] s. 812.14(5), F.S.
[17] s. 812.14(6), F.S.
[18] s. 812.14(8), F.S.
[19] s. 812.14(9), F.S.

- The costs to repair or replace damaged property owned by a utility, including reasonable labor costs;
- Reasonable costs for the use of specialized equipment to investigate or calculate the amount of unlawfully obtained electric services, including reasonable labor costs;
- The amount of any applicable taxes; and
- The amount of unlawfully obtained electric services.

The bill also establishes criteria for the methodology used to estimate losses in order to make a prima facie showing of the amount of unlawfully obtained electric services. The bill provides this prima facie showing may be based on any methodology reasonably relied upon by utilities to estimate such losses. The methodology may consider the estimated start date of the theft or diversion and the estimated daily or hourly use of electricity. The bill provides that once this prima facie showing has been made, the burden shifts to the defendant to demonstrate that the loss is other than that claimed by the utility.

The bill provides that the estimated start date of a theft or diversion may be based upon one or more of the following:

- The date of an overload notification from a transformer, or the tripping of a transformer, that the utility reasonably believes was overloaded as a result of the theft or diversion of electricity.
- The date the utility verified a substantive difference between the amount of electricity used at a property and the amount billed to the accountholder.
- The date the utility or a law enforcement officer located a tap or other device bypassing a meter.
- The date the utility or a law enforcement officer observed or verified meter tampering.
- The maturity of a cannabis crop found in a grow house or other structure using unlawfully obtained electric services or the number of cannabis crops the utility or a law enforcement officer reasonably believes to have been grown in the grow house or other structure.
- The date the utility or a law enforcement agency received a report of suspicious activity potentially indicating the presence of the unlawful cultivation of cannabis in a grow house or other structure or when a law enforcement officer or an employee or contractor of a utility observes such suspicious activity.
- The date when a utility observes a significant change in metered energy usage.
- The date when an account with the utility was opened for a property that receives both metered and unlawfully obtained electric services.
- Any other facts or data reasonably relied upon by utilities to estimate the start date of a theft or diversion of electricity.

These techniques may serve as an accurate way to pinpoint a beginning date for the violation and allow prosecutors and judges to have more certainty when assessing potential restitution.

The bill provides that the estimated average daily or hourly use of the electricity may be based upon any, or a combination, of the following:

- The load imposed by the fixtures, appliances, or equipment powered by unlawfully obtained electric services.
- Recordings by the utility of the amount of electricity used by a property or the difference between the amount used and the amount billed.
- A comparison of the amount of electricity historically used by the property and the amount billed while the property was using unlawfully obtained electricity.
- A reasonable analysis of a meter that was altered or tampered with to prevent the creation of an accurate record of the amount of electricity obtained.
- Any other facts or data reasonably relied upon by utilities to estimate the amount of unlawfully obtained electric services.

The bill provides that a court order requiring a defendant to pay restitution for damages to the property of a utility or for the theft or diversion of electricity need only be based on a criminal offense that is causally connected to the damages or losses and bears a significant relationship to those damages or losses. The bill specifically details that a conviction for a violation is not a prerequisite to a restitution order. Under this bill criminal offenses that bear a significant relationship and are causally connected to a violation can result in a defendant being ordered to pay restitution for damages.

The bill adds that the amount of restitution that a defendant may be ordered to pay is not limited by the monetary threshold of any criminal charge on which the restitution order is based. This provision would allow the restitution for damages to go beyond the monetary threshold ranges that are associated with the criminal charge of theft of utilities.

The bill creates a presumption, through the use of the phrase "prima facie showing," favoring the calculations of losses by the utilities if the utility relies on a methodology detailed above to estimate their losses. Once the amount of the loss the utility incurred is established through the methodology, the burden shifts to the defendant to demonstrate that the loss is something other than the amount calculated by the utility.

While there is not current state case law to support the permissibility of presumptions in the restitution context, there is the basis that evidentiary presumptions are often allowed in civil lawsuits, but not criminal. Since restitution proceedings are not fully civil or criminal, the permissibility of presumptions in the restitution context could be subject of future legal challenges.

Liability for Owner, Lessor, or Sublessor

While the willful violation of subsection (5) of 812.14, F.S., would still result in a misdemeanor of the first degree, the bill retains the wording in s. 812.14(7), F.S., stating that "prosecution for a violation of subsection (5) does not preclude prosecution for theft pursuant to subsection (8) or s. 812.014." This effectively could allow for an owner, lessor, or sublessor, or a person acting on behalf of such person to be prosecuted for grand theft of the third degree and a felony of the third degree.

Clarification of Language

The bill clarifies s. 812.14, F.S., by removing archaic language, simplifying overly long sentences containing substantive information, and eliminating use of passive voice.

B. SECTION DIRECTORY:

Section 1. Amends s. 812.14, F.S., relating to theft of utility services.

Section 2. Amends s. 812.014, F.S., relating to grand theft of the third degree and felony of the third degree for certain property stolen.

Section 3. Provides an effective date of July 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: None.

2. Expenditures: The Criminal Justice Impact Conference (CJIC) met on March 31, 2017, and

determined the bill would have a positive insignificant impact on prison beds.[20]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Electric utilities may be better able to recover losses due to theft of utility services.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to: require 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:

The bill replaces the term "marijuana" with the term "cannabis," which is not defined in this section or chapter. "Cannabis" is defined elsewhere in the Florida Statutes. The bill could be clarified by providing a cross-reference to the definition.

The term "permissive inference" is not defined anywhere in Florida Statutes, and it is currently only used in one other place in the Florida Statutes.[21] Without the reference to case law, it might be difficult to understand what burden this places on each of the parties unless they are familiar with the case or the legal terminology in general.

The bill creates a presumption, through the use of the phrase "prima facie showing," that appears to favor the calculations of losses by a utility if the utility relies on a methodology detailed in the bill or any other methodology reasonably relied upon by utilities. Once the amount of the loss is established, the burden shifts to the defendant to demonstrate that the loss is something other than the amount calculated by the utility. The bill appears to provide utilities with broad discretion to establish the basis

[20] "Positive Insignificant" means an increase in the average daily prison population by ten or fewer.

[21] Permissive inference is referred to in s. 713.345(1)(c), F.S. in regards to intentional misapplication of construction funds.

for a prima facie showing of the amount of damages, though a utility must demonstrate that the methodology used for its calculations, if not detailed in the bill, is one reasonably relied upon by utilities.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

A bill to be entitled

An act relating to the unlawful acquisition of utility services; amending s. 812.14, F.S.; revising the elements that constitute theft of utilities; clarifying that the presence of certain devices and alterations on the property of, and the actual possession by, a person constitutes a permissive inference of a violation; clarifying that certain evidence of controlled substance manufacture in a leased dwelling constitutes a permissive inference of a violation by an owner, lessor, sublessor, or a person acting on behalf of such persons; clarifying that specified circumstances create a permissive inference of theft of utility services for the purpose of facilitating the manufacture of a controlled substance; revising such circumstances; specifying the types of damages that may be recovered in a civil action or as restitution in a criminal case for damaging property of a utility or for the theft or diversion of electric services; specifying the methods and bases used to determine and assess such damages; making technical changes; amending s. 812.014, F.S.; conforming provisions to changes made by the act; providing an effective date.

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

Section 1. Section 812.14, Florida Statutes, is amended to read:

812.14 Trespass and larceny with relation to utility fixtures; theft of utility services.—

(1) As used in this section, "utility" includes any person, firm, corporation, association, or political subdivision, whether private, municipal, county, or cooperative, which is engaged in the sale, generation, provision, or delivery of gas, electricity, heat, water, oil, sewer service, telephone service, telegraph service, radio service, or telecommunication service.

(2) A person may not ~~It is unlawful to~~:

(a) Willfully alter, tamper with, damage ~~injure~~, or knowingly allow damage to a ~~suffer to be injured any~~ meter, meter seal, pipe, conduit, wire, line, cable, transformer, amplifier, or other apparatus or device belonging to a utility line service in such a manner as to cause loss or damage or to prevent any meter installed for registering electricity, gas, or water from registering the quantity which otherwise would pass through the same; ~~to~~

(b) Alter the index or break the seal of any such meter; ~~in any way to~~

(c) Hinder or interfere in any way with the proper action

or accurate ~~just~~ registration of any such meter or device; ~~or~~

(d) Knowingly ~~to~~ use, waste, or allow ~~suffer~~ the waste, by any means, of electricity, ~~or~~ gas, or water passing through any such meter, wire, pipe, or fitting, or other appliance or appurtenance connected with or belonging to any such utility, after the ~~such~~ meter, wire, pipe, or fitting, or other appliance or appurtenance has been tampered with, injured, or altered; ~~.~~

(e) ~~(b)~~ Connect ~~Make~~ or cause a ~~to be made any~~ connection with a ~~any~~ wire, main, service pipe or other pipes, appliance, or appurtenance in a ~~such~~ manner that uses ~~as to use~~, without the consent of the utility, any service or any electricity, gas, or water; ~~, or to~~

(f) Cause a utility, without its consent, to supply any ~~to be supplied any~~ service or electricity, gas, or water ~~from a utility~~ to any person, firm, or corporation or any lamp, burner, orifice, faucet, or other outlet ~~whatsoever,~~ without reporting the ~~such~~ service ~~being reported~~ for payment; ~~or~~

(g) Cause, without the consent of a utility, ~~such~~ electricity, gas, or water to bypass ~~passing through~~ a meter provided by the utility ~~and used for measuring and registering the quantity of electricity, gas, or water passing through the same~~; or ~~.~~

(h) ~~(c)~~ Use or receive the direct benefit from the use of a utility knowing, or under ~~such~~ circumstances that ~~as~~ would induce a reasonable person to believe, that the ~~such~~ direct

benefits have resulted from any tampering with, altering of, or injury to any connection, wire, conductor, meter, pipe, conduit, line, cable, transformer, amplifier, or other apparatus or device owned, operated, or controlled by such utility, for the purpose of avoiding payment.

(3) The presence on the property of and ~~in~~ the actual possession by ~~of~~ a person of any device or alteration that prevents ~~affects the diversion or use of the services of a utility so as to avoid~~ the registration of the ~~such~~ use of services by ~~or on~~ a meter installed by the utility or that avoids ~~so as to otherwise avoid~~ the reporting of the use of services ~~such service~~ for payment creates a permissive inference ~~is prima facie evidence~~ of the violation of subsection (2) ~~this section~~ by such person.~~:~~ However, this inference ~~presumption~~ does not apply unless:

(a) The presence of the ~~such a~~ device or alteration can be attributed only to a deliberate act in furtherance of an intent to avoid payment for utility services;

(b) The person charged has received the direct benefit of the reduction of the cost of the ~~such~~ utility services; and

(c) The customer or recipient of the utility services has received the direct benefit of the ~~such~~ utility service for at least one full billing cycle.

(4) A person who willfully violates subsection (2) ~~paragraph (2)(a), paragraph (2)(b), or paragraph (2)(c)~~ commits

grand theft, punishable as provided in s. 812.014.

(5) ~~It is unlawful for~~ A person or entity that owns, leases, or subleases a property may not ~~to~~ permit a tenant or occupant to use utility services knowing, or under such circumstances as would induce a reasonable person to believe, that such utility services have been connected in violation of subsection (2) ~~paragraph (2)(a), paragraph (2)(b), or paragraph (2)(c)~~.

(6) There exists a permissive inference that an owner, lessor, or sublessor, or a person acting on behalf of such person, intended ~~It is prima facie evidence of a person's intent~~ to violate subsection (5) if:

(a) A controlled substance and materials for manufacturing the controlled substance intended for sale or distribution to another were found in a dwelling or structure;

(b) The dwelling or structure was ~~has been~~ visibly modified to accommodate the use of equipment to grow cannabis ~~marijuana~~ indoors, including, but not limited to, the installation of equipment to provide additional air conditioning, equipment to provide high-wattage lighting, or equipment for hydroponic cultivation; and

(c) The person or entity that owned, leased, or subleased the dwelling or structure knew of, or did so under such circumstances as would induce a reasonable person to believe in, the presence of a controlled substance and materials for

manufacturing a controlled substance in the dwelling or structure, regardless of whether the person or entity was involved in the manufacture or sale of a controlled substance or was in actual possession of the dwelling or structure.

(7) An owner, lessor, or sublessor, or a person acting on behalf of such person, ~~A person~~ who willfully violates subsection (5) commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. Prosecution for a violation of subsection (5) does not preclude prosecution for theft pursuant to subsection (8) or s. 812.014.

(8) Theft of utility services for the purpose of facilitating the manufacture of a controlled substance is theft, punishable as provided in s. 812.014.

(9) A permissive inference ~~It is Prima facie evidence~~ of a person's intent to violate subsection (8) exists if:

(a) The person committed theft of utility services resulting in a dwelling, as defined in s. 810.011, or a structure, as defined in s. 810.011, receiving unauthorized access to utility services;

(b) A controlled substance and materials for manufacturing the controlled substance were found in the dwelling or structure; and

(c) The person knew or should have known of the presence of the controlled substance and materials for manufacturing the controlled substance in the dwelling or structure, regardless of

whether the person was involved in the manufacture of the controlled substance.

(10) Whoever is found in a civil action to have violated this section is liable to the utility involved in an amount equal to 3 times the amount of services unlawfully obtained or $3,000, whichever is greater.

(11)(a) For purposes of determining a defendant's liability for civil damages or criminal restitution for the theft or diversion of electricity, the amount of civil damages or a restitution order must include all of the following amounts:

1. The costs to repair or replace damaged property owned by a utility, including reasonable labor costs.

2. Reasonable costs for the use of specialized equipment to investigate or calculate the amount of unlawfully obtained electric services, including reasonable labor costs.

3. The amount of any applicable taxes.

4. The amount of unlawfully obtained electric services.

(b) A prima facie showing of the amount of unlawfully obtained electric services may be based on any methodology reasonably relied upon by utilities to estimate such losses. The methodology may consider the estimated start date of the theft or diversion and the estimated daily or hourly use of electricity. Once a prima facie showing has been made, the burden shifts to the defendant to demonstrate that the loss is

other than that claimed by the utility.

1. The estimated start date of a theft or diversion may be based upon one or more of the following:

a. The date of an overload notification from a transformer, or the tripping of a transformer, that the utility reasonably believes was overloaded as a result of the theft or diversion of electricity.

b. The date the utility verified a substantive difference between the amount of electricity used at a property and the amount billed to the accountholder.

c. The date the utility or a law enforcement officer located a tap or other device bypassing a meter.

d. The date the utility or a law enforcement officer observed or verified meter tampering.

e. The maturity of a cannabis crop found in a grow house or other structure using unlawfully obtained electric services or the number of cannabis crops the utility or a law enforcement officer reasonably believes to have been grown in the grow house or other structure.

f. The date the utility or a law enforcement agency received a report of suspicious activity potentially indicating the presence of the unlawful cultivation of cannabis in a grow house or other structure or when a law enforcement officer or an employee or contractor of a utility observes such suspicious activity.

g. The date when a utility observes a significant change in metered energy usage.

h. The date when an account with the utility was opened for a property that receives both metered and unlawfully obtained electric services.

i. Any other facts or data reasonably relied upon by utilities to estimate the start date of a theft or diversion of electricity.

2. The estimated average daily or hourly use of the electricity may be based upon any, or a combination, of the following:

a. The load imposed by the fixtures, appliances, or equipment powered by unlawfully obtained electric services.

b. Recordings by the utility of the amount of electricity used by a property or the difference between the amount used and the amount billed.

c. A comparison of the amount of electricity historically used by the property and the amount billed while the property was using unlawfully obtained electricity.

d. A reasonable analysis of a meter that was altered or tampered with to prevent the creation of an accurate record of the amount of electricity obtained.

e. Any other facts or data reasonably relied upon by utilities to estimate the amount of unlawfully obtained electric services.

(c) A court order requiring a defendant to pay restitution for damages to the property of a utility or for the theft or diversion of electricity need only be based on a criminal offense that is causally connected to the damages or losses and bears a significant relationship to those damages or losses. A conviction for a violation of this section is not a prerequisite to a restitution order. Criminal offenses that bear a significant relationship and are causally connected to a violation of this section include, but are not limited to, offenses relating to the unlawful cultivation of cannabis in a grow house or other structure if the theft or diversion of electricity was used to facilitate the growth of the cannabis.

(d) The amount of restitution that a defendant may be ordered to pay is not limited by the monetary threshold of any criminal charge on which the restitution order is based.

(12)~~(11)~~ This section does not apply to licensed and certified electrical contractors while such persons are performing usual and ordinary service in accordance with recognized standards.

Section 2. Paragraph (c) of subsection (2) of section 812.014, Florida Statutes, is amended to read:

812.014 Theft.—

(2)

(c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082, s.

775.083, or s. 775.084, if the property stolen is:

1. Valued at $300 or more, but less than $5,000.

2. Valued at $5,000 or more, but less than $10,000.

3. Valued at $10,000 or more, but less than $20,000.

4. A will, codicil, or other testamentary instrument.

5. A firearm.

6. A motor vehicle, except as provided in paragraph (a).

7. Any commercially farmed animal, including any animal of the equine, bovine, or swine class or other grazing animal; a bee colony of a registered beekeeper; and aquaculture species raised at a certified aquaculture facility. If the property stolen is aquaculture species raised at a certified aquaculture facility, then a $10,000 fine shall be imposed.

8. Any fire extinguisher.

9. Any amount of citrus fruit consisting of 2,000 or more individual pieces of fruit.

10. Taken from a designated construction site identified by the posting of a sign as provided for in s. 810.09(2)(d).

11. Any stop sign.

12. Anhydrous ammonia.

13. Any amount of a controlled substance as defined in s. 893.02. Notwithstanding any other law, separate judgments and sentences for theft of a controlled substance under this subparagraph and for any applicable possession of controlled substance offense under s. 893.13 or trafficking in controlled

substance offense under s. 893.135 may be imposed when all such offenses involve the same amount or amounts of a controlled substance.

14. Utility services, in a manner as specified in s. 812.14.

However, if the property is stolen within a county that is subject to a state of emergency declared by the Governor under chapter 252, the property is stolen after the declaration of emergency is made, and the perpetration of the theft is facilitated by conditions arising from the emergency, the offender commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property is valued at $5,000 or more, but less than $10,000, as provided under subparagraph 2., or if the property is valued at $10,000 or more, but less than $20,000, as provided under subparagraph 3. As used in this paragraph, the term "conditions arising from the emergency" means civil unrest, power outages, curfews, voluntary or mandatory evacuations, or a reduction in the presence of or the response time for first responders or homeland security personnel. For purposes of sentencing under chapter 921, a felony offense that is reclassified under this paragraph is ranked one level above the ranking under s. 921.0022 or s. 921.0023 of the offense committed.

Section 3. This act shall take effect July 1, 2017.

Amendment No.

COMMITTEE/SUBCOMMITTEE ACTION

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

Committee/Subcommittee hearing bill: Justice Appropriations Subcommittee

Representative Burgess offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Section 812.14, Florida Statutes, is amended to read:

812.14 Trespass and larceny with relation to utility fixtures; theft of utility services.—

(1) As used in this section, "utility" includes any person, firm, corporation, association, or political subdivision, whether private, municipal, county, or cooperative, which is engaged in the sale, generation, provision, or delivery of gas, electricity, heat, water, oil, sewer service, telephone

service, telegraph service, radio service, or telecommunication service.

(2) A person may not ~~It is unlawful to~~:

(a) Willfully alter, tamper with, damage ~~injure~~, or knowingly allow damage to a ~~suffer to be injured any~~ meter, meter seal, pipe, conduit, wire, line, cable, transformer, amplifier, or other apparatus or device belonging to a utility line service in such a manner as to cause loss or damage or to prevent any meter installed for registering electricity, gas, or water from registering the quantity which otherwise would pass through the same; ~~to~~

(b) Alter the index or break the seal of any such meter; ~~in any way to~~

(c) Hinder or interfere in any way with the proper action or accurate ~~just~~ registration of any such meter or device; ~~or~~

(d) Knowingly ~~to~~ use, waste, or allow ~~suffer~~ the waste of, by any means, ~~of~~ electricity, ~~or~~ gas, or water passing through any such meter, wire, pipe, or fitting, or other appliance or appurtenance connected with or belonging to any such utility, after the ~~such~~ meter, wire, pipe, or fitting, or other appliance or appurtenance has been tampered with, injured, or altered; ~~.~~

(e) ~~(b)~~ Connect ~~Make~~ or cause a ~~to be made any~~ connection with a ~~any~~ wire, main, service pipe or other pipes, appliance, or appurtenance in a ~~such~~ manner that uses ~~as to use~~, without

the consent of the utility, any service or any electricity, gas, or water;~~, or to~~

(f) Cause a utility, without its consent, to supply any ~~to be supplied any~~ service or electricity, gas, or water ~~from a utility~~ to any person, firm, or corporation or any lamp, burner, orifice, faucet, or other outlet ~~whatsoever,~~ without reporting the ~~such~~ service ~~being reported~~ for payment; ~~or~~

(g) Cause, without the consent of a utility, ~~such~~ electricity, gas, or water to bypass ~~passing through~~ a meter provided by the utility; or ~~and used for measuring and registering the quantity of electricity, gas, or water passing through the same.~~

(h) ~~(c)~~ Use or receive the direct benefit from the use of a utility knowing, or under ~~such~~ circumstances that ~~as~~ would induce a reasonable person to believe, that the ~~such~~ direct benefits have resulted from any tampering with, altering of, or injury to any connection, wire, conductor, meter, pipe, conduit, line, cable, transformer, amplifier, or other apparatus or device owned, operated, or controlled by such utility, for the purpose of avoiding payment.

(3) The presence on the property of and ~~in~~ the actual possession by ~~of~~ a person of any device or alteration that prevents ~~affects the diversion or use of the services of a utility so as to avoid~~ the registration of the ~~such~~ use of services by ~~or on~~ a meter installed by the utility or that

avoids ~~so as to otherwise avoid~~ the reporting of the use of services ~~such service~~ for payment is prima facie evidence of the violation of subsection (2) ~~this section~~ by such person.~~;~~ However, this presumption does not apply unless:

(a) The presence of the ~~such a~~ device or alteration can be attributed only to a deliberate act in furtherance of an intent to avoid payment for utility services;

(b) The person charged has received the direct benefit of the reduction of the cost of the ~~such~~ utility services; and

(c) The customer or recipient of the utility services has received the direct benefit of the ~~such~~ utility service for at least one full billing cycle.

(4) A person who willfully violates subsection (2) ~~paragraph (2)(a), paragraph (2)(b), or paragraph (2)(c)~~ commits theft, punishable as provided in s. 812.014.

(5) ~~It is unlawful for~~ A person or entity that owns, leases, or subleases a property may not ~~to~~ permit a tenant or occupant to use utility services knowing, or under such circumstances as would induce a reasonable person to believe, that such utility services have been connected in violation of subsection (2) ~~paragraph (2)(a), paragraph (2)(b), or paragraph (2)(c)~~.

(6) It is prima facie evidence that an owner, lessor, or sublessor intended ~~It is prima facie evidence of a person's intent~~ to violate subsection (5) if:

(a) A controlled substance and materials for manufacturing the controlled substance intended for sale or distribution to another were found in a dwelling or structure;

(b) The dwelling or structure was ~~has been~~ visibly modified to accommodate the use of equipment to grow cannabis ~~marijuana~~ indoors, including, but not limited to, the installation of equipment to provide additional air conditioning, equipment to provide high-wattage lighting, or equipment for hydroponic cultivation; and

(c) The person or entity that owned, leased, or subleased the dwelling or structure knew of, or did so under such circumstances as would induce a reasonable person to believe in, the presence of a controlled substance and materials for manufacturing a controlled substance in the dwelling or structure, regardless of whether the person or entity was involved in the manufacture or sale of a controlled substance or was in actual possession of the dwelling or structure.

(7) An owner, lessor, or sublessor ~~A person~~ who willfully violates subsection (5) commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. Prosecution for a violation of subsection (5) does not preclude prosecution for theft pursuant to subsection (8) or s. 812.014.

(8) Theft of utility services for the purpose of facilitating the manufacture of a controlled substance is theft, punishable as provided in s. 812.014.

(9) It is prima facie evidence of a person's intent to violate subsection (8) if:

(a) The person committed theft of utility services resulting in a dwelling, as defined in s. 810.011, or a structure, as defined in s. 810.011, receiving unauthorized access to utility services;

(b) A controlled substance and materials for manufacturing the controlled substance were found in the dwelling or structure; and

(c) The person knew or should have known of the presence of the controlled substance and materials for manufacturing the controlled substance in the dwelling or structure, regardless of whether the person was involved in the manufacture of the controlled substance.

(10) Whoever is found in a civil action to have violated this section is liable to the utility involved in an amount equal to 3 times the amount of services unlawfully obtained or $3,000, whichever is greater.

(11)(a) For purposes of determining a defendant's liability for civil damages under subsection (10) or criminal restitution for the theft of electricity, the amount of civil damages or a restitution order must include all of the following amounts:

1. The costs to repair or replace damaged property owned by a utility, including reasonable labor costs.

2. Reasonable costs for the use of specialized equipment to investigate or calculate the amount of unlawfully obtained electricity services, including reasonable labor costs.

3. The amount of unlawfully obtained electricity services.

(b) A prima facie showing of the amount of unlawfully obtained electricity services may be based on any methodology reasonably relied upon by a utility to estimate such loss. The methodology may consider the estimated start date of the theft and the estimated daily or hourly use of electricity. Once a prima facie showing has been made, the burden shifts to the defendant to demonstrate that the loss is other than that claimed by the utility.

1. The estimated start date of a theft may be based upon one or more of the following:

a. The date of an overload notification from a transformer, or the tripping of a transformer, which the utility reasonably believes was overloaded as a result of the theft of electricity.

b. The date the utility verified a substantive difference between the amount of electricity used at a property and the amount billed to the account holder.

c. The date the utility or a law enforcement officer located a tap or other device bypassing a meter.

d. The date the utility or a law enforcement officer observed or verified meter tampering.

e. The maturity of a cannabis crop found in a dwelling or structure using unlawfully obtained electricity services the utility or a law enforcement officer reasonably believes to have been grown in the dwelling or structure.

f. The date the utility or a law enforcement agency received a report of suspicious activity potentially indicating the presence of the unlawful cultivation of cannabis in a dwelling or structure or the date a law enforcement officer or an employee or contractor of a utility observed such suspicious activity.

g. The date when a utility observed a significant change in metered energy usage.

h. The date when an account with the utility was opened for a property that receives both metered and unlawfully obtained electricity services.

i. Any other fact or data reasonably relied upon by the utility to estimate the start date of a theft of electricity.

2. The estimated average daily or hourly use of the electricity may be based upon any, or a combination, of the following:

a. The load imposed by the fixtures, appliances, or equipment powered by unlawfully obtained electricity services.

b. Recordings by the utility of the amount of electricity used by a property or the difference between the amount used and the amount billed.

c. A comparison of the amount of electricity historically used by the property and the amount billed while the property was using unlawfully obtained electricity.

d. A reasonable analysis of a meter that was altered or tampered with to prevent the creation of an accurate record of the amount of electricity obtained.

e. Any other fact or data reasonably relied upon by utilities to estimate the amount of unlawfully obtained electricity services.

(12) A court order requiring a defendant to pay restitution for damages to the property of a utility or for the theft of electricity need only be based on a conviction for a criminal offense that is causally connected to the damages or losses and bears a significant relationship to those damages or losses. A conviction for a violation of this section is not a prerequisite for a restitution order. Criminal offenses that bear a significant relationship and are causally connected to a violation of this section include, but are not limited to, offenses relating to the unlawful cultivation of cannabis in a dwelling or structure if the theft of electricity was used to facilitate the growth of the cannabis.

(13) The amount of restitution that a defendant may be ordered to pay is not limited by the monetary threshold of any criminal charge on which the restitution order is based.

(14) ~~(11)~~ This section does not apply to licensed and certified electrical contractors while such persons are performing usual and ordinary service in accordance with recognized standards.

Section 2. This act shall take effect October 1, 2017.

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

Remove everything before the enacting clause and insert:

A bill to be entitled

An act relating to the unlawful acquisition of utility services; amending s. 812.14, F.S.; revising the elements that constitute theft of utilities; clarifying that the presence of certain devices and alterations on the property of, and the actual possession by, a person constitutes prima facie evidence of a violation; clarifying that certain evidence of the manufacturing of a controlled substance in a leased dwelling constitutes prima facie evidence of a violation by an owner, lessor, sublessor; clarifying that specified circumstances create prima facie evidence of theft of utility services for the purpose of facilitating the manufacture of a controlled substance; revising such

circumstances; specifying the types of damages that may be recovered as civil damages or restitution in a criminal case for damaging property of a utility or for the theft of electricity services; specifying the methods and bases used to determine and assess damages in a civil action or restitution in a criminal case for damaging property of a utility or for the theft of electricity services; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1091 Arrest Warrants for State Prisoners
SPONSOR(S): Criminal Justice Subcommittee and Plakon
TIED BILLS: **IDEN./SIM. BILLS:** SB 894

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	14 Y, 0 N, As CS	Merlin	White
2) Justice Appropriations Subcommittee		Smith	Gusky
3) Judiciary Committee			

SUMMARY ANALYSIS

CS/HB 1091 creates procedures to enable state prisoners to serve out sentences for violations of probation or community control while in prison for other crimes.[1] If a prisoner has an unserved warrant for arrest issued by another county for a violation of probation, the bill allows the prisoner to petition for a status hearing. At that hearing, a state attorney informs the circuit court if the prisoner does in fact have an unserved warrant for a violation of probation.

If the prisoner has an unserved warrant, the bill provides that the court must order the state attorney to submit an order to send the prisoner to the issuing county's jail. The court must send the order to the local county sheriff to execute the prisoner's transport to the county that issued the arrest warrant.

The Criminal Justice Impact Conference (CJIC) met on March 29, 2017, and determined the bill would have a negative indeterminate impact on the prison population.

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

The bill provides an effective date of July 1, 2017.

[1] "Probation" should be read to mean "probation and/or community control" for the remainder of this analysis, as the two mechanisms are treated the same by existing Florida Statutes, caselaw, and the bill.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Unserved Arrest Warrants

In some circumstances, a defendant who is sentenced to probation[2] or community control[3] in one county ("County A") may violate the terms of their supervision and flee the county. The defendant may later commit an unrelated crime in a different county ("County B"), which results in a conviction and sentence for the new offense. The court in County B may order that the defendant's sentence run concurrently[4] to any sentence imposed for violating probation ("VOP") or community control ("VCC") in County A.

The sheriff in County A may file a detainer with the correctional institution where the defendant is incarcerated, requesting that the institution either to hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent.[5] However, the sheriff in County A is not required to serve or execute an arrest warrant[6] while the defendant is held on the detainer.

A detainer is not the equivalent of an arrest and does not trigger a probationer's right to go before the court that placed them on probation or community control for a VOP or VCC hearing.[7] As a result, sentencing of the defendant the VOP or VCC in County A may not occur until after he or she has served the prison sentence for the offense committed in County B.

In *Chapman v. State*,[8] the Fifth District Court of Appeal addressed a similar situation. In that case, the defendant was sentenced in Brevard County in 1996 as a youthful offender to two years in prison, followed by four years of probation.[9] In 1998, the defendant violated probation and was sentenced to two years of community control, followed by 18 months of probation.[10] The defendant subsequently violated his community control and fled the county. In 1999, he was arrested on new charges in Bay County for burglary to a structure and principal to a burglary of a conveyance.[11] The defendant entered pleas to the Bay County charges. He was sentenced to consecutive five-year terms for the two burglary cases, but concurrent with any sentence imposed for violating community control ("VCC") in Brevard County.[12]

The defendant sought to have the Brevard County cases resolved by plea or trial, but "Brevard County only placed a detainer; they did not seek to have him arrested and returned for trial."[13] The defendant

---

[2] Section 948.001(9), F.S., defines "probation" as "a form of community supervision requiring specified contacts with parole and probation officers and other terms and conditions as provided in s. 948.03." *See also Coulson v. State*, 342 So. 2d 1042, 1042 (Fla. 4th DCA 1977) (noting that the purpose of probation is to rehabilitate an offender); *see Crossin v. State*, 244 So. 2d 142, 145 (Fla. 4th DCA 1971) (explaining, "[t]he underlying purpose of probation is to give [an] individual a second chance to live within the rules of society and the law of the land during which time he can prove that he will thereafter do so and become a useful member of society.").

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

[4] "The word 'concurrent' means 'operating or occurring at the same time.'" *Jones v. State*, 966 So. 2d 319, 326 (Fla. 2007) (citing *Merriam Webster's Collegiate Dictionary* 239 (10th ed. 2001)).

[5] *Gethers v. State*, 838 So. 2d 504, 507 (Fla. 2003).

[6] *Id.* (explaining that "[a] warrant is a 'writ directing or authorizing someone to do an act, esp. one directing a law enforcer to make an arrest, a search, or a seizure.'") (citing Black's Law Dictionary 1579 (7th ed. 1999)).

[6] s. 948.06(1)(b)-(1)(c), F.S.

[7] *Diaz v. State*, 737 So. 2d 1203, 1204 (Fla. 5th DCA 1999).

[8] *Chapman v. State*, 910 So. 2d 940 (Fla. 5th DCA 2005).

[9] *Id.* at 941.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

filed a petition in the trial court seeking to compel the Brevard County Sheriff's Office to arrest him by serving the arrest warrant.[14] The trial court denied the petition, ruling that the defendant "was not entitled to mandamus relief while serving a sentence on a separate charge in a different county for an offense committed while he was on Brevard County community control."[15]

On appeal, the Fifth District explained that there was no mechanism by which the defendant could compel Brevard County to arrest him.[16] The defendant had no personal right to have the arrest warrant executed; rather, the state or governmental entity seeking prosecution is the entity that has a right to the service of the arrest warrant.[17] The Fifth District also noted that a trial court has no ministerial duty to conduct a hearing on an affidavit alleging a VOP. A probationer is only entitled to be heard on a VOP after his arrest and return to the court that granted the probation.[18]

Based on the above, there is currently no provision in Florida law for a prisoner to compel an unserved warrant while in prison. The Florida Department of Corrections (FDC) estimates that at any given time, there are approximately 20 inmates that have unserved VOP or VCC warrants.[19]

Effect of the Bill

The bill creates s. 948.33, F.S., to address unserved arrest warrants for state prisoners. Under the bill:

- A state prisoner who has an unserved VOP or VCC warrant for his or her arrest may file a state prisoner's notice of unserved warrant in the circuit court of the judicial circuit where the unserved warrant was issued;
- The prisoner must also serve notice on the state attorney of that circuit;
- The circuit court must schedule the notice for a status hearing within 90 days after receipt of the notice; and
- The state prisoner may not be transported to the status hearing.

At the status hearing, the state attorney must inform the court as to whether there is an unserved VOP or VCC warrant for the arrest of the state prisoner. If there is an outstanding warrant, the court must enter an order within 30 days after the status hearing to transport the state prisoner to the county jail of the county that issued the warrant. The court must send the order to the county sheriff for execution.

The DOC states that prisoners who are able to address their warrants for VOPs or VCCs while imprisoned on other charges are likely to receive a concurrent sentence; thereby, reducing the need for prison beds. Additionally, being able to dispose of such warrants before release from prison, may allow the prisoner to participate in transitional and reintegration programs that would otherwise be unavailable when an outstanding warrant exists.[20]

The bill provides an effective date of July 1, 2017.

B. SECTION DIRECTORY:

Section 1. Creates s. 948.33, F.S., relating to prosecution for VOP and VCC arrest warrants of state prisoners.

Section 2. Provides an effective date.

---

[14] *Id.* at 940-41.
[15] *Id.* at 941.
[16] *Id.* at 942.
[17] *Id.* at 941-42.
[18] *Id.* at 942.
[19] *2017 Agency Legislative Bill Analysis for HB 1091, Department of Corrections*, at 2, dated Mar. 9, 2017 (on file with the House Criminal Justice Subcommittee).
[20] *Id.*

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: The bill does not appear to have any impact on state government revenue.

2. Expenditures: The Criminal Justice Impact Conference met on March 29, 2017, and determined the bill would have a negative indeterminate impact on the prison population.[21]

The bill would prevent the need for state custody detainers upon release of inmates from prison, likely reducing the number of prison days for those offenders whose violations are currently disposed of after their prison terms end. The Department of Corrections expects the applicable inmates will more than likely serve a concurrent prison sentence if the unserved violations are handled while in custody. Per FDC, there are approximately 20 inmates with unserved violation of probation or community control warrants at any given time. However, it is unknown how many inmates would initiate the notice to state attorneys in order to begin this process, or the time it would take to deal with these violations.[22]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: The bill does not appear to have any impact on local government revenue.

2. Expenditures: The bill does not appear to have any impact on state government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: This bill appears to be exempt from the requirements of article VII, section 18 of the Florida Constitution because it is a criminal law.

2. Other: None.

B. RULE-MAKING AUTHORITY: The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 28, 2017, the Criminal Justice Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute (CS). The CS differs from the bill as filed in that the CS:

---

[21] "Negative Indeterminate" means a reduction in the average daily prison population by an unquantifiable amount.

[22] Department of Economic and Demographic Research, *PCS for HB 1091 – Arrest Warrants for State Prisoners*, "Criminal Justice Impact Conference", March 29, 2017, http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/PCSforHB1091.pdf

- Requires the circuit court to schedule a status hearing to determine whether a prisoner has an unserved VOP or VCC within 90 days after receiving notice; and
- Clarifies that if a warrant for either a VOP or VCC exists, the circuit court must enter an order within 30 days after the status hearing for transport of the prisoner to the county jail of the county that issued the warrant for prosecution of the violation.

This analysis is drafted to the bill as amended by the Criminal Justice Subcommittee.

A bill to be entitled

An act relating to arrest warrants for state prisoners; creating s. 948.33, F.S.; authorizing a prisoner in a state prison who has an unserved violation of probation or an unserved violation of community control warrant to file a notice of unserved warrant in the circuit court where the warrant was issued; requiring the prisoner to serve notice on the state attorney; requiring the circuit court to schedule a status hearing within a certain time after receiving notice; specifying procedures and requirements for the status hearing; providing for prosecution of the violation; requiring the court to send the order to the county sheriff; providing an effective date.

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

Section 1. Section 948.33, Florida Statutes, is created to read:

948.33 Prosecution for violation of probation and community control arrest warrants of state prisoners.—A prisoner in a state prison in this state who has an unserved violation of probation or an unserved violation of community control warrant for his or her arrest may file a state prisoner's notice of

unserved warrant in the circuit court of the judicial circuit in which the unserved warrant was issued. The prisoner must also serve notice on the state attorney of that circuit. The circuit court shall schedule the notice for a status hearing within 90 days after receipt of the notice. The state prisoner may not be transported to the status hearing. At the status hearing, the state attorney shall inform the court as to whether there is an unserved violation of probation warrant or an unserved violation of community control warrant for the arrest of the state prisoner. If a warrant for either violation exists, the court must enter an order within 30 days after the status hearing for the transport of the state prisoner to the county jail of the county that issued the warrant for prosecution of the violation and the court shall send the order to the county sheriff for execution.

Section 2. This act shall take effect July 1, 2017.