Criminal Justice Subcommittee

Wednesday, February 15, 2017
9:00 AM – 11:00 AM
404 HOB

Meeting Packet

Richard Corcoran
Speaker

Ross Spano
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Criminal Justice Subcommittee

Start Date and Time:	Wednesday, February 15, 2017 09:00 am
End Date and Time:	Wednesday, February 15, 2017 11:00 am
Location:	Sumner Hall (404 HOB)
Duration:	2.00 hrs

Consideration of the following bill(s):

HB 157 Sentencing by Burgess
HB 505 Controlled Substances by Trumbull
HB 527 Sentencing for Capital Felonies by Sprowls

Consideration of the following proposed committee substitute(s):

PCS for HB 345 -- Criminal Justice Standards and Training Commission
PCS for HB 367 -- Prearrest Diversion Programs
PCS for HB 369 -- Pub. Rec./Prearrest Diversion Programs

NOTICE FINALIZED on 02/08/2017 4:21PM by Gilliam.Ann

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 157 Sentencing
SPONSOR(S): Burgess, Jr.
TIED BILLS: **IDEN./SIM. BILLS:**

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

SUMMARY ANALYSIS

A felony offender who receives a sentence in excess of one year typically serves his or her sentence in a facility operated by the Department of Corrections (DOC); however, other options are statutorily authorized and sometimes available. These include a prison diversion program or placement in a local detention facility pursuant to certain contractual agreements between the DOC and counties.

The bill creates a new alternative that would enable certain types of felony offenders to serve their sentences in the jail for the county in which the offense was committed.

Effective for offenses committed on or after July 1, 2017, the bill authorizes a court to sentence an offender to a term in the county jail in the county where the offense was committed for up to 24 months if the offender meets all of the following criteria:

- The offender's total sentence points are more than 44 points, but no more than 60 points.
- The offender's primary offense is not a forcible felony as defined in s. 776.08, F.S., excluding a third degree felony violation under chapter 810, F.S., entitled "Burglary and Trespass."
- The offender's primary offense is not punishable by a minimum mandatory sentence exceeding 24 months.

The court may only sentence an offender to a county jail under the bill if there is a contractual agreement between the chief correctional officer of the county and the Department of Corrections (DOC). The DOC must enter into such contract upon the request of a chief correctional officer. Contracts are to be awarded by the DOC on a first-come, first-served basis. The contract must specifically establish the maximum number of beds and the validated per diem rate. The contract must provide for per diem reimbursement for occupied inmate days based on the contracting county's most recent annual adult male custody or adult female custody per diem rates not to exceed $60. All contractual per diem rates must be validated by the Auditor General before payments are made.

The bill provides that all contracts are contingent upon a Specific Appropriation in the General Appropriations Act. A specific appropriation amount has not yet been established. Please see "FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT," *infra.*

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Generally

The term "felony" means any criminal offense that is punishable under the laws of Florida, or that would be punishable if committed in Florida, by death or imprisonment in the state penitentiary.[1] "State penitentiary" includes state correctional facilities.[2] In general, an offender must be imprisoned in the state penitentiary for each sentence that exceeds one year.[3] An offender who receives a sentence of a year or less for a felony serves that sentence in a county jail.[4]

Sentencing for Felonies

A Criminal Punishment Code worksheet must be completed for offenders who have a committed one or more felony offenses. The total sentence points calculated by the worksheet determine the lowest permissible sentence (LPS) for an offender.[5] The LPS for an offender who receives less than or equal to 44 points on his or her worksheet is a nonstate prison sanction.[6] The LPS for an offender with 45 or more points is determined by the total number of sentence points minus 28 multiplied by .75.[7] For example, the LPS is 12.75 months for 45 points and 24 months for 60 points.[8]

In general, a sentencing judge, in his or her discretion, may sentence an offender to a term that is between the LPS and the statutory maximum for the offense, unless the judge's discretion is limited because a mandatory minimum sentence applies.[9] The statutory maximum for a: (a) felony of the first degree is 30 years; (b) felony of the second degree is 15 years; and (c) felony of the third degree is 5 years.[10]

A sentencing judge may depart below the LPS, unless a mandatory minimum sentence that exceeds the LPS applies, if the judge enters a written statement delineating the reasons for the departure.[11] A non-exclusive list of mitigating factors that may be considered by a sentencing judge in imposing a downward departure sentence is specified in s. 921.0026, F.S.

Imprisonment

An offender with a sentence in excess of one year typically serves his or her sentence in a facility operated by the Department of Corrections (DOC); however, other options are statutorily authorized and sometimes available. These include placement in a:

- Prison diversion program for offenders who meet certain criteria, including a requirement to have no more than 54 total sentence points.[12]

---

[1] Fla. Const. art. X, s. 10; s. 775.08(1), F.S.
[2] s. 775.08(1), F.S.
[3] *Id.*
[4] s. 775.08(2), F.S.
[5] s. 921.0024(1) –(3), F.S.
[6] s. 921.0042(2), F.S.
[7] Florida Department of Corrections and the Office of State Courts Administrator, *Florida Criminal Punishment Code Scoresheet Preparation Manual,* July 1, 2015, at p. 26, *available at* http://www.dc.state.fl.us/pub/sen_cpcm/cpc_manual.pdf.
[8] *Id.*
[9] s. 921.0024(2), F.S.
[10] s. 775.082(3)(b), (d), and (e), F.S.
[11] s. 921.00265, F.S.
[12] A court may order a nonstate prison sanction for an offender whose primary offense is a felony of the third degree; whose total sentence points do not exceed specified maximums; the offender has not been convicted of specified violent felonies; and a minimum mandatory sentence is not applicable. A sentence under this provision of law must be to a term of probation, community control, or community supervision with mandatory participation in a prison diversion program of the Department of Corrections if such program exists in the judicial circuit in which the offender is sentenced. Such programs may require residential, nonresidential, or day-

- Local detention facility if the offender's sentence is between 366 days and 22 months and there is a contract between the DOC and the chief correctional officer for the applicable county.[13]
- County or municipal facility pursuant to a contract between the DOC and such facility. Section 944.171, F.S., authorizes the DOC to contract with county or municipal facilities for the purpose of housing inmates. The DOC indicates that such contractual arrangements have been used as recently as FY 2011-2012, with Franklin, Washington, and Lafayette Counties.[14]

Effect of the Bill

Effective for offenses committed on or after July 1, 2017, the bill authorizes a court to sentence an offender to a term in the county jail in the county where the offense was committed for up to 24 months if the offender meets all of the following criteria:

- The offender's total sentence points on the CPC worksheet are more than 44 points, but no more than 60 points.
- The offender's primary offense is not a forcible felony as defined in s. 776.08, F.S.,[15] excluding a third degree felony violation under chapter 810, F.S., entitled "Burglary and Trespass."
- The offender's primary offense is not punishable by a minimum mandatory sentence in excess of 24 months.

Under the bill, the court may only sentence an offender meeting the above-referenced criteria to county jail if there is a contract for the applicable county between the county's chief correctional officer and the DOC.

The DOC must enter into a contract with a county when requested by the county's chief correctional officer. The contract must specifically establish the maximum number of beds and the validated per diem rate. The contract must provide for per diem reimbursement for occupied inmate days based on the contracting county's most recent annual adult male custody or adult female custody per diem rates not to exceed $60 per inmate. All contractual per diem rates must be validated by the Auditor General before payments are made.

A contract executed, as provided in the bill, is contingent upon a specific appropriation in the General Appropriations Act. Contracts must be awarded by the DOC on a first-come, first-served basis up to the maximum appropriation. The maximum appropriation allowable consists of funds appropriated in or transferred to the specific appropriation category created by the bill entitled "Inmates Sentenced to County Jail" (ISCJ).

In addition to an appropriation, the bill authorizes the DOC to transfer funds into the ISCJ specific appropriation category to fulfill DOC's contractual per diem obligation that may not exceed the DOC's average male or female total per diem published for the preceding fiscal year. This allows the DOC flexibility in the amount it must transfer into this specific category because the number of counties that will request contracts to have offenders sentenced to their jails is unknown. The maximum appropriation allowable would be the appropriated funds plus any funds that are transferred from other DOC categories to fulfill DOC's contractual per diem obligation.

---

reporting; substance abuse treatment; employment; restitution; academic or vocational opportunities; or community service work. s. 921.00241, F.S.

[13] s. 921.188, F.S.

[14] DOC, Agency Analysis of HB 157 (2017), p. 3 (January 13, 2017) (on file with the Florida House of Representatives, Criminal Justice Subcommittee).

[15] "Forcible felony" means "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." s. 776.08, F.S.

B. SECTION DIRECTORY:

Section 1. Creates s. 950.021, F.S., relating to sentencing of offenders to county jail.

Section 2. Provides an effective date of July 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 requires the DOC to enter into a contract with a county when requested by the county's chief correctional officer. The contract must specifically establish the maximum number of beds and the validated per diem rate. The contract must provide for per diem reimbursement for occupied inmate days based on the contracting county's most recent annual adult male custody or adult female custody per diem rates not to exceed $60. All contractual per diem rates must be validated by the Auditor General before payments are made.

   The DOC's most recent annual adult male custody per diem rate is $48.28. The bill limits the total potential per diem for a county to $60. If a contracted county's per diem is $60 and the county chooses to contract with the DOC for 100 inmates, the total daily cost would be $6,000 per day with $4,828 ($48.28 per inmate per day) of that amount representing the cost that the DOC would have expended if those offenders were sentenced to state prison. The difference of $1,172 would be paid from the funds provided in the ISCJ specific appropriation category. A specific appropriation amount has not yet been established for this category.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None.

2. Expenditures: Counties with excess jail capacity that have a contract with DOC will benefit from the state paying the cost of incarceration.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

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

2. Other: None.

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

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

A bill to be entitled

An act relating to sentencing; creating s. 950.021, F.S.; authorizing a court to sentence certain offenders to a county jail for up to 24 months if the county has a contract with the Department of Corrections; providing contractual requirements; requiring specific appropriations; providing for such appropriations; requiring validation of per diem rates; providing an effective date.

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

Section 1. Section 950.021, Florida Statutes, is created to read:

950.021 Sentencing of offenders to county jail.—

(1) Notwithstanding s. 921.0024 or any other provision of law, and effective for offenses committed on or after July 1, 2017, a court may sentence an offender to a term in the county jail in the county where the offense was committed for up to 24 months if the offender meets all of the following criteria:

(a) The offender's total sentence points score, as provided in s. 921.0024, is more than 44 points but no more than 60 points.

(b) The offender's primary offense is not a forcible felony as defined in s. 776.08; however, an offender whose

primary offense is a third degree felony under chapter 810 is not ineligible to be sentenced to a county jail under this paragraph.

(c) The offender's primary offense is not punishable by a minimum mandatory sentence of more than 24 months.

(2)(a) The court may only sentence an offender to a county jail pursuant to this section if there is a contractual agreement between the chief correctional officer of that county and the Department of Corrections.

(b) If the chief correctional officer of a county requests the Department of Corrections to enter into a contract that allows offenders to be sentenced to the county jail pursuant to subsection (1), subject to the restrictions of this paragraph and subsections (3) and (6), the Department of Corrections must enter into such a contract. The contract shall specifically establish the maximum number of beds and the validated per diem rate. The contract shall provide for per diem reimbursement for occupied inmate days based on the contracting county's most recent annual adult male custody or adult female custody per diem rates, not to exceed $60 per inmate.

(3) A contract under this section is contingent upon a specific appropriation in the General Appropriations Act. Contracts shall be awarded by the Department of Corrections on a first-come, first-served basis up to the maximum appropriation allowable in the General Appropriations Act for this purpose.

The maximum appropriation allowable consists of funds appropriated in or transferred to the specific appropriation in the Inmates Sentenced to County Jail appropriation category. Prior to any transferred appropriation under this section, the Inmates Sentenced to County Jail appropriation category provides for estimated incremental appropriation for county jail beds contracted under this section in excess of the Department of Corrections' per diem for adult male and female inmates.

(4) The Department of Corrections shall transfer funds pursuant to s. 216.177 from other appropriation categories within the Adult Male Custody Operations or Adult and Youthful Offender Female Custody Operations budget entities to the Inmates Sentenced to County Jail appropriation category in an amount necessary to satisfy the requirements of each executed contract, but not to exceed the Department of Corrections' average total per diem published for the preceding fiscal year for adult male custody or adult and youthful offender female custody inmates for each county jail bed contracted.

(5) The Department of Corrections shall assume maximum annual value of each contract when determining the full use of funds appropriated and to ensure that the maximum appropriation allowable is not exceeded.

(6) All contractual per diem rates under this section as well as the per diem rates used by the Department of Corrections must be validated by the Auditor General before payments are

made.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 505 Controlled Substances
SPONSOR(S): Trumbull
TIED BILLS: **IDEN./SIM. BILLS:**

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

SUMMARY ANALYSIS

Chapter 893, F.S., sets forth the Florida Comprehensive Drug Abuse Prevention and Control Act and classifies controlled substances into five categories, known as schedules I through V. These schedules regulate the manufacture, distribution, preparation, and dispensing of the substances listed therein. The distinguishing factors between the different drug schedules are the "potential for abuse" of the substances listed therein and whether there is a currently accepted medical use for the substance.

Currently, ioflupane I 123 is a schedule II controlled substance in Florida because of its derivation from cocaine via ecgonine, both of which are schedule II substances. Prior to September 2015, ioflupane I 123 was also a schedule II controlled substance under the federal Controlled Substances Act; however, it was removed from that schedule by the U.S. Drug Enforcement Administration effective September 11, 2015, because the drug is not subject to abuse and currently has a medical acceptable use in DaTscan, a drug product used to visualize striatal dopamine transporters in the brains of adult patients with suspected Parkinsonian syndromes.

The bill amends s. 893.03, F.S., to remove ioflupane I 123 from the list of substances that are classified under schedule II in Florida.

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

The bill is effective July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Regulating Controlled Substances

The Florida Comprehensive Drug Abuse Prevention and Control Act

Chapter 893, F.S., sets forth the Florida Comprehensive Drug Abuse Prevention and Control Act and classifies controlled substances into five categories, known as schedules. These schedules regulate the manufacture, distribution, preparation, and dispensing of the substances listed therein. The distinguishing factors between the different drug schedules are the "potential for abuse"[1] of the substances listed therein and whether there is a currently accepted medical use for the substance.[2] The Controlled Substance Schedules are as follows:

- Schedule I substances have a high potential for abuse and have no currently accepted medical use in the United States. This schedule includes substances such as cannabis and heroin.[3]
- Schedule II substances have a high potential for abuse and have a currently accepted but severely restricted medical use in the United States. This schedule includes substances such as raw opium, cocaine, and codeine.[4]
- Schedule III substances have a potential for abuse less than the substances contained in Schedules I and II and have a currently accepted medical use in the United States. This schedule includes substances such as stimulants and anabolic steroids.[5]
- Schedule IV substances have a low potential for abuse relative to the substances in Schedule III and have a currently accepted medical use in the United States. This schedule includes substances such as benzodiazepines and barbiturates.[6]
- Schedule V substances have a low potential for abuse relative to the substances in Schedule IV and have a currently accepted medical use in the United States. This schedule includes substances such as mixtures that contain small quantities of opiates and codeine.[7]

Chapter 893, F.S., contains a variety of provisions criminalizing behavior related to controlled substances. Most of these provisions are found in s. 893.13, F.S., which criminalizes the possession, sale, purchase, manufacture, and delivery of controlled substances. The penalty for violating these provisions depends largely on the schedule in which the substance is listed.[8] Other factors, such as the quantity of controlled substances involved in a crime or the location where the violation occurs can also affect the penalties for violating the criminal provisions of ch. 893, F.S.

Ioflupane I 123

Federal Law

Federal Law, pursuant to the Controlled Substances Act,[9] also classifies certain substances into schedules based on potential for abuse and whether there is a currently accepted medical use for it. Until 2015, federal law recognized ioflupane I 123 as a schedule II controlled substance because of its

---

[1] Section 893.035(3)(a), F.S., defines "potential for abuse" to mean that a substance has properties as a central nervous system stimulant or depressant or a hallucinogen that create a substantial likelihood of its being: 1) used in amounts that create a hazard to the user's health or the safety of the community; 2) diverted from legal channels and distributed through illegal channels; or 3) taken on the user's own initiative rather than on the basis of professional medical advice.

[2] *See* s. 893.03, F.S.

[3] s. 893.03(1), F.S.

[4] s. 893.03(2), F.S.

[5] s. 893.03(3), F.S.

[6] s. 893.03(4), F.S.

[7] s. 893.03(5), F.S.

[8] *See, e.g.*, s. 893.13(1)(a) and (c), F.S.

[9] 21 U.S.C. § 812.

derivation from cocaine via ecgonine, both of which are schedule II substances.[10] Ioflupane I 123 is the active pharmaceutical ingredient in the drug product DaTscan.[11] The U.S. Food and Drug Administration (FDA) approved the New Drug Application for DaTscan, for the indication of visualizing striatal dopamine transporters in the brains of adult patients with suspected Parkinsonian syndromes.[12]

In 2010, the U.S. Department of Health and Human Services (HHS) recommended to the U.S. Drug Enforcement Administration (DEA) that ioflupane I 123 be removed from the list of schedule II substances.[13] In response, the DEA completed a review of FDA-approved diagnostic products containing ioflupane I 123, which at the time was only DaTscan.[14] The DEA agreed to remove ioflupane I 123 from the federal Controlled Substances Act based on the following:

- There is no data demonstrating that individuals are administering quantities of DaTscan sufficient to create a hazard to their health or to the safety of other individuals or to the community. Approximately 6,000 vials of DaTscan would be required to produce a subjective "high" in humans from exposure to ioflupane I 123. The volume of 6,000 vials is about 15 liters of fluid, an amount that would be lethal if administered intravenously.
- Over 168,000 doses of DaTscan were administered to patients worldwide and there was no clinical evidence of pharmacological effects.
- Meaningful extraction of ioflupane I 123 from DaTscan would be impossible due to its limited production and availability and because extraction is technically complex and would require advanced equipment not available to the general public.
- There have been no reports of abuse of ioflupane I 123 or seizures resulting from its use.
- Because of the limited amounts of manufactured DaTscan, the low concentration of ioflupane I 123 per vial, and the existence of stringent regulatory controls on the manufacturing and handling of DaTscan, abuse of DaTscan is not possible as a practical matter.
- There was no psychic or physiological dependence potential of FDA-approved diagnostic products containing ioflupane I 123.
- Ioflupane I 123 is not an immediate precursor of a substance already controlled under the Controlled Substances Act.[15]

Accordingly, ioflupane I 123 was removed from schedule II of the federal Controlled Substances Act on September 11, 2015.[16]

Florida Law
Ioflupane I 123 is a schedule II substance under s. 893.03(2)(a)(4), F.S.

Effect of the Bill
The bill amends s. 893.03, F.S., to remove ioflupane I 123 from the list of substances classified under Schedule II.

The bill also reenacts ss. 893.0301, 893.055, and 893.13, F.S., to incorporate the amendment made by the bill to s. 893.03, F.S.

The bill takes effect July 1, 2017.

---

[10] Department of Justice, *Schedules of Controlled Substances: Removal of Ioflupane I 123 from Schedule II of the Controlled Substances Act*, https://www.deadiversion.usdoj.gov/fed_regs/rules/2015/fr0603.htm (last visited Feb. 6, 2017).
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Department of Justice, *Schedules of Controlled Substances: Removal of Ioflupane I 123 from Schedule II of the Controlled Substances Act*, https://www.deadiversion.usdoj.gov/fed_regs/rules/2015/fr0911.htm (last visited Feb. 7, 2017).

B. SECTION DIRECTORY:

Section 1. Amends s. 893.03, F.S., relating to standards and schedules.

Section 2. Reenacts s. 893.0301, F.S., relating to death resulting from apparent drug overdose; reporting requirements.

Section 3. Reenacts s. 893.055, F.S., relating to prescription drug monitoring programs.

Section 4. Reenacts s. 893.13, F.S., relating prohibited acts; penalties.

Section 5. Provides an effective date of July 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

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

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

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

2. Expenditures: The bill does not appear to have an 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: 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 the need for rulemaking or rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

A bill to be entitled

An act relating to controlled substances; amending s. 893.03, F.S.; specifying that ioflupane I 123 is not included in Schedule II; reenacting ss. 893.0301, 893.055(1)(b), and 893.13(1)(a), (c), (d) (e), (f), (h), (4)(a), and (5)(a), F.S., relating to reporting requirements for death resulting from apparent drug overdose; the Prescription Drug Monitoring Program, and prohibited acts and penalties, respectively, for the purpose of incorporating the amendment made by this act to s. 893.03, F.S., in references thereto; providing an effective date.

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

Section 1. Paragraph (a) of subsection (2) of section 893.03, Florida Statutes, is amended to read:

893.03 Standards and schedules.—The substances enumerated in this section are controlled by this chapter. The controlled substances listed or to be listed in Schedules I, II, III, IV, and V are included by whatever official, common, usual, chemical, trade name, or class designated. The provisions of this section shall not be construed to include within any of the schedules contained in this section any excluded drugs listed within the purview of 21 C.F.R. s. 1308.22, styled "Excluded

Substances"; 21 C.F.R. s. 1308.24, styled "Exempt Chemical Preparations"; 21 C.F.R. s. 1308.32, styled "Exempted Prescription Products"; or 21 C.F.R. s. 1308.34, styled "Exempt Anabolic Steroid Products."

(2) SCHEDULE II.—A substance in Schedule II has a high potential for abuse and has a currently accepted but severely restricted medical use in treatment in the United States, and abuse of the substance may lead to severe psychological or physical dependence. The following substances are controlled in Schedule II:

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances, whether produced directly or indirectly by extraction from substances of vegetable origin or independently by means of chemical synthesis:

1. Opium and any salt, compound, derivative, or preparation of opium, except nalmefene or isoquinoline alkaloids of opium, including, but not limited to the following:

a. Raw opium.

b. Opium extracts.

c. Opium fluid extracts.

d. Powdered opium.

e. Granulated opium.

f. Tincture of opium.

g. Codeine.

h. Ethylmorphine.

i. Etorphine hydrochloride.

j. Hydrocodone.

k. Hydromorphone.

l. Levo-alphacetylmethadol (also known as levo-alpha-acetylmethadol, levomethadyl acetate, or LAAM).

m. Metopon (methyldihydromorphinone).

n. Morphine.

o. Oxycodone.

p. Oxymorphone.

q. Thebaine.

2. Any salt, compound, derivative, or preparation of a substance which is chemically equivalent to or identical with any of the substances referred to in subparagraph 1., except that these substances shall not include the isoquinoline alkaloids of opium.

3. Any part of the plant of the species Papaver somniferum, L.

4. Cocaine or ecgonine, including any of their stereoisomers, and any salt, compound, derivative, or preparation of cocaine or ecgonine, except that these substances shall not include ioflupane I 123.

Section 2. For the purpose of incorporating the amendment made by this act to section 893.03, Florida Statutes, in references thereto, section 893.0301, Florida Statutes, is

reenacted to read:

893.0301 Death resulting from apparent drug overdose; reporting requirements.—If a person dies of an apparent drug overdose:

(1) A law enforcement agency shall prepare a report identifying each prescribed controlled substance listed in Schedule II, Schedule III, or Schedule IV of s. 893.03 which is found on or near the deceased or among the deceased's possessions. The report must identify the person who prescribed the controlled substance, if known or ascertainable. Thereafter, the law enforcement agency shall submit a copy of the report to the medical examiner.

(2) A medical examiner who is preparing a report pursuant to s. 406.11 shall include in the report information identifying each prescribed controlled substance listed in Schedule II, Schedule III, or Schedule IV of s. 893.03 that was found in, on, or near the deceased or among the deceased's possessions.

Section 3. For the purpose of incorporating the amendment made by this act to section 893.03, Florida Statutes, in a reference thereto, paragraph (b) of subsection (1) of section 893.055, Florida Statutes, is reenacted to read:

893.055 Prescription drug monitoring program.—

(1) As used in this section, the term:

(b) "Controlled substance" means a controlled substance listed in Schedule II, Schedule III, or Schedule IV in s.

893.03.

Section 4. For the purpose of incorporating the amendment made by this act to section 893.03, Florida Statutes, in references thereto, paragraphs (a), (c), (d), (e), (f), and (h) of subsection (1), paragraph (a) of subsection (4), and paragraph (a) of subsection (5) of section 893.13, Florida Statutes, are reenacted to read:

893.13 Prohibited acts; penalties.—

(1)(a) Except as authorized by this chapter and chapter 499, a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance. A person who violates this provision with respect to:

1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4. commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2. A controlled substance named or described in s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

3. A controlled substance named or described in s. 893.03(5) commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(c) Except as authorized by this chapter, a person may not

sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance in, on, or within 1,000 feet of the real property comprising a child care facility as defined in s. 402.302 or a public or private elementary, middle, or secondary school between the hours of 6 a.m. and 12 midnight, or at any time in, on, or within 1,000 feet of real property comprising a state, county, or municipal park, a community center, or a publicly owned recreational facility. As used in this paragraph, the term "community center" means a facility operated by a nonprofit community-based organization for the provision of recreational, social, or educational services to the public. A person who violates this paragraph with respect to:

1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4. commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. The defendant must be sentenced to a minimum term of imprisonment of 3 calendar years unless the offense was committed within 1,000 feet of the real property comprising a child care facility as defined in s. 402.302.

2. A controlled substance named or described in s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) commits a felony of the second degree, punishable as provided in s. 775.082, s.

775.083, or s. 775.084.

3. Any other controlled substance, except as lawfully sold, manufactured, or delivered, must be sentenced to pay a $500 fine and to serve 100 hours of public service in addition to any other penalty prescribed by law.

This paragraph does not apply to a child care facility unless the owner or operator of the facility posts a sign that is not less than 2 square feet in size with a word legend identifying the facility as a licensed child care facility and that is posted on the property of the child care facility in a conspicuous place where the sign is reasonably visible to the public.

(d) Except as authorized by this chapter, a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance in, on, or within 1,000 feet of the real property comprising a public or private college, university, or other postsecondary educational institution. A person who violates this paragraph with respect to:

1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4. commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2. A controlled substance named or described in s.

893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

3. Any other controlled substance, except as lawfully sold, manufactured, or delivered, must be sentenced to pay a $500 fine and to serve 100 hours of public service in addition to any other penalty prescribed by law.

(e) Except as authorized by this chapter, a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance not authorized by law in, on, or within 1,000 feet of a physical place for worship at which a church or religious organization regularly conducts religious services or within 1,000 feet of a convenience business as defined in s. 812.171. A person who violates this paragraph with respect to:

1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4. commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2. A controlled substance named or described in s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

3. Any other controlled substance, except as lawfully sold, manufactured, or delivered, must be sentenced to pay a $500 fine and to serve 100 hours of public service in addition to any other penalty prescribed by law.

(f) Except as authorized by this chapter, a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance in, on, or within 1,000 feet of the real property comprising a public housing facility at any time. As used in this section, the term "real property comprising a public housing facility" means real property, as defined in s. 421.03(12), of a public corporation created as a housing authority pursuant to part I of chapter 421. A person who violates this paragraph with respect to:

1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4. commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2. A controlled substance named or described in s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

3. Any other controlled substance, except as lawfully sold, manufactured, or delivered, must be sentenced to pay a $500 fine and to serve 100 hours of public service in addition

to any other penalty prescribed by law.

(h) Except as authorized by this chapter, a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance in, on, or within 1,000 feet of the real property comprising an assisted living facility, as that term is used in chapter 429. A person who violates this paragraph with respect to:

1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4. commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2. A controlled substance named or described in s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

3. Any other controlled substance, except as lawfully sold, manufactured, or delivered, must be sentenced to pay a $500 fine and to serve 100 hours of public service in addition to any other penalty prescribed by law.

(4) Except as authorized by this chapter, a person 18 years of age or older may not deliver any controlled substance to a person younger than 18 years of age, use or hire a person younger than 18 years of age as an agent or employee in the sale or delivery of such a substance, or use such person to assist in

avoiding detection or apprehension for a violation of this chapter. A person who violates this paragraph with respect to:

(a) A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4. commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Imposition of sentence may not be suspended or deferred, and the person so convicted may not be placed on probation.

(5) A person may not bring into this state any controlled substance unless the possession of such controlled substance is authorized by this chapter or unless such person is licensed to do so by the appropriate federal agency. A person who violates this provision with respect to:

(a) A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4. commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 5. This act shall take effect July 1, 2017.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 527 Sentencing for Capital Felonies
SPONSOR(S): Sprowls
TIED BILLS: **IDEN./SIM. BILLS:** SB 280

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee		Homburg	White

SUMMARY ANALYSIS

On the first day of the 2016 Regular Session, the United States Supreme Court found Florida's death penalty sentencing process unconstitutional, holding that the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death because a jury's "mere recommendation is not enough." To address this decision, the Legislature during the 2016 Regular Session enacted HB 7101 (hereinafter "the 2016 Act"), which took effect on March 7, 2016. In relevant part, the 2016 Act required the sentencing jury in a death penalty case to unanimously find at least one aggravating factor before the defendant could be eligible for a sentence of death. The 2016 Act also required at least 10 of the 12 jurors to concur in a recommendation of a sentence of death to the court.

On October 14, 2016, the Florida Supreme Court (FSC) held in *Hurst v. State* that all of the findings necessary for a jury to impose a sentence of death must be determined unanimously by the jury and that a jury's recommendation of a sentence of death must also be unanimous. On that same day, the FSC issued *Perry v. State,* in which the Court held the 2016 Act unconstitutional because it does not require the jury to unanimously recommend a sentence of death. The FSC stated, "[w]hile most of the Act can be construed constitutionally under our holding in *Hurst*, the Act's 10-2 jury recommendation requirement renders the Act unconstitutional."

To address the FSC's holding, the bill amends Florida's death penalty sentencing process to require that a jury's recommendation of a sentence of death be unanimous. Under the bill, if the jury does not unanimously determine that the defendant should be sentenced to death, the jury's recommendation must be a sentence of life imprisonment without parole.

The bill does not appear to have a fiscal impact.

The bill takes effect upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Death Penalty Sentencing - Background

In 1972, the United States (U.S.) Supreme Court decided *Furman v. Georgia*, which struck down all of the then-existing death penalty statutes in the U.S. on grounds that the imposition and carrying out of the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[1]

Florida was the first state to reenact a death penalty statute in the wake of *Furman*. This occurred in the fall of 1972, when House Bill 1-A was enacted during a Special Session of the Legislature.[2] The death penalty sentencing process adopted at that time was repeatedly upheld as constitutional[3] and remained largely the same until 2016.

Under that process, when a defendant was convicted of a capital felony,[4] a separate sentencing proceeding was conducted before the trial jury or, if the defendant pled, before a jury impaneled for the purpose of sentencing.[5] During the sentencing proceeding, the jury, after hearing all the evidence, was required to render a recommended sentence to the judge based on the following factors:

- Whether sufficient aggravating factors[6] existed;
- Whether sufficient aggravating factors existed which outweighed the mitigating circumstances found to exist; and
- Based on these considerations, whether the defendant should be sentenced to life imprisonment without the possibility of parole or death.[7]

Only a simple majority vote of the jury was necessary to recommend the death penalty. Juries were not required to list on the verdict aggravating and mitigating circumstances that the jury found persuasive or to disclose the number of jurors making the findings.[8] Moreover, the judge was not required to

---

[1] *Furman v. Georgia*, 408 U.S. 238 (1972).

[2] The bill was signed by Governor Askew on December 8, 1972. Ch. 72-724, Laws of Fla. (1973).

[3] *See Proffitt v. Florida*, 428 U.S. 242 (1976) (holding that the death penalty was not a "cruel and unusual" punishment per se, and that Florida's capital-sentencing procedure was not unconstitutionally arbitrary and/or capricious);*Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984) (rejecting defendant's claim that allowing the judge to impose death when the jury recommends life violates the 5th, 6th, and 8th Amendments of the U.S. Constitution); *Hildwin v. Florida*, 490 U.S. 638, 109 S. Ct. 2055, 104 L.Ed. 2d 728 (1989)(rejecting defendant's claim that a jury, rather than the judge, must find the aggravating factors; holding that the Sixth Amendment "does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.").

[4] Capital felonies in Florida are: (a) first degree murder; (b) the killing of an unborn child by injury to the mother which would be murder in the first degree constituting a capital felony if it resulted in the death of the mother; (c) willfully making, possessing, throwing, etcetera, a destructive device, if the act results in the death of another person; (d) unlawfully manufacturing, possessing, selling, using, etcetera, a weapon of mass destruction, if death results; and (e) certain drug trafficking, importation, and manufacturing crimes that result in a death or where the probable result of such act would be the death of a person ss. 782.04(1)(a), 782.09(1)(a), 790.161(4), 790.166(2), and 893.135(1), F.S

[5] ss. 921.141(1) and 921.142(2), F.S.

[6] "An aggravating circumstance is a standard to guide the jury in making the choice between the alternative recommendations of life imprisonment without the possibility of parole or death. It is a statutorily enumerated circumstance which increases the gravity of a crime or the harm to a victim." *Fla. Standard Jury Instructions, Criminal Cases,* Penalty Proceedings Capital Cases, Instr. 7.11.

[7] ss. 921.141(2) and 921.142(3), F.S.

[8] "If a majority of the jury, seven or more, determine that (defendant) should be sentenced to death, your advisory sentence will be: A majority of the jury by a vote of _____ to _____ advise and recommend to the court that it impose the death penalty upon (defendant). On the other hand, if by six or more votes the jury determines that (defendant) should not be sentenced to death, your advisory sentence will be: The jury advises and recommends to the court that it impose a sentence of life imprisonment upon (defendant) without possibility of parole." *Fla. Standard Jury Instructions, Criminal Cases, Penalty Proceedings Capital Cases, Instr. 7.11.*

sentence a defendant as recommended by the jury; instead, the judge conducted an independent analysis of the aggravating and mitigating circumstances and was authorized to impose a sentence of life or death notwithstanding the jury's recommendation.[9]

***Hurst v. Florida* – U.S. Supreme Court**

On the opening day of the 2016 Regular Session, January 12, 2016, the U.S. Supreme Court found Florida's death penalty sentencing process unconstitutional in *Hurst v. Florida*.[10]

In this case, Timothy Lee Hurst was convicted of first-degree murder for fatally stabbing his co-worker in 1998 with a box cutter.[11] A jury recommended a sentence of death by a seven-to-five vote; thereafter, the trial court entered a sentence of death.[12] Hurst challenged his sentence arguing before the U.S. Supreme Court that the jury was required to find specific aggravators and issue a unanimous advisory sentence recommendation.[13]

In the eight-to-one decision, the U.S. Supreme Court ruled that the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death because a jury's "mere recommendation is not enough."[14] The Court compared Florida's sentencing scheme to Arizona's scheme, which the Court had ruled unconstitutional in 2002 in *Ring v. Arizona*,[15] and found Florida's distinctive factor of the advisory jury verdict immaterial. Like the trial judge in *Ring*, the trial judge in *Hurst* performed her own fact finding and increased *Hurst's* authorized punishment, thereby violating the Sixth Amendment.[16] The Court remanded the case to the Florida Supreme Court (FSC) for "proceedings not inconsistent with" its decision.[17]

The U.S. Supreme Court never mentioned the issue of jury unanimity in its decision.

2016 Legislation

During the 2016 Regular Session, the Legislature for purposes of addressing the U.S. Supreme Court's decision in *Hurst* enacted HB 7101, which took effect on March 7, 2016.[18] Under the new law, the death penalty sentencing process was revised to require the jury, after hearing all of the evidence regarding aggravating factors and mitigating circumstances, to:

- Determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor.
- Return findings identifying each aggravating factor found. A finding that an aggravating factor exists must be unanimous.[19]

The new law further specified that if the jury:

- Does not unanimously find an aggravating factor, the defendant is ineligible for a sentence of death.

---

[9] ss. 921.141(3) and 921.142(4), F.S

[10] *Hurst v. Florida,* 136 S.Ct. 616 (2016).

[11] *Hurst v. State*, 147 So. 3d 435, 437 (Fla. 2014), *rev'd and remanded*, 136 S.Ct. 616 (U.S. Jan. 12, 2016).

[12] *Id.* at 440.

[13] *Hurst,* 136 S.Ct. at 619-620.

[14] *Id.*

[15] In *Ring,* the court ruled that the jury, rather than the judge, must find the aggravating factors justifying a sentence of death. The decision was clear as to its application to the Arizona death penalty sentencing scheme wherein the judge, without any input from the jury beyond the verdict of guilty on the murder charge, made the sentencing decision. It was not clear, however, as to whether the *Ring* decision had any impact on Florida's "hybrid" sentencing scheme. Under Florida's "hybrid" process, the jury had input given that it made a recommendation of death or life to the judge. *Ring v. Arizona*, 536 U.S. 584 (2002).

[16] *Id.* at 621,622.

[17] *Id.* at 624.

[18] Chapter 2016-13, L.O.F. (2016).

[19] ss. 921.141(2)(a) and (b) and 921.142(3)(a) and (b), F.S.

- Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury must recommend to the court whether the defendant shall be sentenced to life imprisonment without the possibility of parole or death.[20]

In making its recommendation, the jury must weigh the following:

- Whether sufficient aggravating factors exist.
- Whether sufficient mitigating circumstances exist that outweigh the aggravating factors found to exist.
- Based on the above-referenced considerations, whether the defendant should be sentenced to life imprisonment without the possibility of parole or death.[21]

To recommend a sentence of death, a minimum of 10 jurors out of the 12 jurors must concur in the recommendation. If fewer than 10 jurors concur, a sentence of life imprisonment without the possibility of parole must be the jury's recommendation to the court.[22]

If the jury recommends:

- Life imprisonment without the possibility of parole, the judge must impose that sentence.
- A sentence of death, the judge may impose a sentence of death or life imprisonment without the possibility of parole. The judge may only consider an aggravating factor that was unanimously found by the jury.[23]

***Hurst v. State* (on remand to the FSC)**

On October 14, 2016, the FSC issued its opinion in *Hurst v. State,* on remand from the U.S. Supreme Court. In this opinion, a majority of the FSC ruled that there are three "critical findings," also referred to by as "facts" and "elements," which must be found by the jury before the jury may consider a recommendation of death.[24] According to the majority, these critical findings are:

- The existence of each aggravating factor that has been proven beyond a reasonable doubt;
- That the aggravating factors are sufficient to impose death; and
- That the aggravating factors outweigh the mitigating circumstances.[25]

Further, according to the majority, each of the critical findings must be found *unanimously* by the jury based on Florida common law, the Florida Constitution's right to trial by jury, and the Sixth and Eighth Amendments of the U.S. Constitution. With respect to Florida law, the majority stated:

> [J]ust as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty— are also elements that must be found unanimously by the jury. ... This holding is founded upon the Florida Constitution and Florida's long history of requiring jury unanimity in finding all the elements of the offense to be proven; and it gives effect to our precedent that the "final decision in the weighing process must be supported by 'sufficient competent evidence in the record.'"[26]

Finally, the majority ruled that a jury's recommendation of a sentence of death must also be unanimous. In part, the majority stated, "[W]e conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment. Although the [U.S.]

---

[20] ss. 921.141(2)(b) and 921.142(3)(b), F.S.
[21] *Id.*
[22] ss. 921.141(2)(c) and 921.142(3)(c), F.S.
[23] ss. 921.141(3)(a) and 921.142(4)(a), F.S.
[24] *Hurst v. State*, 202 So.3d 40, 54 (Fla. 2016).
[25] *Hurst*, 202 So.3d at 45.
[26] *Id.* at 53-54.

Supreme Court has not ruled on whether unanimity is required in the jury's advisory verdict in capital cases, the foundational precept of the Eighth Amendment calls for unanimity...."[27]

Applying the aforementioned holding to Hurst's case, the majority reversed and remanded for resentencing.[28] According to the majority, *Hurst v. Florida* error is not structural error. Such error "is capable of harmless error review."[29] The majority determined, however, that the error in Hurst's case was not harmless because the court could not determine whether the jury unanimously found that: (a) any aggravators existed; (b) the aggravation was sufficient for death; or (c) the aggravating factors outweighed the mitigating circumstances.[30] According to the majority, "the fact that only seven jurors recommended death strongly suggests to the contrary."[31]

Justice Canady dissented in an opinion in which Justice Polston concurred. According to the dissent:

> Because I conclude that the Sixth Amendment as explained by the Supreme Court's decision in *Hurst v. Florida* ... simply requires that an aggravating circumstance be found by the jury, I disagree with the majority's expansive understanding of *Hurst v. Florida*. And because I conclude that the absence of a finding of an aggravator by the jury that tried Hurst was harmless beyond a reasonable doubt and agree with the majority's rejection of Hurst's claim that he is entitled to be sentenced to life, I would affirm the sentence of death.
>
> The majority concludes that the Supreme Court decided in *Hurst v. Florida* that the Sixth Amendment requires jury sentencing in death cases so that no death sentence can be imposed unless a unanimous jury decides that death should be the penalty. But this conclusion cannot be reconciled with the reasoning of the Court's opinion in *Hurst v. Florida* or with [other Supreme Court precedent].... The majority's reading of *Hurst v. Florida* wrenches the Court's reference to "each fact necessary to impose a sentence of death," ..., out of context, ignoring how the Court has used the term "facts" in its Sixth Amendment jurisprudence, and failing to account for the *Hurst v. Florida* Court's repeated identification of Florida's failure to require a jury finding of an aggravator as the flaw that renders Florida's death penalty law unconstitutional.
>
> ***
>
> Not content with its undue expansion of *Hurst v. Florida's* holding regarding the requirements of the Sixth Amendment, the majority injects conclusions based on the Eighth Amendment even though *Hurst v. Florida* does not address the Eighth Amendment. Remarkably, the majority adopts the view of the Eighth Amendment expressed by Justice Breyer in his concurring opinions in *Ring* and *Hurst v. Florida*. In doing so, the majority addresses a question that is not even properly at issue in this remand proceeding—which solely concerns how we are to apply *Hurst v. Florida's* Sixth Amendment holding—and delivers a ruling that dramatically departs from binding precedent from the Supreme Court. In short, the majority fundamentally misapprehends and misuses *Hurst v. Florida*, thereby unnecessarily disrupting the administration of the death penalty in Florida. I strongly dissent.[32]

---

[27] *Id.* at 44-45.
[28] The majority rejected Hurst's argument that his sentence should be commuted to life imprisonment sentence under s. 775.082(2), F.S., which provides that a death penalty sentence shall be reduced to life imprisonment if the death penalty is held unconstitutional. According to the majority, the U.S. Supreme Court, "did not invalidate death as a penalty, but invalidated only that portion of the process which had allowed the necessary factfinding to be made by the judge rather than the jury in order to impose a sentence of death." *Id.* at 62-63.
[29] *Id.* at 68.
[30] *Id.* at 55-56.
[31] *Id.* at 56.
[32] *Id.* at 89-92 (citations omitted).

Perry v. State

On the same day that the FSC decided *Hurst v. State,* it also decided *Perry v. State.* In this case, the FSC considered whether the new death penalty sentencing process enacted by the Legislature in 2016 could be constitutionally applied in cases where the underlying crime was committed prior to 2016. Answering the question in the negative, the majority stated:

> [W]e resolve any ambiguity in the [death penalty sentencing process enacted in 2016] consistent with our decision in *Hurst.* Namely, to increase the penalty from a life sentence to a sentence of death, the jury must unanimously find the existence of any aggravating factor, that the aggravating factors are sufficient to warrant a sentence of death, that the aggravating factors outweigh the mitigating circumstances, and must unanimously recommend a sentence of death. ... ***While most of the Act can be construed constitutionally under our holding in Hurst, the Act's 10-2 jury recommendation requirement renders the Act unconstitutional.***[33]

Effect of the Bill

To address the FSC's holding that the death penalty sentencing process is constitutional except for its 10-2 jury recommendation requirement, the bill amends ss. 921.141(2)(c) and 921.142(3)(c), F.S., to require that a jury's recommendation of a sentence of death be unanimous. If the jury does not unanimously determine that the defendant should be sentenced to death, the jury's recommendation shall be a sentence of life imprisonment without parole.

The bill reeneacts ss. 775.082(1)(a), 782.04(1)(b), 8 794.011(2)(a), and 893.135(1)(b) through (l), F.S., for purposes of incorporating the bill's amendments to ss. 921.141 and 921.142, F.S.

The bill is effective upon becoming law.

B. SECTION DIRECTORY:

Section 1. Amends s. 921.141, F.S., relating to a sentence of death or life imprisonment for capital felonies.

Section 2. Amends s. 921.142, F.S., relating to a sentence of death or life imprisonment for capital drug trafficking felonies.

Section 3. Reenacts s. 775.082, F.S., relating to capital felonies.

Section 4. Reenacts s. 782.04, F.S., relating to murder.

Section 5. Reenacts s. 794.011, F.S., relating to sexual battery.

Section 6. Reenacts s. 893.135, F.S., relating to trafficking.

Section 7. Provides the bill is effective upon becoming law.

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 does not appear to have any impact on state expenditures.

[33] *Perry v. State,* 2016 WL 6036982, *25 (Fla. 2016)(emphasis added).

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: The bill does not appear to have any direct economic impact on the private sector.

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:

Retroactivity
On December 22, 2016, a majority of the FSC ruled that *Hurst* applies retroactively to anyone whose sentence became final on or after June 24, 2002, which is the day that the U.S. Supreme Court decided *Ring v. Arizona*.[34]

According to data from the Office of State Court Administrator, the sentences of 211 death penalty defendants[35] became final on or after *Ring;*[36] however, not all of these defendants will be eligible to receive a new sentencing proceeding based on *Hurst* error. If the defendant waived his or her right to a penalty phase jury, he or she is precluded from raising *Hurst* error on appeal.[37] Further, as discussed below, *Hurst* error may be found harmless in cases where the jury unanimously recommended a sentence of death. As illustrated in the chart below, approximately 20 percent of jury recommendations for a sentence of death are unanimous.

---

[34] *Mosely v. State, Mosely v. Jones*, Nos. SC14-436, SC14-2108 (Dec. 22, 2016); *Asay v. State, Asay v. Jones,* Nos. SC16-223, SC16-102, SC16-628 (Dec. 22, 2016).
[35] As of February 10, 2017, there are a total of 383 inmates on Florida's Death Row. Department of Corrections, *Death Row Statistics,* http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx (last visited February 10, 2017).
[36] E-mail from Sarah Naf, Director, Community and Intergovernmental Relations, Office of State Court Administrator, January 11, 2017 (on file with House of Representatives, Criminal Justice Subcommittee).
[37] *Mullens v. State,* 197 So.3d 16, 40 (2016): and *Davis v. State*, Case No. SC 13-1 (Nov. 10, 2016).

Distribution of Jury Votes in Death Cases by Calendar Year of Disposition by Florida Supreme Court[38] (N=296)																			
Original Jury Vote	'00	'01	'02	'03	'04	'05	'06	'07	'08	'09	'10	'11	'12	'13	'14	'15	Total	%[39]	Cum %
7-5	6	1	4	4	0	3	0	2	4	1	3	2	2	3	2	3	40	12%	12%
8-4	4	6	2	6	2	0	3	0	2	9	2	1	5	2	3	5	52	15%	27%
9-3	4	4	3	6	2	2	11	3	5	6	6	9	5	2	1	2	71	21%	48%
10-2	3	12	4	3	3	3	2	2	2	5	11	1	3	2	2	2	60	18%	66%
11-1	2	8	5	5	3	1	1	2	1	5	5	1	3	2	1	0	45	13%	79%
12-0	9	6	8	4	2	3	6	7	6	0	1	6	2	5	2	3	70	21%	100%
Subtotal	28	37	26	28	12	12	23	16	20	26	28	20	20	16	11	15	338	100%	
Other[40]	3	1	2	3	4	2	0	0	1	4	3	1	0	1	0	1	26		
TOTAL	31	38	28	31	16	14	23	16	21	30	31	21	20	17	11	16	364		

Harmless Error

As discussed above, the FSC has held that *Hurst* error "is capable of harmless error review."[41] To date, the FSC has reversed for resentencing each death penalty case raising cognizable *Hurst* error where the jury did not make a unanimous recommendation of death.[42] The FSC has found *Hurst* error to be harmless in two cases where the jury unanimously recommended a sentence of death.[43]

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

Pending Prosecutions

As of January 15, 2017, state attorneys reported a total of 313 pending death penalty cases of which 66 were ready for trial in the twenty judicial circuits.[44] The FSC has not yet ruled on whether pending prosecutions may move forward by changing the jury instructions for death penalty sentencing proceedings to require unanimity, although litigation on this issue has been pending since October 2017.[45] As a result, death penalty prosecutions in this state have been effectively halted. Defendants charged with capital crimes are presenting demands for speedy trial in some cases in an attempt to avoid the death penalty.[46]

---

[38] E-mail from Sarah Naf, Director, Community and Intergovernmental Relations, Office of State Court Administrator, November 30, 2016 (on file with House of Representatives, Criminal Justice Subcommittee).

[39] Calculated percentage excludes the "other" category.

[40] Includes waiver of penalty phase, and judicial overrides from jury recommendation of life to judge imposing death.

[41] *Hurst*, 202 So.3d at 68.

[42] *See, e.g., Franklin v. State*, No. SC13-1632 (Nov. 23, 2016)(remanding for resentencing where the jury recommended a death sentence by a 9-to-3 vote); *Johnson v. State,* No. SC14-1175 (Dec. 1, 2016) (remanding for resentencing where the jury recommended a death sentence by an 11-to-1 vote); and *Dubose v. State,* No. SC 10-2363, *31 (February 9, 2017)(remanding for resentencing where jury recommended death sentence by an 8-to-4 vote).

[43] *See Davis v. State*, No. SC11-1122 (Nov. 10, 2016); *Hall v. State,* No. SC15-1662 (February 9, 2017).

[44] Data on file with House of Representatives, Criminal Justice Committee staff.

[45] On October 25, 2016, in the death penalty prosecution of Patrick Evans in Pinellas County, Circuit Court Judge Bulon ruled that the state could move forward with the guilt phase, notwithstanding arguments by defense counsel that such cases may not be prosecuted until the Legislature amends the capital sentencing law. According to Judge Bulone, if Evans is convicted, the sentencing phase will then be conducted in accordance with the FSC's decision in *Hurst.* Defense counsel filed an Emergency Petition for Writ of Prohibition in the FSC arguing that Judge Bulone must be restrained from trying Evans. The FSC has not yet ruled on the petition. *See Evans v. State*, No. SC16-1946.

[46] Zack McDonald, *Triple murder suspect seeks speedy trial,* PANAMA CITY NEWS HERALD (Jan. 18, 2017) http://www.newsherald.com/news/20170118/triple-murder-suspect-seeks-speedy-trial (last visited February 9, 2017); Rafael Olmeda, *Speedy trial demand knocks out death penalty in Sunrise disemboweling case,* SUN SENTINEL (February 3, 2017) http://www.sun-sentinel.com/local/broward/sunrise/fl-disembowelment-case-speedy-trial-20170202-story.html (last visited February 10, 2017);.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

A bill to be entitled

An act relating to sentencing for capital felonies; amending ss. 921.141 and 921.142, F.S.; requiring a jury's recommendation of a sentence of death to be unanimous; requiring a jury to recommend life imprisonment without the possibility of parole if the jury does not unanimously recommend a sentence of death; reenacting ss. 775.082(1)(a), 782.04(1)(b), 794.011(2)(a), and 893.135(1)(b) through (l), F.S., relating to penalties, murder, sexual battery, and trafficking in controlled substances, respectively, to incorporate the amendments made by the act in cross-references to amended provisions; providing an effective date.

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

Section 1. Paragraph (c) of subsection (2) of section 921.141, Florida Statutes, is amended to read:

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(2) FINDINGS AND RECOMMENDED SENTENCE BY THE JURY.—This subsection applies only if the defendant has not waived his or her right to a sentencing proceeding by a jury.

(c) If the jury unanimously determines ~~at least 10 jurors~~

~~determine~~ that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If the jury does not unanimously ~~fewer than 10 jurors~~ determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.

Section 2. Paragraph (c) of subsection (3) of section 921.142, Florida Statutes, is amended to read:

921.142 Sentence of death or life imprisonment for capital drug trafficking felonies; further proceedings to determine sentence.—

(3) FINDINGS AND RECOMMENDED SENTENCE BY THE JURY.—This subsection applies only if the defendant has not waived his or her right to a sentencing proceeding by a jury.

(c) If the jury unanimously determines ~~at least 10 jurors determine~~ that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If the jury does not unanimously ~~fewer than 10 jurors~~ determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.

Section 3. For the purpose of incorporating the amendment made by this act to section 921.141, Florida Statutes, in a reference thereto, paragraph (a) of subsection (1) of section 775.082, Florida Statutes, is reenacted to read:

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

(1)(a) Except as provided in paragraph (b), a person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in a determination that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

Section 4. For the purpose of incorporating the amendment made by this act to section 921.141, Florida Statutes, in a reference thereto, paragraph (b) of subsection (1) of section 782.04, Florida Statutes, is reenacted to read:

782.04 Murder.—

(1)

(b) In all cases under this section, the procedure set forth in s. 921.141 shall be followed in order to determine sentence of death or life imprisonment. If the prosecutor intends to seek the death penalty, the prosecutor must give notice to the defendant and file the notice with the court within 45 days after arraignment. The notice must contain a list of the aggravating factors the state intends to prove and has reason to believe it can prove beyond a reasonable doubt. The court may allow the prosecutor to amend the notice upon a

showing of good cause.

Section 5. For the purpose of incorporating the amendment made by this act to section 921.141, Florida Statutes, in a reference thereto, paragraph (a) of subsection (2) of section 794.011, Florida Statutes, is reenacted to read:

794.011 Sexual battery.—

(2)(a) A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony, punishable as provided in ss. 775.082 and 921.141.

Section 6. For the purpose of incorporating the amendment made by this act to section 921.142, Florida Statutes, in references thereto, paragraphs (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), and (l) of subsection (1) of section 893.135, Florida Statutes, are reenacted to read:

893.135 Trafficking; mandatory sentences; suspension or reduction of sentences; conspiracy to engage in trafficking.—

(1) Except as authorized in this chapter or in chapter 499 and notwithstanding the provisions of s. 893.13:

(b)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine, as described in s. 893.03(2)(a)4., or of any mixture containing cocaine, but less than 150 kilograms of

cocaine or any such mixture, commits a felony of the first degree, which felony shall be known as "trafficking in cocaine," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of $50,000.

b. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of $100,000.

c. Is 400 grams or more, but less than 150 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of $250,000.

2. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 150 kilograms or more of cocaine, as described in s. 893.03(2)(a)4., commits the first degree felony of trafficking in cocaine. A person who has been convicted of the first degree felony of trafficking in cocaine under this subparagraph shall be punished by life imprisonment and is ineligible for any form of discretionary early release except pardon or executive clemency or conditional medical release under s. 947.149. However, if the court

determines that, in addition to committing any act specified in this paragraph:

a. The person intentionally killed an individual or counseled, commanded, induced, procured, or caused the intentional killing of an individual and such killing was the result; or

b. The person's conduct in committing that act led to a natural, though not inevitable, lethal result,

such person commits the capital felony of trafficking in cocaine, punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

3. Any person who knowingly brings into this state 300 kilograms or more of cocaine, as described in s. 893.03(2)(a)4., and who knows that the probable result of such importation would be the death of any person, commits capital importation of cocaine, a capital felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(c)1. A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or

more of any morphine, opium, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b), (2)(a), (3)(c)3., or (3)(c)4., or 4 grams or more of any mixture containing any such substance, but less than 30 kilograms of such substance or mixture, commits a felony of the first degree, which felony shall be known as "trafficking in illegal drugs," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

a. Is 4 grams or more, but less than 14 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years and shall be ordered to pay a fine of $50,000.

b. Is 14 grams or more, but less than 28 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and shall be ordered to pay a fine of $100,000.

c. Is 28 grams or more, but less than 30 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 years and shall be ordered to pay a fine of $500,000.

2. A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 14 grams or more of hydrocodone, or any salt, derivative, isomer, or salt of an isomer thereof, or 14 grams or more of any mixture containing

any such substance, commits a felony of the first degree, which felony shall be known as "trafficking in hydrocodone," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

a. Is 14 grams or more, but less than 28 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years and shall be ordered to pay a fine of $50,000.

b. Is 28 grams or more, but less than 50 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years and shall be ordered to pay a fine of $100,000.

c. Is 50 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and shall be ordered to pay a fine of $500,000.

d. Is 200 grams or more, but less than 30 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 years and shall be ordered to pay a fine of $750,000.

3. A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 7 grams or more of oxycodone, or any salt, derivative, isomer, or salt of an isomer thereof, or 7 grams or more of any mixture containing any such

substance, commits a felony of the first degree, which felony shall be known as "trafficking in oxycodone," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

a. Is 7 grams or more, but less than 14 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years and shall be ordered to pay a fine of $50,000.

b. Is 14 grams or more, but less than 25 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years and shall be ordered to pay a fine of $100,000.

c. Is 25 grams or more, but less than 100 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and shall be ordered to pay a fine of $500,000.

d. Is 100 grams or more, but less than 30 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 years and shall be ordered to pay a fine of $750,000.

4. A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 30 kilograms or more of any morphine, opium, oxycodone, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b), (2)(a),

(3)(c)3., or (3)(c)4., or 30 kilograms or more of any mixture containing any such substance, commits the first degree felony of trafficking in illegal drugs. A person who has been convicted of the first degree felony of trafficking in illegal drugs under this subparagraph shall be punished by life imprisonment and is ineligible for any form of discretionary early release except pardon or executive clemency or conditional medical release under s. 947.149. However, if the court determines that, in addition to committing any act specified in this paragraph:

a. The person intentionally killed an individual or counseled, commanded, induced, procured, or caused the intentional killing of an individual and such killing was the result; or

b. The person's conduct in committing that act led to a natural, though not inevitable, lethal result,

such person commits the capital felony of trafficking in illegal drugs, punishable as provided in ss. 775.082 and 921.142. A person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

5. A person who knowingly brings into this state 60 kilograms or more of any morphine, opium, oxycodone, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s.

893.03(1)(b), (2)(a), (3)(c)3., or (3)(c)4., or 60 kilograms or more of any mixture containing any such substance, and who knows that the probable result of such importation would be the death of a person, commits capital importation of illegal drugs, a capital felony punishable as provided in ss. 775.082 and 921.142. A person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(d)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of phencyclidine or of any mixture containing phencyclidine, as described in s. 893.03(2)(b), commits a felony of the first degree, which felony shall be known as "trafficking in phencyclidine," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of $50,000.

b. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of $100,000.

c. Is 400 grams or more, such person shall be sentenced to

a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of $250,000.

2. Any person who knowingly brings into this state 800 grams or more of phencyclidine or of any mixture containing phencyclidine, as described in s. 893.03(2)(b), and who knows that the probable result of such importation would be the death of any person commits capital importation of phencyclidine, a capital felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(e)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 200 grams or more of methaqualone or of any mixture containing methaqualone, as described in s. 893.03(1)(d), commits a felony of the first degree, which felony shall be known as "trafficking in methaqualone," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

a. Is 200 grams or more, but less than 5 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of $50,000.

b. Is 5 kilograms or more, but less than 25 kilograms, such person shall be sentenced to a mandatory minimum term of

imprisonment of 7 years, and the defendant shall be ordered to pay a fine of $100,000.

c. Is 25 kilograms or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of $250,000.

2. Any person who knowingly brings into this state 50 kilograms or more of methaqualone or of any mixture containing methaqualone, as described in s. 893.03(1)(d), and who knows that the probable result of such importation would be the death of any person commits capital importation of methaqualone, a capital felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(f)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 14 grams or more of amphetamine, as described in s. 893.03(2)(c)2., or methamphetamine, as described in s. 893.03(2)(c)4., or of any mixture containing amphetamine or methamphetamine, or phenylacetone, phenylacetic acid, pseudoephedrine, or ephedrine in conjunction with other chemicals and equipment utilized in the manufacture of amphetamine or methamphetamine, commits a felony of the first degree, which felony shall be known as "trafficking in amphetamine," punishable as provided in s.

775.082, s. 775.083, or s. 775.084. If the quantity involved:

a. Is 14 grams or more, but less than 28 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of $50,000.

b. Is 28 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of $100,000.

c. Is 200 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of $250,000.

2. Any person who knowingly manufactures or brings into this state 400 grams or more of amphetamine, as described in s. 893.03(2)(c)2., or methamphetamine, as described in s. 893.03(2)(c)4., or of any mixture containing amphetamine or methamphetamine, or phenylacetone, phenylacetic acid, pseudoephedrine, or ephedrine in conjunction with other chemicals and equipment used in the manufacture of amphetamine or methamphetamine, and who knows that the probable result of such manufacture or importation would be the death of any person commits capital manufacture or importation of amphetamine, a capital felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine

provided under subparagraph 1.

(g)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of flunitrazepam or any mixture containing flunitrazepam as described in s. 893.03(1)(a) commits a felony of the first degree, which felony shall be known as "trafficking in flunitrazepam," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

a. Is 4 grams or more but less than 14 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of $50,000.

b. Is 14 grams or more but less than 28 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of $100,000.

c. Is 28 grams or more but less than 30 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 calendar years and pay a fine of $500,000.

2. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state or who is knowingly in actual or constructive possession of 30 kilograms or more of flunitrazepam or any mixture containing flunitrazepam as described in s. 893.03(1)(a) commits the first degree felony

of trafficking in flunitrazepam. A person who has been convicted of the first degree felony of trafficking in flunitrazepam under this subparagraph shall be punished by life imprisonment and is ineligible for any form of discretionary early release except pardon or executive clemency or conditional medical release under s. 947.149. However, if the court determines that, in addition to committing any act specified in this paragraph:

a. The person intentionally killed an individual or counseled, commanded, induced, procured, or caused the intentional killing of an individual and such killing was the result; or

b. The person's conduct in committing that act led to a natural, though not inevitable, lethal result,

such person commits the capital felony of trafficking in flunitrazepam, punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(h)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 1 kilogram or more of gamma-hydroxybutyric acid (GHB), as described in s. 893.03(1)(d), or any mixture containing gamma-hydroxybutyric acid (GHB), commits a felony of the first degree, which felony

shall be known as "trafficking in gamma-hydroxybutyric acid (GHB)," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

a. Is 1 kilogram or more but less than 5 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of $50,000.

b. Is 5 kilograms or more but less than 10 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of $100,000.

c. Is 10 kilograms or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of $250,000.

2. Any person who knowingly manufactures or brings into this state 150 kilograms or more of gamma-hydroxybutyric acid (GHB), as described in s. 893.03(1)(d), or any mixture containing gamma-hydroxybutyric acid (GHB), and who knows that the probable result of such manufacture or importation would be the death of any person commits capital manufacture or importation of gamma-hydroxybutyric acid (GHB), a capital felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(i)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 1 kilogram or more of gamma-butyrolactone (GBL), as described in s. 893.03(1)(d), or any mixture containing gamma-butyrolactone (GBL), commits a felony of the first degree, which felony shall be known as "trafficking in gamma-butyrolactone (GBL)," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

a. Is 1 kilogram or more but less than 5 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of $50,000.

b. Is 5 kilograms or more but less than 10 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of $100,000.

c. Is 10 kilograms or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of $250,000.

2. Any person who knowingly manufactures or brings into the state 150 kilograms or more of gamma-butyrolactone (GBL), as described in s. 893.03(1)(d), or any mixture containing gamma-butyrolactone (GBL), and who knows that the probable result of such manufacture or importation would be the death of any person

commits capital manufacture or importation of gamma-butyrolactone (GBL), a capital felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(j)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 1 kilogram or more of 1,4-Butanediol as described in s. 893.03(1)(d), or of any mixture containing 1,4-Butanediol, commits a felony of the first degree, which felony shall be known as "trafficking in 1,4-Butanediol," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

a. Is 1 kilogram or more, but less than 5 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of $50,000.

b. Is 5 kilograms or more, but less than 10 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of $100,000.

c. Is 10 kilograms or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of $500,000.

2. Any person who knowingly manufactures or brings into

this state 150 kilograms or more of 1,4-Butanediol as described in s. 893.03(1)(d), or any mixture containing 1,4-Butanediol, and who knows that the probable result of such manufacture or importation would be the death of any person commits capital manufacture or importation of 1,4-Butanediol, a capital felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(k)1. A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 10 grams or more of any of the following substances described in s. 893.03(1)(c):

a. (MDMA) 3,4-Methylenedioxymethamphetamine;

b. DOB (4-Bromo-2,5-dimethoxyamphetamine);

c. 2C-B (4-Bromo-2,5-dimethoxyphenethylamine);

d. 2,5-Dimethoxyamphetamine;

e. DOET (4-Ethyl-2,5-dimethoxyamphetamine);

f. N-ethylamphetamine;

g. 3,4-Methylenedioxy-N-hydroxyamphetamine;

h. 5-Methoxy-3,4-methylenedioxyamphetamine;

i. PMA (4-methoxyamphetamine);

j. PMMA (4-methoxymethamphetamine);

k. DOM (4-Methyl-2,5-dimethoxyamphetamine);

l. MDEA (3,4-Methylenedioxy-N-ethylamphetamine);

m. MDA (3,4-Methylenedioxyamphetamine);

n. N,N-dimethylamphetamine;

o. 3,4,5-Trimethoxyamphetamine;

p. Methylone (3,4-Methylenedioxymethcathinone);

q. MDPV (3,4-Methylenedioxypyrovalerone); or

r. Methylmethcathinone,

individually or analogs thereto or isomers thereto or in any combination of or any mixture containing any substance listed in sub-subparagraphs a.-r., commits a felony of the first degree, which felony shall be known as "trafficking in Phenethylamines," punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2. If the quantity involved:

a. Is 10 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years and shall be ordered to pay a fine of $50,000.

b. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years and shall be ordered to pay a fine of $100,000.

c. Is 400 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and shall be ordered to pay a fine of $250,000.

3. A person who knowingly manufactures or brings into this state 30 kilograms or more of any of the following substances described in s. 893.03(1)(c):

a. MDMA (3,4-Methylenedioxymethamphetamine);

b. DOB (4-Bromo-2,5-dimethoxyamphetamine);

c. 2C-B (4-Bromo-2,5-dimethoxyphenethylamine);

d. 2,5-Dimethoxyamphetamine;

e. DOET (4-Ethyl-2,5-dimethoxyamphetamine);

f. N-ethylamphetamine;

g. N-Hydroxy-3,4-methylenedioxyamphetamine;

h. 5-Methoxy-3,4-methylenedioxyamphetamine;

i. PMA (4-methoxyamphetamine);

j. PMMA (4-methoxymethamphetamine);

k. DOM (4-Methyl-2,5-dimethoxyamphetamine);

l. MDEA (3,4-Methylenedioxy-N-ethylamphetamine);

m. MDA (3,4-Methylenedioxyamphetamine);

n. N,N-dimethylamphetamine;

o. 3,4,5-Trimethoxyamphetamine;

p. Methylone (3,4-Methylenedioxymethcathinone);

q. MDPV (3,4-Methylenedioxypyrovalerone); or

r. Methylmethcathinone,

individually or analogs thereto or isomers thereto or in any combination of or any mixture containing any substance listed in sub-subparagraphs a.-r., and who knows that the probable result

of such manufacture or importation would be the death of any person commits capital manufacture or importation of Phenethylamines, a capital felony punishable as provided in ss. 775.082 and 921.142. A person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(l)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 1 gram or more of lysergic acid diethylamide (LSD) as described in s. 893.03(1)(c), or of any mixture containing lysergic acid diethylamide (LSD), commits a felony of the first degree, which felony shall be known as "trafficking in lysergic acid diethylamide (LSD)," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

a. Is 1 gram or more, but less than 5 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of $50,000.

b. Is 5 grams or more, but less than 7 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of $100,000.

c. Is 7 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and

pay a fine of $500,000.

2. Any person who knowingly manufactures or brings into this state 7 grams or more of lysergic acid diethylamide (LSD) as described in s. 893.03(1)(c), or any mixture containing lysergic acid diethylamide (LSD), and who knows that the probable result of such manufacture or importation would be the death of any person commits capital manufacture or importation of lysergic acid diethylamide (LSD), a capital felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

Section 7. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

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

SUMMARY ANALYSIS

The Criminal Justice Standards and Training Commission (Commission), within the Florida Department of Law Enforcement (FDLE), is statutorily-assigned responsibilities relating to the training, certification, and discipline of law enforcement officers, correctional officers, and correctional probation officers. These responsibilities include a requirement that the Commission ensure that applicants entering into a criminal justice basic recruit program have successfully passed a Commission-approved basic abilities test (BAT).

To implement this responsibility, the Commission currently contracts with two out-of-state vendors and Miami Dade College for the development and administration of the BAT. Each of the three vendors administers a unique test. Training and selection centers for officers may choose, in their discretion, which test to administer.

The FDLE reports that this 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 to $75 with a statewide average of $46. Further, a review of BAT test scores in 2010-2015, by the federal Department of Justice 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 lowered passage rates for the BAT have been retroactively applied.

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 administration of the BAT, and must establish standards for acceptable performance on the test.

The bill also authorizes the Commission to establish a fee up to $50 for one scheduled BAT attempt and requires that fees collected for the BAT be deposited in the Criminal Justice Standards and Training Trust Fund (CJSTTF) annually.

The FDLE reports that there will be an estimated $400,000 in net revenue deposited in the CJSTTF annually and that this amount should pay for the FDLE's cost for the Commission's implementation of the BAT. The bill does not appear to have any impact on local government revenues or expenditures. . Please see "FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT," *infra.*

The bill is effective 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

Under s. 943.17, F.S., the Commission is required, 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 unique 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 Florida House of Representatives, Criminal Justice 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]

2016 Proviso

During the 2016 Regular Session, proviso was adopted which directed:

> 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. Reenacts s. 943.173, F.S., relating to examinations.

Section 4. Reenacts and amends s. 943.25, F.S., relating to criminal justice trust funds.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The FDLE projects that 20,000 individuals will take the BAT annually, which would result in $800,000 if the fee were $40. Of this amount, FDLE estimates that $20 will pay for the costs to Miami Dade College to administer the BAT, and that $20 will pay for the FDLE's cost for the

[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.

Commission's implementation of the BAT. FDLE estimates that the net revenue to be deposited in the CJSTTF annually will be $400,000.[19]

2. Expenditures:

FDLE states that $20 of the fee for the BAT will pay for the FDLE's cost for the Commission's implementation of the BAT.[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 take the BAT will have to pay fee of up to $50 to take the BAT. The two current out-of-state providers will no longer receive fees for the BAT once the Commission assumes the implementation responsibilities for the BAT.

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 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

N/A

[19] FDLE, Agency Analysis of HB 345 (2017) at pp. 4-6.
[20] *Id.* at 4.

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. This paragraph 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).

Section 3. 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 4. 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 ~~s. 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 5. This act shall take effect July 1, 2017.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 367 Prearrest Diversion Programs
SPONSOR(S): Criminal Justice Subcommittee
TIED BILLS: HB 369 **IDEN./SIM. BILLS:** SB 448

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Criminal Justice Subcommittee		Brummett WB	White TW

SUMMARY ANALYSIS

In the criminal prosecution context, diversion refers to programs that place an individual on a justice track that is less restrictive and affords more opportunities for rehabilitation and restoration. Diversion may also result in the avoidance or dropping of a charge and dismissal of a criminal case completely.

One form of prearrest diversion is a civil citation program. Under this type of program, a law enforcement officer may issue a civil citation to an individual who commits an eligible misdemeanor offense (as determined by the prearrest diversion program), meets other eligibility requirements, and agrees to successfully complete a program that incorporates interventions and sanctions, such as community service hours and restitution.

Juvenile civil citation programs are established in Florida law and currently operate throughout the state. Leon County also operates an adult civil citation program (ACCP). Florida law does not specifically address ACCPs or other prearrest diversion programs for adults.

The bill creates s. 901.40, F.S., to encourage local communities and public and private educational institutions to implement a prearrest diversion program. The bill provides a framework for a model ACCP and allows a law enforcement officer, at the officer's sole discretion, to issue a civil citation or similar prearrest diversion program notice to an adult who:

- Commits a qualifying misdemeanor offense (as determined by the program);
- Does not contest that he or she committed the offense; and
- Has not previously been arrested or received an adult civil citation, unless the program terms provide otherwise.

The bill requires an adult who receives a civil citation or similar notice to report for intake and comply with specified requirements. Upon successful completion of the ACCP, the adult will avoid an arrest record for the offense. If the adult does not successfully complete the ACCP, the law enforcement agency that issued the citation or similar notice may criminally charge the adult for the original offense and refer the case to the state attorney to determine if prosecution is appropriate.

The model program requires specified persons to participate in the creation of the prearrest diversion program and in the development of its policies and procedures. The persons responsible for developing the program must solicit input from other interested stakeholders.

The bill is effective on July 1, 2017.

The bill does not have a fiscal impact on state government. With respect to local governments, the bill could result in a cost savings if an ACCP is created. Please see "FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT," *infra.*

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Diversion - Generally

In its most general usage, diversion means that an individual is placed on a justice track that is less restrictive and affords more opportunities for rehabilitation and restoration.[1] Diversion may result in the avoidance or dropping of a charge and dismissal of a case completely.[2] Florida currently provides *post* arrest diversion alternatives to certain qualifying offenders for participation in pretrial intervention programs that include, but are not limited to, therapeutic treatment court programs.[3] Generally, failure to complete the requirements of such programs can result in the case reverting to normal channels for prosecution, while successful completion of the requirements results in dismissal of the charges.[4]

One diversion alternative that occurs *prior* to arrest is a civil citation program where a law enforcement officer issues a civil citation to an individual who commits an eligible misdemeanor offense (as determined by the prearrest diversion program), meets other eligibility requirements, and agrees to successfully complete a program that incorporates interventions and sanctions, such as community service hours and restitution. If the individual successfully completes the program, he or she is not arrested and will not have an arrest record.[5]

Juvenile civil citation programs are established in Florida law and operate throughout the state.[6] Leon County also operates an adult civil citation program.[7] Florida law does not specifically address adult civil citation programs or other prearrest diversion programs for adults.

Juvenile Civil Citation Program

The Juvenile Civil Citation Program (JCCP), created by s. 985.12, F.S., provides law enforcement with an alternative to taking juveniles who have committed non-serious delinquent acts into custody while ensuring swift and appropriate consequences.[8] JCCPs are open to juveniles with no criminal history who admit to committing a qualifying misdemeanor.[9] Law enforcement agencies are not required to issue civil citations and there is variation in the current use of JCCPs among agencies and counties.[10] Under a JCCP, a law enforcement officer (LEO) has discretion to:

- Issue a warning or inform the juvenile's parent when a juvenile admits to having committed a misdemeanor;

---

[1] Center for Health and Justice at TASC, *No Entry: A National Survey of Criminal Justice Diversion Programs and Initiatives* (December 2013), pg. 6, *available at* http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/CHJ%20Diversion%20Report_web.pdf (last visited February 3, 2017).

[2] *Id.*

[3] Section 948.08, F.S., provides for pretrial intervention programs including a treatment based drug court program, a pretrial veterans' treatment intervention program, and a pretrial mental health court program.

[4] *Id.*

[5] Civil Citation Network, *Adult Civil Citation Program*, (revised September 2013), pg. 2, *available at* http://www.discvillage.com/DOCS/AdultCivilCitationBrochure.pdf (last visited February 3, 2017).

[6] Section 985.12, F.S.

[7] Dan Sullivan, *Florida Law Enforcement Agencies Consider Adult Civil Citations*, OFFICER.COM (December 3, 2012) http://www.officer.com/news/10836959/fla-le-agencies-consider-adult-civil-citations.

[8] s. 985.12(1), F.S.

[9] The Department of Juvenile Justice's guidelines suggest certain misdemeanors , including those related to the possession of a firearm, a sexually related offense, or a gang related offense may not always be appropriate for civil citation, but should be judged on a case by case basis. DJJ, *Civil Citation Model Plan, A Guide to Implementation*, DJJ (October 2015) , *available at* http://www.djj.state.fl.us/docs/probation-policy-memos/civil-citation-model-plan.pdf?Status=Master&sfvrsn=4 (last visited February 3, 2017).

[10] *Id.*

- Issue a civil citation or require participation in a similar diversion program and assess up to 50 hours of community service and require participation in intervention services; or
- Arrest the juvenile, conditioned upon the LEO providing written documentation as to why an arrest was warranted.[11]

The availability of the above-mentioned options are not limited to first-time misdemeanors and can also be used for up to two subsequent misdemeanors.[12] The statute requires the LEO issuing the civil citation[13] to advise the juvenile of his or her option to refuse the citation and instead be arrested and referred to a DJJ intake office.[14]

A juvenile who elects to participate in the JCCP must report to a community service performance monitor within seven working days after the date of issuance of the civil citation, and must complete the work assignment at a rate of not less than five hours per week.[15] Upon completion of the program, the agency operating the JCCP must report the outcome to DJJ.[16]

Adult Civil Citation

The American Bar Association has observed: "Although Florida's civil citation programs are focused on juveniles, the guidelines and principles inherent in the programs are generally applicable to adults, as well."[17] Leon County currently operates an adult civil citation program (ACCP).

Leon County Adult Civil Citation Program

Under the Leon County program, a law enforcement officer has the discretion to issue a civil citation after the officer has determined probable cause for an arrest and has obtained an admission to the offense following the administration of Miranda Warnings.[18] The law enforcement officer must then verify whether the adult meets all of the following criteria:

- The offense is one of the following misdemeanors:
  - Possession of alcohol by a person under 21 years of age;[19]
  - Possession of less than 20 grams of marijuana;[20]
  - Possession of drug paraphernalia;[21]
  - An open house party violation;[22]
  - Selling or giving alcoholic beverages to a minor;[23]
  - Criminal mischief (restitution may not exceed $50);[24]
  - Trespass;[25]
  - Non-domestic battery or assault;[26]

---

[11] s. 985.12(1), F.S.
[12] *Id.*
[13] If the LEO issues a civil citation, a copy must be provided to the county sheriff, state attorney, the appropriate DJJ intake office or the community performance monitor designated by DJJ, the parents or guardian of the youth, and the victim. s. 985.12(1), F.S.
[14] The youth has the right to opt out of the JCCP and be referred to a DJJ intake office at any time before completion of the work assignment. s. 985.12(6), F.S.
[15] s. 985.12(4), F.S.
[16] s. 985.12(1), F.S.
[17] American Bar Association, Criminal Justice Section, *State Policy Implementation Project*, pg. 5, *available at* http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/spip_civilcitations.authcheckdam.pdf (last visited February 4, 2017).
[18] Civil Citation Network, Pilot Adult Civil Citation Program, *Implementation Guide*, Second Judicial Circuit of Florida, (August 2013), pg. 4, *available at* http://www.civilcitationnetwork.com/docs/Implementation-Guide.pdf (last visited February 4, 2017)(hereinafter cited to as "Implementation Guide").
[19] In violation of s. 562.111, F.S.
[20] In violation of s. 893.13, F.S.
[21] In violation of s. 893.147, F.S.
[22] In violation of s. 856.015, F.S.
[23] In violation of s. 562.11, F.S.
[24] In violation of s. 806.13, F.S..
[25] In violation of s. 810.08, F.S.
[26] In violation of s. 784.03 or s. 784.011, F.S., respectively.

    - Petit theft (restitution may not exceed $50);[27] or
    - Disorderly conduct.[28]
- The adult resides within the Second Judicial Circuit;[29] and
- The adult is a first-time adult offender (no previous arrest as an adult and no previous adult civil citation).[30]

If the officer determines that the adult is eligible to participate in the ACCP and that a civil citation is appropriate, the officer must explain to the adult that participation in the ACCP is voluntary.[31] If the adult chooses not to participate in the ACCP, the officer either issues a Notice to Appear (NTA) or transports the adult to the jail for formal booking.[32]

If the adult agrees to participate in the ACCP, the officer issues a civil citation and the adult has seven days to report to DISC Village, Inc.,[33] for intake and assessment. Based on the results of the assessment and initial drug screening, the provider creates an individualized intervention plan. The intervention plan includes:

- Counseling sessions (at least three with a behavioral health specialist);
- Drug screening;
- Online educational intervention modules;
- Community service hours; and
- A program fee. [34]

If the participant successfully completes all sanctions and intervention services, the social services provider notifies the referring law enforcement agency and the person will not have an arrest record.[35]

If the participant does not successfully complete the program, the referring law enforcement agency is notified and then contacts the adult and attempts to issue a NTA. If the adult does not comply with arrangements to receive a NTA, an arrest affidavit and warrant are submitted to the court. Subsequently, the adult may face prosecution if the state attorney determines that prosecution is appropriate.[36]

Statistics on the Leon County Adult Civil Citation Program

Between March 2013 and August 2016, 1,113 adult civil citations were issued by the Tallahassee Police Department and Leon County Sheriff's Office.[37] Fifty-four percent of the citations issued were for petit theft; 25 percent issued were for possession of marijuana; seven percent issued were for possession of alcohol by a minor; five percent issued were for battery/assault; four percent issued were for possession of drug paraphernalia; two percent issued were for criminal mischief; and three percent issued were for other offenses.[38]

---

[27] In violation of s. 812.014, F.S.
[28] In violation of s. 877.03, F.S.
[29] The Second Judicial Circuit includes the following counties: Franklin; Gadsden; Jefferson; Leon; Liberty; and Wakulla. *See* Florida's Second Judicial Circuit, *Court Map, available at* http://2ndcircuit.leoncountyfl.gov/ (last visited February 4, 2017). *See also* Implementation Guide, at 2-3.
[30] A prior juvenile civil citation does not make the adult ineligible. Implementation Guide, at pg. 3.
[31] Civil Citation Network, *Adult Civil Citation Program* (revised September 2013), pg.2, *available at* http://www.discvillage.com/DOCS/AdultCivilCitationBrochure.pdf (last visited February 3, 2017). .
[32] *Id.*
[33] DISC Village, Inc., is a non-profit social services provider. DISC Village, Inc., also operates the juvenile assessment center and juvenile civil citation program that serve counties in the Second Judicial Circuit. *See Disc Village*, available at http://www.discvillage.com/home.html (last visited February 4, 2017).
[34] Implementation Guide at 5, 7-12.
[35] *Id.* at 12.
[36] *Id.*
[37] Civil Citation Network, *Tallahassee/Leon County Three-Year Outcomes, Prearrest Diversion Adult Civil Citation Program*, pg.1 (on file with Criminal Justice Subcommittee).
[38] *Id.*

Approximately 83 percent of the ACCP participants successfully completed the program. The successful completion rate for each offense was:

- 84 percent for criminal mischief;
- 88 percent for possession of alcohol by a person under 21 years of age;
- 83 percent for petit theft;
- 84 percent for possession of less than 20 grams of marijuana;
- 76 percent for non-domestic battery or assault; and
- 74 percent for other offenses.[39]

Of those who successfully completed the ACCP, the rearrest rate was seven percent. Of those who did not successfully complete the program, the rearrest rate was 61 percent.[40]

Effect of the Bill

The bill creates s. 901.40, F.S., to encourage local communities and public or private educational institutions to implement a prearrest diversion program for adults. The bill provides a framework for a model ACCP. The model program allows a law enforcement officer, at the officer's sole discretion, to issue a civil citation or similar prearrest diversion program notice to an adult who:

- Commits a qualifying misdemeanor offense (as determined by the program); and
- Does not contest that he or she committed the offense.

Unless the terms of the program allow otherwise, an adult is not eligible for ACCP if he or she has previously been arrested or received an adult civil citation.

The bill requires an adult who receives a civil citation or similar notice to report for intake and be provided with appropriate assessment, intervention, education, and behavioral health care services. While in the ACCP, the adult must complete the required community service hours and pay restitution.

The bill provides that if the adult successfully completes the ACCP, an arrest record may not be associated with the offense. If the adult does not successfully complete the ACCP, the law enforcement agency that issued the citation or similar notice may criminally charge the adult for the original offense and refer the case to the state attorney to determine if prosecution is appropriate.

The model program requires the participation of specific persons in the creation of the program and development of its policies and procedures relating to eligibility criteria, program implementation and operation, and determination of the program fee, if any. The following persons are required to participate in program development and to solicit input from other interested stakeholders:

- Representatives of the law enforcement agencies participating in the program;
- A representative of the program services provider;
- The public defender;
- The state attorney; and
- The clerk of the circuit court.

The bill specifies that the newly created section of law does not preempt a county or municipality from enacting noncriminal sanctions for a violation of an ordinance or other violation. Further, the bill states that a county, municipality, or public or private educational institution is not preempted from creating its own model for an ACCP.

The bill takes effect July 1, 2017.

---

[39] *Id.* at 2.
[40] *Id.* at 3-4.

B. SECTION DIRECTORY:

Section 1. Creates s. 901.40, F.S., relating to adult prearrest diversion programs.

Section 2. Provides an effective date of July 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 government revenues.

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: The bill does not mandate that local governments or public or private educational institutions create a prearrest diversion program for adults. Under the Leon County model, the ACCP is self-sustaining (paid for by program fees). Creation of an adult civil citation program could result in cost savings (e.g., reduced detention/confinement costs and arrest/booking processing costs), depending on the number of eligible offenses, other eligibility criteria chosen, the pool of eligible adults, the number of participating law enforcement agencies, the use of civil citations by those agencies, and any impact the program may have in reducing arrests.

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: Under the Leon County model, an eligible adult who chooses to participate in the ACCP must pay a program fee, but this fee may be waived if the participant does not have the means to pay it.

D. FISCAL COMMENTS: None.

II. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: The bill does not mandate that local governments create ACCP; it only "encourages" the creation of such a program. Additionally, criminal laws are excluded from Article VII, section 18 of the Florida Constitution, relating to state mandates that affect revenues and expenditures of local governments.

2. Other: The bill does not appear to create the need for rulemaking or rulemaking or rulemaking authority.

B. RULE-MAKING AUTHORITY: None.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

A bill to be entitled

An act relating to prearrest diversion programs; creating s. 901.40, F.S.; encouraging local communities and public or private educational institutions to implement prearrest diversion programs for certain offenders; encouraging prearrest diversion programs to share information with other prearrest diversion programs; authorizing law enforcement officers, at their sole discretion, to issue a civil citation or similar prearrest diversion program notice to adults under specified circumstances; requiring an adult who is issued a civil citation or similar notice by a participating law enforcement agency to report for intake as required by the prearrest diversion program; requiring the program to provide certain appropriate services; requiring that an adult who is issued a civil citation or similar notice fulfill a community service requirement; requiring the adult to pay restitution to a victim; specifying that a law enforcement agency may criminally charge an adult who fails to complete the prearrest diversion program and refer the case for prosecution; prohibiting an arrest record from being associated with a certain offense for an adult who successfully completes the program; requiring specified entities to create the prearrest

diversion program; requiring the entities to develop policies and procedures for the development and operation of the program and to solicit input from other interested stakeholders; authorizing specified entities to operate the program; specifying how the misdemeanor offenses that are eligible for the prearrest diversion program are selected; providing applicability; providing an effective date.

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

Section 1. Section 901.40, Florida Statutes, is created to read:

901.40 Prearrest diversion programs.—

(1) INTENT.—The Legislature encourages local communities and public or private educational institutions to implement prearrest diversion programs that afford certain adults who fulfill specified intervention and community service obligations the opportunity to avoid an arrest record. The Legislature does not mandate that a particular prearrest diversion program for adults be adopted, but finds that the adoption of the model provided in this section would allow certain adults to avoid an arrest record, while ensuring that those adults receive appropriate intervention and fulfill community service obligations. If a prearrest diversion program is implemented,

the program is encouraged to share information with other prearrest diversion programs.

(2) MODEL ADULT CIVIL CITATION PROGRAM.—Local communities and public or private educational institutions may adopt a program in which:

(a) Law enforcement officers, at their sole discretion, may issue a civil citation or similar prearrest diversion program notice to certain adults who commit a qualifying misdemeanor offense selected by the program. A civil citation or similar notice may be issued only if the adult does not contest that he or she committed the offense and if the adult has not previously been arrested and has not previously received an adult civil citation or similar notice, unless the terms of the program allow otherwise.

(b) An adult who receives a civil citation or similar notice shall report for intake as required by the prearrest diversion program and shall be provided appropriate assessment, intervention, education, and behavioral health care services by the program. While in the program, the adult shall perform community service hours as specified by the program. The adult shall pay restitution due to the victim as a program requirement. If the adult does not successfully complete the prearrest diversion program, the law enforcement agency that issued the civil citation or similar notice may criminally charge the adult for the original offense and refer the case to

the state attorney to determine if prosecution is appropriate. If the adult successfully completes the program, an arrest record may not be associated with the offense.

(3) PROGRAM DEVELOPMENT, IMPLEMENTATION, AND OPERATION.—Representatives of participating law enforcement agencies, a representative of the program services provider, the public defender, the state attorney, and the clerk of the circuit court shall create the prearrest diversion program and develop its policies and procedures including, but not limited to, eligibility criteria, program implementation and operation, and the determination of the fee, if any, to be paid by adults participating in the program. In developing the policies and procedures for the program, the parties must solicit input from other interested stakeholders. The program may be operated by an entity such as a law enforcement agency, the county or municipality, or another entity selected by the county or municipality.

(4) QUALIFYING OFFENSES.—Misdemeanor offenses that qualify the offender for a prearrest diversion program must be selected as part of the program development under subsection (3).

(5) APPLICABILITY.—This section does not preempt a county or municipality from enacting noncriminal sanctions for a violation of an ordinance or other violation, and it does not preempt a county, a municipality, or a public or private educational institution from creating its own model for a

prearrest diversion program for adults.

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

V

PCS for HB 369

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 369 Pub. Rec./Prearrest Diversion Programs
SPONSOR(S): Criminal Justice Subcommittee
TIED BILLS: HB 367 **IDEN./SIM. BILLS:** SB 450

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Criminal Justice Subcommittee		Brummett WB	White TW

SUMMARY ANALYSIS

HB 367 (2017), which is tied to this bill, creates s. 901.40, F.S., to encourage local communities and public or private educational institutions to implement prearrest diversion programs. The bill provides a framework for a model Adult Civil Citation Program that allows a law enforcement officer, at the officer's sole discretion, to issue a civil citation or similar prearrest diversion program notice to an adult who commits a qualifying misdemeanor offense and satisfies other requirements.

The program provides a participating adult with intervention and behavior services while requiring them to complete community service hours and pay restitution. If the adult successfully completes the prearrest diversion program, an arrest record may not be associated with the offense.

Under current Florida law, there is no public records exemption for the records associated with a civil citation or similar prearrest diversion program.

This bill amends s. 904.10, F.S., created in HB 367 (2017) to create a public records exemption for the personal identifying information of an adult who participates in a civil citation or similar prearrest diversion program.

The bill provides a statement of public necessity as required by the Florida Constitution.

The bill provides that it shall take effect on the same date that HB 367 or similar legislation takes effect.

The bill may have a minimal fiscal impact on the state and local governments. Please see "FISCAL ANALSYSIS & ECONOMIC IMPACT STATEMENT," *infra.*

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public records or public meetings exemption. The bill creates a public records exemption for a civil citation, documentation of a prearrest diversion program, and any reports or documents concerning a civil citation or a prearrest diversion program, and therefore requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Public Records

Florida Constitution

Article I, s. 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

The Legislature, however, may provide by general law for the exemption of records from the requirements of article I, s. 24(a) of the Florida Constitution provided the exemption passes by two-thirds vote of each chamber, states with specificity the public necessity justifying the exemption (public necessity statement), and is no broader than necessary to meet its public purpose.[1]

Florida Statutes

The Florida Statutes also address the public policy regarding access to government records. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record, unless the record is exempt.

The Open Government Sunset Review Act[2] provides that a public record exemption may be created or maintained only if it serves an identifiable public purpose and the "Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption."[3] However, the exemption may be no broader than is necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision; or
- Protect trade or business secrets.[4]

The Open Government Sunset Review Act requires the automatic repeal of a public records exemption on October 2nd of the fifth year after its creation or substantial amendment, unless the Legislature reenacts the exemption.[5]

Prearrest Diversion Programs

HB 367 (2017), which is tied to this bill, creates s. 901.40, F.S., to encourage local communities and public or private educational institutions to implement prearrest diversion programs. The bill provides a framework for a model Adult Civil Citation Program (ACCP) that allows a law enforcement officer, at the officer's sole discretion, to issue a civil citation or similar prearrest diversion program notice to an adult who:

- Commits a qualifying misdemeanor offense (as determined by the program);
- Does not contest that he or she committed the offense; and
- Has not previously been arrested or previously received an adult civil citation or similar notice, unless the terms of the program allow otherwise.

---

[1] FLA. CONST. art. I, s. 24(c).
[2] s. 119.15, F.S.
[3] s. 119.15(6)(b), F.S.
[4] *Id.*
[5] s. 119.15(3), F.S.

The ACCP provides an adult with appropriate assessment, intervention, education, and behavioral health care services, while requiring them to complete community service hours and pay restitution. If the adult successfully completes the ACCP, an arrest record may not be associated with the offense.

Public Records Exemptions for Certain Criminal Records

Effect of a Criminal History Record

Research estimates that as many as one in three adults in the United States have a criminal record. The Federal Bureau of Investigation maintains a database of records compiled when a suspected offender is arrested and fingerprinted by local, state, or federal law enforcement agencies.[6] Private consumer reporting agencies offer background reports for sale to employers, but often times utilize databases that may include outdated court records.[7] Consequently, any contact with the criminal justice system, including arrests that do not lead to conviction, can have long-lasting effects on a person's employment, housing, education and other opportunities.[8]

Adult Criminal History Records

A criminal history record includes the disposition of an arrest, whether it results in a conviction, acquittal, or dismissal of the charges before trial.[9] Generally, Florida law allows dissemination of criminal justice information[10] to the public. Section 943.053, F.S., provides that an adult's criminal history information[11] is available to criminal justice agencies for criminal justice purposes free of charge, and to persons in the private sector upon payment of a fee.[12] Adults seeking to prevent such disclosure may obtain a court order making criminal history records confidential and exempt from the provisions of s. 119.07(1), F.S., and article I, s. 24(a) of the Florida Constitution by petitioning for:

- Court-ordered sealing;[13] or
- Court-ordered expunction.[14]

Sealing of Criminal History Records

To be eligible for the sealing of a criminal history record, an applicant must petition the court providing a sworn statement attesting that he or she:

- Has never been adjudicated guilty of a criminal offense or comparable ordinance violation;
- Has not been adjudicated guilty for any of the acts stemming from the arrest or alleged criminal activity to which the petition to seal pertains;
- Has never had a prior sealing or expunction of criminal history record; and
- Is otherwise eligible and does not have any other petition to seal or expunge pending before any court.[15]

If a criminal history record is ordered sealed by the court, it is confidential and exempt from the provisions of s. 119.07(1), F.S., and article I, s. 24(a) of the Florida Constitution, and available only to:

---

[6] Matthew Friedman, Brennan Center for Justice at New York University School of Law, *Just Facts: As Many Americans Have Criminal Records As College Diplomas*, https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas (last visited Feb. 6, 2017).

[7] The result being that even some expunged arrests are reported to employers. Brendan Lynch, Talk Poverty, *Never Convicted, but Held Back by a Criminal Record*, https://talkpoverty.org/2014/12/09/held-back-by-a-criminal-record/ (last visited Feb. 6, 2017).

[8] Justice Center, The Council of State Governments, *Clean Slate Clearinghouse*, https://csgjusticecenter.org/cleanslate (last visited Feb. 6, 2017).

[9] Florida Department of Law Enforcement, *Seal and Expunge Frequently Asked Questions*, http://www.fdle.state.fl.us/cms/Seal-and-Expunge-Process/Frequently-Asked-Questions.aspx#Charges_dropped_dismissed (last visited Feb. 5, 2017).

[10] "Criminal Justice Information" means information on individuals collected or disseminated as a result of arrest, detention, or the initiation of a criminal proceeding by criminal justice agencies, including arrest record information, correctional and release information, criminal history record information, conviction record information, offender registration information, identification record information, and wanted persons record information." s. 943.045(12), F.S.

[11] "Criminal history information" means "information collected by criminal justice agencies on persons, which information consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges and the diposition thereof. The term does not include identification information, such as biometric records, if the information does not indicate involvement of the person in the criminal justice system." s. 943.045(5), F.S.

[12] s. 943.053(3)(a), F.S.

[13] s. 943.059, F.S.

[14] s. 943.0585, F.S.

[15] s. 943.059, F.S.

- The person who is the subject of the record, or their attorney;
- Criminal justice agencies for criminal justice purposes;[16]
- Judges; and
- Certain entities for licensing, access authorization, and employment purposes.[17]

An order sealing a criminal history record does not require that the record be destroyed and criminal justice agencies may continue to maintain the record. An adult, whose criminal history record has been sealed, may lawfully deny or fail to acknowledge the arrest covered by the sealed record, except in certain specific instances.[18]

Expunction of Criminal History Records
To be eligible for expunction, an applicant must petition the court providing a sworn statement that he or she:

- Has never been adjudicated guilty of a criminal offense or comparable ordinance violation;[19]
- Has not been adjudicated guilty for any of the acts stemming from the arrest or alleged criminal activity to which the petition to expunge pertains;
- Has not received a prior sealing or expunction of a criminal history record;[20] and
- Is otherwise eligible and does not have any other petition to expunge or seal before any court.[21]

He or she must also obtain a written statement of the state attorney or statewide prosecutor indicating that a charging document was not issued in the case, or the case was dismissed or nolle prossed, and did not result in a trial.[22]

If a court orders expunction, the criminal history record must be physically destroyed by any criminal justice agency having custody of the record, except that it must be retained by Florida Department of Law Enforcement (FDLE). The record retained by FDLE is confidential and exempt from the provisions of s. 119.07(1), F.S., and article I, s. 24(a) of the Florida Constitution, and is not available to any person or entity without a court order. When a criminal history record has been expunged, the subject of the record may lawfully deny or fail to acknowledge the arrests covered by the expunged record, except in certain specified circumstances.[23]

Pre-Arrest Diversion Program Records
Due to the prearrest nature of the programs, records held by a civil citation or similar prearrest diversion program are created before any arrest occurs and, thus, do not become part of the criminal history record system. As such, there is no ability to seal or expunge a civil citation or prearrest diversion program record. Instead, such records are subject to public disclosure because there is no public records exemption applicable under current Florida law.

---

[16] Such purposes include conducting criminal history background check for firearms purchases and transfers. s. 943.059(4), F.S.
[17] *Id.*
[18] The subject of the record may not deny the existence of the sealed record when they are seeking employment with a criminal justice agency; a defendant in a criminal prosecution; concurrently or subsequently petitions for either expunction or sealing; seeking admission to the Florida Bar; seeking certain employment or professional licenses; seeking appointment as a guardian; subject to a background check when attempting to purchase a firearm; or seeking a license to carry a concealed weapon or firearm. s. 943.059(4)(a), F.S.
[19] A pardon does not have the effect of erasing guilt so that a conviction is treated as though it never occurred. A pardoned individual cannot satisfy the requirements for a certificate of eligibility for an expunction. *R.J.L. v. State*, 887 So. 2d 1268, 1281 (Fla. 2004).
[20] Unless expunction is sought of a criminal history record that was previously sealed for 10 years and the record is now otherwise eligible for expunction. s. 943.0585(1)(b)3., F.S.
[21] s. 943.0585(1), F.S.
[22] s. 943.0585(2), F.S.
[23] A person may not deny the existence of the expunged record when they are seeking employment with a criminal justice agency; a defendant in a criminal prosecution; concurrently or subsequently petitions for either expunction or sealing; seeking admission to the Florida Bar; seeking certain employment or professional licenses; or seeking appointment as a guardian. The existence of the expunged record is confidential, except that FDLE must disclose the record of expunction to these entities for their respective licensing, access authorization, or licensure decisions. s. 943.0585(4), F.S.

Effect of the Bill

The bill amends s. 904.10, F.S., as created by HB 367 (2017), to create a public records exemption related to adult civil citation and similar prearrest diversion programs. Under the exemption, the personal identifying information of an adult who participates in a civil citation or similar prearrest diversion program is exempt from the requirements of s. 119.07(1), F.S., and article I, s. 24(a) of the Florida Constitution.

The bill repeals the exemption on October 2, 2022, unless reviewed and saved from repeal by the Legislature.

The bill provides a statement of public necessity as required by the Florida Constitution.[24] It specifies that the Legislature finds that "[t]he goal of the such programs is to give a second chance to adults who commit misdemeanor offenses and allow them the opportunity to avoid having an arrest record." As such, prearrest diversion program records must be exempt, as disclosure "would defeat the program's goal of giving adults who commit misdemeanor offenses a means to avoid the negative consequences of an arrest and prosecution", and "disclosure might negatively impact the effectiveness of the program."

The bill provides that it takes effect on the same date that HB 367 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

B. SECTION DIRECTORY:

Section 1. Amends s. 901.40, F.S., as created by HB 367 (2017), to provide a public records exemption for the personal identifying information of an adult who participates in a civil citation or similar prearrest diversion program.

Section 2. Provides a public necessity statement.

Section 3. Provides an effective date for the same date that HB 367 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

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: *See* Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

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

2. Expenditures: *See* Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

D. FISCAL COMMENTS: The bill could have a minimal impact on agencies because agency staff responsible for complying with public records requests may require training related to the creation of the public records exemption. In addition, agencies could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed by existing resources, as they are part of the day-to-day responsibilities of agencies.

[24] FLA. CONST. art. I, s. 24(c).

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; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Vote Requirement
Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or newly expanded public records or public meetings exemption. The bill creates a public records exemption; therefore, it requires a two-thirds vote for final passage.

Public Necessity Statement
Article I, s. 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public records or public meetings exemption. The bill creates a public records exemption; therefore, it includes a public necessity statement.

Breadth of Exemption
Article I, s. 24(c) of the Florida Constitution requires a newly created public records or public meetings exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a limited public records exemption for the personal identifying information of an adult who participates in a civil citation or similar prearrest diversion program which does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

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

N/A

A bill to be entitled

An act relating to public records; amending s. 901.40, F.S.; providing that the personal identifying information of an adult who participates in a civil citation or similar prearrest diversion program is exempt from public record requirements; providing for future review and repeal of the exemption; providing an exception; providing a statement of public necessity; providing a contingent effective date.

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

Section 1. Subsection (6) is added to section 901.40, Florida Statutes, as created by HB 367, 2017 Regular Session, to read:

901.40 Prearrest diversion programs.—

(6) PUBLIC RECORDS EXEMPTION.—The personal identifying information of an adult who participates in a civil citation or similar prearrest diversion program, as encouraged by this section, is exempt from s. 119.07(1), and s. 24(a), Art. I of the State Constitution. This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2022, unless reviewed and saved from such repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public

necessity that the personal identifying information of an adult who participates in a civil citation or similar prearrest diversion program be exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. The goal of such programs is to give a second chance to adults who commit misdemeanor offenses and allow them the opportunity to avoid having an arrest record. If the personal identifying information of such adults were not exempt from disclosure, it would defeat the program's goal of giving adults who commit misdemeanor offenses a means to avoid the negative consequences of an arrest and prosecution. If such information were able to be obtained by the public, the disclosure might negatively impact the effectiveness of the program. For these reasons, the Legislature finds that it is a public necessity that the personal identifying information of an adult who participates in a civil citation or similar prearrest diversion program be exempt from public records requirements.

Section 3. This act shall take effect on the same date that HB 367 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.