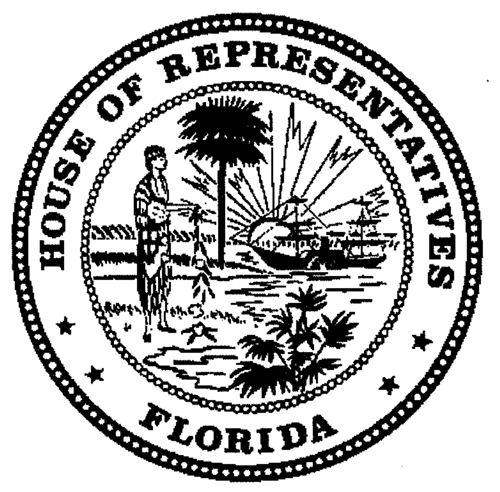

Justice Appropriations Subcommittee

Meeting Packet

April 9 2013
8:00 a.m. – 10:00 a.m.
404 HOB

Will Weatherford
Speaker

Charles McBurney
Chair

The Florida House of Representatives
APPROPRIATION COMMITTEE

Justice Appropriations Subcommittee

Will Weatherford
Speaker

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MEETING AGENDA
404 HOB
April 9 2013

I. Meeting Called To Order

II. Opening Remarks by Chair

III. Consideration of the following bill(s):

CS/HB 49 - Retail Sale of Smoking Devices by Criminal Justice Subcommittee and Rep. Rouson

CS/HB 159 - Sentencing for Controlled Substance Violations by Criminal Justice Subcommittee and Rep. Edwards.

CS/HB 785 - Restitution for Juvenile Offenses by Criminal Justice Subcommittee and Rep. Eagle

HB 787 - Computer or Electronic Device Harassments by Rep. Goodson

CS/HB 1325 - Victims of Human Trafficking by Criminal Justice Committee and Rep. Spano

HB 7121 - Inmate Reentry by Judiciary Committee and Rep. Baxley, Campbell

HB 7137 - Juvenile Sentencing by Criminal Justice Subcommittee, and Rep. Pilon

IV. Closing Remarks

V. Meeting Adjourned

CS/HB 49

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 49 Retail Sale of Smoking Devices
SPONSOR(S): Criminal Justice Subcommittee; Rouson and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1140

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N, As CS	Jones	Cunningham
2) Business & Professional Regulation Subcommittee	11 Y, 0 N	Livingston	Luczynski
3) Justice Appropriations Subcommittee		McAuliffe	Jones Darity
4) Judiciary Committee			

SUMMARY ANALYSIS

Currently, it is a first degree misdemeanor, with an exception, for any person to offer for sale at retail, the following smoking pipes and smoking devices:

- Metal wooden acrylic, glass, stone, plastic, or ceramic smoking pipes, with or without screens, permanent screens or punctured metal bowls;
- Water pipes;
- Carburetion tubes and devices;
- Chamber pipes;
- Carburetor pipes;
- Electric pipes;
- Air-driven pipes;
- Chillums; Bongs; and
- Ice pipes or chillers.

An exception currently allows retail tobacco product dealers to sell the listed smoking pipes and devices if they:

- Derive at least 75 percent of its annual gross revenues from the retail sale of cigarettes, cigars, and other tobacco products; or
- Derive no more than 25 percent of its annual gross revenues from the retail sale of the smoking pipes and smoking devices listed above.

The smoking pipes and smoking devices listed above are included in the definition of "drug paraphernalia" in s. 893.145, F.S.

The bill removes the exception that allows retail tobacco products dealers to sell the smoking devices listed above so long as their gross revenues meet the above-described criteria. As a result, all persons, including all retail tobacco products dealers, will be prohibited from selling such devices at retail. The bill makes a second or subsequent violation of the statute a third degree felony.

The Criminal Justice Impact Conference (CJIC) met on February 27, 2013 and determined the bill had an indeterminate impact on state prison beds. However, since the penalty in the bill for a second or subsequent offense is an unranked third degree felony, the impact will likely be insignificant. The bill also authorizes the Division of Alcoholic Beverages and Tobacco to assess fines of up to $1,000 against a tobacco dealer violating the drug paraphernalia statute. Since these fines are deposited into the General Revenue Fund, the bill may result in increased revenues (likely insignificant) to that fund.

The bill is effective October 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present situation

Section 569.0073, F.S., makes it a first degree misdemeanor[1] for any person to offer for sale at retail the following smoking pipes and smoking devices:

- Metal wooden acrylic, glass, stone, plastic, or ceramic smoking pipes, with or without screens, permanent screens or punctured metal bowls;
- Water pipes;
- Carburetion tubes and devices;
- Chamber pipes;
- Carburetor pipes;
- Electric pipes;
- Air-driven pipes;
- Chillums;
- Bongs; and
- Ice pipes or chillers.

The statute provides an exception that allows retail tobacco products dealers[2] to sell the above listed items if they:

- Derive at least 75 percent of their annual gross revenues from the retail sale of cigarettes, cigars, and other tobacco products; or
- Derive no more than 25 percent of their annual gross revenues from the retail sale of the smoking pipes and smoking devices listed above.[3]

Section 893.145, F.S., includes the above listed items in the definition of drug paraphernalia subject to civil forfeiture.

Retail tobacco product dealers are governed by the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation (Division).[4] The Division is currently able to suspend or revoke the permit of a dealer if they violate any of the provisions in ch. 569, F.S.[5]

Effect of proposed changes

The bill amends s. 569.0073, F.S., to remove the exception that allows retail tobacco products dealers to sell the smoking devices listed above so long as their gross revenues meet the above-described criteria. As a result, all persons, including all retail tobacco products dealers, will be prohibited from selling such devices at retail. The bill makes a second or subsequent violation of the statute a third degree felony.[6]

The bill also amends s. 569.006, F.S., to specify that a violation of the drug paraphernalia[7] statute (s. 893.147, F.S.),[8] is cause for a retail tobacco product dealers' permit to be suspended or revoked. The

[1] A first degree misdemeanor is punishable by up to one year in county jail and a $1,000 fine. Sections 775.082 and 775.083, F.S.

[2] Section 569.002, F.S., defines "retail tobacco products dealer" as the holder of a retail tobacco products dealer permit.

[3] Sections 569.0073(1)(b)1. and 2. and 893.145, F.S.

[4] Section 569.003, F.S.

[5] Section 569.006, F.S.

[6] A third degree felony is punishable by up to five years imprisonment and a $5,000 fine. Sections 775.082 and 775.083, F.S.

[7] Section 893.145, F.S., defines the term "drug paraphernalia" as all equipment, products, and materials of any kind which are used, intended for use, or designed for use in the planting, propagating, cultivating, growing, harvesting, manufacturing, compounding,

section further authorizes the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation assess fines of up to $1,000 against a dealer for each violation. Those fines are deposited into the General Revenue Fund.

B. SECTION DIRECTORY:

Section 1. Amends s. 569.0073, F.S., relating to retails sale of smoking pipes and smoking devices.

Section 2. Amends s. 569.006, F.S., relating to retail tobacco dealers; administrative penalties.

Section 3. Provides an effective date of October 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill authorizes the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation to assess fines of up to $1,000 against a tobacco dealer violating the drug paraphernalia statute. Since these fines are deposited into the General Revenue Fund, the bill may result in increased revenues (likely insignificant) to that fund.

2. Expenditures:

   The Criminal Justice Impact Conference (CJIC) met on February 27, 2013 and determined the bill had an indeterminate impact on state prison beds. The bill was subsequently amended, however the effect of the bill appears not to have changed. Since the penalty in the bill for a second or subsequent offense is an unranked third degree felony, the impact will likely be insignificant.

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 expands the application of s. 569.0073, F.S., violations of which are a first degree misdemeanor. As such, it may have a negative jail bed impact on local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Private retailors who were legally selling the items under s. 569.0073, F.S., may see a loss of income since the bill makes retail sale of any of the items listed in 569.0073, F.S., a first degree misdemeanor.

D. FISCAL COMMENTS:

None.

III. COMMENTS

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converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, transporting, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of ch. 893 or s. 877.111, F.S. The statute further lists items that are included in the definition.

[8] Section 893.147, F.S. establishes the following five drug paraphernalia crimes: use or possession of drug paraphernalia; manufacture or delivery of drug paraphernalia; delivery of drug paraphernalia to a minor; transportation of drug paraphernalia; and advertisement of drug paraphernalia.

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 19, 2013, the Criminal Justice Subcommittee adopted one strike all amendment and reported the bill favorable as a committee substitute. The strike all amendment:

- Removes the section of the bill relating to drug paraphernalia; and
- Removes the exception in s. 569.0073, F.S., that allows retail tobacco products dealers to sell the specified smoking devices.

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

1 A bill to be entitled
2 An act relating to the retail sale of smoking devices;
3 amending s. 569.0073, F.S.; prohibiting the retail
4 sale of certain smoking pipes and devices; providing
5 penalties; amending s. 569.006, F.S.; authorizing the
6 imposition of administrative penalties upon retail
7 tobacco products dealers who commit certain offenses
8 related to drug paraphernalia; providing an effective
9 date.
10
11 Be It Enacted by the Legislature of the State of Florida:
12
13 Section 1. Section 569.0073, Florida Statutes, is amended
14 to read:
15 569.0073 Retail sale of ~~Special provisions;~~ smoking pipes
16 and smoking devices; penalties.—
17 (1) It is unlawful for any person to offer for sale at
18 retail any of the following items ~~listed in subsection (2)~~
19 ~~unless such person~~:
20 ~~(a) Has a retail tobacco products dealer permit under s.~~
21 ~~569.003. The provisions of this chapter apply to any person that~~
22 ~~offers for retail sale any of the items listed in subsection~~
23 ~~(2); and~~
24 ~~(b)1. Derives at least 75 percent of its annual gross~~
25 ~~revenues from the retail sale of cigarettes, cigars, and other~~
26 ~~tobacco products; or~~
27 ~~2. Derives no more than 25 percent of its annual gross~~
28 ~~revenues from the retail sale of the items listed in subsection~~

29 ~~(2).~~
30 ~~(2) The following smoking pipes and smoking devices are~~
31 ~~subject to the provisions of this section:~~
32 (a) Metal, wooden, acrylic, glass, stone, plastic, or
33 ceramic smoking pipes, with or without screens, permanent
34 screens, or punctured metal bowls.
35 (b) Water pipes.
36 (c) Carburetion tubes and devices.
37 (d) Chamber pipes.
38 (e) Carburetor pipes.
39 (f) Electric pipes.
40 (g) Air-driven pipes.
41 (h) Chillums.
42 (i) Bongs.
43 (j) Ice pipes or chillers.
44 <u>(2)</u>~~(3)~~ Any person who violates this section commits a
45 misdemeanor of the first degree, punishable as provided in s.
46 775.082 or s. 775.083<u>, and upon a second or subsequent violation</u>
47 <u>commits a felony of the third degree, punishable as provided in</u>
48 <u>s. 775.082, s. 775.083, or s. 775.084</u>.
49 Section 2. Section 569.006, Florida Statutes, is amended
50 to read:
51 569.006 Retail tobacco products dealers; administrative
52 penalties.—The division may suspend or revoke the permit of the
53 dealer upon sufficient cause appearing of the violation of any
54 of the provisions of this chapter <u>or s. 893.147</u>~~,~~ by a dealer or
55 by a dealer's agent or employee. The division may also assess
56 and accept administrative fines of up to $1,000 against a dealer

57 for each violation. The division shall deposit all fines
58 collected into the General Revenue Fund as collected. An order
59 imposing an administrative fine becomes effective 15 days after
60 the date of the order. The division may suspend the imposition
61 of a penalty against a dealer, conditioned upon the dealer's
62 compliance with terms the division considers appropriate.
63 Section 3. This act shall take effect October 1, 2013.

CS/HB 159

COMMITTEE/SUBCOMMITTEE ACTION

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

1 Committee/Subcommittee hearing bill: Justice Appropriations
2 Subcommittee
3 Representative Edwards offered the following:
4
5 **Amendment (with title amendment)**
6 Remove everything after the enacting clause and insert:
7 Enter Amending
8 Section 1. Paragraph (c) of subsection (1) of section
9 893.135, Florida Statutes, is amended to read:
10 893.135 Trafficking; mandatory sentences; suspension or
11 reduction of sentences; conspiracy to engage in trafficking.—
12 (1) Except as authorized in this chapter or in chapter 499
13 and notwithstanding the provisions of s. 893.13:
14 (c)1. Any person who knowingly sells, purchases,
15 manufactures, delivers, or brings into this state, or who is
16 knowingly in actual or constructive possession of, 4 grams or
17 more of any morphine, opium, ~~oxycodone, hydrocodone,~~
18 hydromorphone, or any salt, derivative, isomer, or salt of an
19 isomer thereof, including heroin, as described in s.
20 893.03(1)(b), (2)(a), (3)(c)3., or (3)(c)4., or 4 grams or more

21 of any mixture containing any such substance, but less than 30
22 kilograms of such substance or mixture, commits a felony of the
23 first degree, which felony shall be known as "trafficking in
24 illegal drugs," punishable as provided in s. 775.082, s.
25 775.083, or s. 775.084. If the quantity involved:
26 a. Is 4 grams or more, but less than 14 grams, such person
27 shall be sentenced to a mandatory minimum term of imprisonment
28 of 3 years, and the defendant shall be ordered to pay a fine of
29 $50,000.
30 b. Is 14 grams or more, but less than 28 grams, such
31 person shall be sentenced to a mandatory minimum term of
32 imprisonment of 15 years, and the defendant shall be ordered to
33 pay a fine of $100,000.
34 c. Is 28 grams or more, but less than 30 kilograms, such
35 person shall be sentenced to a mandatory minimum term of
36 imprisonment of 25 calendar years and the defendant shall be
37 ordered to pay a fine of $500,000.
38 2. Any person who knowingly sells, purchases,
39 manufactures, delivers, or brings into this state, or who is
40 knowingly in actual or constructive possession of 14 grams or
41 more of any oxycodone or hydrocodone, or 14 grams or more of any
42 mixture containing any such substance, commits a felony of the
43 first degree, which felony shall be known as "trafficking in
44 illegal prescription drugs," punishable as provided in s.
45 775.082, s. 775.083, or s. 775.084. If the quantity involved:
46 a. Is 14 grams or more, but less than 28 grams, such
47 person shall be sentenced to a mandatory minimum term of

48 imprisonment of 3 years, and the defendant shall be ordered to
49 pay a fine of $50,000.
50 b. Is 28 grams or more, but less than 50 grams, such
51 person shall be sentenced to a mandatory minimum term of
52 imprisonment of 7 years, and the defendant shall be ordered to
53 pay a fine of $100,000.
54 c. Is 50 grams or more, but less than 200 grams, such
55 person shall be sentenced to a mandatory minimum term of
56 imprisonment of 15 calendar years, and the defendant shall be
57 ordered to pay a fine of $500,000.
58 d. Is 200 grams or more, such person shall be sentenced to
59 a mandatory minimum term of imprisonment of 25 calendar years,
60 and the defendant shall be ordered to pay a fine of $750,000.
61 3.~~2.~~ Any person who knowingly sells, purchases,
62 manufactures, delivers, or brings into this state, or who is
63 knowingly in actual or constructive possession of, 30 kilograms
64 or more of any morphine, opium, ~~oxycodone, hydrocodone,~~
65 hydromorphone, or any salt, derivative, isomer, or salt of an
66 isomer thereof, including heroin, as described in s.
67 893.03(1)(b), (2)(a), (3)(c)3., or (3)(c)4., or 30 kilograms or
68 more of any mixture containing any such substance, commits the
69 first degree felony of trafficking in illegal drugs. A person
70 who has been convicted of the first degree felony of trafficking
71 in illegal drugs under this subparagraph shall be punished by
72 life imprisonment and is ineligible for any form of
73 discretionary early release except pardon or executive clemency
74 or conditional medical release under s. 947.149. However, if the

75 court determines that, in addition to committing any act
76 specified in this paragraph:
77 a. The person intentionally killed an individual or
78 counseled, commanded, induced, procured, or caused the
79 intentional killing of an individual and such killing was the
80 result; or
81 b. The person's conduct in committing that act led to a
82 natural, though not inevitable, lethal result,
83
84 such person commits the capital felony of trafficking in illegal
85 drugs, punishable as provided in ss. 775.082 and 921.142. Any
86 person sentenced for a capital felony under this paragraph shall
87 also be sentenced to pay the maximum fine provided under
88 subparagraph 1.
89 4.~~3.~~ Any person who knowingly brings into this state 60
90 kilograms or more of any morphine, opium, ~~oxycodone,~~
91 ~~hydrocodone,~~ hydromorphone, or any salt, derivative, isomer, or
92 salt of an isomer thereof, including heroin, as described in s.
93 893.03(1)(b), (2)(a), (3)(c)3., or (3)(c)4., or 60 kilograms or
94 more of any mixture containing any such substance, and who knows
95 that the probable result of such importation would be the death
96 of any person, commits capital importation of illegal drugs, a
97 capital felony punishable as provided in ss. 775.082 and
98 921.142. Any person sentenced for a capital felony under this
99 paragraph shall also be sentenced to pay the maximum fine
100 provided under subparagraph 1.
101 Section 2. This act shall take effect July 1, 2013.Text
102 Here

103
104
105 ---
106 **T I T L E A M E N D M E N T**
107 Remove everything before the enacting clause and insert:
108 An act relating to drug trafficking; amending s.
109 893.135, F.S.; providing that if a person knowingly
110 sells, purchases, manufactures, delivers, or brings
111 into this state, or who is knowingly in actual or
112 constructive possession of specified quantities of
113 oxycodone or hydrocodone, he or she commits a felony
114 of the first degree; providing for other criminal
115 penalties for greater quantities of oxycodone or
116 hydrocodone; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 159 Sentencing for Controlled Substance Violations
SPONSOR(S): Criminal Justice Subcommittee; Edwards and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 420

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	8 Y, 5 N, As CS	Cox	Cunningham
2) Justice Appropriations Subcommittee		McAuliffe	Jones Darity
3) Judiciary Committee			

SUMMARY ANALYSIS

Section 893.135, F.S., relates to drug trafficking, which occurs when a person knowingly sells, purchases, manufactures, delivers, or brings into this state; or when a person is knowingly in actual or constructive possession of, a specified quantity of a drug. Generally, drug trafficking offenses are first degree felonies that are subject to mandatory minimum sentences, which vary depending on the type and quantity of drug trafficked. A judge has no discretion to sentence a person below the mandatory minimum sentence.

Paragraph (1)(c) of s. 893.135, F.S., establishes the offense of "trafficking in illegal drugs," and specifically addresses trafficking in morphine, opium, oxycodone, hydrocodone, and hydromorphone. If a person violates s. 893.135(1)(c)1., F.S., and the quantity involved is:

- 4 grams or more, but less than 14 grams - 3 year minimum mandatory and a $50,000 fine.
- 14 grams or more, but less than 28 grams - 15 year minimum mandatory and a $100,000 fine.
- 28 grams or more, but less than 30 kilograms - 25 year minimum mandatory and a $500,000 fine.

There are numerous prescription medications that are within the scope of s. 893.135(1)(c), F.S., such as vicodin, percocet, etc. As such, a person who unlawfully possesses, purchases, sells, etc., these prescription medications in a trafficking weight may be subject to the mandatory minimum penalties outlined above.

The bill creates s. 893.135(8), F.S., authorizing the court to grant a state attorney or defendant's motion to depart from a mandatory minimum sentence required by s. 893.135(1)(c), F.S., if the court finds that a number of specified criteria are met. In deciding whether to depart from the mandatory minimum sentence, the court may consider a number of enumerated factors, including any fact the court considers relevant.

If the sentencing court grants the motion to depart from the mandatory minimum sentence for a defendant convicted of a violation of s. 893.135(1)(c)1.a., F.S., (4 grams or more but less than 14 grams), the bill requies the sentencing court to, as a part of any sentence it imposes, require the defendant to:

- Successfully complete postadjudicatory treatment-based drug court program; or
- If the defendant intends to reside in a county that has not established a postadjudicatory treatment-based drug court program, drug offender probation as described in s. 948.20(2), F.S.

This bill provides that courts <u>may</u> depart from mandatory minimum mandatory sentence for trafficking in certain drugs. Because this bill is permissive its fiscal impact is dependent upon judicial discretion which cannot be predicted. However, the bill has the potential for savings for the Department of Corrections. On February 27, 2013, the Criminal Justice Impact Conference determined this bill will have an indeterminate negative prison bed impact (potential savings).

The bill has an effective date of July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Drug Trafficking – Generally

Section 893.135, F.S., creates a variety of drug trafficking offenses. Drug trafficking occurs when a person knowingly sells, purchases, manufactures, delivers, or brings into this state; or when a person is knowingly in actual or constructive possession of, a specified quantity of a controlled substance.[1] Section 893.135, F.S., categorizes drug trafficking offenses by drug type as follows:

- Paragraph (1)(a) establishes the offense of "trafficking in cannabis;"
- Paragraph (1)(b) establishes the offense of "trafficking in cocaine;"
- Paragraph (1)(c) establishes the offense of "trafficking in illegal drugs;"
- Paragraph (1)(d) establishes the offense of "trafficking in phencyclidine;"
- Paragraph (1)(e) establishes the offense of "trafficking in methaqualone;"
- Paragraph (1)(f) establishes the offense of "trafficking in amphetamine;"
- Paragraph (1)(g) establishes the offense of "trafficking in flunitrazepam;"
- Paragraph (1)(h) establishes the offense of "trafficking in GHB;"
- Paragraph (1)(i) establishes the offense of "trafficking in GBL;"
- Paragraph (1)(j) establishes the offense of "trafficking in 1,4-butanediol;"
- Paragraph (1)(k) establishes the offense of "trafficking in phenethylamines;" and
- Paragraph (1)(l) establishes the offense of "trafficking in LSD."

Generally, drug trafficking offenses are first degree felonies that are subject to mandatory minimum terms of imprisonment.[2] The mandatory minimum sentence applicable to a drug trafficking offense depends on the type and quantity of drug trafficked. A sentencing judge has no discretion to sentence a person below the mandatory minimum prison sentences outlined in statute, regardless of any mitigating testimony provided to the court.[3] Only the state attorney has the discretion to waive the mandatory minimum sentence for trafficking offenses.[4]

Trafficking in Illegal Drugs

Paragraph (1)(c) of s. 893.135, F.S., establishes the offense of "trafficking in illegal drugs," and specifically addresses trafficking in morphine, opium, oxycodone, hydrocodone, and hydromorphone. The statute provides:

> 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 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., F.S., 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."[5]

If a person violates s. 893.135(1)(c)1., F.S., and the quantity involved:

- Is 4 grams[6] or more, but less than 14 grams, the person must be sentenced to a mandatory minimum term of imprisonment of 3 years and ordered to pay a fine of $50,000.[7]

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[1] *See* s. 893.135(1)(a)-(l), F.S.

[2] Section 893.135, F.S., provides for more severe penalties in certain situations. For example, drug trafficking is a capital felony if, during the commission of the offense, the defendant intentionally killed a person; counseled, commanded, induced, procured, or caused the intentional killing of an individual; or the trafficking led to a natural, though not inevitable, lethal result to another person.

[3] 16 Fla. Prac., Sentencing s. 6:69 (2012-2013 ed.).

[4] *Id.*

[5] Section 893.135(10)(c)1., F.S.

[6] For the purpose of comparison, the approximate weight of a U.S. currency note, regardless of denomination, is one gram.

- Is 14 grams or more, but less than 28 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and ordered to pay a fine of $100,000.[8]
- Is 28 grams or more, but less than 30 kilograms, the person shall be sentenced to a mandatory minimum term of imprisonment of 25 years and pay a fine of $500,000.[9]

There are numerous prescription medications that are within the scope of s. 893.135(1)(c), F.S., such as vicodin, percocet, etc. As such, person who unlawfully possesses, purchases, sells, etc., these prescription medications in a trafficking weight may be subject to prosecution for drug trafficking under s. 893.135(1)(c), F.S.

Weighing Prescription Medications for Drug Trafficking Offenses

When determining the weight of pills or tablets for trafficking offenses, the weight is determined by the total weight of each pill or tablet multiplied by the number of pills or tablets possessed, sold, etc. The total weight of a pill or tablet includes the weight of the controlled substance in the pill or tablet (e.g., hydrocodone) and the weight of noncontrolled substances or matter in the pill or tablet, such as coating, binders, and nonprescription drugs (e.g., acetaminophen).[10]

In a 2012 report, the Office of Program Policy Analysis and Government Accountability (OPPAGA) cited the example of a pill that had a weight of 0.65 grams with 10 milligrams (mg.) of hydrocodone: "... [I]t takes 7 pills of 10 mg. hydrocodone, which are large pills with 325 to 750 mg. of acetaminophen, to reach the threshold of 4 grams for a minimum mandatory prison sentence of three years."[11] Based upon this medication, OPPAGA found that 22 pills would meet the 14 gram threshold (15-year mandatory minimum term) and 44 pills would meet the 28 gram threshold (25-year mandatory minimum term).[12]

Due to the different compositions of prescription opioids, noncontrolled substances may add significantly to the total weight of the pill or tablet as, for example, is the case with medication that contains hydrocodone and acetaminophen. When comparing this medication to a sample medication containing oxycodone, which does not contain acetaminophen, OPPAGA found: "... [I]t takes approximately 31 pills of 30 mg. oxycodone to reach the threshold of 4 grams since this type of oxycodone is a smaller pill and does not include acetaminophen. Thus, it takes more oxycodone pills than hydrocodone pills to trigger a minimum mandatory sentence, even though oxycodone is more potent and likely to lead to adverse outcomes, such as addiction and overdose."[13] Based upon this oxycodone medication, OPPAGA found that 108 pills would meet the 14 gram threshold (15-year mandatory minimum term) and 215 pills would meet the 28 gram threshold (25-year mandatory minimum term).[14]

OPPAGA Report: Sample Information Regarding Prescription Drug Trafficking Offenders

OPPAGA analyzed arrest reports for a sample of 194 offenders admitted to prison in Fiscal Year 2010-11 for opioid trafficking and determined that "almost all (93%) were convicted of trafficking in prescription painkillers... [A]rrests most commonly involved oxycodone (73%) or hydrocodone (28%).

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www.moneyfactory.gov/faqlibrary.html (last visited on March 5, 2013).

[7] Section 893.135(1)(c)1.a., F.S. This offense is ranked in Level 7 of the Criminal Punishment Code offense severity ranking chart. Section 921.0022(3)(g), F.S.

[8] Section 893.135(1)(c)1.b., F.S. This offense is ranked in Level 8 of the Criminal Punishment Code offense severity ranking chart. Section 921.0022(3)(h), F.S.

[9] Section 893.135(1)(c)1.c., F.S. This offense is ranked in Level 9 of the Criminal Punishment Code offense severity ranking chart. Section 921.0022(3)(i), F.S.

[10] *See* ss. 893.02(16) and 893.135(6), F.S.

[11] *Opinions Are Mixed About Sentencing Laws for Painkiller Trafficking*, Office of Program Policy Analysis and Government Accountability, http://www.oppaga.state.fl.us/Summary.aspx?reportNum=12-02 (last visited on March 5, 2013). Report No. 12-02 (January 2012), at p. 5. This report is further cited as "OPPAGA Report."

[12] *Id.*

[13] *Id.*

[14] *Id.*

In comparison, 6% of the offenders were convicted of trafficking in heroin."[15] OPPAGA provided the following information regarding how most of these arrests occurred:

> Most offenders in our sample (62%) were arrested for selling prescription painkillers to an undercover law enforcement officer or confidential informant... In these cases, officers worked undercover to buy drugs from known dealers or monitored confidential informants during meetings they arranged to make purchases. In other cases, offenders were arrested for trafficking after a traffic stop or other law enforcement contact, or after being reported by a pharmacist for possible prescription fraud.[16]

The majority of the offenders in OPPAGA's sample illegally possessed or sold 30 to 90 pills:

> For most of the offenders convicted of trafficking in oxycodone or hydrocodone, their convictions were based on the illegal possession or sale of the number of pills equivalent to one or two prescriptions. For those offenders sentenced for trafficking in hydrocodone, 50% were arrested for possessing or selling fewer than 30 pills and 25% were arrested for fewer than 15 pills. For offenders sentenced for trafficking in oxycodone, offenders possessed or sold a median number of 91 pills at the time of their arrests.
>
> Following accepted medical practice, physicians may prescribe 30 or more prescription painkillers for patients with chronic pain or recovering from surgery. For example, a patient recovering from surgery may receive a one-time prescription of 30 to 60 hydrocodone or oxycodone pills, often in forms that also contain acetaminophen. Illegal possession of such an amount could trigger a minimum mandatory sentence.[17]

Most of the offenders in the OPPAGA sample did not have a prior drug trafficking record and were determined by prison staff to need substance abuse treatment:

> Our analysis of Department of Corrections data on the 1,200 offenders admitted to prison for opioid trafficking in Fiscal Year 2010-11 found that 74% had not previously been admitted to prison... Half had either never been on probation or had been on probation solely for drug possession, and 81% did not have a prior history of offenses involving selling or trafficking drugs. Most (84%) had no current or past violent offenses. These offenders tended to have substance abuse problems and were at low risk for recidivism. Prison staff assessments determined that 65% of these offenders needed substance abuse treatment and 61% were at low risk for recidivism.[18]

Minimum Mandatory Sentences

The Criminal Punishment Code applies to sentencing for felony offenses committed on or after October 1, 1998. Criminal offenses are ranked in the "offense severity ranking chart"[19] from level one (least severe) to level ten (most severe) and are assigned points based on the severity of the offense as determined by the legislature. If an offense is not listed in the ranking chart, it defaults to a ranking based on the degree of the felony.

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[15] OPPAGA Report, at p. 3.

[16] *Id.*

[17] OPPAGA Report, at p. 4. In a footnote (n. 7, at p. 4) at the end of the second paragraph of this quote, OPPAGA noted: "Law enforcement and other stakeholders reported that pain clinics they would consider as being 'pill mills' routinely prescribe much higher amounts of prescription painkillers, such as 180 oxycodone pills per month."

[18] *Id.* In a footnote (n. 8, at p. 4) at the end of the second paragraph of this quote, the OPPAGA noted: "Prison staff assessed offenders' risk of recidivism using the risk assessment instrument developed by the Department of Corrections (DOC). Recidivism is defined as return to prison within three years of release."

[19] Section 921.0022, F.S.

A defendant's sentence is calculated based on points assigned for factors including: the offense for which the defendant is being sentenced; injury to the victim; additional offenses that the defendant committed at the time of the primary offense; the defendant's prior record and other aggravating factors. The points are added in order to determine the "lowest permissible sentence" for the offense. A judge cannot impose a sentence below the lowest permissible sentence unless the judge makes written findings that there are mitigating "circumstances or factors that reasonably justify the downward departure."[20] The permissible sentence (absent downward departure) for an offense ranges from the calculated lowest permissible sentence to the statutory maximum for the primary offense. The statutory maximum sentence for a first degree felony is 30 years, for a second degree felony is 15 years and for a third degree felony is 5 years.[21]

Rule 3.704(c)(26) of the Florida Rules of Criminal Procedure specifies that if the lowest permissible sentence is less than a mandatory minimum sentence, the mandatory minimum sentence takes precedence. If the lowest permissible sentence exceeds the mandatory sentence, the lowest permissible sentence takes precedence.[22]

With few exceptions, the sentencing court must impose the mandatory minimum term – there is no judicial discretion. There are only two circumstances in which a sentencing court is authorized by law to impose a sentence below the mandatory minimum term: when the court sentences a defendant as a youthful offender;[23] and when the state attorney waives the mandatory minimum sentence.[24]

As noted above, the mandatory minimum sentence applicable to a drug trafficking offense depends on the type and quantity of drug trafficked. As shown in the following chart, a person need only possess 4 grams of an illegal substance (prescription drug) to reach the "trafficking in illegal drugs" threshold, while a person must possess a much greater amount of other drugs (cocaine, etc.) to reach the trafficking thresholds.

Trafficking Provision	First Weight Range	Second Weight Range	Third Weight Range
Trafficking in illegal drugs (includes prescription opioids) (s. 893.135(1)(c)1., F.S.)	3-year mandatory minimum term (4 grams to less than 14 grams)	15-year mandatory minimum term (14 grams to less than 28 grams)	25-year mandatory minimum term (28 grams to less than 30 kilograms)
Trafficking in cocaine (s. 893.135(1)(b)1., F.S.)	3-year mandatory minimum term (28 grams to less than 200 grams)	7-year mandatory minimum term (200 grams to less than 400 grams)	15-year mandatory minimum term (400 grams to less than 150 kilograms)
Trafficking in phencyclidine (s. 893.135(1)(d)1., F.S.)	3-year mandatory minimum term (28 grams to less than 200 grams)	7-year mandatory minimum term (200 grams to less than 400 grams)	15-year mandatory minimum term (400 grams or more)

[20] Section 921.0026, F.S.

[21] Section 775.082, F.S.

[22] Rule 3.704(c)(26), Florida Rules of Criminal Procedure. A trafficking mandatory minimum term is a minimum sentencing "floor" for the court and there is no prohibition on earning gain-time. If the court only sentences the defendant to the mandatory term specified by statute, DOC establishes an 85% minimum service date on the term and the offender is subject to s. 944.275(4)(b)3., F.S., which does not allow release prior to serving a minimum of 85% of the sentence. If the court imposes a sentence that exceeds the mandatory term specified by statute, the DOC establishes an 85% minimum service date on the sentence. See *Mastay v. McDonough*, 928 So.2d 512 (Fla. 1st DCA 2006) (Section 893.135, F.S., does not preclude earning gain-time during the mandatory term as long as it does not result in the prisoner's release prior to serving a minimum of 85% of the sentence).

[23] Section 958.04, F.S. *See Christian v. State*, 84 So.3d 437 (Fla. 5th DCA 2012).

[24] 16 Fla. Prac., Sentencing s. 6:69 (2012-2013 ed.). The state attorney may also move to reduce or suspend a sentence based upon substantial assistance rendered by the defendant. Section 893.135(4), F.S.

Trafficking Provision	First Weight Range	Second Weight Range	Third Weight Range
Trafficking in methaqualone (s. 893.135(1)(e)1., F.S.)	3-year mandatory minimum term (200 grams to less than 5 kilograms)	7-year mandatory minimum term (5 kilograms to less than 25 kilograms)	15-year mandatory minimum term (25 kilograms or more)
Trafficking in amphetamine or methamphetamine (s. 893.135(1)(f)1., F.S.)	3-year mandatory minimum term (14 grams to less than 28 grams)	7-year mandatory minimum term (28 grams to less than 200 grams)	15-year mandatory minimum term (200 grams or more)

Effect of the Bill

The bill creates subsection (8) in s. 893.135, F.S., to create a mechanism that allows a judge to depart from a mandatory minimum sentence required by s. 893.135(1)(c), F.S., for trafficking in illegal drugs (prescription drugs).

The bill authorizes the state attorney, defendant, or defense counsel to move the court to depart from the applicable mandatory minimum term of imprisonment in instances where a defendant has been convicted of a violation of s. 893.135(1)(c), F.S., that involves possession of a mixture that is a prescription drug as defined in s. 499.003, F.S. The court may grant such a motion if it finds:

- The defendant's violation of paragraph (1)(c), did not involve the use, attempted use, or threatened use of physical force against another person;
- The defendant's violation of paragraph (1)(c), did not result in the serious bodily injury, disfigurement or death of another person;
- In the commission of the offense in violation of paragraph (1)(c), the defendant was not armed with, did not threaten to use or display, and did not represent by word or conduct that they possessed a firearm, deadly weapon or dangerous instrument;
- The defendant has not been previously convicted of a felony or a misdemeanor involving violence;
- The provisions of the newly created subsection (8) have not been previously invoked;
- There was no evidence of possession with intent to distribute; and
- The quantity of prescription drugs involved in the violation evidenced that the drugs were for personal use.

In deciding whether to grant such motion, the court may consider any facts the court considers relevant, including, but not limited to:

- The criteria listed above;
- The sentencing report and any evidence admitted in a previous sentencing proceeding;
- The defendant's record of arrests;
- Any other evidence of allegations of unlawful conduct or the use of violence by the defendant;
- The defendant's family ties, length of residence in the community, employment history, and mental condition;
- The likelihood that an alternative sentence will produce the same deterrent effect, rehabilitate the defendant, and prevent or delay recidivism to an equal or greater extent than imposition of the mandatory minimum term of imprisonment; and
- Whether the defendant has a history of alcohol or substance abuse.

If a sentencing court grants the motion to depart from the mandatory minimum sentence for a defendant convicted of a violation of s. 893.135(1)(c)1.a., F.S., (4 grams or more but less than 14 grams), the sentencing court must, as a part of any sentence it imposes, require the defendant to successfully complete postadjudicatory treatment-based drug court program. If the defendant intends to reside in a county which has not established a postadjudicatory treatment-based drug court program, the sentencing court must, as a part of any sentence it imposes, sentence the defendant to drug offender probation, as described in s. 948.20(2), F.S.

If the court grants the motion, the court must state in open court at the time of sentencing the specific reasons for imposing the sentence and not imposing the mandatory minimum sentence.

B. SECTION DIRECTORY:

Section 1. Amends s. 893.135, F.S., relating to trafficking; mandatory sentences; suspension or reduction of sentences; conspiracy to engage in trafficking.

Section 2. Provides an effective date of July 1, 2013.

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:

   This bill provides that courts may depart from mandatory minimum mandatory sentence for trafficking in certain drugs. Because this bill is permissive its fiscal impact is dependent upon judicial discretion which cannot be predicted. However, the bill has the potential for savings for the Department of Corrections.

   Using data from the OPPAGA report referenced in this analysis, which used Fiscal Year 2010-11 data from the Department of Corrections, shows that 1,004 offenders were sentenced to prison for opioid trafficking with no prior or accompanying violent offenses. OPPAGA estimates that 62% of these offenders would have been arrested for selling opioids to a confidential informant or undercover law enforcement officer, leaving 382 offenders potentially eligible for diversion under the current criteria in HB 159.

   Assuming that these offenders would also need to have had a history of alcohol or substance abuse to receive a departure from a minimum mandatory sentence, the potential number of eligible offenders is lower. Of the 1,004 offenders, 656 had been assessed by the Department of Corrections as needing substance abuse treatment. If we assume, based on the estimate from our file review referenced above, that 62% of the 656 offenders would have been arrested for selling opioids to a confidential informant or undercover law enforcement officer, this would leave 249 offenders potentially eligible for diversion under the current criteria in HB 159. This would represent a potential savings of $3,500,890.

   On February 27, 2013, the Criminal Justice Impact Conference determined that this bill will have an indeterminate negative prison bed impact (potential savings).

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

1. For a court to depart from the minimum mandatory sentence, a finding must be made that the defendant has not previously invoked the provisions of this subsection. There could be practical difficulties with obtaining this information as a defendant's criminal history could involve more than one county, thus making those court records more difficult to obtain.

2. A court must make a finding that the defendant has not previously been convicted of a felony. There is no guidance in the bill as to whether this is intended to preclude only those defendants who have been previously adjudicated for a felony offense, or whether it also precludes defendants who have a withhold of adjudication for a felony offense in their criminal history.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 12, 2013, the Criminal Justice Subcommittee adopted three amendments and reported the bill favorably as a committee substitute. The amendments:

- Add additional criteria which must be met for a sentencing court to grant a motion to depart filed under subsection (8);
- Modify the factors which may be considered by a sentencing court when granting a motion to depart filed under subsection (8); and
- Provide that if a sentencing court does grant the motion to depart from the mandatory minimum sentence for a defendant convicted of a violation of s. 893.135(1)(c)1.a., F.S., (4 grams or more but less than 14 grams), the sentencing court must, as a part of any sentence it imposes, require the defendant to successfully complete postadjudicatory treatment-based drug court program; or if a postadjudicatory treatment-based drug court program is not available in the defendant's county of residence, drug offender probation as described in s. 948.20(2), F.S.

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

1 A bill to be entitled
2 An act relating to sentencing for controlled substance
3 violations; amending s. 893.135, F.S.; providing for
4 an exception to mandatory minimum sentencing
5 requirements for certain violators of specified
6 controlled substance provisions; specifying criteria
7 to qualify for an exception; providing criteria that
8 may be considered by a court in departing for the
9 mandatory minimum term of imprisonment; requiring a
10 court to make certain statements if it departs from
11 the mandatory minimum term of imprisonment; requiring
12 a sentencing court that departs from the mandatory
13 minimum term of imprisonment to, as part of any
14 sentence, require the defendant to successfully
15 complete a postadjudicatory treatment-based drug court
16 program or sentence the defendant to drug offender
17 probation; providing an effective date.
18
19 Be It Enacted by the Legislature of the State of Florida:
20
21 Section 1. Subsection (8) is added to section 893.135,
22 Florida Statutes, to read:
23 893.135 Trafficking; mandatory sentences; suspension or
24 reduction of sentences; conspiracy to engage in trafficking.—
25 (8)(a) Notwithstanding any other provision of law, if a
26 defendant has been convicted of a violation of paragraph (1)(c)
27 that involves possession of a mixture that is a prescription
28 drug as defined in s. 499.003, the state attorney, defendant, or

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

29 counsel representing the defendant may move the sentencing court
30 to depart from the mandatory minimum term of imprisonment
31 applicable to that violation.
32 (b) The sentencing court may grant a motion under this
33 subsection if the court finds that the following criteria are
34 met:
35 1. The defendant's violation of paragraph (1)(c) did not
36 involve the use, attempted use, or threatened use of physical
37 force against another person.
38 2. The defendant's violation of paragraph (1)(c) did not
39 result in serious bodily injury to another person or the
40 disfigurement or death of another person.
41 3. In the commission of the offense in violation of
42 paragraph (1)(c), the defendant was not armed with, did not
43 threaten to use or display, and did not represent by word or
44 conduct that he or she possessed a firearm, deadly weapon, or
45 dangerous instrument.
46 4. The defendant has not previously been convicted of a
47 felony or a misdemeanor involving violence.
48 5. The provisions of this subsection have not been
49 previously invoked.
50 6. There was no evidence of possession with intent to
51 distribute.
52 7. The quantity of prescription drugs involved in the
53 violation evidenced that the drugs were for personal use.
54 (c) When departing from the mandatory minimum term of
55 imprisonment, the sentencing court may consider any facts that
56 the court considers relevant, including, but not limited to:

57 1. The criteria listed in paragraph (b).
58 2. The sentencing report and any evidence admitted in a
59 previous sentencing proceeding.
60 3. The defendant's record of arrests.
61 4. Any other evidence of allegations of unlawful conduct
62 or the use of violence by the defendant.
63 5. The defendant's family ties, length of residence in the
64 community, employment history, and mental condition.
65 6. The likelihood that an alternative sentence will
66 produce the same deterrent effect, rehabilitate the defendant,
67 and prevent or delay recidivism to an equal or greater extent
68 than imposition of the mandatory minimum term of imprisonment.
69 7. Whether the defendant has a history of alcohol or
70 substance abuse.
71 (d) If a sentencing court departs from the mandatory
72 minimum term of imprisonment for a defendant convicted of a
73 violation of s. 893.135(1)(c)1.a., the court must, as part of
74 any sentence, require the defendant to successfully complete a
75 postadjudicatory treatment-based drug court program as described
76 in s. 397.334. If the defendant intends to reside in a county
77 that has not established a postadjudicatory treatment-based drug
78 court program, the court must, as part of any sentence that the
79 court imposes, sentence the defendant to drug offender probation
80 as described in s. 948.20(2).
81 (e) If the sentencing court grants the motion, the court
82 shall state in open court at time of sentencing the specific
83 reasons for imposing the sentence and for not imposing the
84 mandatory minimum term of imprisonment.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

85 Section 2. This act shall take effect July 1, 2013.

CS/HB 785

COMMITTEE/SUBCOMMITTEE ACTION

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

1 Committee/Subcommittee hearing bill: Justice Appropriations
2 Subcommittee
3 Representative Eagle offered the following:
4
5 **Amendment (with title amendment)**
6 Remove lines 17-37 and insert:
7 Section 1. Subsections (2), (4), and (5) of section
8 985.437, Florida Statutes, are amended to read:
9 985.437 Restitution.—
10 (2) The court shall ~~may~~ order the child and the child's
11 parent or guardian to make restitution in money, through a
12 promissory note cosigned by the child's parent or guardian, or
13 in kind for any damage or loss caused by the child's offense in
14 a reasonable amount or manner to be determined by the court.
15 When restitution is ordered by the court, the amount of
16 restitution may not exceed an amount the child and the parent or
17 guardian could reasonably be expected to pay or make. If the
18 child and the child's parent or guardian are unable to pay the
19 restitution in one lump-sum payment, the court may set up a

20 payment plan that reflects their ability to pay the restitution
21 amount.
22 (4) The parent or guardian may be absolved of liability
23 for restitution under this section, if:
24 (a) After a hearing, the court finds that it is the child's
25 first referral to the delinquency system and ~~A finding by the~~
26 ~~court, after a hearing,~~ that the parent or guardian has made
27 diligent and good faith efforts to prevent the child from
28 engaging in delinquent acts; or
29 (b) The victim entitled to restitution as a result of
30 damage or loss caused by the child's offense is that child's
31 parent or guardian ~~absolves the parent or guardian of liability~~
32 ~~for restitution under this section~~.
33 (5) For purposes of this section, the Department of
34 Children and Families shall not be considered a guardian
35 responsible for restitution for the delinquent acts of a child
36 who is found to be dependent, as defined in s. 39.01(15).
37 (6) ~~(5)~~ The court may retain jurisdiction over a child and
38 the child's parent or legal guardian whom the court has ordered
39 to pay restitution until the restitution order is satisfied or
40 until the court orders otherwise, as provided in s. 985.0301.
41
42 ---
43 **T I T L E A M E N D M E N T**
44 Remove lines 7-9 and insert:
45 circumstances; absolving the parent or guardian of liability for
46 restitution in certain circumstances; providing that Department

47 of Children and Families shall not be considered a guardian for
48 purposes of restitution; amending s. 985.513, F.S.;
49

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 785 Restitution for Juvenile Offenses
SPONSOR(S): Criminal Justice Subcommittee; Eagle and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1438

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 1 N, As CS	Cox	Cunningham
2) Justice Appropriations Subcommittee		Toms	Jones Darity
3) Judiciary Committee			

SUMMARY ANALYSIS

Section 985.437, F.S., authorizes a court with jurisdiction over a child that has been adjudicated delinquent to order the child to pay restitution to the victim for any damage or loss caused by the child's offense in a reasonable amount or manner. Restitution may be satisfied by performing community service, or by monetary payments, with a promissory note cosigned by the child's parent or guardian. A parent or guardian may be absolved of liability for restitution in their child's criminal case if the court makes a finding that the parent or guardian has made "diligent and good faith efforts to prevent the child from engaging in delinquent acts."

Section 985.513, F.S., authorizes a court to order the parent or legal guardian to make restitution payments, in money or in kind, for any damage or loss caused by the child's offense; and to be responsible for any restitution ordered against the child, as provided under s. 985.437, F.S.

The bill amends s. 985.437, F.S., to *require*, rather than authorize, the court to order a child *and* the child's parent or legal guardian to pay restitution. The bill further amends s. 985.437, F.S., to:

- Authorize the court to set up a payment plan if the child and the child's parents or legal guardians are unable to pay the restitution in one lump-sum payment; and
- Remove the provision absolving a parent or guardian of any liability for restitution in their child's criminal case when the court makes a finding that the parent or guardian has made "diligent and good faith efforts to prevent the child from engaging in delinquent acts."

The bill amends s. 985.513, F.S., to remove duplicative language relating to authority the court has to order a parent or guardian to be responsible for the child's restitution.

To the extent that the bill increases the number and/or length of restitution hearings, which must be conducted by the court prior to entering an order of restitution, it could create an insignificant increased workload on the courts.

The bill provides an effective date of July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Restitution in Juvenile Criminal Cases

Section 985.437, F.S., authorizes, but does not require, a court with jurisdiction over a child that has been adjudicated delinquent to order the child to pay restitution to the victim for any damage or loss caused by the child's offense[1] in a reasonable amount or manner.[2] The court determines the amount or manner of restitution that is reasonable.[3]

To enter an order of restitution, a trial court must first conduct a restitution hearing addressing the child's ability to pay and the amount of restitution the victim is entitled to,[4] unless the child previously entered into an agreement to pay[5] or has waived their right to attend a restitution hearing.[6] When restitution is ordered by the court, the amount of restitution may not exceed an amount the child or the parent or guardian could reasonably be expected to pay or make.[7]

Restitution may be satisfied by performing community service, or by monetary payments, with a promissory note cosigned by the child's parent or guardian.[8] However, a parent or guardian may be absolved of any liability for restitution in their child's criminal case if, through a hearing, the court makes a finding that the parent or guardian has made "diligent and good faith efforts to prevent the child from engaging in delinquent acts."[9]

The clerk of the circuit court receives and dispenses restitution payments. The clerk must notify the court if restitution is not made. The court may retain jurisdiction over a child and the child's parent or legal guardian whom the court has ordered to pay restitution until the restitution order is satisfied or until the court orders otherwise.[10]

Court's Powers over Juvenile Offender's Parent or Guardian

Section 985.513, F.S., authorizes, but does not require, a court that has jurisdiction over a child that has been adjudicated delinquent to order the parents or guardians of such child to perform community service and participate in family counseling. The statute also authorizes the court to:

- Order the parent or guardian to make restitution in money or in kind for any damage or loss caused by the child's offense; and
- Require the child's parent or legal guardian to be responsible for any restitution ordered against the child, as provided under s. 985.437, F.S.

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[1] The damage or loss or damage must be directly or indirectly related to the child's offense or criminal episode. *L.R.L. v. State*, 9 So.3d 714 (Fla. 2nd DCA 2009).

[2] If restitution is ordered, it becomes a condition of probation, or if the child is committed to a residential commitment program, part of community-based sanctions upon release from the program. Section 985.437(1), F.S.

[3] Section 985.437(2), F.S.

[4] *J.G. v. State*, 978 So.2d 270 (Fla. 4th DCA 2008). If a court intends to establish an amount of restitution based solely on evidence adduced at a hearing of a charge of delinquency, the juvenile must be given notice.

[5] *T.P.H. v. State*, 739 So.2d 1180 (Fla. 4th DCA 1999).

[6] *T.L. v. State*, 967 So.2d 421 (Fla. 1st DCA 2007).

[7] Section 985.437(2), F.S.

[8] Section 985.437(2), F.S. Similar to the process for juveniles, a parent or guardian cannot be ordered to pay restitution arising from offenses committed by their minor child, without the court providing the parent with meaningful notice and an opportunity to be heard, or without making a determination of the parents' ability to do so. *See, S.B.L. v. State*, 737 So.2d 1131 (Fla. 1st DCA 1999); *A.T. v. State*, 706 So.2d 109 (Fla. 2nd DCA 1998); and *M.H. v. State*, 698 So.2d 395 (Fla. 4th DCA 1997).

[9] Section 985.437(4), F.S.

[10] Section 985.437(5), F.S.

Failing to Pay Restitution Order
Sections 985.0301(h), F.S., states that the terms of restitution orders in juvenile criminal cases are subject to s. 775.089, F.S. Section 775.089, F.S., provides that a restitution order may be enforced in the same manner as a judgment in a civil lien. Thus, if a child or parent fails to pay court-ordered restitution, a civil lien may be placed upon the parent or child's real property.[11] The court may transfer a restitution order to a collection court or a private collection agency to collect unpaid restitution.[12]

Effect of the Bill
The bill amends s. 985.437, F.S., to *require*, rather than authorize, the court to order a child *and* the child's parent or legal guardian to pay restitution. The bill further amends s. 985.437, F.S., to authorize the court to set up a payment plan if the child and the child's parents or legal guardians are unable to pay the restitution in one lump-sum payment. The payment plan must reflect the child and child's parent or legal guardian's ability to pay the restitution amount.

The bill removes the provision in s. 985.437(4), F.S., absolving a parent or guardian of any liability for restitution in their child's criminal case when the court makes a finding that the parent or guardian has made "diligent and good faith efforts to prevent the child from engaging in delinquent acts."

The bill amends s. 985.513, F.S., to remove duplicative language relating to the authority the court has to order a parent or guardian to be responsible for the child's restitution, ensuring the requirement that a parent and child both be responsible for restitution is addressed solely in s. 985.437, F.S.

B. SECTION DIRECTORY:

Section 1. Amends s. 985.437, F.S., relating to restitution.

Section 2. Amends s. 985.513, F.S., relating to powers of the court over parent or guardian at disposition.

Section 3. Provides an effective date of July 1, 2013.

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 amends ss. 985.437 and 985.513, F.S., to *require* the court to order a child and the child's parent or legal guardian to pay restitution. To enter an order of restitution, the court must conduct a restitution hearing. To the extent that bill increases the number and/or length of restitution hearings, the bill may result in an insignificant workload increase on the court system.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

---

[11] Section 775.089(5), F.S.
[12] Section 985.045, F.S., also states that this is allowed in a case where the circuit court has retained jurisdiction over the child and the child's parent or legal guardian.

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Parents and legal guardians of children that have been adjudicated delinquent will be liable for restitution in money or in kind for damages caused by the child's offense. Additionally, victims of a child's offense may be more likely to receive restitution.

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:

To be in compliance with the due process clause requirements of the Fourteenth Amendment,[13] of the U.S. Constitution, the court must conduct a restitution hearing to determine if restitution is necessary, how much shall be ordered, and the ability of the juvenile and parent to make payments.[14] Both the juvenile and the parent must be notified and have the opportunity to present evidence to the court about what, if any, restitution amount should be owed and their ability to pay.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill requires the court to enter a restitution order against both the child and parent for a victim's losses resulting from the child's criminal episode. This could result in a court being required to enter an order of restitution against a parent when the parent was the victim of the child's criminal offense.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 12, 2013, the Criminal Justice Subcommittee adopted one amendment and reported it favorably as a committee substitute. The amendment removes duplicative language in s. 985.513, F.S., relating to the court's authority to order a parent or guardian to be responsible for restitution for any damage or loss caused by the child's offense.

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

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[13] Art. XIV, Sec. 1, U.S. CONST.

[14] *J.G. v. State*, 978 So.2d 270 (Fla. 4th DCA 2008).

1 A bill to be entitled
2 An act relating to restitution for juvenile offenses;
3 amending s. 985.437, F.S.; requiring a child's parent
4 or guardian, in addition to the child, to make
5 restitution for damage or loss caused by the child's
6 offense; providing for payment plans in certain
7 circumstances; deleting provisions for absolving the
8 parent or guardian of liability for restitution in
9 certain circumstances; amending s. 985.513, F.S.;
10 removing duplicative language authorizing the court to
11 require a parent or guardian to be responsible for any
12 restitution ordered against the child; providing an
13 effective date.
14
15 Be It Enacted by the Legislature of the State of Florida:
16
17 Section 1. Subsection (5) of section 985.437, Florida
18 Statutes, is renumbered as subsection (4), and subsections (2)
19 and (4) of that section are amended to read:
20 985.437 Restitution.—
21 (2) The court shall ~~may~~ order the child and the child's
22 parent or guardian to make restitution in money, through a
23 promissory note cosigned by the child's parent or guardian, or
24 in kind for any damage or loss caused by the child's offense in
25 a reasonable amount or manner to be determined by the court.
26 When restitution is ordered by the court, the amount of
27 restitution may not exceed an amount the child and the parent or
28 guardian could reasonably be expected to pay or make. If the

29 child and the child's parent or guardian are unable to pay the
30 restitution in one lump-sum payment, the court may set up a
31 payment plan that reflects their ability to pay the restitution
32 amount.
33 ~~(4) A finding by the court, after a hearing, that the~~
34 ~~parent or guardian has made diligent and good faith efforts to~~
35 ~~prevent the child from engaging in delinquent acts absolves the~~
36 ~~parent or guardian of liability for restitution under this~~
37 ~~section.~~
38 Section 2. Subsection (1) of section 985.513, Florida
39 Statutes, is amended to read:
40 985.513 Powers of the court over parent or guardian at
41 disposition.—
42 (1) The court that has jurisdiction over an adjudicated
43 delinquent child may, by an order stating the facts upon which a
44 determination of a sanction and rehabilitative program was made
45 at the disposition hearing,~~:~~
46 ~~(a)~~ order the child's parent or guardian, together with
47 the child, to render community service in a public service
48 program or to participate in a community work project. In
49 addition to the sanctions imposed on the child, the court may
50 order the child's parent or guardian to perform community
51 service if the court finds that the parent or guardian did not
52 make a diligent and good faith effort to prevent the child from
53 engaging in delinquent acts.
54 ~~(b) Order the parent or guardian to make restitution in~~
55 ~~money or in kind for any damage or loss caused by the child's~~
56 ~~offense. The court may also require the child's parent or legal~~

57 ~~guardian to be responsible for any restitution ordered against~~
58 ~~the child, as provided under s. 985.437. The court shall~~
59 ~~determine a reasonable amount or manner of restitution, and~~
60 ~~payment shall be made to the clerk of the circuit court as~~
61 ~~provided in s. 985.437. The court may retain jurisdiction, as~~
62 ~~provided under s. 985.0301, over the child and the child's~~
63 ~~parent or legal guardian whom the court has ordered to pay~~
64 ~~restitution until the restitution order is satisfied or the~~
65 ~~court orders otherwise.~~
66 Section 3. This act shall take effect July 1, 2013.

HB 787

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED __ (Y/N)

ADOPTED AS AMENDED __ (Y/N)

ADOPTED W/O OBJECTION __ (Y/N)

FAILED TO ADOPT __ (Y/N)

WITHDRAWN __ (Y/N)

OTHER ____

---

1 Committee/Subcommittee hearing bill: Justice Appropriations
2 Subcommittee
3 Representative Goodson offered the following:
4
5 **Amendment (with title amendment)**
6 Remove lines 23-55 and insert:
7 847.0042 Nude depictions with personal identifying
8 information.—
9 (1) A person may not knowingly transmit or post to a
10 social networking service or any other website, or knowingly
11 cause to be transmitted or posted to a social networking service
12 or any other website, in one or more transmissions or posts:
13 (a) A photograph or video which depicts nudity of another
14 person;
15 (b) Descriptive information in any form that conveys the
16 personal identification information, as defined in s. 817.568,
17 of the person whose nudity is depicted in the photograph or
18 video; and

19 (c) That results in the personal identification
20 information being displayed together with, or being otherwise
21 identifiable as connected with, the photograph or video,
22
23 for the purpose of harassing the depicted person or causing
24 others to harass the depicted person. "Harass" means to engage
25 in conduct directed at a specific person that is intended to
26 cause substantial emotional distress to such person and serves
27 no legitimate purpose.
28 (2)(a) Except as provided in paragraph (b), a person who
29 violates this section commits a felony of the third degree,
30 punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
31 (b) A person who is 18 years of age or older at the time
32 of violating this section commits a felony of the second degree,
33 punishable as provided in s. 775.082, s. 775.083, or s. 775.084,
34 if the violation involves a photograph or video of a person who
35 was younger than 16 years of age at the time the photograph or
36 video was made.
37 (3) An offense is committed within this state if any
38 conduct that is an element of the offense or any harm to the
39 depicted person resulting from the offense occurs within this
40 state.
41
42
43
44 ---
45 **T I T L E A M E N D M E N T**
46 Remove lines 6-9 and insert:

47 depicts nudity and specified information relating to the
48 depicted individual for the purpose of harassment;
49 providing criminal penalties;
50

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 787 Computer or Electronic Device Harassment
SPONSOR(S): Goodson and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 946

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 0 N	Jones	Cunningham
2) Justice Appropriations Subcommittee		McAuliffe	Jones Darity
3) Judiciary Committee			

SUMMARY ANALYSIS

A recent survey found that one in ten people have threatened to expose risqué photos of their ex-partners online, and that these threats were carried out nearly 60 percent of the time. In Florida, there are no criminal laws that specifically prohibit the posting of nude adult photos or videos on the Internet.

The bill creates s. 847.0042, F.S., to criminalize the non-consensual transmission or posting of nude adult photographs and videos that include personal information to websites or social networking services. Specifically, the bill makes it a third degree felony for a person to knowingly use a computer (or other device capable of electronic data transmission or distribution) to transmit or post to a website or any other social networking service, or cause to be posted to a website or any other social networking service, any photograph or video of an individual which depicts nudity and contains the depicted individual's personal identification information (as defined above), or counterfeit or fictitious information purporting to be such personal identification information, without first obtaining the depicted person's written consent (unless the victim was photographed or videotaped in public and a lack of objection to the photography or videotaping could reasonably be implied by the victim's conduct).

The bill makes it a second degree felony if the person is 18 years old or older when they transmit or post the nude photo or video and the individual in the photo of video is younger than 16 when the photo or video was created.

The Criminal Justice Impact Conference met on April 4, 2013 and determined this bill will have an insignificant impact on state prison beds.

The bill provides an effective date of October 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

McAfee, an Internet security provider, recently published the results of a survey exploring the connection between romantic breakups and loss of privacy online.[1] Among other results, the survey found that 1 in 10 ex-partners have threatened to expose risqué photos online, and that these threats were carried out nearly 60 percent of the time.[2] Men reported being threatened with such exposure more often than women, and also reported that a higher proportion of the threats were carried out.[3] Some victims of such activity have been so emotionally affected that they have committed or attempted suicide.[4]

Recently, nude photographs and videos of a young woman in Brevard County were posted online by the woman's ex-boyfriend.[5] Along with the photos, her name, e-mail address, and the name of the city where she lived were also posted.[6] The woman said she called the Brevard County Sheriff's Office for help and was told it's not a crime to post nude photos without a person's consent, even if the person and the person's address are identified.[7]

In Florida, there are no criminal laws that specifically prohibit the posting of nude adult photos on the Internet. However, in some circumstances posting such pictures could be an element of the offenses of stalking (s. 784.048, F.S.), or extortion (s. 836.05, F.S.). Additionally, s. 817.568(4), F.S., makes the non-consensual use of a person's personal identification information to harass[8] that person a first degree misdemeanor.[9] "Personal identification information" is defined as any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any:

- Name, postal or electronic mail address, telephone number, social security number, date of birth, mother's maiden name, official state-issued or United States-issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number, Medicaid or food assistance account number, bank account number, credit or debit card number, or personal identification number or code assigned to the holder of a debit card by the issuer to permit authorized electronic use of such card;
- Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
- Unique electronic identification number, address, or routing code;
- Medical records;
- Telecommunication identifying information or access device; or
- Other number or information that can be used to access a person's financial resources.[10]

---

[1] *Lovers Beware: Scorned Exes May Share Intimate Data And Images Online*, McAfee.com, http://www.mcafee.com/us/about/news/2013/q1/20130204-01.aspx (last viewed on March 25, 2013).
[2] *Id.*
[3] *Id.*
[4] *Supra* note 1.
[5] *See* http://www.wftv.com/news/news/local/9-investigates-issue-nude-photos-posted-online-wit/nWgdb/ (last viewed March 25, 2013).
[6] *Id.*
[7] *Id.*
[8] Section 817.568, F.S., defines "harass" as engaging in conduct directed at a specific person that is intended to cause substantial emotional distress to such person and serves no legitimate purpose.
[9] A first degree misdemeanor is punishable by up to one year in county jail and a $1,000 fine. Sections 775.082 and 775.083, F.S.
[10] Section 817.568, F.S.

Effect of the Bill
The bill creates s. 847.0042, F.S., to criminalize the non-consensual transmission or posting of nude photographs or videos that include personal information to websites or social networking services.

The bill makes it a third degree felony[11] for a person to knowingly use a computer (or other device capable of electronic data transmission or distribution) to transmit or post to a website or any other social networking service, or cause to be posted to a website or any other social networking service, any photograph or video of an individual which depicts nudity[12] and contains the depicted individual's personal identification information (as defined above), or counterfeit or fictitious information purporting to be such personal identification information, without first obtaining the depicted person's written consent (unless the victim was photographed or videotaped in public and a lack of objection to the photography or videotaping could reasonably be implied by the victim's conduct).

The bill makes it a second degree felony[13] if the person is 18 years old or older when they transmit or post the nude photo or video and the individual in the photo of video is younger than 16 when the photo or video was created.

The offense is considered to be committed in Florida if any conduct that is an element of the offense or any harm to the depicted person, including harm to the depicted person's privacy interests, resulting from the offense occurs within Florida.

The bill also amends s. 921.244, F.S.,[14] to add s. 847.0042, F.S., to the list of offenses for which a court must issue a no contact order with the victim.

B. SECTION DIRECTORY:

Section 1. Creates s. 847.0042, F.S., relating to nude depictions with personal identifying information.

Section 2. Amends s. 921.244, F.S., relating to order of no contact; penalties.

Section 3. Provides an effective date of October 1, 2013.

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 Criminal Justice Impact Conference met on April 4, 2013 and determined this bill will have an insignificant impact on state prison beds since the third degree felony created in the bill is unranked and the second degree felony is a low volume offense.

---

[11] A third degree felony is punishable by up to five years imprisonment and a $5,000 fine. Sections 775.082 and 775.083, F.S.
[12] Section 847.001(9), F.S., defines "nudity" as the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. A mother's breastfeeding of her baby does not under any circumstance constitute "nudity," irrespective of whether or not the nipple is covered during or incidental to feeding.
[13] A second degree felony is punishable by up to 15 years imprisonment and a $10,000 fine. Sections 775.082 and 775.083, F.S.
[14] Section 921.244, F.S., requires a court to order a defendant not to have contact with a victim, directly or indirectly, including through a third person, if the defendant was convicted for violating ss. 794.011, 800.04, 847.0135(5), or 775.084(1)(b)1.a.- o., F.S. A violation of this court order is a third degree felony.

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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:

Private individuals or companies who engage in the behavior prohibited by the bill for profit will face criminal penalties for doing so.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The 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:

   The First Amendment to the United States Constitution and Article I, Section 4, of the Florida Constitution protect the rights of individuals to express themselves in a variety of ways. The constitutions protect not only speech and the written word, but also conduct intended to communicate. When lawmakers attempt to restrict or burden fundamental and basic rights such as these, the laws must not only be directed toward a legitimate public purpose, but they must be drawn as narrowly as possible. As the United States Supreme Court has noted, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[15] Put another way, statutes cannot be so broad that they prohibit constitutionally protected conduct as well as unprotected conduct.[16]

   When legislation is drafted so that it may be applied to conduct that is protected by the First Amendment, it is said to be unconstitutionally overbroad. The overbreadth doctrine permits an individual whose own speech or conduct may be prohibited to challenge an enactment facially "because it also threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid."[17] The doctrine contemplates the pragmatic judicial assumption that an overbroad statute will have a chilling effect on protected speech.[18] If statutes are not narrowly constructed they may be challenged as being overbroad.

   In *Reno v. American Civil Liberties Union*, the United States Supreme Court stated:

   > [T]he growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free

[15] *NAACP v. Button*, 371 U.S. 415, 433 (1963).
[16] *Sult v. State*, 906 So.2d 1013 (Fla. 2005).
[17] *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).
[18] *Sult v. State*, 906 So.2d 1013 (Fla. 2005).

exchange of ideas than encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.[19]

The bill makes it a crime to knowingly transmit or post to a website or social networking service any photograph or video that depicts nudity of an individual, contains the personal identification information of that individual, and is transmitted or posted without the individual's consent. To the extent that the bill regulates content of speech protected by the First Amendment, it could be challenged as being unconstitutional.

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

[19] 521 U.S. 844 (1997).

1 A bill to be entitled
2 An act relating to computer or electronic device
3 harassment; creating s. 847.0042, F.S.; prohibiting
4 knowing use of a computer or other device to transmit
5 or post any photograph or video of an individual which
6 depicts nudity and contains specified information
7 relating to the depicted individual without first
8 obtaining the depicted person's written consent;
9 providing an exception; providing criminal penalties;
10 providing enhanced penalties for violations by persons
11 18 years of age or older involving victims younger
12 than 16 years of age; providing for jurisdiction;
13 amending s. 921.244, F.S.; providing that a person
14 convicted of a violation of s. 847.0042, F.S., be
15 ordered to have no contact with the victim; providing
16 criminal penalties for violation of such an order;
17 providing an effective date.
18
19 Be It Enacted by the Legislature of the State of Florida:
20
21 Section 1. Section 847.0042, Florida Statutes, is created
22 to read:
23 <u>847.0042 Nude depictions with personal identifying</u>
24 <u>information.—</u>
25 <u>(1) A person may not knowingly use a computer or other</u>
26 <u>device capable of electronic data transmission or distribution</u>
27 <u>to transmit or post to a website or any other social networking</u>
28 <u>service, or cause to be posted to a website or any other social</u>

CODING: Words ~~stricken~~ are deletions; words <u>underlined</u> are additions.

29 networking service, any photograph or video of an individual
30 which depicts nudity and contains any of the depicted
31 individual's personal identification information, as defined in
32 s. 817.568, or counterfeit or fictitious information purporting
33 to be such personal identification information, without first
34 obtaining the depicted person's written consent unless the
35 victim was photographed or videotaped in public and a lack of
36 objection to the photography or videotaping could reasonably be
37 implied by the victim's conduct.
38 (2)(a) Except as provided in paragraph (b), a person who
39 violates this section commits a felony of the third degree,
40 punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
41 (b) A person who is 18 years of age or older at the time
42 of the transmission or posting of a video or photograph to a
43 website or any other social networking service, or the causing
44 to be posted to a website or any other social networking service
45 of a video or photograph, who violates this section through such
46 conduct and the violation involves a photograph or video of a
47 person who was younger than 16 years of age at the time of
48 making the photograph or video commits a felony of the second
49 degree, punishable as provided in s. 775.082, s. 775.083, or s.
50 775.084.
51 (3) An offense is committed within this state if any
52 conduct that is an element of the offense or any harm to the
53 depicted person, including any harm to the depicted person's
54 privacy interests, resulting from the offense occurs within this
55 state.
56 Section 2. Section 921.244, Florida Statutes, is amended

57 to read:
58 921.244 Order of no contact; penalties.—
59 (1) At the time of sentencing an offender convicted of a
60 violation of s. 794.011, s. 800.04, s. 847.0042, s. 847.0135(5),
61 or any offense in s. 775.084(1)(b)1.a.-o., the court shall order
62 that the offender be prohibited from having any contact with the
63 victim, directly or indirectly, including through a third
64 person, for the duration of the sentence imposed. The court may
65 reconsider the order upon the request of the victim if the
66 request is made at any time after the victim has attained 18
67 years of age. In considering the request, the court shall
68 conduct an evidentiary hearing to determine whether a change of
69 circumstances has occurred which warrants a change in the court
70 order prohibiting contact and whether it is in the best interest
71 of the victim that the court order be modified or rescinded.
72 (2) Any offender who violates a court order issued under
73 this section commits a felony of the third degree, punishable as
74 provided in s. 775.082, s. 775.083, or s. 775.084.
75 (3) The punishment imposed under this section shall run
76 consecutive to any former sentence imposed for a conviction for
77 any offense under s. 794.011, s. 800.04, s. 847.0135(5), or any
78 offense in s. 775.084(1)(b)1.a.-o.
79 Section 3. This act shall take effect October 1, 2013.

CS/HB 1325

Amendment No.1

COMMITTEE/SUBCOMMITTEE ACTION

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

---

1 Committee/Subcommittee hearing bill: Justice Appropriations
2 Subcommittee
3 Representative Spano offered the following:
4
5 **Amendment**
6 Remove lines 179-180 and insert:
7 fail to acknowledge the arrests covered by the expunged record,
8 except when the subject of the record is a candidate for
9 employment with a criminal justice agency or is a defendant in a
10 criminal prosecution.
11 (c) Subject to the exceptions in paragraph (b), a person
12 who has been granted an expunction under this
13

Amendment No.2

COMMITTEE/SUBCOMMITTEE ACTION

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

---

1 Committee/Subcommittee hearing bill: Justice Appropriations
2 Subcommittee
3 Representative Spano offered the following:
4
5 **Amendment (with title amendment)**
6 Remove line 413 and insert:
7 Section 6. Effective July 1, 2013, the sum of $99,275 in
8 nonrecurring funds is appropriated from the General Revenue Fund
9 to the Department of Law Enforcement to fund programming costs
10 associated with this bill.
11 Section 7. Except as otherwise provided in this act, this
12 act shall take effect January 1, 2014, except that the
13 Department of Law Enforcement or any other criminal justice
14 agency shall not be required to comply with an order to expunge
15 a criminal history record as required in this bill until March
16 1, 2014.
17
18
19
20 ---

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

22 Remove lines 34-40 and insert:

23 made by the act; providing an appropriation; providing an
24 effective date.

25 WHEREAS, victims of trafficking may be forced to engage in
26 a variety of illegal acts beyond prostitution, and

27 WHEREAS, trafficked persons have not always been recognized
28 as victims by the police and prosecutors and plead guilty or did
29 not understand the consequences of
30

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1325 Victims of Human Trafficking
SPONSOR(S): Criminal Justice Subcommittee; Spano and others
TIED BILLS: HB 1327 **IDEN./SIM. BILLS:** CS/SB 1644

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 0 N, As CS	Jones	Cunningham
2) Justice Appropriations Subcommittee		McAuliffe	Jones Darity
3) Judiciary Committee			

SUMMARY ANALYSIS

Section 787.06, F.S., Florida's human trafficking statute, defines human trafficking as the transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining of another person for the purpose of exploitation of that person. The statute contains a variety of provisions prohibiting persons from knowingly engaging in human trafficking using coercion for labor or services and for commercial sexual activity. In addition to addressing the perpetrators of human trafficking, s. 787.06, F.S., addresses *victims* of human trafficking by providing legislative intent that "victims of trafficking be protected and assisted by this state and its agencies."

The bill creates s. 943.0583, F.S., which authorizes a victim of human trafficking to petition the court for the expunction of any conviction for an offense committed while he or she was a victim of human trafficking. A "victim of human trafficking" is defined as a person subjected to coercion for the purpose of being used in human trafficking, a minor who is a victim of human trafficking through coercion, or an individual subject to human trafficking as defined by federal law.

A petition must be initiated with due diligence after the victim has ceased to be a victim of human trafficking or has sought services for victims of human trafficking. The bill requires the petition to include:

- A sworn statement attesting that the victim is eligible for such expunction to the best of his or her knowledge or belief and does not have another petition to expunge or seal before any other court; and
- Official documentation of the victim's status as a victim of human trafficking, if any exists. Official documentation of the victim's status creates a presumption that his or her participation in the offense was a result of having been a victim of human trafficking. However, a petition may be granted without official documentation.

The court's determination of the petition must be by a preponderance of the evidence. A determination made without official documentation must be made by a showing of clear and convincing evidence. If a court grants an expunction the bill requires criminal justice agencies with custody of the expunged record, except FDLE, to physically destroy the record. Persons who have had their human trafficking criminal history records expunged may lawfully deny or fail to acknowledge the arrests that were expunged. The bill specifies that an expunged conviction is deemed to have been vacated due to a substantive defect in the underlying criminal proceedings.

The bill amends s. 90.803(23), F.S., by increasing the age of a child to which the hearsay exception applies from 11 to 16.

The Criminal Justice Impact Conference met on March 21, 2013 and determined this bill may have an insignificant negative impact on state prison beds. FDLE reports that the bill will have a negative fiscal impact. See fiscal section.

The bill is effective on July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Hearsay Evidence
Section 90.803, F.S., contains a variety of hearsay exceptions. Subsection (23) of the statute specifies that unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing certain crimes[1] is admissible in evidence in any civil or criminal proceeding if:

- The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability;[2] and
- The child either:
  - Testifies; or
  - Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability includes a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1), F.S.[3]

Effect of the Bill
The bill amends s. 90.803(23), F.S., by increasing the age of a child to which the hearsay exception applies from 11 to 16.

Human Trafficking
In October 2010, the Center for the Advancement of Human Rights at Florida State University provided the Florida Task Force on Human Trafficking a "Statewide Strategic Plan on Human Trafficking."[4] The Strategic Plan found that Florida is the third most popular American destination for human traffickers and that sex trafficking is the most under-reported offense.[5]

Florida first passed legislation specifically criminalizing human trafficking in 2004.[6] This legislation created separate statutes for involuntary servitude, human trafficking in labor and services, and human

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[1] These crimes include child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child. Section 90.803(23)(a), F.S.

[2] In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate. Section 90.803(23)(a)1., F.S.

[3] Section 90.804(1), F.S., specifies that "unavailability as a witness" means that the declarant:

- Is exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
- Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
- Has suffered a lack of memory of the subject matter of his or her statement so as to destroy the declarant's effectiveness as a witness during the trial;
- Is unable to be present or to testify at the hearing because of death or because of then-existing physical or mental illness or infirmity; or
- Is absent from the hearing, and the proponent of a statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means.

However, a declarant is not unavailable as a witness if such exemption, refusal, claim of lack of memory, inability to be present, or absence is due to the procurement or wrongdoing of the party who is the proponent of his or her statement in preventing the witness from attending or testifying.

[4] The Strategic Plan is available and can be viewed at http://www.cahr.fsu.edu/sub_category/Florida_StrategicPlanonHumanTrafficking.html (last visited March 14, 2013).

[5] Page 3 of the Strategic Plan.

[6] Chapter 2004-391, L.O.F.

sex trafficking.[7] While the human trafficking statutes have been amended in various ways over the years, comprehensive legislation passed in 2012 that updated and enhanced Florida's human trafficking statutes, and consolidated the various laws into one statute.[8]

Section 787.06, F.S., is Florida's current human trafficking statute and defines human trafficking as the transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining of another person for the purpose of exploitation of that person.[9] The statute contains a variety of provisions prohibiting persons from knowingly engaging in human trafficking using coercion for labor or services and for commercial sexual activity.[10]

In addition to addressing the perpetrators of human trafficking, s. 787.06, F.S., acknowledges, through the following language, the Legislature's intent regarding victims of human trafficking:

> It is the intent of the Legislature that...the victims of trafficking be protected and assisted by this state and its agencies. In furtherance of this policy, it is the intent of the Legislature that the state Supreme Court, The Florida Bar, and relevant state agencies prepare and implement training programs in order that judges, attorneys, law enforcement personnel, investigators, and others are able to identify...victims of human trafficking and direct victims to appropriate agencies for assistance. It is the intent of the Legislature that the Department of Children and Family Services and other state agencies cooperate with other state and federal agencies to ensure that victims of human trafficking can access social services and benefits to alleviate their plight.[11]

Sealing and Expunging Criminal History Records

Sections 943.0585 and 943.059, F.S., set forth procedures for sealing and expunging criminal history records. When a criminal history record is expunged, criminal justice agencies other than the Florida Department of Law Enforcement (FDLE) must physically destroy the record.[12] Criminal justice agencies are allowed to make a notation indicating compliance with an expunction order.[13] FDLE is required to retain expunged records.[14] When a record is sealed, it is not destroyed, but access is limited to the subject of the record, his or her attorney, criminal justice agencies for their respective criminal justice purposes, judges in the state courts system for the purpose of assisting them in their case-related decision-making responsibilities, and certain other specified agencies for their respective licensing and employment purposes.[15] Records that have been sealed or expunged are confidential and exempt from the public records law.[16] It is a first degree misdemeanor[17] to divulge their existence.[18]

Persons who have had their criminal history records sealed or expunged may lawfully deny or fail to acknowledge the arrests covered by their record, except when they are applying for certain types of employment,[19] petitioning the court for a record sealing or expunction, or are a defendant in a criminal prosecution.[20]

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[7] *Id.*
[8] Chapter 2012-97, L.O.F.
[9] Section 787.06(2)(d), F.S.
[10] Section 787.06(3), F.S.
[11] Section 787.06(1)(d), F.S.
[12] Section 943.0585(4), F.S.
[13] *Id.*
[14] *Id.*
[15] Section 943.059(4), F.S.
[16] Sections 943.059(4)(c) and 943.0585(4)(c), F.S.
[17] A first degree misdemeanor is punishable by up to one year in county jail and a $1,000 fine. Sections 775.082 and 775.083, F.S.
[18] Sections 943.059 and 943.0585, F.S., require FDLE to disclose sealed and expunged criminal history record to specified entities for specified purposes.
[19] These include candidates for employment with a criminal justice agency; applicants for admission to the Florida Bar; those seeking a sensitive position involving direct contact with children, the developmentally disabled, or the elderly with the Department of

In 1992, the Legislature amended the sealing and expunction statute to require a person seeking a sealing or expunction to first obtain a certificate of eligibility from FDLE. In order to receive a certificate, a person must:

- Submit to FDLE a written, certified statement from the appropriate state attorney or statewide prosecutor indicating that:
  - An indictment, information, or other charging document was not filed or issued in the case; or if filed, was dismissed or nolle prosequi by the state attorney or statewide prosecutor or was dismissed by a court of competent jurisdiction;
  - None of the charges related to the record the person wishes to expunge resulted in a trial, without regard to whether the outcome of the trial was other than an adjudication of guilt; and
  - The criminal history record does not relate to a violation of specified offenses.[21]
- Pay a $75 processing fee.
- Submit a certified copy of the disposition of the record they wish to have expunged.
- Have never been adjudicated guilty or delinquent for committing a felony or misdemeanor specified in s. 943.051(3)(b), F.S.,[22] prior to the date of their application for the certificate.[23]
- Have never been adjudicated guilty or delinquent for committing any of the acts stemming from the arrest or alleged criminal activity of the record they wish to have expunged.
- Have never had a prior sealing or expunction of criminal history record unless an expunction is sought for a record previously sealed for 10 years and the record is otherwise eligible for expunction. A record must have been sealed for 10 years before it can be expunged, unless charges were not filed or were dismissed by the prosecutor or court.[24]
- No longer be under any court supervision related to the disposition of the record they wish to have expunged.[25]

In addition to the certificate, a petition to seal or expunge a criminal history record must also include the petitioner's sworn statement that he or she:

- Has not previously been adjudicated guilty of any offense or comparable ordinance violation, or adjudicated delinquent for committing any felony or misdemeanor listed in s. 943.051(3)(b), F.S.;
- Has not been adjudicated guilty or delinquent for committing any of the acts he or she is currently trying to have sealed or expunged;

Children and Family Services, Division of Vocational Rehabilitation within the Department of Education, the Agency for Health Care Administration, the Agency for Persons with Disabilities, the Department of Health, the Department of Elderly Affairs, or the Department of Juvenile Justice; persons seeking to be employed or licensed by the Department of Education, any district school board, any university laboratory school, any charter school, any private or parochial school, or any local governmental entity that licenses child care facilities; or a Florida seaport.

[20] Sections 943.059(4)(c), and 943.0585(4)(c), F.S.

[21] These offenses include: sexual misconduct with developmentally disabled clients, mental health patients, or forensic clients, or the reporting of such sexual misconduct; luring or enticing a child; sexual battery; procuring a person under 18 years for prostitution; lewd, lascivious, or indecent assault upon a child, lewd or lascivious offenses committed on an elderly or disabled person; communications fraud; sexual performance by a child; unlawful distribution of obscene materials to a minor; unlawful activities involving computer pornography; selling or buying minors for the purpose of engaging in sexually explicit conduct; offenses by public officers and employees; drug trafficking; and other dangerous crimes such as arson, aggravated assault or battery, kidnapping, murder, robbery, home invasion robbery, carjacking, stalking, domestic violence, and burglary.

[22] These offenses include: assault, as defined in s. 784.011, F.S.; battery, as defined in s. 784.03, F.S.; carrying a concealed weapon, as defined in s. 790.01(1), F.S.; unlawful use of destructive devices or bombs, as defined in s. 790.1615(1), F.S.; negligent treatment of children, as defined in s. 827.05, F.S.; assault or battery on a law enforcement officer, a firefighter, or other specified officers, as defined in s. 784.07(2)(a) and (b), F.S.; open carrying of a weapon, as defined in s. 790.053 F.S.; exposure of sexual organs, as defined in s. 800.03, F.S.; unlawful possession of a firearm, as defined in s. 790.22(5), F.S.; petit theft, as defined in s. 812.014(3), F.S.; cruelty to animals, as defined in s. 828.12(1), F.S.; arson, as defined in s. 806.031(1), F.S.; and unlawful possession or discharge of a weapon or firearm at a school-sponsored event or on school property as defined in s. 790.115, F.S.

[23] Section 943.0585(2)(d), F.S.

[24] Section 943.0585(2)(h), F.S.

[25] Sections 943.09(2) and 943.0585(2), F.S.

- Has not obtained a prior sealing or expunction; and
- Is eligible to the best of his or her knowledge and has no other pending expunction or sealing petitions before any court.[26]

Once a petition to seal or expunge is submitted, it is up to the court to decide whether the sealing or expunction is appropriate.[27]

Effect of the Bill

The bill creates s. 943.0583, F.S., entitled "human trafficking victim expunction," and provides the following whereas clauses:

- Whereas victims of trafficking may be forced to engage in a variety of illegal acts beyond prostitution;
- Whereas, trafficked persons are not always recognized as victims by the police and prosecutors and are thus pressured into pleading guilty or do not understand the consequences of criminal charges;
- Whereas, all persons with criminal records reflecting their involvement in the sex industry may face barriers to employment and other life opportunities long after they escape from their trafficking situations; and
- Whereas, there is a genuine need for a workable solution to alleviate the impact of the collateral consequences of conviction for victims of human trafficking.

The bill authorizes a victim of human trafficking to petition the court for the expunction of any conviction for an offense, except an offense listed in s. 775.084(1)(b)1, F.S., committed while he or she was a victim of human trafficking, which offense was committed as a part of the human trafficking scheme of which he or she was a victim, or at the direction of an operator of the scheme. A "victim of human trafficking" is defined as a person subjected to coercion[28] for the purpose of being used in human trafficking, a child under 18 years of age subjected to human trafficking, or an individual subjected to human trafficking as defined by federal law.

A petition must be initiated by the petitioner with due diligence after the victim has ceased to be a victim of human trafficking or has sought services for victims of human trafficking (subject to reasonable concerns for the safety of the victim, family members of the victim, or other victims of human trafficking that may be jeopardized by the bringing of such petition).

The bill requires the petition to include:

- A sworn statement[29] attesting that the victim is eligible for such expunction to the best of his or her knowledge or belief and does not have another petition to expunge or seal before any other court; and
- Official documentation of the victim's status as a victim of human trafficking, if any exists.

The bill defines "official documentation" as any documentation issued by a federal, state, or local agency tending to show a person's status as a victim of human trafficking. Official documentation of the victim's status creates a presumption that his or her participation in the offense was a result of having been a victim of human trafficking. However, a petition may be granted without official documentation.

The completed petition must be served on the appropriate state attorney or statewide prosecutor and the arresting agency, who can each respond to the court regarding the petition.[30]

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[26] Sections 943.059(1)(b) and 943.0585(1)(b), F.S. Any person knowingly providing false information on the sworn statement commits a third degree felony.

[27] Sections 943.0585 and 943.059, F.S.

[28] As defined in s. 787.06, F.S.

[29] Providing false information on the sworn statement is punishable as a third degree felony.

[30] In judicial proceedings on the petition, the petitioner and their attorney may appear telephonically, via video conference, or other electronic means.

The court's determination of the petition must be by a preponderance of the evidence. A determination made without official documentation must be made by a showing of clear and convincing evidence. If a court grants an expunction the bill requires:

- The clerk of the court to certify copies of the order to the appropriate state attorney or the statewide prosecutor, the arresting agency, and to any other agency that the records of the court reflect has received the criminal history record from the court;
- The arresting agency to forward the order to any other agency listed in the court order to which the arresting agency disseminated the criminal history record information to which the order pertains;
- FDLE to forward the order to expunge to the Federal Bureau of Investigation; and
- Criminal justice agencies with custody of the expunged record, except FDLE, to physically destroy the record.

The bill also allows for persons who have had their human trafficking criminal history records expunged to lawfully deny or fail to acknowledge the arrests covered by the expunged record and not face perjury charges or otherwise be liable for giving a false statement for failing to acknowledge an expunged criminal record. The bill requires persons to acknowledge such arrests when applying for future sealing or expunctions under ss. 943.059, 943.0585, or 943.0583, F.S.

The bill specifies that an expunged conviction is deemed to have been vacated due to a substantive defect in the underlying criminal proceedings.

The bill makes conforming changes by adding the newly created statute s. 943.0583, F.S., to ss. 943.0582 (relating to juvenile diversion program expunction) and 961.06, F.S. (relating to administrative expunction).

B. SECTION DIRECTORY:

Section 1. Amends s. 90.803, F.S., relating to hearsay exceptions; availability of declarant immaterial.

Section 2. Creates s. 943.0583, F.S., relating to human trafficking victim expunction.

Section 3. Amends s. 943.0582, F.S., relating to prearrest, postarrest, or teen court diversion program expunction.

Section 4. Amends s. 943.0585, F.S., relating to court-ordered expunction of criminal history records.

Section 5. Amends s. 943.059, F.S., relating to court-ordered sealing of criminal history records.

Section 6. Amends s. 961.06, F.S., relating to compensation for wrongful incarceration.

Section 7. Provides an effective date of July 1, 2013.

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 Criminal Justice Impact Conference met on March 21, 2013 and determined this bill may have an insignificant negative impact on state prison beds.

According to FDLE, because dissemination of information concerning these records will be different than the dissemination of information on records expunged under s. 943.0585, F.S., there will be a programming cost of $99,275.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not have any impact on local government revenues.

2. Expenditures:

The bill does not have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

1. The bill specifies that an expunged conviction is deemed to have been vacated due to a substantive defect in the underlying criminal proceedings. Currently a sentence can only be vacated in narrow circumstances provided by the Florida Rules of Criminal Procedure.

2. The bill requires that a petition must be initiated by the petitioner with due diligence after the victim has ceased to be a victim of human trafficking. It is unclear how long a person will have to file a petition under this standard.

3. Under current expunction law, a person can only have one record expunged. The bill does not contain such a limitation.

4. The bill does not clearly establish a standard that courts must use when ruling on a petition.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 19, 2013, the Criminal Justice Subcommittee adopted two amendments and reported the bill favorable as a committee substitute. The first amendment changed the definition of "victim of human trafficking" to conform to federal law. The second amendment added s. 90.803, F.S., to the bill and increased the age of a child to which the hearsay exception applies from 11 to 16.

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

1 A bill to be entitled
2 An act relating to victims of human trafficking;
3 amending s. 90.803, F.S.; revising the mental,
4 emotional, or developmental age of a child victim
5 whose out-of-court statement describing specified
6 criminal acts is admissible in evidence in certain
7 instances; creating s. 943.0583, F.S.; providing
8 definitions; providing for the expungement of the
9 criminal history record of a victim of human
10 trafficking; designating what offenses may be
11 expunged; providing exceptions; providing that an
12 expunged conviction is deemed to have been vacated due
13 to a substantive defect in the underlying criminal
14 proceedings; providing for a period in which such
15 expungement must be sought; providing that official
16 documentation of the victim's status as a human
17 trafficking victim creates a presumption; providing a
18 standard of proof absent official documentation;
19 providing requirements for petitions; providing
20 criminal penalties for false statements on such
21 petitions; providing for parties to and service of
22 such petitions; providing for electronic appearances
23 of petitioners and attorneys at hearings; providing
24 for orders of relief; providing for physical
25 destruction of certain records; authorizing a person
26 whose records are expunged to lawfully deny or fail to
27 acknowledge the arrests covered by the expunged
28 record; providing that such lawful denial does not

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29 constitute perjury or subject the person to liability;
30 providing that cross-references are considered general
31 reference for the purpose of incorporation by
32 reference; amending ss. 943.0582, 943.0585, 943.059,
33 and 961.06, F.S.; conforming provisions to changes
34 made by the act; providing an effective date.
35
36 WHEREAS, victims of trafficking may be forced to engage in
37 a variety of illegal acts beyond prostitution, and
38 WHEREAS, trafficked persons are not always recognized as
39 victims by the police and prosecutors and are thus pressured
40 into pleading guilty or do not understand the consequences of
41 criminal charges, and
42 WHEREAS, all persons with criminal records reflecting their
43 involvement in the sex industry may face barriers to employment
44 and other life opportunities long after they escape from their
45 trafficking situations, and
46 WHEREAS, there is a genuine need for a workable solution to
47 alleviate the impact of the collateral consequences of
48 conviction for victims of human trafficking, NOW, THEREFORE,
49
50 Be It Enacted by the Legislature of the State of Florida:
51
52 Section 1. Paragraph (a) of subsection (23) of section
53 90.803, Florida Statutes, is amended to read:
54 90.803 Hearsay exceptions; availability of declarant
55 immaterial.—The provision of s. 90.802 to the contrary
56 notwithstanding, the following are not inadmissible as evidence,

57 even though the declarant is available as a witness:
58 (23) HEARSAY EXCEPTION; STATEMENT OF CHILD VICTIM.—
59 (a) Unless the source of information or the method or
60 circumstances by which the statement is reported indicates a
61 lack of trustworthiness, an out-of-court statement made by a
62 child victim with a physical, mental, emotional, or
63 developmental age of 16 ~~11~~ or less describing any act of child
64 abuse or neglect, any act of sexual abuse against a child, the
65 offense of child abuse, the offense of aggravated child abuse,
66 or any offense involving an unlawful sexual act, contact,
67 intrusion, or penetration performed in the presence of, with,
68 by, or on the declarant child, not otherwise admissible, is
69 admissible in evidence in any civil or criminal proceeding if:
70 1. The court finds in a hearing conducted outside the
71 presence of the jury that the time, content, and circumstances
72 of the statement provide sufficient safeguards of reliability.
73 In making its determination, the court may consider the mental
74 and physical age and maturity of the child, the nature and
75 duration of the abuse or offense, the relationship of the child
76 to the offender, the reliability of the assertion, the
77 reliability of the child victim, and any other factor deemed
78 appropriate; and
79 2. The child either:
80 a. Testifies; or
81 b. Is unavailable as a witness, provided that there is
82 other corroborative evidence of the abuse or offense.
83 Unavailability shall include a finding by the court that the
84 child's participation in the trial or proceeding would result in

85 a substantial likelihood of severe emotional or mental harm, in
86 addition to findings pursuant to s. 90.804(1).
87 Section 2. Section 943.0583, Florida Statutes, is created
88 to read:
89 943.0583 Human trafficking victim expunction.—
90 (1) As used in this section, the term:
91 (a) "Human trafficking" has the same meaning as provided
92 in s. 787.06.
93 (b) "Official documentation" means any documentation
94 issued by a federal, state, or local agency tending to show a
95 person's status as a victim of human trafficking.
96 (c) "Victim of human trafficking" means a person subjected
97 to coercion, as defined in s. 787.06, for the purpose of being
98 used in human trafficking, a child under 18 years of age
99 subjected to human trafficking, or an individual subjected to
100 human trafficking as defined by federal law.
101 (2) Notwithstanding any other provision of law, the court
102 of original jurisdiction over the crime sought to be expunged
103 may order a criminal justice agency to expunge the criminal
104 history record of a victim of human trafficking who complies
105 with the requirements of this section. This section does not
106 confer any right to the expunction of any criminal history
107 record, and any request for expunction of a criminal history
108 record may be denied at the discretion of the court.
109 (3) A person who is a victim of human trafficking may
110 petition for the expunction of any conviction for an offense
111 committed while he or she was a victim of human trafficking,
112 which offense was committed as a part of the human trafficking

113 scheme of which he or she was a victim or at the direction of an
114 operator of the scheme, including, but not limited to,
115 violations under chapters 796 and 847. However, this section
116 does not apply to any offense listed in s. 775.084(1)(b)1.
117 Determination of the petition under this section should be by a
118 preponderance of the evidence. A conviction expunged under this
119 section is deemed to have been vacated due to a substantive
120 defect in the underlying criminal proceedings.
121 (4) A petition under this section must be initiated by the
122 petitioner with due diligence after the victim has ceased to be
123 a victim of human trafficking or has sought services for victims
124 of human trafficking, subject to reasonable concerns for the
125 safety of the victim, family members of the victim, or other
126 victims of human trafficking that may be jeopardized by the
127 bringing of such petition or for other reasons consistent with
128 the purpose of this section.
129 (5) Official documentation of the victim's status creates
130 a presumption that his or her participation in the offense was a
131 result of having been a victim of human trafficking but is not
132 required for granting a petition under this section. A
133 determination made without such official documentation must be
134 made by a showing of clear and convincing evidence.
135 (6) Each petition to a court to expunge a criminal history
136 record is complete only when accompanied by:
137 (a) The petitioner's sworn statement attesting that the
138 petitioner is eligible for such an expunction to the best of his
139 or her knowledge or belief and does not have any other petition
140 to expunge or any petition to seal pending before any court.

141 (b) Official documentation of the petitioner's status as a
142 victim of human trafficking, if any exists.
143
144 Any person who knowingly provides false information on such
145 sworn statement to the court commits a felony of the third
146 degree, punishable as provided in s. 775.082, s. 775.083, or s.
147 775.084.
148 (7)(a) In judicial proceedings under this section, a copy
149 of the completed petition to expunge shall be served upon the
150 appropriate state attorney or the statewide prosecutor and upon
151 the arresting agency; however, it is not necessary to make any
152 agency other than the state a party. The appropriate state
153 attorney or the statewide prosecutor and the arresting agency
154 may respond to the court regarding the completed petition to
155 expunge.
156 (b) The petitioner or the petitioner's attorney may appear
157 at any hearing under this section telephonically, via video
158 conference, or by other electronic means.
159 (c) If relief is granted by the court, the clerk of the
160 court shall certify copies of the order to the appropriate state
161 attorney or the statewide prosecutor and the arresting agency.
162 The arresting agency is responsible for forwarding the order to
163 any other agency listed in the court order to which the
164 arresting agency disseminated the criminal history record
165 information to which the order pertains. The department shall
166 forward the order to expunge to the Federal Bureau of
167 Investigation. The clerk of the court shall certify a copy of
168 the order to any other agency that the records of the court

169 reflect has received the criminal history record from the court.
170 (8)(a) Any criminal history record of a minor or an adult
171 that is ordered expunged by the court of original jurisdiction
172 over the crime sought to be expunged pursuant to this section
173 must be physically destroyed or obliterated by any criminal
174 justice agency having custody of such record, except that any
175 criminal history record in the custody of the department must be
176 retained in all cases.
177 (b) The person who is the subject of a criminal history
178 record that is expunged under this section may lawfully deny or
179 fail to acknowledge the arrests covered by the expunged record.
180 (c) A person who has been granted an expunction under this
181 section may not be held under any law of this state to commit
182 perjury or to be otherwise liable for giving a false statement
183 by reason of such person's failure to recite or acknowledge an
184 expunged criminal history record.
185 (9) Any reference to any other chapter, section, or
186 subdivision of the Florida Statutes in this section constitutes
187 a general reference under the doctrine of incorporation by
188 reference.
189 Section 3. Subsection (6) of section 943.0582, Florida
190 Statutes, is amended to read:
191 943.0582 Prearrest, postarrest, or teen court diversion
192 program expunction.—
193 (6) Expunction or sealing granted under this section does
194 not prevent the minor who receives such relief from petitioning
195 for the expunction or sealing of a later criminal history record
196 as provided for in ss. 943.0583, 943.0585, and 943.059, if the

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197 minor is otherwise eligible under those sections.
198 Section 4. Paragraph (a) of subsection (4) of section
199 943.0585, Florida Statutes, is amended to read:
200 943.0585 Court-ordered expunction of criminal history
201 records.—The courts of this state have jurisdiction over their
202 own procedures, including the maintenance, expunction, and
203 correction of judicial records containing criminal history
204 information to the extent such procedures are not inconsistent
205 with the conditions, responsibilities, and duties established by
206 this section. Any court of competent jurisdiction may order a
207 criminal justice agency to expunge the criminal history record
208 of a minor or an adult who complies with the requirements of
209 this section. The court shall not order a criminal justice
210 agency to expunge a criminal history record until the person
211 seeking to expunge a criminal history record has applied for and
212 received a certificate of eligibility for expunction pursuant to
213 subsection (2). A criminal history record that relates to a
214 violation of s. 393.135, s. 394.4593, s. 787.025, chapter 794,
215 s. 796.03, s. 800.04, s. 810.14, s. 817.034, s. 825.1025, s.
216 827.071, chapter 839, s. 847.0133, s. 847.0135, s. 847.0145, s.
217 893.135, s. 916.1075, a violation enumerated in s. 907.041, or
218 any violation specified as a predicate offense for registration
219 as a sexual predator pursuant to s. 775.21, without regard to
220 whether that offense alone is sufficient to require such
221 registration, or for registration as a sexual offender pursuant
222 to s. 943.0435, may not be expunged, without regard to whether
223 adjudication was withheld, if the defendant was found guilty of
224 or pled guilty or nolo contendere to the offense, or if the

225 defendant, as a minor, was found to have committed, or pled
226 guilty or nolo contendere to committing, the offense as a
227 delinquent act. The court may only order expunction of a
228 criminal history record pertaining to one arrest or one incident
229 of alleged criminal activity, except as provided in this
230 section. The court may, at its sole discretion, order the
231 expunction of a criminal history record pertaining to more than
232 one arrest if the additional arrests directly relate to the
233 original arrest. If the court intends to order the expunction of
234 records pertaining to such additional arrests, such intent must
235 be specified in the order. A criminal justice agency may not
236 expunge any record pertaining to such additional arrests if the
237 order to expunge does not articulate the intention of the court
238 to expunge a record pertaining to more than one arrest. This
239 section does not prevent the court from ordering the expunction
240 of only a portion of a criminal history record pertaining to one
241 arrest or one incident of alleged criminal activity.
242 Notwithstanding any law to the contrary, a criminal justice
243 agency may comply with laws, court orders, and official requests
244 of other jurisdictions relating to expunction, correction, or
245 confidential handling of criminal history records or information
246 derived therefrom. This section does not confer any right to the
247 expunction of any criminal history record, and any request for
248 expunction of a criminal history record may be denied at the
249 sole discretion of the court.
250 (4) EFFECT OF CRIMINAL HISTORY RECORD EXPUNCTION.—Any
251 criminal history record of a minor or an adult which is ordered
252 expunged by a court of competent jurisdiction pursuant to this

253 section must be physically destroyed or obliterated by any
254 criminal justice agency having custody of such record; except
255 that any criminal history record in the custody of the
256 department must be retained in all cases. A criminal history
257 record ordered expunged that is retained by the department is
258 confidential and exempt from the provisions of s. 119.07(1) and
259 s. 24(a), Art. I of the State Constitution and not available to
260 any person or entity except upon order of a court of competent
261 jurisdiction. A criminal justice agency may retain a notation
262 indicating compliance with an order to expunge.
263 (a) The person who is the subject of a criminal history
264 record that is expunged under this section or under other
265 provisions of law, including former s. 893.14, former s. 901.33,
266 and former s. 943.058, may lawfully deny or fail to acknowledge
267 the arrests covered by the expunged record, except when the
268 subject of the record:
269 1. Is a candidate for employment with a criminal justice
270 agency;
271 2. Is a defendant in a criminal prosecution;
272 3. Concurrently or subsequently petitions for relief under
273 this section, s. 943.0583, or s. 943.059;
274 4. Is a candidate for admission to The Florida Bar;
275 5. Is seeking to be employed or licensed by or to contract
276 with the Department of Children and Family Services, the
277 Division of Vocational Rehabilitation within the Department of
278 Education, the Agency for Health Care Administration, the Agency
279 for Persons with Disabilities, the Department of Health, the
280 Department of Elderly Affairs, or the Department of Juvenile

281 Justice or to be employed or used by such contractor or licensee
282 in a sensitive position having direct contact with children, the
283 disabled, or the elderly;
284 6. Is seeking to be employed or licensed by the Department
285 of Education, any district school board, any university
286 laboratory school, any charter school, any private or parochial
287 school, or any local governmental entity that licenses child
288 care facilities; or
289 7. Is seeking authorization from a seaport listed in s.
290 311.09 for employment within or access to one or more of such
291 seaports pursuant to s. 311.12.
292 Section 5. Paragraph (a) of subsection (4) of section
293 943.059, Florida Statutes, is amended to read:
294 943.059 Court-ordered sealing of criminal history
295 records.—The courts of this state shall continue to have
296 jurisdiction over their own procedures, including the
297 maintenance, sealing, and correction of judicial records
298 containing criminal history information to the extent such
299 procedures are not inconsistent with the conditions,
300 responsibilities, and duties established by this section. Any
301 court of competent jurisdiction may order a criminal justice
302 agency to seal the criminal history record of a minor or an
303 adult who complies with the requirements of this section. The
304 court shall not order a criminal justice agency to seal a
305 criminal history record until the person seeking to seal a
306 criminal history record has applied for and received a
307 certificate of eligibility for sealing pursuant to subsection
308 (2). A criminal history record that relates to a violation of s.

309 393.135, s. 394.4593, s. 787.025, chapter 794, s. 796.03, s.
310 800.04, s. 810.14, s. 817.034, s. 825.1025, s. 827.071, chapter
311 839, s. 847.0133, s. 847.0135, s. 847.0145, s. 893.135, s.
312 916.1075, a violation enumerated in s. 907.041, or any violation
313 specified as a predicate offense for registration as a sexual
314 predator pursuant to s. 775.21, without regard to whether that
315 offense alone is sufficient to require such registration, or for
316 registration as a sexual offender pursuant to s. 943.0435, may
317 not be sealed, without regard to whether adjudication was
318 withheld, if the defendant was found guilty of or pled guilty or
319 nolo contendere to the offense, or if the defendant, as a minor,
320 was found to have committed or pled guilty or nolo contendere to
321 committing the offense as a delinquent act. The court may only
322 order sealing of a criminal history record pertaining to one
323 arrest or one incident of alleged criminal activity, except as
324 provided in this section. The court may, at its sole discretion,
325 order the sealing of a criminal history record pertaining to
326 more than one arrest if the additional arrests directly relate
327 to the original arrest. If the court intends to order the
328 sealing of records pertaining to such additional arrests, such
329 intent must be specified in the order. A criminal justice agency
330 may not seal any record pertaining to such additional arrests if
331 the order to seal does not articulate the intention of the court
332 to seal records pertaining to more than one arrest. This section
333 does not prevent the court from ordering the sealing of only a
334 portion of a criminal history record pertaining to one arrest or
335 one incident of alleged criminal activity. Notwithstanding any
336 law to the contrary, a criminal justice agency may comply with

337 laws, court orders, and official requests of other jurisdictions
338 relating to sealing, correction, or confidential handling of
339 criminal history records or information derived therefrom. This
340 section does not confer any right to the sealing of any criminal
341 history record, and any request for sealing a criminal history
342 record may be denied at the sole discretion of the court.
343 (4) EFFECT OF CRIMINAL HISTORY RECORD SEALING.—A criminal
344 history record of a minor or an adult which is ordered sealed by
345 a court of competent jurisdiction pursuant to this section is
346 confidential and exempt from the provisions of s. 119.07(1) and
347 s. 24(a), Art. I of the State Constitution and is available only
348 to the person who is the subject of the record, to the subject's
349 attorney, to criminal justice agencies for their respective
350 criminal justice purposes, which include conducting a criminal
351 history background check for approval of firearms purchases or
352 transfers as authorized by state or federal law, to judges in
353 the state courts system for the purpose of assisting them in
354 their case-related decisionmaking responsibilities, as set forth
355 in s. 943.053(5), or to those entities set forth in
356 subparagraphs (a)1., 4., 5., 6., and 8. for their respective
357 licensing, access authorization, and employment purposes.
358 (a) The subject of a criminal history record sealed under
359 this section or under other provisions of law, including former
360 s. 893.14, former s. 901.33, and former s. 943.058, may lawfully
361 deny or fail to acknowledge the arrests covered by the sealed
362 record, except when the subject of the record:
363 1. Is a candidate for employment with a criminal justice
364 agency;

365 2. Is a defendant in a criminal prosecution;
366 3. Concurrently or subsequently petitions for relief under
367 this section, s. 943.0583, or s. 943.0585;
368 4. Is a candidate for admission to The Florida Bar;
369 5. Is seeking to be employed or licensed by or to contract
370 with the Department of Children and Family Services, the
371 Division of Vocational Rehabilitation within the Department of
372 Education, the Agency for Health Care Administration, the Agency
373 for Persons with Disabilities, the Department of Health, the
374 Department of Elderly Affairs, or the Department of Juvenile
375 Justice or to be employed or used by such contractor or licensee
376 in a sensitive position having direct contact with children, the
377 disabled, or the elderly;
378 6. Is seeking to be employed or licensed by the Department
379 of Education, any district school board, any university
380 laboratory school, any charter school, any private or parochial
381 school, or any local governmental entity that licenses child
382 care facilities;
383 7. Is attempting to purchase a firearm from a licensed
384 importer, licensed manufacturer, or licensed dealer and is
385 subject to a criminal history check under state or federal law;
386 or
387 8. Is seeking authorization from a Florida seaport
388 identified in s. 311.09 for employment within or access to one
389 or more of such seaports pursuant to s. 311.12.
390 Section 6. Paragraph (e) of subsection (1) of section
391 961.06, Florida Statutes, is amended to read:
392 961.06 Compensation for wrongful incarceration.—

393 (1) Except as otherwise provided in this act and subject
394 to the limitations and procedures prescribed in this section, a
395 person who is found to be entitled to compensation under the
396 provisions of this act is entitled to:
397 (e) Notwithstanding any provision to the contrary in s.
398 943.0583 or s. 943.0585, immediate administrative expunction of
399 the person's criminal record resulting from his or her wrongful
400 arrest, wrongful conviction, and wrongful incarceration. The
401 Department of Legal Affairs and the Department of Law
402 Enforcement shall, upon a determination that a claimant is
403 entitled to compensation, immediately take all action necessary
404 to administratively expunge the claimant's criminal record
405 arising from his or her wrongful arrest, wrongful conviction,
406 and wrongful incarceration. All fees for this process shall be
407 waived.
408
409 The total compensation awarded under paragraphs (a), (c), and
410 (d) may not exceed $2 million. No further award for attorney's
411 fees, lobbying fees, costs, or other similar expenses shall be
412 made by the state.
413 Section 7. This act shall take effect July 1, 2013.

HB 7121

Amendment No.1

COMMITTEE/SUBCOMMITTEE ACTION

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

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1 Committee/Subcommittee hearing bill: Justice Appropriations
2 Subcommittee
3 Representative Baxley offered the following:
4
5 **Amendment**
6 Remove lines 103-107 and insert:
7 (f) The department shall, as part of its annual report,
8 provide a report that identifies
9

Amendment No.2

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED ___ (Y/N)

ADOPTED AS AMENDED ___ (Y/N)

ADOPTED W/O OBJECTION ___ (Y/N)

FAILED TO ADOPT ___ (Y/N)

WITHDRAWN ___ (Y/N)

OTHER ___

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1 Committee/Subcommittee hearing bill: Justice Appropriations
2 Subcommittee
3 Representative Baxley offered the following:
4
5 **Amendment**
6 Between lines 177 and 178, insert:
7 (b) The sentencing court, in evaluating an offender's
8 eligibility for the reentry program, may consider the offender's
9 prior arrest record.
10

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7121 PCB JDC 13-01 Inmate Reentry
SPONSOR(S): Judiciary Committee, Baxley and others
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Judiciary Committee	12 Y, 6 N	Keegan	Havlicak
1) Justice Appropriations Subcommittee		McAuliffe	Jones Darity

SUMMARY ANALYSIS

The Department of Corrections (DOC) reports that 88% of all inmates incarcerated in Florida will eventually be released from prison. In FY 2011-12, 32,279 inmates were released. Florida's most recent recidivism rates show that 27.6% of inmates released will return to prison within three years. Inmate reentry efforts are designed to reduce recidivism rates, which in turn will result in fewer new crime victims.

A common problem inmates face upon leaving prison and returning to society is a lack of any state-issued identification card. Without an ID card, one has difficulty finding employment or housing and opening a bank account. This bill requires DOC, working in conjunction with the Department of Health (DOH) and Department of Highway Safety and Motor Vehicles (DHSMV), to assist Florida-born inmates in acquiring a state ID card prior to release. To accomplish this, the bill waives the $9 fee DOH charges for a copy of a Florida birth certificate and the $25 fee DHSMV charges to issue a state ID card. For non-Florida born inmates, the bill directs DOC to assist inmates in completing the necessary forms or applications to obtain a driver license or state identification card. The bill requires DOC to assist all inmates in applying for and obtaining a social security card.

Faith- and character-based institutions and programs have been effectively used in preparing inmates for their transition to society. This bill provides DOC with policy direction to expand its faith- and character-based institutions to serve both male and female inmates at their respective institutions.

The bill also directs DOC to establish and administer a reentry program for nonviolent, drug offenders who are sentenced to the program by a court. An offender must meet certain criteria to be eligible. The sentence to the program is a conditional split sentence; containing both a term of incarceration that includes substance abuse treatment followed by a period of drug offender probation. Once sentenced to the program by a judge, DOC will place the inmate into a substance abuse treatment program towards the end of the incarceration portion of the inmate's sentence. If the inmate successfully completes the substance abuse program, he or she then serves the drug offender probation component of the sentence per the court's order. If the inmate fails to complete the in-prison treatment program, his or her probation sentence becomes a term of incarceration. The bill requires the inmate, under either scenario, to serve at least 85% of his or her incarceration portion of the sentence.

The bill directs DOC to remove an inmate from the reentry program if the inmate commits a violent act; cannot complete the program for medical reasons; the sentence is modified or expired; the inmate is reclassified; or removal is in the best interest of the inmate or the security of the institution.

The Revenue Estimating Conference estimated that the bill will result in a $0.2 million loss to state revenues in Fiscal Year 2013-14 because of the effective date, and a $0.4 million recurring impact. The General Revenue impact is estimated to be a loss of $0.2 million in Fiscal Year 2013-14, and a $0.1 million recurring impact.

The bill will take effect on July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background:

The Department of Corrections reports that 88% of all inmates incarcerated in Florida will eventually be released from prison.[1] In FY 2011-12, DOC released 32,279 inmates.[2] Florida's most recent recidivism rates show that 27.6% of inmates released will return to prison within three years.[3] Inmate reentry efforts are designed to reduce recidivism rates, which in turn mean fewer new crime victims and a lower cost to DOC. "A one percent reduction in recidivism equates to a cost avoidance of nearly $19 million over five years."[4]

State-Issued ID Cards for Prisoners

The Real ID Act of 2005[5] (the "Act") took effect on May 11, 2008.[6] The Act is an extensive federal law that addresses a number of issues ranging from state-issued identification cards to asylum provisions. Title II of the Act creates national standards for issuing driver licenses and identification cards ("state-issued ID"), as well as detailed specifications for verifying the identity of those who apply for state-issued ID.[7] The federal Department of Homeland Security is vested with the authority to govern these requirements and determine which states are in compliance with the Act.[8]

In order for a state-issued ID card to be compliant with the Act, applicants must present a number of identifying documents when applying for the ID card.[9] Specifically, the applicant's documentation must include a photo identity document, or a non-photo identity document that includes the applicant's full name and date of birth, as well as independent documentation of the applicant's date of birth, social security number, and principal residence.[10] Once the Act is fully implemented on a national level, an individual must have a photo ID issued in compliance with the Act in order to prove identity for any federal purpose, including boarding airplanes and accessing federal buildings.[11]

According to the Florida Department of Highway Safety and Motor Vehicles (DHSMV), a U.S. citizen must provide one piece of primary identification, proof of the individual's social security number, and two documents proving residence in order to acquire a state-issued ID.[12] Primary identification can be an original U.S. birth certificate, valid U.S. Passport, consular report of birth abroad, certificate of naturalization, or other similar listed documents.[13] Proof of social security number can be satisfied with a U.S. social security card, tax forms, paycheck stubs, or other similar documents.[14] Proof of residence can include deeds, utility bills, a Certification of Address Form from a homeless shelter or halfway house, as

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[1] *See,* "Recidivism Reduction Strategic Plan." Fiscal Year 2009-2014. Department of Corrections. http://www.dc.state.fl.us/orginfo/FinalRecidivismReductionPlan.pdf (last visited March 18, 2013).
[2] *See,* http://www.dc.state.fl.us/pub/recidivism/2013.html (last visited March 18, 2013).
[3] *Id.* These numbers are for inmates released in 2008.
[4] Press Release, Florida Department of Corrections (Feb. 4, 2013) http://www.dc.state.fl.us/secretary/press/2013/02-04-Recidivism.html (last visited March 20, 2013).
[5] Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005).
[6] 12 Mass. Prac. Series, Motor Vehicle Law and Practice, § 21:2 (4th ed.).
[7] Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005).
[8] 1 IMMIGRATION LAW SERVICE 2d § 1:88 (2013).
[9] § 202(c), 119 Stat. at 312-14.
[10] *Id.* at 312-13.
[11] 1 IMMIGRATION LAW SERVICE 2d § 1:88 (2013).
[12] Florida Driver License Identification Requirements, FLORIDA DEPARTMENT OF MOTOR VEHICLES, http://www.dmvflorida.org/drivers-license-identification.shtml (last visited March 18, 2013).
[13] *Id.*
[14] *Id.*

well as other similar documents.[15] The DHSMV charges a $25 fee for issuing or renewing a state ID card.[16]

Currently, a birth certificate is an essential part of acquiring state-issued ID for a Florida-born applicant.[17] A Floridian may request a copy of his or her birth certificate from the Department of Health (DOH) after paying $9.00, providing valid photo identification, and submitting a written request.[18] Florida law also permits any Florida or Federal agency to acquire a copy of a birth certificate upon request and payment of the $9.00 fee.[19] There is no statutory fee waiver for Florida prisoners applying for a copy of his or her Florida birth certificate.[20]

In December 2009, Office of Program Policy Analysis & Government Accountability (OPPAGA) issued a report based on their study of the Department of Corrections' (DOC or department) rehabilitation efforts.[21] The report identified the importance of an inmate acquiring an identification card upon release from prison. The report found:

> Proper identification generally is required to find employment, obtain housing, or apply for public benefits that may be necessary to obtain medication or other treatment services that can help reduce inmates' risks of reoffending.[22]

Similarly, the lack of a state ID card makes it difficult to cash paychecks or open a bank account. Barriers such as lack of ID increase the likelihood of an inmate failing to successfully reenter society.

Over the last few years, DOC, partnering with DHSMV and DOH, has worked to get inmates identification cards prior to release using DHSMV's mobile units that travel to the prison facilities and issue ID cards to those inmates with the proper identification documents and upon payment of the $25 fee. The DHSMV reports that in 2011 they conducted 17 prison visits and issued 642 ID cards; in 2012 those numbers were 13 visits and 458 cards.[23]

Proposed Changes:

Section 1: The bill amends s. 322.051, F.S., to provide statutory authorization for DHSMV to waive the fee charged for issuing or renewing a state identification card. This waiver will be for Florida-born inmates.

Section 2: The bill amends s. 382.0255, F.S., to provide a similar waiver of the fee the DOH charges one requesting a certified copy of a Florida birth certificate.

Section 3: The bill amends s. 944.605, F.S., to direct DOC to work with DOH and DHSMV to provide every Florida-born inmate a certified copy of their birth certificate to be used in acquiring a state ID card prior to release. DOC is required to provide DOH with a list of all Florida-born inmates, including a photo and various identifying information for each inmate. Inmates that do not cooperate with DOC in providing this information are subject to discipline.

This ID card requirement is not applicable to inmates who:

- Currently have a valid driver's license or state ID card;

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[15] *Id.*

[16] *See,* s. 322.21(f), F.S.

[17] *Id.*

[18] Fla. Admin. Code Ann. R. 64V-1.0131.

[19] Section 382.025, F.S.

[20] A number of states have various fee waivers for vital records. *See* N.C. Gen. Stat. Ann. § 130A-93.1 (2013); Md. Code Ann., Health-Gen. § 4-217 (2013).

[21] *See,* OPPAGA, Report No. 09-44, "Department of Corrections Should Maximize Use of Best Practices in Inmate Rehabilitation Efforts. See http://www.oppaga.state.fl.us/Summary.aspx?reportNum=09-44 (last visited March 18, 2013).

[22] Id. at 5.

[23] The departments currently have over 60 prison visits planned for March through December 2013. *See,* e-mail from DHSMV dated March 11, 2013 (on file with Judiciary staff).

- Have an active detainer, unless DOC determines that cancellation of the detainer is likely or that the incarceration for which the detainer was issued will be for less than 12 months;
- Are given emergency or conditional medical release under s. 947.149, F.S.;
- Are not in the physical custody of DOC at or 180 days prior to release; and
- Are subject to sex offender residency restrictions, which, upon release under such restrictions, do not have a qualifying address.

The bill directs DOC to assist all inmates in applying for and obtaining their social security cards and non-Florida birth certificates. The bill also directs DOC to provide an annual report to the Governor, the President of the Senate, and the Speaker of the House of Representatives detailing the number of inmates released with or without identification cards, as well as the factors and difficulties involved in providing such identification cards.

Background: Faith- and Character-Based Institutions
The Legislature set forth policy direction for DOC in 1997 when it first addressed faith- and character-based (FCB) programing by enacting s. 944.803, F.S. [24] Over the years this section has been amended, most recently in 2011 when the Legislature directed DOC to focus its FCB programs more at full institutions rather than dormitories within institutions. The statute was also amended in 2011 to provide for peer-to-peer programing such as Alcoholic Anonymous within FCB institutions.[25]

DOC currently has only two male FCB institutions at Wakulla and Lawtey Correctional Institutions. They also have 11 FCB programs located in dormitories at 8 institutions. The department has plans to open 6 more dorms in 2013.

Proposed Changes:

Section 4: The bill amends s. 944.803, F.S., to give DOC policy direction to expand its FCB programs into both male institutions to serve their male inmate population. The bill also gives DOC direction to serve its female inmates FCB programs at female institutions.

Background: The Department of Corrections Reentry Programming
Currently, DOC, subject to available funding, provides the following reentry programming to inmates:
- Substance abuse treatment;
- Educational and academic programs;
- Career and technical education; and
- Faith and character-based programs.[26]

Additionally, DOC is statutorily mandated[27] to provide inmates who are within 12 months of their release with the 100-Hour Transition Training Program. This program offers inmates training in the following:
- Job readiness and life management skills, including goal setting;
- Problem solving and decision making;
- Communication;
- Values clarification;
- Living a healthy lifestyle;
- Family issues;
- Seeking and keeping a job;
- Continuing education;
- Community reentry; and
- Legal responsibilities.[28]

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[24] *See,* s. 19, ch. 97-78, L.O.F.
[25] *See,* s. 1, ch. 2011-185, L.O.F.
[26] "Recidivism Reduction Strategic Plan." Fiscal Year 2009-2014. Department of Corrections. http://www.dc.state.fl.us/orginfo/FinalRecidivismReductionPlan.pdf (last visited March 18, 2013).
[27] Section 944.7065, F.S.

Drug Offender Probation
The department is required to develop and administer a drug offender probation program which emphasizes a combination of treatment and intensive community supervision approaches and which provides for supervision of offenders in accordance with a specific treatment plan.[29] To be eligible, a defendant must:

- Be a chronic substance abuser;
- Have committed a violation of s. 893.13(2)(a)[30] or (6)(a),[31] F.S., or other nonviolent felony;[32,33] and
- Have a Criminal Punishment Code score sheet total of 60 sentence points or fewer.[34]

The program may include the use of graduated sanctions consistent with the conditions imposed by the court, such as random drug testing.[35] Probationers in this program are subject to probation revocation if they violate any conditions of their probation.[36] This can result in an imposition of any sentence that may have originally been imposed before the offender was placed on probation.[37] In Fiscal Year 2010-11, 10,099 offenders were on drug offender probation.[38]

Criminal Sentences
Chapter 921, F.S., is Florida's Criminal Punishment Code that applies to all felony offenses, except capital felonies, committed on or after October 1, 1998. Current law authorizes a judge to impose a split sentence.[39] A split sentence is a sentence issued by the court that includes an incarceration and a probation portion of the sentence.

In 1995, the Legislature passed into law the requirement that inmates must serve a minimum of 85% of their court-imposed sentence. The Criminal Punishment Code provides:

> The sentence imposed by the sentencing judge reflects the length of actual time to be served, shortened only by the application of incentive and meritorious gain-time as provided by law, and may not be shortened if the defendant would consequently serve less than 85 percent of his or her term of imprisonment as provided in s. 944.275(4)(b)3.[40]

Proposed Changes:

<u>Section 5</u>: The bill creates s. 948.0125, F.S., to direct DOC to establish and administer a reentry program for non-violent drug offenders sentenced to the reentry program by a judge. The bill excludes inmates from participation in the program if the inmate has been convicted of any of ten listed types of crimes.

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[28] *Supra* "Recidivism Reduction Strategic Plan."
[29] Section 948.20(2), F.S.
[30] Section 893.13(2)(a), F.S., states that it is unlawful for any person to purchase, possess with intent to purchase, a controlled substance and provides varying penalties based on the type and quantity of such controlled substance.
[31] Section 893.13(6)(a), F.S., states that it is unlawful for any person to be in actual or constructive possession of a controlled substance if such controlled substance was unlawfully obtained from a practitioner or pursuant to an invalid prescription or order of a practitioner. Any person who violates this provision commits a felony of the third degree, punishable as provided in ss. 775.082, 775.083, or 775.084, F.S.
[32] As used in this section, the term "nonviolent felony" means a third degree felony violation under ch. 810, F.S., or any other felony offense that is not a forcible felony as defined in s. 776.08, F.S.
[33] If such nonviolent felony is committed on or after July 1, 2009.
[34] Section 948.20(1), F.S.
[35] Section 948.20(2), F.S.
[36] Section 948.06(2)(a), F.S.
[37] Section 948.06(2)(e), F.S.
[38] Department of Corrections, Community Supervision Admissions, 2010-2011 Agency Statistics, http://www.dc.state.fl.us/pub/annual/1011/stats/csa_prior.html (last visited March 18, 2013).
[39] *See,* s. 944.012, F.S.
[40] *See,* s. 921.002(1)(e), F.S.

Eligibility for program:
The bill sets forth eligibility requirements a judge must find an offender meets before the offender may be sentenced to the reentry program. In order to be eligible, the offender has to have been identified as having a substance abuse problem by the court;[41] the offender's primary offense must be a 3rd degree felony; and the offender must have never been convicted of any:

- Forcible felony as defined in s. 776.08;
- Offense that requires a person to register as a sexual offender;[42]
- Offense listed in s. 775.082(9)(a)1.r., F.S.;[43]
- Obscenity offense involving a minor or depiction of a minor;[44]
- Child abuse or neglect offense in ch. 827, F.S.;
- Assault or battery offense described in ss. 784.07, 784.074, 784.075, 784.076, 784.08, 784.083 or 784.085;
- Offense involving the possession or use of a firearm;
- Capital, first or second degree felony;
- Offense that includes as an element of that offense the sale of a controlled substance; or
- Any of the above offenses committed in another jurisdiction.

Reentry Program — In-Prison Component:
The bill requires DOC to place an inmate sentenced to a reentry program split sentence into their substance abuse treatment program not more than nine months prior to the end of the inmate's incarceration period of the split sentence. The substance abuse treatment program will last for a minimum of 180 days.

Reentry Program — Drug Offender Probation Component:
The out-of-prison component of the reentry program split sentence includes a one-year drug offender probation sanction. The judge, at the time of sentencing the offender to the reentry program, will impose a sentence that includes drug offender probation. An inmate transitioning into drug offender probation must have first successfully completed the in-prison substance abuse treatment program. If the inmate fails to successfully complete that component of the reentry program, the probation portion of his or her sentence becomes a term of incarceration.

The bill provides that when an inmate is released into drug offender probation all of the standard terms and conditions of regular probation under s. 948.20, F.S., and drug offender probation conditions under s. 948.20, F.S., apply. Additionally, if there is a postadjudicatory drug court in the county to which the offender returns, the inmate may have his or her case transferred to that drug court subject to the drug court judge accepting the case. In such instance, the probation portion of the sentence is transferred to the local drug court. The drug court judge will then maintain jurisdiction over the offender for purposes of compliance with the reentry program.

DOC — Administration:
Although an inmate may meet the eligibility requirements for a judge to sentence him or her to the reentry program, the bill expressly provides an inmate has no right to be so sentenced. The bill provides that no rights are created or conferred upon an inmate by means of DOC administering the reentry program. Similarly, the bill provides that an inmate sentenced to the reentry program, will be removed from the program by DOC under the following circumstances:

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[41] This court determination must be based in part on the judge requesting and reviewing a presentence investigation report prepared pursuant to s. 921.231, F.S.
[42] Pursuant to s. 943.0435, F.S.
[43] These include any violation of s. 790.07, F.S. (criminal offenses involving possession of weapons), s. 800.04, F.S. (lewd and lascivious offenses against children under 16), s. 827.03, F.S. (child abuse and neglect), s. 827.071, F.S. (sexual performance by a child), or s. 847.0135(5), F.S. (exposing minors to lewd and lascivious conduct online).
[44] Specifically, offenses in chapter 847, F.S.

- If the inmate commits a violent act;
- If the department determines medical conditions will keep the inmate from participating in the program;
- The inmates sentence is modified or expires;
- DOC reassigns the offender's classification status; or
- DOC determines that removing the inmate from the program is in the best interest of the inmate or for the security of the institution.

Because an inmate has no right to participate in a reentry program, the bill expressly provides that an inmate does not have a cause of action against DOC, a court, state attorney or a victim relating to placement or participation in the reentry program.

The bill requires that an inmate sentenced to the reentry program must comply with Florida's 85% law. This would preclude an inmate from being released from the incarceration portion of his or her sentence prior to meeting the 85% threshold of his prison sanction. Additionally, the bill specifically requires in cases where the inmate fails to complete the in-prison component of the reentry program, and the probation portion of the sentence is changed to a term of incarceration, the inmate must serve 85% of the total incarceration time.

The bill provides DOC authorization to contract out any portion of the reentry program to qualified individuals, agencies or corporations. They are also authorized to establish incentives for the reentry program to promote participation by private-sector employers within the program.

The department, as part of its annual report, must include information on the implementation of the reentry program; the number of offenders sentenced to the program; number of inmates that successfully complete the in-prison and out-of-prison portions of the program; and the recidivism numbers on participating offenders.

B. SECTION DIRECTORY:

Section 1: Amends s. 322.051, F.S., relating to identification cards.

Section 2: Amends s. 382.0255, F.S., relating to fees.

Section 3: Amends s. 944.605, F.S., relating to inmate release; notification.

Section 4: Amends s. 944.803, F.S., relating to faith- and character-based programs.

Section 5: Creates s. 948.0125, F.S., relating to reentry program sentence.

Section 6: Provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill will have a negative fiscal impact on state revenues due to the waiver of the fee for a state ID card and the waiver of the charge for a certified copy of a Florida birth certificate.

The Revenue Estimating Conference met on April 5, 2013 to determine the impact of this bill to state revenues. The conference used annual prison release data from the Criminal Justice Estimating Conference and the Department of Corrections estimates of the number of inmates who would apply for a state identification card and a birth certificate.

The Revenue Estimating Conference estimated that the bill will result in a $0.2 million loss to state revenues in Fiscal Year 2013-14 because of the effective date, and a $0.4 million recurring impact. The General Revenue impact is estimated to be a loss of $0.2 million in Fiscal Year 2013-14, and a $0.1 million recurring impact.

2. Expenditures:

Anticipated increase in DOC, DOH and DHSMV's workload will be subsumed within existing agency resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Florida's most recent recidivism rates show that 27.6% of inmates released will return to prison within three years.[45] Inmate reentry efforts are designed to reduce recidivism rates, which result in a lower cost to DOC. "A one percent reduction in recidivism equates to a cost avoidance of nearly $19 million over five years."[46]

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear the 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.

[45] *See*, http://www.dc.state.fl.us/pub/recidivism/2013.html (last visited March 18, 2013). These numbers are for inmates released in 2008.

[46] Press Release, Florida Department of Corrections (Feb. 4, 2013) http://www.dc.state.fl.us/secretary/press/2013/02-04-Recidivism.html (last visited March 20, 2013).

B. RULE-MAKING AUTHORITY:

The implementation and administration of the reentry program may require DOC to promulgate rules. The bill provides DOC with adequate authority to do so.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 20, 2013, the Judiciary Committee adopted two amendments and reported the bill favorably. The first amendment did the following:

- Added three additional categories of inmates that are not required to be provided with an identification card prior to release.
- Provides new requirements that DOC assist inmates in obtaining social security cards and birth certificates from Florida as well as other states.
- Requires the DHSMV and the DOH to provide yearly reports to the Governor, President of the Senate, and Speaker of the House of Representatives that detail the identification cards provided to inmates and the factors involved in providing identification cards. This reporting requirement begins February 1, 2014.

The second amendment excludes offenders convicted of "any offense that includes as an element of that offense the sale of a controlled substance" from participation in the reentry program.

This analysis is drafted to the bill with the amendments as passed by the Judiciary Committee.

1 A bill to be entitled
2 An act relating to inmate reentry; amending s.
3 322.051, F.S.; waiving the fee for identification
4 cards issued to certain inmates; amending s. 382.0255,
5 F.S.; requiring a waiver of fees for certain inmates
6 receiving a copy of a birth certificate; amending s.
7 944.605, F.S.; requiring the Department of Corrections
8 to work with other agencies in acquiring necessary
9 documents for certain inmates to acquire an
10 identification card before release; providing
11 exceptions; requiring the department to provide
12 specified assistance to inmates born outside this
13 state; requiring a report; amending s. 944.803, F.S.;
14 authorizing the department to operate male and female
15 faith- and character-based institutions; creating s.
16 948.0125, F.S.; directing the department to establish
17 a reentry program for nonviolent offenders; providing
18 eligibility and participation requirements; providing
19 guidelines where the department shall terminate
20 inmate's participation in program; providing for
21 inmate to participate in drug offender probation upon
22 completion of in-prison reentry program; authorizing
23 use of postadjudicatory drug court for program
24 participant; authorizing the department to contract
25 for services; providing that no rights are conferred
26 upon inmates to participate in reentry program;
27 providing for reports and rulemaking authority;
28 providing an effective date.

29
30 Be It Enacted by the Legislature of the State of Florida:
31
32 Section 1. Subsection (9) of section 322.051, Florida
33 Statutes, is amended to read:
34 322.051 Identification cards.—
35 (9) Notwithstanding any other provision of this section or
36 s. 322.21 to the contrary, the department shall issue or renew a
37 card at no charge to a person who presents evidence satisfactory
38 to the department that he or she is homeless as defined in s.
39 414.0252(7) or to an inmate receiving a card issued pursuant to
40 s. 944.605(7).
41 Section 2. Subsection (3) of section 382.0255, Florida
42 Statutes, is amended to read:
43 382.0255 Fees.—
44 (3) Fees shall be established by rule. However, until
45 rules are adopted, the fees assessed pursuant to this section
46 shall be the minimum fees cited. The fees established by rule
47 must be sufficient to meet the cost of providing the service.
48 All fees shall be paid by the person requesting the record, are
49 due and payable at the time services are requested, and are
50 nonrefundable, except that, when a search is conducted and no
51 vital record is found, any fees paid for additional certified
52 copies shall be refunded. The department may waive all or part
53 of the fees required under this section for any government
54 entity. The department shall waive all fees required under this
55 section for a certified copy of a birth certificate issued for
56 purposes of an inmate acquiring a state identification card

57 before release pursuant to s. 944.605(7).
58 Section 3. Subsection (7) is added to section 944.605,
59 Florida Statutes, to read:
60 944.605 Inmate release; notification; identification
61 card.—
62 (7)(a) The department, working in conjunction with the
63 Department of Health and the Department of Highway Safety and
64 Motor Vehicles, shall provide every Florida-born inmate with a
65 certified copy of their birth certificate and a state
66 identification card before his or her release upon expiration of
67 the inmate's sentence.
68 (b) Paragraph (a) does not apply to inmates who:
69 1. The department determines have a valid driver license
70 or state identification card.
71 2. Have an active detainer, unless the department
72 determines that cancellation of the detainer is likely or that
73 the incarceration for which the detainer was issued will be less
74 than 12 months in duration.
75 3. Are released due to an emergency release or a
76 conditional medical release under s. 947.149.
77 4. Are not in the physical custody of the department at or
78 within 180 days before release.
79 5. Are subject to sex offender residency restrictions, and
80 who, upon release under such restrictions, do not have a
81 qualifying address.
82 (c) The department shall assist each inmate in applying
83 for and obtaining a social security card before release if the
84 inmate needs a social security card.

85 (d) The department, for purposes of assisting the inmate
86 in obtaining a birth certificate, shall submit to the Department
87 of Health on all Florida-born inmates in its custody, the
88 department's inmate photo or digitized photo, and as provided by
89 the inmate his or her date of birth, full name at birth and any
90 subsequent legal name changes, city or county of birth, mother's
91 full name including her maiden surname, and father's full name.
92 Failure of the inmate to cooperate with the department in
93 providing this information may subject the inmate to
94 disciplinary action.
95 (e) For inmates born outside of this state, the department
96 shall assist the inmate in completing the necessary forms or
97 applications to obtain a social security card, driver license,
98 or state identification card. The department shall also provide
99 the inmate with the location and address of the appropriate
100 licensing authority the inmate will need to obtain a valid
101 identification card in proximity to the inmate's release
102 address.
103 (f) By February 1, 2014, and annually thereafter, the
104 department, in consultation with the Department of Highway
105 Safety and Motor Vehicle and the Department of Health, shall
106 provide a report to the Governor, the President of the Senate,
107 and the Speaker of the House of Representatives that identifies
108 the number of inmates released with and without identification
109 cards, identifies any impediments in the implementation of this
110 subsection, and provides recommendations to improve obtaining
111 release documents and identification cards for all inmates.
112 Section 4. Subsections (2) and (6) of section 944.803,

113 Florida Statutes, are amended to read:
114 944.803 Faith- and character-based programs.—
115 (2) It is the intent of the Legislature that the
116 department expand the faith- and character-based initiative
117 through the use of faith- and character-based institutions. The
118 department is encouraged to phase out the faith-based and self
119 improvement dormitory programs and move toward the goal of only
120 implementing faith- and character-based institutions. The
121 department is also encouraged to dedicate and maintain faith-
122 and character-based institutions that serve both male and female
123 inmates at their respective institutions.
124 (6) Within faith- and character-based institutions of the
125 state correctional system, peer-to-peer programming shall be
126 offered ~~allowed~~, such as Alcoholics Anonymous, literacy
127 instruction, and other activities~~, when appropriate~~.
128 Section 5. Section 948.0125, Florida Statutes, is created
129 to read:
130 948.0125 Reentry program sentence.—
131 (1) PROGRAM DEVELOPMENT.—The department shall develop and
132 implement a reentry program for nonviolent drug offenders. The
133 program shall provide a mechanism by which an eligible,
134 nonviolent offender for whom the reentry program has been
135 ordered as part of his or her conditional split sentence by the
136 court may be transitioned into the community during the last
137 year of the sentence. The reentry program shall consist of a
138 prison-based substance abuse treatment program for a minimum of
139 180 days and a community-based aftercare treatment program. The
140 reentry program may include a work-release component.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

141 (2) ELIGIBILITY.—For an offender to participate in the
142 reentry program, the court at the time of ordering a state
143 prison sentence must have imposed a conditional split sentence
144 whereby the offender is ordered into the department's reentry
145 program that consists of an in-prison treatment component, and
146 upon successful completion of the in-prison treatment, drug
147 offender probation. Entry into the department's reentry program
148 is subject to available funding and resources of the department.
149 (a) The sentencing court may order the offender into the
150 department's reentry program if the offender meets the following
151 criteria:
152 1. The offender's primary offense is a felony of the third
153 degree.
154 2. The sentencing court, after requesting and reviewing a
155 presentence investigation report prepared pursuant to s.
156 921.231, has found that the offender has a substance abuse
157 problem.
158 3. The offender has never been convicted of:
159 a. A forcible felony as defined in s. 776.08.
160 b. An offense listed in s. 775.082(9)(a)1.r. without
161 regard to prior incarceration or release.
162 c. An offense described in chapter 847 involving a minor
163 or a depiction of a minor.
164 d. An offense described in chapter 827.
165 e. Any offense described in s. 784.07, s. 784.074, s.
166 784.075, s. 784.076, s. 784.08, s. 784.083, or s. 784.085.
167 f. An offense involving the possession or use of a
168 firearm.

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169 g. A capital felony or a felony of the first or second
170 degree.
171 h. An offense that requires a person to register as a
172 sexual offender pursuant to s. 943.0435.
173 i. An offense that includes as an element of that offense
174 the sale of a controlled substance.
175 j. An offense in another jurisdiction that would be an
176 offense described in this subparagraph if that offense had been
177 committed in this state.
178 (b) Placement on drug offender probation shall be
179 conditioned upon the offender's successful completion of the in-
180 prison treatment component of the program.
181 (3) ADMISSION AND PARTICIPATION IN THE REENTRY PROGRAM.—If
182 an offender meets the eligibility criteria under subsection (2),
183 the sentencing court may order the reentry program at the time
184 of sentencing. Admission into the reentry program, and an
185 offender's continued participation in the program, is not a
186 right. Accordingly, a sentencing court is not required to
187 sentence an offender to the reentry program and an offender,
188 based upon conduct in prison, may lose eligibility to continue
189 participating in the reentry program.
190 (4) PROCEDURE UPON ADMISSION TO PROGRAM; IN-PRISON
191 TREATMENT.—If the sentencing court orders the offender into the
192 reentry program, the department shall, subject to available
193 funding and resources, place the offender into the in-prison
194 treatment component not more than 9 months before the end of the
195 offender's incarceration portion of the split sentence,
196 including any gain time accrued.

197 (a) Before the offender completes the in-prison treatment
198 component, the department shall evaluate the offender's needs
199 for community placement and develop a postrelease treatment plan
200 that includes substance abuse aftercare services.
201 (b) An offender in the in-prison component of the reentry
202 program is subject to the rules of conduct established by the
203 department and may have sanctions imposed, including loss of
204 privileges, restrictions, disciplinary confinement, forfeiture
205 of gain-time or the right to earn gain-time in the future,
206 alteration of release plans, termination from the reentry
207 program, or other program modifications in keeping with the
208 nature and gravity of the program violation. The department may
209 place an offender in the reentry program in an administrative or
210 protective confinement, as necessary. Except as provided in
211 paragraph (c), the offender shall be readmitted to the reentry
212 program after completing the ordered discipline.
213 (c) The department shall terminate an offender from the
214 reentry program if:
215 1. The offender commits a violent act;
216 2. The department determines that the offender is unable
217 to participate in the reentry program due to the offender's
218 medical condition;
219 3. The offender's sentence is modified or expires;
220 4. The department reassigns the offender's classification
221 status; or
222 5. The department determines that removing the offender
223 from the reentry program is in the best interest of the offender
224 or the security of the institution.

225 (d) An offender must serve at least 85 percent of the
226 incarceration portion of the conditional split sentence before
227 being released to drug offender probation. If the offender does
228 not successfully complete the in-prison treatment component of
229 the reentry program, the drug offender probation portion of the
230 conditional split sentence becomes a term of imprisonment to be
231 served while incarcerated. The offender must then serve at least
232 85 percent of the total term of imprisonment.
233 (5) PROCEDURE UPON COMPLETION OF IN-PRISON TREATMENT.—
234 Following successful completion of the in-prison treatment
235 component, the offender shall be transitioned into the community
236 to serve the drug offender probation portion of the offender's
237 conditional split sentence.
238 (a) While in the community, the offender shall be subject
239 to all standard terms of probation under s. 948.03, and of drug
240 offender probation under s. 948.20, a special condition of
241 supervision ordered by the sentencing court, including
242 participation in an aftercare substance abuse program, residence
243 in a postrelease transitional residential halfway house, or
244 other appropriate form of supervision or treatment.
245 (b) Violation of a condition or order may result in
246 revocation of supervision by the court and imposition of a
247 sentence that is authorized by law, subject to time served in
248 prison.
249 (c) If there is a postadjudicatory drug court program as
250 described in s. 397.334 in the county of the sentencing court,
251 or the county to which the offender returns, and the drug court
252 is willing to accept the case, the offender's case shall be

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253 transferred to the drug court for supervision for the probation
254 portion of the offender's split sentence. The drug court judge
255 shall be deemed the sentencing judge for purposes of ensuring
256 compliance with this section.
257 (d) While on drug offender probation, the department shall
258 collect from the offender the cost of supervision as provided
259 for in s. 948.09. An offender who is financially able shall also
260 pay all costs of his or her drug rehabilitation, including drug
261 testing fees. The sentencing judge may impose on the offender
262 additional conditions requiring payment of court costs and
263 fines, public service, and compliance with other court-ordered
264 special conditions.
265 (6) CONTRACTORS.—The department may develop and enter into
266 performance-based contracts with qualified individuals,
267 agencies, or corporations to supply any or all services provided
268 in the reentry program. The department may establish incentives
269 within the reentry program to promote participation by private-
270 sector employers in the rehabilitative reentry programs and the
271 orderly operation of institutions and facilities.
272 (7) NO RIGHTS CONFERRED UPON OFFENDERS.—This section does
273 not create or confer a right to an offender to placement in the
274 reentry program or a right to placement or early-release under
275 supervision of any type. An offender does not have a cause of
276 action against the department, a court, the state attorney, or a
277 victim related to placement in or continued participation in the
278 reentry program.
279 (8) REPORTING.—The department shall, as part of its annual
280 report, provide a detailed account of the department's

281 implementation of the reentry program, the number of offenders
282 sentenced to the program, the number of inmates who successfully
283 complete the in-prison portion of the program, the number of
284 inmates who successfully complete the drug offender probation,
285 and recidivism numbers for inmates who have participated in the
286 reentry program.
287 (9) RULEMAKING.—The department may adopt rules to
288 implement this section.
289 Section 6. This act shall take effect July 1, 2013.

HB 7137

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7137 PCB CRJS 13-06 Juvenile Sentencing
SPONSOR(S): Criminal Justice Subcommittee, Pilon
TIED BILLS: **IDEN./SIM. BILLS:** SB 1350

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Criminal Justice Subcommittee	10 Y, 3 N	Cox	Cunningham
1) Justice Appropriations Subcommittee		Toms	Jones Darity
2) Judiciary Committee			

SUMMARY ANALYSIS

In 2010, the United States Supreme Court held in *Graham v. Florida* that the 8th Amendment of the U.S. Constitution prohibits states from sentencing juvenile nonhomicide offenders to life without providing a meaningful opportunity to obtain release. In 2012, the United States Supreme Court held in *Miller v. Alabama* that the 8th Amendment of the U.S. Constitution prohibits a sentencing scheme that *mandates* life in prison without the possibility of parole for juvenile offenders convicted of a homicide offense. The Court held that children are constitutionally different from adults and as a result, the sentencer must take into consideration these differences before sentencing these offenders to one of the most severe punishments available in the criminal justice system.

To address the *Graham* decision, the bill amends s. 775.082, F.S., to prohibit a court from imposing a life sentence on juveniles convicted of a nonhomicide life felony or a nonhomicide offense punishable by a term of years not exceeding life imprisonment, that was committed on or after July 1, 2013. Instead, the court must sentence such offenders to a term of imprisonment that cannot exceed 50 years.

The bill addresses the *Miller* decision by making a variety of changes to s. 775.082, F.S. The bill *requires* juveniles convicted of a capital felony to be sentenced to life imprisonment, but only if the judge, after considering specified factors at a mandatory sentencing hearing, concludes that life imprisonment is an appropriate sentence. If the judge determines that life imprisonment is not appropriate, the court must sentence the juvenile to no less than 50 years imprisonment.

The bill *permits* a court to sentence a juvenile offender convicted of a life felony or first degree felony homicide offense to life imprisonment, but only if the judge, after considering specified factors at a mandatory sentencing hearing, concludes that life imprisonment is an appropriate sentence. In these instances, the bill does not prescribe a minimum sentence if the judge determines that life imprisonment is not appropriate.

On March 21, 2013, the Criminal Justice Impact Conference determined that SB 1350, which is substantially similar to this bill, would have no impact on prison beds.

The bill provides and effective date of July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Graham v. Florida
In 2010, the United States Supreme Court held in *Graham v. Florida*[1] that the 8th Amendment of the U.S. Constitution[2] prohibits states from sentencing juvenile nonhomicide offenders to a life sentence without providing a meaningful opportunity to obtain release. The Court's opinion stated:

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance.[3]

Graham was held to apply retroactively, even to criminal cases which were considered final at the time *Graham* was rendered.[4]

Post-Graham Decisions
Subsequent to the *Graham* decision, inmates who were convicted of nonhomicide offenses and sentenced to life imprisonment before *Graham* was decided began petitioning for and receiving resentencing hearings. There appears to be no consolidated source for obtaining the results of these resentencing hearings. However, the results of some resentencing hearings are known from news reports. These include:

- An inmate sentenced to life for the 2005 rape of a young girl when he was seventeen years old was resentenced to a split sentence of 7 years in prison followed by 20 years of probation.[5]
- An inmate sentenced to four life sentences for armed robberies committed in 2004 and 2005 when he was 14 and 15 years old was resentenced to a term of 30 years.[6]
- An inmate sentenced to life for sexual battery with a weapon or force committed in 2008 when he was 14 was resentenced to a term of 65 years.[7]

Juvenile offenders convicted and sentenced after the issuance of *Graham* have received lengthy prison sentences. For example:

- An inmate was sentenced to concurrent 50 years in prison with a 25-year mandatory minimum for armed robbery and aggravated battery;[8]

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[1] *Graham v. Florida,* 130 S.Ct. 2011 (2010).
[2] The 8th Amendment of the U.S. Constitution forbids the government from imposing cruel and unusual punishment.
[3] *Graham,* at 2016.
[4] *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980)(Court held that the "doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications....a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that .... post-conviction relief is necessary to avoid individual instances of obvious injustice."). In addition, Florida courts have held that *Graham* applies retroactively even without applying the *Witt* standard. *Kleppinger v. State*, 81 So. 3d 547, 549 (Fla. 2nd DCA 2012).
[5] "Rapist who was serving life sentence will get second chance," August 30, 2011, http://www2.tbo.com/news/breaking-news/2011/aug/30/3/rapist-who-was-serving-life-resentenced-to-seven-y-ar-254096/ (last visited on March 14, 2013).
[6] "Man who served 11 years fails to persuade Hillsborough judge to set him free," October 6, 2011, http://www.tampabay.com/news/courts/criminal/man-who-served-11-years-fails-to-persuade-hillsborough-judge-to-set-him/1195464 (last visited on March 14, 2013).
[7] "Teenage rapist Jose Walle resentenced to 65 years in prison," November 17, 2010, http://www.tampabay.com/news/courts/criminal/teenage-rapist-jose-walle-resentenced-to-65-years-in-prison/1134862 (last visited on March 14, 2013).
[8] *Thomas v. State,* 78 So.3d 644 (Fla. 1st DCA 2011). The Court held that the defendant's sentence of a term-of-years totaling 50 years is not the functional equivalent of a life sentence for purposes of the Eighth Amendment prohibition on life was not constitutionally excessive.

- An inmate was sentenced to 70 years in prison for attempted first degree murder, including a 25 year mandatory minimum for the use of a firearm;[9]
- An inmate was sentenced to 60 years in prison with an aggregate minimum mandatory term of 50 years for attempted first degree murder, armed burglary ad armed robbery.[10]

Juveniles who have been sentenced or resentenced subsequent to *Graham* have challenged their sentences on grounds that they effectively constitute a life sentence. To date, Florida's District Courts of Appeal have provided a wide range of rulings. Some courts have applied a strict reading of *Graham* holding that *Graham* only applies when a defendant is sentenced to a term of life imprisonment, not a lengthy term of years.[11] Other courts have held that a term of years sentence is not in violation of *Graham* if the sentence is for multiple nonhomicide offenses, thus limiting the application of *Graham* to a singular nonhomicide offense where a juvenile is sentenced to life.[12] Yet still other courts have held that *any* sentence which will result in the juvenile being incarcerated past that juvenile's life expectancy is violative of the *Graham* decision.[13] Courts also disagree on the number of years that is the functional equivalent of a life sentence for the purposes of *Graham.*[14]

Several of these conflicting rulings have been certified to the Florida Supreme Court, and have been granted review.

Effect of the Bill

The bill amends s. 775.082, F.S., to prohibit a court from imposing a life sentence on juveniles convicted of a nonhomicide life felony or a nonhomicide offense punishable by a term of years not exceeding life imprisonment (or an offense reclassified as such), that was committed on or after July 1, 2013. Instead, the court must sentence such offenders to a term of imprisonment that cannot exceed 50 years.

To date, none of the Florida District Courts of Appeal have held a sentence of 50 years unconstitutional based on *Graham*. This provision complies with *Graham* in that it prohibits a juvenile convicted of a nonhomicide offense from being sentenced to life.

Miller v. Alabama

In 2012, the United States Supreme Court held in *Miller v. Alabama* that the 8th Amendment of the U.S. Constitution[15] prohibits a sentencing scheme that *mandates* life in prison without the possibility of parole for juvenile offenders.[16] *Miller* does not prohibit a court from sentencing a juvenile offender convicted of a homicide offense to life without parole, but requires the sentencer to take into

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[9] *Gridine v. State*, 89 So.3d 909 (Fla. 1st DCA 2011). The Court held that a term-of-years sentence of 70 years including a 25 year mandatory minimum was not constitutionally excessive. The Florida Supreme Court granted review on October 11, 2012.

[10] *Adams v. State*, 2012 WL 3193932. The Court held that a term-of-years sentence which would require the juvenile to serve a minimum of 58.5 years was unconstitutional for purposes of the 8th Amendment. Then Court held that at the earliest the juvenile would not be released until he was 76 years of age, which was past the life expectancy, thus the sentence was a de facto life sentence. The Court certified conflict with the case *Henry v. State*, 82 So.3d 1084 (Fla. 5th D.C.A. 2012).

[11] *See Walle v. State*, 99 So.3d 967, 971 (Fla. 1st DCA 2012)(Court held that the expressed holdings of *Graham* and *Miller* were not violated and held that extending the rulings would be left for the Supreme Court.); *Henry v. State*, 82 So.3d 1084, 1089 (Fla. 5th DCA 2012)(Court held that a defendant's aggregate term-of-years sentence totaling 90 years in prison was not unconstitutionally excessive. Review granted by the Florida Supreme Court on November 6, 2012.)

[12] *Walle*, at 972.

[13] *See Floyd v. State*, 87 So.3d 45, 47 (Fla. 1st DCA 2012); *Adams*, at 2.

[14] *See Walle v. State*, 99 So.3d 967 (Fla. 1st DCA 2012)(Court held a sentence of 65 years consecutive to a 27 year sentence was not violative of the 8th Amendment); *Henry v. State*, 82 So.3d 1084 (Court held that 90 years, of which he would be required to serve at least 76.5 years was not violative of the 8th Amendment); *Floyd v. State*, 87 So.3d 45, 47 (Fla. 1st DCA 2012)(Court held that consecutive sentences of 40 years, totaling 80 years, was unconstitutional under the 8th Amendment.); *Adams v. State*, 2012 WL 3193932 (Court held that a 60 year sentence which would require the juvenile to serve a minimum of 58.5 years was unconstitutional under the 8th Amendment.).

[15] *Supra* note 1.

[16] *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

consideration "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" before doing so.[17] The Court's opinion stated:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.[18,19]

Unlike *Graham*, the ruling in *Miller* does not apply retroactively to juveniles who were sentenced to life for homicide offenses before *Miller* was rendered.[20] Therefore, juveniles convicted of a homicide offense whose judgments were final at the time Miller was rendered are not entitled to be resentenced.

Effect of the Bill

The bill amends s. 775.082, F.S., to *require* a court to sentence a person convicted of a capital felony or an offense that was reclassified as a capital felony, that was committed before the person was 18, to life imprisonment if the judge, at a mandatory sentencing hearing, concludes that life imprisonment is an appropriate sentence. In determining whether life imprisonment is an appropriate sentence, the judge must consider factors relevant to the offense and to the juvenile offender's youth and attendant circumstances, including, but not limited to the:

- Nature and circumstances of offense committed by the juvenile offender;
- Effect of crime on the victim's family and on the community;
- Juvenile offender's age, maturity, intellectual capacity, and mental and emotional health at time of offense;
- Juvenile offender's background, including his or her family, home, and community environment;
- Effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the juvenile offender's participation in the offense;
- Extent of the juvenile offender's participation in the offense;
- Effect, if any, of familial pressure or peer pressure on the juvenile offender's actions;
- Nature and extent of the juvenile offender's prior criminal history;
- Effect, if any, of characteristics attributable to the juvenile offender's youth on the juvenile offender's judgment; and
- Possibility of rehabilitating the juvenile offender.

If the judge concludes that life imprisonment is not an appropriate sentence, the juvenile offender must be sentenced to a term of imprisonment of not less than 50 years. This sentencing scheme applies retroactively only to the extent necessary to meet constitutional requirements for imposing a life sentence on a defendant who is convicted of committing a murder while a juvenile as set forth in *Miller*.

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[17] *Id.* at 2469.

[18] *Id.* at 2468.

[19] The Court further held that "*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *See also Roper v. Simmons*, 543 S.Ct. 551(2005)(Court barred capital punishment for children and first held that children are constitutionally different from adults for purposes of sentencing.); *Woodson v. North Carolina*, 96 S.Ct. 2978 (1976)(Court held that imposition of mandatory death sentence without consideration of the character and record of the individual offender or the circumstances of the particular offense was inconsistent with the fundamental respect for humanity which underlies the 8th Amendment.)

[20] *See Geter v. State*, 3D12-1736, 2012 WL 4448860 (Fla. 3rd DCA Sept. 27, 2012)(Court held that the ruling in *Miller* was not a development of "fundamental significance;" because "*Miller* mandates only that a sentencer follow a certain process before imposing life sentence. . . . this was a procedural change providing for new process in juvenile homicide sentencing and was merely an evolutionary refinement in criminal law that did not compel abridgement of the finality of judgments."); *Gonzalez v. State*, 101 So.3d 886, 887 (Fla. 1st DCA 2012).

The bill *permits* a court to sentence a juvenile offender convicted of a homicide offense[21] that is a life felony or first degree felony (or an offense that was reclassified as such), that was committed before the person was 18, to life imprisonment, but only if the judge, after considering the above-described factors at a mandatory sentencing hearing, concludes that life imprisonment is an appropriate sentence. In these instances, the bill does not prescribe a minimum sentence if the judge determines that life imprisonment is not appropriate. This sentencing scheme applies retroactively only to the extent necessary to meet constitutional requirements for imposing a life sentence on a defendant who is convicted of committing a murder while a juvenile as set forth in *Miller*.

The bill complies with *Miller* in that it prohibits a juvenile convicted of a homicide offense from being sentenced to life or a term of years equal to life without the judge having considered "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" before doing so.[22]

B. SECTION DIRECTORY:

Section 1. Amends s. 775.082, F.S., relating to penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison.

Section 2. Provides an effective date of July 1, 2013.

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:

   On March 21, 2013, the Criminal Justice Impact Conference determined that the SB 1350, which is substantially similar to this bill, would have no impact prison beds.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

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[21] Section 782.04, F.S.
[22] *Miller*, at 2469.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

1 A bill to be entitled
2 An act relating to juvenile sentencing; amending s.
3 775.082, F.S.; providing criminal sentences applicable
4 to a person who was under the age of 18 years at the
5 time the offense was committed; requiring that a judge
6 consider certain factors before determining whether
7 life imprisonment is an appropriate sentence;
8 providing for retroactive application in certain
9 circumstances; providing an effective date.
10
11 Be It Enacted by the Legislature of the State of Florida:
12
13 Section 1. Subsections (1) and (3) of section 775.082,
14 Florida Statutes, are amended to read:
15 775.082 Penalties; applicability of sentencing structures;
16 mandatory minimum sentences for certain reoffenders previously
17 released from prison.—
18 (1)(a) Except as provided in paragraph (b), a person who
19 has been convicted of a capital felony shall be punished by
20 death if the proceeding held to determine sentence according to
21 the procedure set forth in s. 921.141 results in findings by the
22 court that such person shall be punished by death, otherwise
23 such person shall be punished by life imprisonment and shall be
24 ineligible for parole.
25 (b) A person who is convicted of a capital felony, or an
26 offense that was reclassified as a capital felony, that was
27 committed before the person was 18 years of age shall be
28 punished by life imprisonment and is ineligible for parole if

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

29 the judge at a mandatory sentencing hearing concludes that life
30 imprisonment is an appropriate sentence. In determining whether
31 life imprisonment is an appropriate sentence, the judge shall
32 consider factors relevant to the offense and to the defendant's
33 age and attendant circumstances, including, but not limited to:
34 1. The nature and circumstances of the offense committed
35 by the defendant.
36 2. The effect of the crime on the victim's family and on
37 the community.
38 3. The defendant's age, maturity, intellectual capacity,
39 and mental and emotional health at the time of the offense.
40 4. The defendant's background, including his or her
41 family, home, and community environment.
42 5. The effect, if any, of immaturity, impetuosity, or
43 failure to appreciate risks and consequences on the defendant's
44 participation in the offense.
45 6. The extent of the defendant's participation in the
46 offense.
47 7. The effect, if any, of familial pressure or peer
48 pressure on the defendant's actions.
49 8. The nature and extent of the defendant's prior criminal
50 history.
51 9. The effect, if any, of characteristics attributable to
52 the defendant's age on the defendant's judgment at the time of
53 the offense.
54 10. The possibility of rehabilitating the defendant.
55
56 If the judge concludes that life imprisonment is not an

57 appropriate sentence, the defendant shall be punished by
58 imprisonment for a term of not less than 50 years. This
59 paragraph applies retroactively only to the extent necessary to
60 meet constitutional requirements for imposing a life sentence on
61 a defendant who is convicted of committing a murder that was
62 committed before the person was 18 years of age as set forth by
63 the United States Supreme Court in Miller v. Alabama, 132 S. Ct.
64 2455 (2012).
65 (3) A person who has been convicted of any other
66 designated felony may be punished as follows:
67 (a)1. For a life felony committed before ~~prior to~~ October
68 1, 1983, by a term of imprisonment for life or for a term of
69 years not less than 30.
70 2. For a life felony committed on or after October 1,
71 1983, by a term of imprisonment for life or by a term of
72 imprisonment not exceeding 40 years.
73 3. Except as provided in subparagraph 4., for a life
74 felony committed on or after July 1, 1995, by a term of
75 imprisonment for life or by imprisonment for a term of years not
76 exceeding life imprisonment.
77 4.a. Except as provided in sub-subparagraph b., for a life
78 felony committed on or after September 1, 2005, which is a
79 violation of s. 800.04(5)(b), by:
80 (I) A term of imprisonment for life; or
81 (II) A split sentence that is a term of not less than 25
82 years' imprisonment and not exceeding life imprisonment,
83 followed by probation or community control for the remainder of
84 the person's natural life, as provided in s. 948.012(4).

85 b. For a life felony committed on or after July 1, 2008,
86 which is a person's second or subsequent violation of s.
87 800.04(5)(b), by a term of imprisonment for life.
88 5. Notwithstanding subparagraphs 1.-4., a person convicted
89 under s. 782.04 for an offense that was reclassified as a life
90 felony that was committed before the person was 18 years of age
91 is eligible to be punished by a term of imprisonment for life or
92 by a term of years equal to life imprisonment if the judge at a
93 mandatory sentencing hearing considers factors relevant to the
94 offense and to the defendant's age and attendant circumstances,
95 including, but not limited to, the factors listed in paragraph
96 (1)(b) and concludes that imprisonment for life or a term of
97 years equal to life imprisonment is an appropriate sentence.
98 This subparagraph applies retroactively only to the extent
99 necessary to meet constitutional requirements for imposing a
100 life sentence on a defendant who is convicted of committing a
101 murder that was committed before the person was 18 years of age
102 as set forth by the United States Supreme Court in Miller v.
103 Alabama, 132 S. Ct. 2455 (2012).
104 (b)1. For a felony of the first degree, by a term of
105 imprisonment not exceeding 30 years or, when specifically
106 provided by statute, by imprisonment for a term of years not
107 exceeding life imprisonment.
108 2. Notwithstanding subparagraph 1., a person convicted
109 under s. 782.04 of a first-degree felony punishable by a term of
110 years not exceeding life imprisonment, or an offense that was
111 reclassified as a first-degree felony punishable by a term of
112 years not exceeding life, that was committed before the person

113 was 18 years of age is eligible for a term of years equal to
114 life imprisonment if the judge at a mandatory sentencing hearing
115 considers factors relevant to the offense and to the defendant's
116 age and attendant circumstances, including, but not limited to,
117 the factors listed in paragraph (1)(b) and concludes that a term
118 of years equal to life imprisonment is an appropriate sentence.
119 This subparagraph applies retroactively only to the extent
120 necessary to meet constitutional requirements for imposing a
121 life sentence on a defendant who is convicted of committing a
122 murder that was committed before the person was 18 years of age
123 as set forth by the United States Supreme Court in Miller v.
124 Alabama, 132 S. Ct. 2455 (2012).
125 (c) For a felony of the second degree, by a term of
126 imprisonment not exceeding 15 years.
127 (d) For a felony of the third degree, by a term of
128 imprisonment not exceeding 5 years.
129 (e) Notwithstanding paragraphs (a)-(d), for an offense
130 committed on or after July 1, 2013, a person convicted of a life
131 felony or an offense punishable by a term of years not exceeding
132 life imprisonment, other than an offense listed in s. 782.04, or
133 an offense, other than an offense listed in s. 782.04, that was
134 reclassified as a life felony or an offense punishable by a term
135 of years not exceeding life, that was committed before the
136 person was 18 years of age shall be punished by a term of
137 imprisonment not to exceed 50 years.
138 Section 2. This act shall take effect July 1, 2013.