Judiciary Committee

Wednesday, February 10, 2016
9:00 a.m. – 12:00 p.m.
Sumner Hall (404 HOB)

MEETING PACKET

Steve Crisafulli
Speaker

Charles McBurney
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Judiciary Committee

Start Date and Time:	Wednesday, February 10, 2016 09:00 am
End Date and Time:	Wednesday, February 10, 2016 12:00 pm
Location:	Sumner Hall (404 HOB)
Duration:	3.00 hrs

Consideration of the following bill(s):

CS/CS/HB 11 Missing Persons with Special Needs by Education Appropriations Subcommittee, Criminal Justice Subcommittee, Porter
CS/HB 81 Infectious Disease Elimination Pilot Program by Health Quality Subcommittee, Edwards
CS/HB 293 Public Records/Juvenile Criminal History Records by Criminal Justice Subcommittee, Pritchett
CS/CS/HB 379 Transfers of Structured Settlement Payment Rights by Insurance & Banking Subcommittee, Civil Justice Subcommittee, Santiago
CS/CS/HB 403 Guardianship by Health Care Appropriations Subcommittee, Children, Families & Seniors Subcommittee, Ahern
CS/CS/HB 439 Mental Health Services in the Criminal Justice System by Appropriations Committee, Children, Families & Seniors Subcommittee, McBurney
CS/HB 713 Consumer Debt Collection by Insurance & Banking Subcommittee, Passidomo
CS/HB 821 Reimbursement of Assessments by Civil Justice Subcommittee, Rooney
CS/HB 1087 Protection of Motor Vehicle Dealers' Consumer Data by Highway & Waterway Safety Subcommittee, Rooney
HB 7101 Sentencing for Capital Felonies by Criminal Justice Subcommittee, Trujillo, Spano

Pursuant to rule 7.12, the deadline for amendments to bills on the agenda by non-appointed members shall be 6:00 p.m., Tuesday, February 9, 2016.
By request of the chair, all committee members are asked to have amendments to bills on the agenda submitted to staff by 6:00 p.m., Tuesday, February 9, 2016.

NOTICE FINALIZED on 02/08/2016 4:03PM by Ingram.Michele

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 11 Missing Persons with Special Needs
SPONSOR(S): Education Appropriations Subcommittee; Criminal Justice Subcommittee; Porter and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 230

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 0 N, As CS	Cox	White
2) Education Appropriations Subcommittee	13 Y, 0 N, As CS	deNagy	Heflin
3) Judiciary Committee		Cox	Havlicak

SUMMARY ANALYSIS

Elopement, which means leaving an area without supervision or caregiver permission, is prevalent among persons with certain special needs and may expose them to dangerous situations. Individuals with Alzheimer's disease or autism are two populations at higher risk to elope.

There are a number of personal devices on the market which aid in search and rescue of individuals who elope.

The bill creates the "Project Leo" pilot program in Alachua, Baker, Columbia, Hamilton, and Suwanee Counties to provide personal devices to aid in search-and-rescue efforts for persons with special needs in cases of elopement.

The project will be developed and administered by the Center for Autism and Related Disabilities at the University of Florida (CARD UF). The bill directs CARD UF to select participants on a first-come, first-serve basis to receive a personal device to aid in search-and-rescue efforts. Participants will be selected based on criteria developed by CARD UF, which at a minimum must consider the individual's risk of elopement. The number of participants shall be determined based on available funding within the center's existing resources. The respective county sheriff's offices will distribute these devices to the project participants.

The bill requires CARD UF to submit preliminary and final reports to the Governor, the Speaker of the House of Representatives, and the President of the Senate. The final report must include recommendations for modifications or continued implementation of the program.

The bill provides that the act is subject to available funding within the center's existing resources and expires on June 30, 2018. The bill provides an appropriation of $100,000 in nonrecurring general revenue funds for the 2016-2017 Fiscal Year to CARD UF to purchase personal devices to aid search and rescue efforts.

The bill is effective on July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Elopement of Individuals with Special Needs

Elopement, which means leaving an area without supervision or caregiver permission, is prevalent among persons with certain special needs and may expose a person to dangerous situations.[1] Wandering and elopement are concerns in particular with children and adults with autism and seniors with Alzheimer's.[2]

Elopement and Wandering of Individuals with Autism

There are various reasons someone with autism may wander; more often than not, he or she will wander to something of interest (especially bodies of water) or away from something that is bothersome (such as uncomfortable noise or bright lights).[3] Children and adults with autism wander from all types of settings, such as educational, therapeutic, residential, camp programs, outdoor, public places, and home settings.[4]

Approximately half of children with autism have a tendency to wander or elope.[5] Families report that about half of the children who have a tendency to wander have gone missing long enough to cause serious concern. A substantial portion of those children who wander are at risk for bodily harm.[6] Of those children who went missing, 24% were in danger of drowning and 65% were in danger of a traffic injury.[7]

Elopement and Wandering of Individuals with Alzheimer's Disease

Wandering and elopement can also be dangerous for individuals with Alzheimer's disease and other forms of dementia, as the individual may become disoriented, even in familiar places and may not remember his or her name or address to assist rescuers. An individual with Alzheimer's disease who wanders or elopes is most often looking for someone or something familiar, escaping a source of stress of anxiety, or may be reliving the past.[8]

Statistics indicate that in the U.S., more than 34,000 individuals with Alzheimer's disease wander out of their homes or care facilities each year.[9] Six in ten people with some form of dementia will wander or elope;[10] additionally, it is estimated that 11-24% of institutionalized dementia patients wander.[11]

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[1] Russell Lang, et al., *Treatment of elopement in individuals with developmental disabilities: A systematic review*, RESEARCH IN DEVELOPMENTAL DISABILITIES 30 (2009) 670–681, http://scholar.google.com/scholar_url?url=http://www.researchgate.net/profile/Christina_Fragale/publication/23716164_Treatment_of_elopement_in_individuals_with_developmental_disabilities_a_systematic_review/links/53e3f99e0cf21cc29fc75814.pdf&hl=en&sa=X&scisig=AAGBfm33xL1MHakTS87tq_NEgw_oFixP4w&nossl=1&oi=scholarr (last visited October 15, 2015).

[2] *Autism & Wandering*, AWAARE COLLABORATION, http://awaare.nationalautismassociation.org/autism-wandering/ (last visited October 15, 2015).

[3] *Id.*

[4] *Id.*

[5] Michelle Diament, *Autism Wandering Poses "Critical Safety Issue," Survey Suggests*, DISABILITY SCOOP, (April 21, 2011), http://www.disabilityscoop.com/2011/04/21/autism-wandering-survey/12953/ (last visited October 15, 2015).

[6] Connie Anderston, et al., *Occurrence and Family Impact of Elopement in Children With Autism Spectrum Disorders*, PEDIATRICS, (October 8, 2012), *available at* http://pediatrics.aappublications.org/content/early/2012/10/02/peds.2012-0762.full.pdf+html (last visited October 15, 2015).

[7] *Id.*

[8] *Alzheimer's: Understand and control wandering*, MAYO CLINIC, http://www.mayoclinic.org/healthy-living/caregivers/in-depth/alzheimers/art-20046222 (last visited October 15, 2015).

[9] *Wandering and Elopement Resources*, NATIONAL COUNCIL OF CERTIFIED DEMENTIA PRACTITIONERS, http://www.nccdp.org/wandering.htm (last visited October 15, 2015).

[10] *Wandering and Getting Lost*, ALZHEIMER'S ASSOCIATION, http://www.alz.org/care/alzheimers-dementia-wandering.asp (last visited October 15, 2015).

[11] *Supra*, note 9.

Personal Devices for Individuals with Special Needs

Anti-wandering and global-positioning system (GPS)[12] tracking devices can be worn as a bracelet, attached to an individual's shoe or belt loop, or sewn into clothing. If an individual goes missing, a caregiver can utilize products and services from the monitoring company for the device to pinpoint the wearer's location. There are a number of anti-wandering and GPS tracking devices on the market that are specially designed to aid in search-and-rescue efforts for individuals with special needs who are prone to wander. Two examples are the Protect and Locate (PAL) tracking system through Project Lifesaver and the Amber Alert GPS.

The PAL is a tracking device that is worn as a watch by the individual at risk of wandering and has a companion portable receiver that notifies the caregiver of a wandering event. Through the use of cell ID location and GPS technologies, it provides the location of a wearer accurate to nine feet.[13] If an individual wearing a PAL device wanders outside of a set perimeter, the caregiver's receiver will receive an alert and the caregiver will receive email and text alerts with the date and location of the wandering event.[14] Additionally, a caregiver can press the "find" button on his or her receiver to have the location of the individual and the address displayed on the portable receiver. If the individual wearing the PAL watch/transmitter is lost, he or she can push the panic button on the PAL watch to have the current address shown on the caregiver's portable receiver.[15] The PAL tracking system costs $249.99 per unit and requires a monitoring/service plan of $29.95 per month.[16]

The Amber Alert GPS is a small disk that can be put in an individual's purse or backpack or, with the purchase of an accessory, can be attached to the individual. The Amber Alert GPS syncs with an online tracking portal and mobile application for iPhone, Blackberry, and Droid cellular phones to provide the real-time location of the wearer.[17] It allows the caregiver to designate up to 20 "safe zones" and receive an alert each time a wearer leaves one of the designated safe zones.[18] It also has a two-way voice feature to allow the caregiver and wearer to talk to each other through the device and an SOS button that the wearer can push in the event of an emergency to notify the caregiver and up to ten additional individuals.[19] Amber Alert GPS costs $179 per unit and requires a monitoring/service plan of $10-42 per month.[20]

Center for Autism and Related Disabilities

The Center for Autism and Related Disabilities (CARD) works with families, caregivers, and professionals to optimize the potential of people with autism and related disabilities.[21] CARD serves children and adults of all levels of intellectual functioning who have autism, autistic-like disabilities, pervasive developmental disorder, dual sensory impairments (deaf-blindness), or a vision or hearing loss with another disabling condition.[22]

There are seven non-residential CARD centers across the state. The Center for Autism and Related Disabilities at the University of Florida (CARD UF) serves fourteen counties in North Central Florida.[23]

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[12] GPS is a network of computers and earth-orbiting satellites that allows an earth-bound receiver to determine its precise location. BLACK'S LAW DICTIONARY (10th ed. 2014).

[13] *PAL Info*, PROJECT LIFESAVER, http://www.projectlifesaver.org/Pal-info/ (last visited October 15, 2015).

[14] *Id.*

[15] *Id.*

[16] *10 Resources And Devices For Wandering Children With Autism*, FRIENDSHIP CIRCLE BLOG, (June 1, 2011; updated 2014) http://www.friendshipcircle.org/blog/2011/06/01/10-resources-for-wandering-children-with-autism/ (last visited October 15, 2015).

[17] *Amber Alert GPS Smart Locator*, AMBER ALERT GPS, https://www.amberalertgps.com/products (last visited October 15, 2015).

[18] *Id.*

[19] *Id.*

[20] *Supra*, note 16.

[21] CENTER FOR AUTISM AND RELATED DISABILITIES UNIVERSITY OF FLORIDA, *About CARD FAQ*, http://card.ufl.edu/about-card/faq/ (last visited October 15, 2015).

[22] *Id.*

[23] *Id.*

The counties served by CARD UF are Alachua, Bradford, Citrus, Columbia, Dixie, Gilchrist, Hamilton, Hernando, Lafayette, Levy, Marion, Putnam, Suwannee, and Union.[24]

Effect of the Bill

The bill creates the "Project Leo" pilot program in Alachua, Baker, Columbia, Hamilton, and Suwanee Counties to provide personal devices to aid search-and-rescue efforts for persons with special needs in case of elopement. The bill does not define the term "special needs."

The project will be developed and administered by CARD UF. The bill directs CARD UF to select participants based on criteria it develops, which must include, at a minimum, the individual's risk of elopement. The participants will be selected on a first-come, first-served basis. The number of participants must be determined based on available funding within the center's existing resources.

Participation in the project is voluntary. Participants will be provided a personal device to aid in search-and-rescue efforts which is attachable to clothing or otherwise wearable. The respective county sheriff's offices will distribute these devices to the project participants. CARD UF will fund any cost associated with the monitoring of the devices.

The bill requires CARD UF to submit preliminary and final reports to the Governor, the Speaker of the House of Representatives, and the President of the Senate. Both reports must include:

- The criteria used to select the participants;
- The number of participants;
- The age of the participants;
- The nature of the participants' special needs;
- The number of participants who elope;
- The amount of time taken to rescue a participant following elopement; and
- The outcome of any rescue attempts.

Additionally, the final report must include recommendations for modifications or continued implementation of the program.

The bill provides that the "Project Leo" is subject to available funding within CARD UF's existing resources and expires on June 30, 2018. However, the bill also provides that $100,000 from the General Revenue Fund for Fiscal Year 2016-2017 is appropriated to CARD UF to implement the act.

B. SECTION DIRECTORY:

Section 1. Creates s. 937.041, F.S., relating to missing persons with special needs pilot program.

Section 2. Provides an appropriation.

Section 3. Provides an effective date of July 1, 2016.

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.

[24] CENTER FOR AUTISM AND RELATED DISABILITIES UNIVERSITY OF FLORIDA, *About CARD*, http://card.ufl.edu/about-card/ (last visited October 15, 2015).

2. Expenditures:

The bill is subject to available funding within the existing resources of the Center for Autism and Related Disabilities at the University of Florida (CARD UF).

The bill provides an appropriation of $100,000 in nonrecurring general revenue funds for the 2016-2017 fiscal year to CARD UF to purchase personal devices to aid search and rescue efforts.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On November 17, 2015, the Criminal Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment adds Alachua County to the list of counties served by the pilot project.

On January 28, 2016, the Education Appropriations Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment clarified that the appropriation of $100,000 in general revenue is nonrecurring and that it is specifically for the purchase of personal devices to aid search and rescue efforts.

This bill analysis is drafted to the committee substitute as passed by the Education Appropriations Subcommittee.

A bill to be entitled

An act relating to missing persons with special needs; creating s. 937.041, F.S.; creating a pilot project in specified counties to provide personal devices to aid search-and-rescue efforts for persons with special needs; providing for administration of the project; requiring reports; providing for expiration; providing an appropriation; providing an effective date.

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

Section 1. Section 937.041, Florida Statutes, is created to read:

937.041 Missing persons with special needs pilot project.—

(1) There is created a pilot project in Alachua, Baker, Columbia, Hamilton, and Suwannee Counties to be known as "Project Leo" to provide personal devices to aid search-and-rescue efforts for persons with special needs in the case of elopement.

(2) Participants for the pilot project shall be selected based on criteria developed by the Center for Autism and Related Disabilities at the University of Florida. Criteria for participation shall include, at a minimum, the person's risk of elopement. The qualifying participants shall be selected on a first-come, first-served basis by the center to the extent of available funding within the center's existing resources. The

project shall be voluntary and free to participants.

(3) Under the pilot project, personal devices to aid search-and-rescue efforts that are attachable to clothing or otherwise worn shall be provided by the center to the sheriff's offices of the participating counties. The devices shall be distributed to project participants by the county sheriff's offices in conjunction with the center. The center shall fund any costs associated with monitoring the devices.

(4) The center shall submit a preliminary report by December 1, 2016, and a final report by December 15, 2017, to the Governor, the President of the Senate, and the Speaker of the House of Representatives describing the implementation and operation of the pilot project. At a minimum, the report shall include the criteria used to select participants, the number of participants, the age of the participants, the nature of the participants' special needs, the number of participants who elope, the amount of time taken to rescue such participants following elopement, and the outcome of any rescue attempts. The final report shall also provide recommendations for modification or continued implementation of the project.

(5) The project shall operate to the extent of available funding within the center's existing resources.

(6) This section expires June 30, 2018.

Section 2. For the 2016-2017 fiscal year, the sum of $100,000 in nonrecurring general revenue funds is appropriated to the Center for Autism and Related Disabilities at the

University of Florida for the purchase of personal devices to aid search-and-rescue efforts for missing persons with special needs.

Section 3. This act shall take effect July 1, 2016.

Amendment No. 1

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

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Porter offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Section 937.041, Florida Statutes, is created to read:

937.041 Missing persons with special needs pilot project.—

(1) There is created a pilot project in Alachua, Baker, Columbia, Hamilton, and Suwannee Counties to be known as "Project Leo" to provide personal devices to aid search-and-rescue efforts for persons with special needs in the case of elopement.

(2) There is created an additional pilot project in Broward and Palm Beach Counties to provide personal devices to aid search-and-rescue efforts for persons with special needs in the case of elopement.

(3) Participants for the pilot project in the counties specified in subsection (1) shall be selected based on criteria developed by the Center for Autism and Related Disabilities at the University of Florida. Participants for the pilot project specified in subsection (2) shall be selected based on criteria developed by the Center for Autism and Related Disabilities at Florida Atlantic University. Criteria for participation in the pilot projects must include, at a minimum, the person's risk of elopement. The qualifying participants shall be selected on a first-come, first-served basis by the respective centers to the extent of available funding within their existing resources. The project must be voluntary and free of charge to participants.

(4) Under the pilot projects, personal devices to aid search-and-rescue efforts which are attachable to clothing or otherwise worn shall be provided by the centers to the sheriff's offices of the participating counties. The devices shall be distributed to project participants by the county sheriff's offices in conjunction with the centers. The centers shall fund any costs associated with monitoring the devices.

(5) The centers shall submit a preliminary report by December 1, 2016, and a final report by December 15, 2017, to the Governor, the President of the Senate, and the Speaker of the House of Representatives describing the implementation and operation of the pilot projects. At a minimum, the report must include the criteria used to select participants, the number of participants, the nature of the participants' special needs, the

number of participants who elope, the amount of time taken to rescue such participants following elopement, and the outcome of any rescue attempts. The final report must also provide recommendations for modification or continued implementation of the projects.

(6) The projects shall operate to the extent of available funding within the respective centers' existing resources.

(7) This section expires June 30, 2018.

Section 2. For the 2016-2017 fiscal year, the sum of $100,000 is appropriated from the General Revenue Fund to the Center for Autism and Related Disabilities at the University of Florida and the sum of $100,000 is appropriated from the General Revenue Fund to the Center for Autism and Related Disabilities at Florida Atlantic University for the purpose of implementing this act.

Section 3. This act shall take effect July 1, 2016.

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

Remove line 3 and insert:

creating s. 937.041, F.S.; creating pilot projects in

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 81 Infectious Disease Elimination Pilot Program
SPONSOR(S): Health Quality Subcommittee; Edward and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/CS/SB 242

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Quality Subcommittee	11 Y, 1 N, As CS	Siples	O'Callaghan
2) Judiciary Committee		Aziz PA	Havlicak RN
3) Health & Human Services Committee			

SUMMARY ANALYSIS

The bill amends s. 381.0038, F.S., to create the Miami-Dade Infectious Disease Elimination Act (IDEA). The IDEA authorizes the University of Miami and its affiliates to establish a needle and syringe exchange pilot program (pilot program) in Miami-Dade County. The pilot program is to offer free, clean, and unused needles and hypodermic syringes as a means to prevent the transmission of HIV/AIDS and other blood-borne diseases among intravenous drug users, their sexual partners, and offspring. The University of Miami must operate the pilot program at fixed locations on its property or the property of its affiliates.

The pilot program must:

- Provide maximum security of the exchange site and equipment;
- Account for the number, disposal, and storage of needles and syringes;
- Adopt any measure to control the use and dispersal of sterile needles and syringes;
- Operate a one sterile needle and syringe unit to one used unit exchange ratio; and
- Make available educational materials; HIV and viral hepatitis counseling and testing; referral services to provide education regarding HIV, AIDS, and viral hepatitis transmission; and drug-abuse prevention and treatment counseling and referral services.

The bill provides that the possession, distribution, or exchange of needles or syringes as part of the pilot program does not violate the Florida Comprehensive Drug Abuse Prevention and Control Act under ch. 893, F.S., or any other law. However, pilot program staff and participants are not immune from prosecution for the possession or redistribution of needles or syringes in any form if acting outside of the pilot program.

The bill requires the collection of data for annual and final reporting purposes, but prohibits the collection of any personal identifying information from a participant. The pilot program expires on July 1, 2021. Six months prior to expiration, the Office of Program Policy Analysis and Government Accountability is required to submit a report to the Legislature that includes data on the pilot program and a recommendation on whether the pilot program should continue.

The bill prohibits the use of state, county, or municipal funds to operate the pilot program and requires the use of grants and donations from private sources to fund the program. The bill includes a severability clause.

The bill may have a positive fiscal impact on state government or local governments. *See* FISCAL COMMENTS.

The bill provides an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Needle and syringe exchange programs (NSEPs) provide sterile needles and syringes in exchange for used needles and syringes to reduce the transmission of human immunodeficiency virus (HIV) and other blood-borne infections associated with reuse of contaminated needles and syringes by injection-drug users (IDUs).

Federal Ban on Funding

In 2009, Congress passed the FY 2010 Consolidated Appropriations Act, which contained language that removed the ban on federal funding of NSEPs. In July 2010, the U.S. Department of Health and Human Services issued implementation guidelines for programs interested in using federal dollars for NSEPs.[1]

However, on December 23, 2011, President Obama signed the FY 2012 omnibus spending bill that, among other things, reinstated the ban on the use of federal funds for NSEPs; this step reversed the 111th Congress' 2009 decision to allow federal funds to be used for NSEPs.[2]

Safe Sharps Disposal

Improperly discarded sharps pose a serious risk for injury and infection to sanitation workers and the community. "Sharps" is a medical term for devices with sharp points or edges that can puncture or cut skin.[3]

Examples of sharps include:[4]

- Needles – hollow needles used to inject drugs (medication) under the skin.
- Syringes – devices used to inject medication into or withdraw fluid from the body.
- Lancets, also called "fingerstick" devices – instruments with a short, two-edged blade used to get drops of blood for testing. Lancets are commonly used in the treatment of diabetes.
- Auto Injectors, including epinephrine and insulin pens – syringes pre-filled with fluid medication designed to be self-injected into the body.
- Infusion sets – tubing systems with a needle used to deliver drugs to the body.
- Connection needles/sets – needles that connect to a tube used to transfer fluids in and out of the body. This is generally used for patients on home hemodialysis.

On November 8, 2011, the U.S. Food and Drug Administration (FDA) launched a new website for patients and caregivers on the safe disposal of sharps that are used at home, at work, and while traveling.[5]

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[1] Matt Fisher, *A History of the Ban on Federal Funding for Syringe Exchange Programs*, The Global Health Policy Center, (Feb. 6, 2012), available at http://www.smartglobalhealth.org/blog/entry/a-history-of-the-ban-on-federal-funding-for-syringe-exchange-programs/ (last visited October 10, 2015).
[2] *Id.*
[3] Food and Drug Administration, *Needles and Other Sharps (Safe Disposal Outside of Health Care Settings)*, available at http://www.fda.gov/MedicalDevices/ProductsandMedicalProcedures/HomeHealthandConsumer/ConsumerProducts/Sharps/ucm200256 47.htm (last visited October 10, 2015).
[4] *Id.*
[5] Food and Drug Administration, *FDA launches website on safe disposal of used needles and other "sharps"*, FDA News Release, Nov. 8, 2011, available at http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm278851.htm (last visited on October 10, 2015).

According to the FDA, used needles and other sharps are dangerous to people and animals if not disposed of safely because they can injure people and spread infections that cause serious health conditions. The most common infections from such injuries are Hepatitis B (HBV), Hepatitis C (HCV), and Human Immunodeficiency Virus (HIV).[6]

Approximately 2.6% of the U.S. population[7] has injected illicit drugs.[8] The danger of used needles and other sharps combined with the number of injections of illicit drugs has prompted communities to try and manage the disposal of sharps within the illicit drug population. In San Francisco in 2000, approximately 2 million syringes were recovered at NSEPs, and an estimated 1.5 million syringes were collected through a pharmacy-based program that provided free-of-charge sharps containers and accepted filled containers for disposal. As a result, an estimated 3.5 million syringes were recovered from community syringe users and safely disposed of as infectious waste.[9] Other NSEPs offer methods for safe disposal of syringes after hours. For example, in Santa Cruz, California, the Santa Cruz Needle Exchange Program, in collaboration with the Santa Cruz Parks and Recreation Department, installed 12 steel sharps containers in public restrooms throughout the county.[10]

National Data & Survey Results

In 2010, 8 percent (3,900) of the estimated 47,500 new HIV infections in the U.S. were attributed to injection drug use.[11] According to the Centers for Disease Control and Prevention (CDC), NSEPs can help prevent blood-borne pathogen transmission by increasing access to sterile syringes among IDUs and enabling safe disposal of used needles and syringes.[12] Often, programs also provide other public health services, such as HIV testing, risk-reduction education, and referrals for substance-abuse treatment.[13]

Based on findings of a survey conducted by staff from the Beth Israel Medical Center in New York City and the North American Syringe Exchange Network, there were 184 NSEPs operating in 36 states, the District of Columbia, and Puerto Rico as of March 2009,[14] compared to 148 NSEPs in 2002 and 68 NSEPs in 1995.[15] The survey found that the proportion of NSEP budgets coming from public sources increased from 62% during 1994-1995 to 79% in 2008.[16]

In 2011, the Beth Israel Medical Center conducted another survey of NSEPs in the U.S.[17] The results revealed that the most frequent drug being used by participants was heroin, followed by cocaine, and

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[6] *Supra* fn. 3.
[7] This population represents persons aged 13 years or older in 2011.
[8] Public Library of Science; Lansky, A., Finlayson, T., Johnson, C., et. al.; *Estimating the Number of Persons Who Inject Drugs in the United States by Meta-Analysis to Calculate National Rates of HIV and Hepatitis C Virus Infections*; May 19, 2014; •DOI: 10.1371/journal.pone.0097596; available at http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0097596 (last visited on October 15, 2015).
[9] *Id.* (citing Brad Drda et al., San Francisco Safe Needle Disposal Program, 1991—2001, 42 J. Am Pharm Assoc. S115—6 (2002), available at http://japha.org/article.aspx?articleid=1035735) (last visited October 11, 2015).
[10] Centers for Disease Control and Prevention, *Update: Syringe Exchange Programs --- United States, 2002*, *supra* note 7.
[11] Centers for Disease Control and Prevention, *HIV and Injection Drug Use*, April 2015, available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAAahUKEwj8nbvLnbvIAhUEFR4KHUQuAPU&url=http%3A%2F%2Fwww.cdc.gov%2Fhiv%2Fpdf%2Fg-l%2Fcdc-hiv-idu-fact-sheet.pdf&usg=AFQjCNHXNVbqd729aWoMiRXcVhqtQsAJ9Q&sig2=s88dqAr_jEqG8X3gJlNBVg&bvm=bv.104819420,d.dmo (last visited on October 11, 2015).
[12] Centers for Disease Control and Prevention, *Syringe Exchange Programs---United States, 2008*, November 19, 2010, 59(45); 1488-1491, available at http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5945a4.htm/Syringe-Exchange-Programs-United-States-2008 (last visited on October 15, 2015).
[13] *Id. See* Table 3.
[14] Supra fn. 12.
[15] Centers for Disease Control and Prevention, Update: Syringe Exchange Programs---United States, 2002, July 15, 2005, 54(27); 673-676, available at http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5427a1.htm (last visited on October 15, 2015).
[16] *Supra* fn. 12.
[17] North American Syringe Exchange Network, *2011 Beth Israel Survey, Results Summary*, (PowerPoint slide) available at http://www.nasen.org/news/2012/nov/29/2011-beth-israel-survey-results-summary/ (last visited October 11, 2015).

that usually the problems NSEPs encountered had to do with the lack of resources and staff shortages.[18]

A separate 2014 report, examining the results of a needle exchange program in the District of Columbia shows an 81 percent decline between 2008 and 2012 in the number of HIV cases in which injection drug use was reported as transmission mode.[19]

A 2012 study compared improper public syringe disposal between Miami, a city without NESPs, and San Francisco, a city with NSEPs.[20] Using visual inspection walk-throughs of high drug-use public areas, the study found that Miami was eight times more likely to have syringes improperly disposed of in public areas.[21]

Heroin Use in Florida

An estimated 1.2 million people in the U.S. are living with HIV/AIDS,[22] and it has been estimated that one-third of those cases are linked directly or indirectly to injection drug use, including the injection of heroin.[23] In 2014, the National Institute on Drug Abuse reported an epidemic of heroin use in South Florida and particularly in Miami-Dade County.[24] The number of heroin-related deaths in Miami-Dade County jumped to 60 in 2014 from 40 in 2013 and 32 in 2012. Statewide, Florida has experienced a steady upswing in heroin deaths, which rose to 408 in 2014 from 199 in 2013 and 108 in 2012.[25]

Florida Comprehensive Drug Abuse Prevention and Control Act

Section 893.147, F.S., regulates the use or possession of drug paraphernalia. Currently, it is unlawful for any person to use, or to possess with intent to use, drug paraphernalia:

- To plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance in violation of ch. 893, F.S.; or
- To inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of ch. 893, F.S.

Any person who violates the above provision is guilty of a misdemeanor of the first degree.[26]

Moreover, it is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used:[27]

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[18] *Id.*
[19] The District of Columbia Department of Health, *2013 Annual Epidemiology and Surveillance Report, Section 2: Newly Diagnosed HIV Cases (2014)*, available at http://doh.dc.gov/page/2013-annual-epidemiology-and-surveillance-report (last visited October 11, 2015).
[20] Hansel E. Tookes, et al., *A Comparison of Syringe Disposal Practices Among Injection Drug Users in a City with Versus a City Without Needle and Syringe Programs*, 123 Drug & Alcohol Dependence 255 (2012), available at http://www.ncbi.nlm.nih.gov/pubmed/22209091 (last visited October 11, 2015).
[21] *Id.* at 255 (finding "44 syringes/1000 census blocks in San Francisco, and 371 syringes/1000 census blocks in Miami.").
[22] Centers for Disease Control and Prevention, *HIV in the United States: At a Glance*, accessible at: http://www.cdc.gov/hiv/statistics/basics/ataglance.html (last visited October 11, 2015).
[23] Health Resources and Services Administration, *Innovative Programs for HIV Positive Substance Users*, available at http://www.drugabuse.gov/publications/topics-in-brief/linked-epidemics-drug-abuse-hivaids (last visited October 11, 2015).
[24] James N. Hall, *Drug Abuse Patterns and Trends in Miami-Dade and Broward Counties, Florida—Update: January 2014*, available at http://www.drugabuse.gov/about-nida/organization/workgroups-interest-groups-consortia/community-epidemiology-work-group-cewg/meeting-reports/highlights-summaries-january-2014/miami (last visited October 11, 2015).
[25] Florida Department of Law Enforcement, Medical Examiners Commission, *Drugs Identified in Deceased Persons by Florida Medical Examiners, 2014 Annual Report*, (September 2015), available at http://www.fdle.state.fl.us/Content/getdoc/0f1f79c0-d251-4904-97c0-2c6fd4cb3c9f/MEC-Publications-and-Forms.aspx (last visited October 11, 2015).
[26] A first degree misdemeanor is punishable by a term of imprisonment not to exceed 1 year and a $1,000 fine. Sections 775.082 and 775.083, F.S.
[27] Section 893.147(2), F.S.

- To plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance in violation of ch. 893, F.S.; or
- To inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of ch. 893, F.S.

Any person who violates the above provision is guilty of a felony of the third degree.[28]

Federal Drug Paraphernalia Statute

Under federal law, it is unlawful for any person to sell or offer for sale drug paraphernalia, use the mails or any other facility of interstate commerce to transport drug paraphernalia or to import or export drug paraphernalia.[29] The penalty for such crime is imprisonment for not more than three years and a fine.[30] Persons authorized by state law to possess or distribute drug paraphernalia are exempt from the federal drug paraphernalia statute.[31]

EFFECT OF PROPOSED CHANGES

The bill amends s. 381.0038, F.S., to allow the University of Miami and its affiliates to establish a 5-year needle and syringe exchange pilot program in Miami-Dade County. The pilot program is to offer free, clean, and unused needles and hypodermic syringes as a means to prevent the transmission of HIV/AIDS and other blood-borne diseases among intravenous drug users and their sexual partners and offspring. The University of Miami must operate the pilot program at fixed locations on its property or the property of its affiliates.

The exchange program must:

- Provide maximum security of the exchange site and equipment;
- Account for the number, disposal, and storage of needles and syringes;
- Adopt any measure to control the use and dispersal of sterile needles and syringes;
- Operate a 1 sterile to 1 used needle and syringe exchange ratio; and
- Make available educational materials; HIV and viral hepatitis counseling and testing; referral services to provide education regarding HIV, AIDS, and viral hepatitis transmission; and drug-abuse prevention and treatment counseling and referral services.

The bill provides that the possession, distribution, or exchange of needles or syringes as part of the pilot program does not violate the Florida Comprehensive Drug Abuse Prevention and Control Act under ch. 893, F.S., or any other law. However, pilot program staff and participants are not immune from prosecution for the possession or redistribution of needles or syringes in any form if acting outside of the pilot program.

The bill requires the collection of data for annual and final reporting purposes, but prohibits the collection of any personal identifying information from a participant. The data collected must include:

- The number of participants served;
- The number of needles and syringes exchanged and distributed;
- The demographic profiles of the participants served;
- The number of participants entering drug counseling and treatment;
- The number of participants receiving HIV, AIDS, or viral hepatitis testing;

[28] 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.
[29] 21 U.S.C. § 863(a).
[30] 21 U.S.C. § 863(b).
[31] 21 U.S.C. § 863(f)(1).

- The rates of HIV, AIDS, viral hepatitis, or other blood borne disease before the pilot program began and every subsequent year thereafter; and
- Other data deemed necessary for the pilot program.

The pilot program expires on July 1, 2021. Six months prior to expiration, the Office of Program Policy Analysis and Government Accountability is required to submit a report to the President of the Senate and the Speaker of the House that includes the data listed above on the pilot program and a recommendation on whether the pilot program should continue.

The bill prohibits the use of state, county, or municipal funds to operate the pilot program and requires the use of grants and donations from private sources to fund the program.

The bill includes a severability clause[32] and provides an effective date of July 1, 2016.

B. SECTION DIRECTORY:

Section 1. Creates an unnumbered section to name the act the "Miami-Dade Infectious Disease Elimination Act (IDEA)."
Section 2. Amends s. 381.0038, F.S., relating to education.
Section 3. Creates an unnumbered section to provide a severability clause.
Section 4. Provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The pilot program required by the bill may significantly reduce state and local government expenditures for the treatment of blood borne diseases associated with intravenous drug use for individuals in Miami-

[32] A "severability clause" is a provision of a contract or statute that keeps the remaining provisions in force if any portion of that contract or statute is judicially declared void or unconstitutional. Courts may hold a law constitutional in one part and unconstitutional in another. Under such circumstances, a court may sever the valid portion of the law from the remainder and continue to enforce the valid portion. *See Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Florida Hosp. Waterman, Inc. v. Buster*, 984 So.2d 478 (Fla. 2008); *Ray v. Mortham*, 742 So.2d 1276 (Fla. 1999); and *Wright v. State*, 351 So.2d 708 (Fla. 1977).

Dade County.[33] The reduction in expenditures for such treatments depends on the extent to which the needle and syringe exchange pilot program reduces transmission of blood-borne diseases among intravenous drug users, their sexual partners, offspring, and others who might be at risk of transmission.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

   None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

   None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On October 20, 2015, the Health Quality Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. The first amendment restricted the operation of the pilot program to fixed locations on the property of the University of Miami or its affiliates. The second amendment prohibited the pilot program from using not only state funds, but also county or municipal funds. The analysis is drafted to the committee substitute as passed by the Health Quality Subcommittee.

[33] The State of Florida and county governments incur costs for HIV/AIDS treatment through a variety of programs, including Medicaid, the AIDS Drug Assistance Program, and the AIDS Insurance Continuation Program. The lifetime treatment cost of an HIV infection is estimated at $379,668 (in 2010 dollars). Centers for Disease Control and Prevention, *HIV Cost-effectiveness*, (Apr. 16, 2013) available at http://www.cdc.gov/hiv/prevention/ongoing/costeffectiveness/ (last visited October 11, 2015). Miami-Dade County has 3,274 reported cases of individuals living with HIV/AIDS that have an IDU-associated risk. Florida Department of Health, *HIV Infection Among Those with an Injection Drug Use-Associated Risk, Florida, 2012* (PowerPoint slide) (Sept. 17, 2013), available at http://www.floridahealth.gov/diseases-and-conditions/aids/surveillance/_documents/HIV-AIDS-slide%20sets/IDU_2012.pdf (last visited October 11, 2015) (noting that HIV IDU infection risk includes IDU cases, men who have sex with men (MSM)/IDU, heterosexual sex with IDU, children of IDU mom). If 10 percent of those individuals with an IDU-associated risk had avoided infection, this would represent a savings in treatment costs of approximately $124 million.

A bill to be entitled

An act relating to an infectious disease elimination pilot program; creating the "Miami-Dade Infectious Disease Elimination Act (IDEA)"; amending s. 381.0038, F.S.; authorizing the University of Miami and its affiliates to establish a sterile needle and syringe exchange pilot program in Miami-Dade County; specifying locations for operation of the pilot program; establishing pilot program criteria; providing that the distribution of needles and syringes under the pilot program is not a violation of the Florida Comprehensive Drug Abuse Prevention and Control Act or any other law; providing conditions under which a pilot program staff member or participant may be prosecuted; prohibiting the collection of identifying information from program participants; providing funding for the pilot program through private grants and donations; providing for expiration of the pilot program; requiring the Office of Program Policy Analysis and Government Accountability to submit a report and recommendations regarding the pilot program to the Legislature; providing for severability; providing an effective date.

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

Section 1. This act may be cited as the "Miami-Dade Infectious Disease Elimination Act (IDEA)."

Section 2. Section 381.0038, Florida Statutes, is amended to read:

381.0038 Education; sterile needle and syringe exchange pilot program.—The Department of Health shall establish a program to educate the public about the threat of acquired immune deficiency syndrome.

(1) The acquired immune deficiency syndrome education program shall:

(a) Be designed to reach all segments of Florida's population;

(b) Contain special components designed to reach non-English-speaking and other minority groups within the state;

(c) Impart knowledge to the public about methods of transmission of acquired immune deficiency syndrome and methods of prevention;

(d) Educate the public about transmission risks in social, employment, and educational situations;

(e) Educate health care workers and health facility employees about methods of transmission and prevention in their unique workplace environments;

(f) Contain special components designed to reach persons who may frequently engage in behaviors placing them at a high risk of contracting ~~for acquiring~~ acquired immune deficiency

syndrome;

(g) Provide information and consultation to state agencies to educate all state employees; ~~and~~

(h) Provide information and consultation to state and local agencies to educate law enforcement and correctional personnel and inmates;~~.~~

(i) Provide information and consultation to local governments to educate local government employees;~~.~~

(j) Make information available to private employers and encourage them to distribute this information to their employees;~~.~~

(k) Contain special components which emphasize appropriate behavior and attitude change; and~~.~~

(l) Contain components that include information about domestic violence and the risk factors associated with domestic violence and AIDS.

(2) The education program designed by the Department of Health shall use ~~utilize~~ all forms of the media and shall place emphasis on the design of educational materials that can be used by businesses, schools, and health care providers in the regular course of their business.

(3) The department may contract with other persons in the design, development, and distribution of the components of the education program.

(4) The University of Miami and its affiliates may establish a single sterile needle and syringe exchange pilot

program in Miami-Dade County. The pilot program shall operate at fixed locations on the property of the University of Miami or its affiliates. The pilot program shall offer the free exchange of clean, unused needles and hypodermic syringes for used needles and hypodermic syringes as a means to prevent the transmission of HIV, AIDS, viral hepatitis, or other blood-borne diseases among intravenous drug users and their sexual partners and offspring.

(a) The pilot program shall:

1. Provide for maximum security of exchange sites and equipment, including an accounting of the number of needles and syringes in use, the number of needles and syringes in storage, safe disposal of returned needles, and any other measure that may be required to control the use and dispersal of sterile needles and syringes.

2. Operate a one-to-one exchange, whereby the participant shall receive one sterile needle and syringe unit in exchange for each used one.

3. Make available educational materials; HIV and viral hepatitis counseling and testing; referral services to provide education regarding HIV, AIDS, and viral hepatitis transmission; and drug-abuse prevention and treatment counseling and referral services.

(b) The possession, distribution, or exchange of needles or syringes as part of the pilot program established under this

subsection is not a violation of any part of chapter 893 or any other law.

(c) A pilot program staff member, volunteer, or participant is not immune from criminal prosecution for:

1. The possession of needles or syringes that are not a part of the pilot program; or

2. Redistribution of needles or syringes in any form, if acting outside the pilot program.

(d) The pilot program shall collect data for annual and final reporting purposes, which shall include information on the number of participants served, the number of needles and syringes exchanged and distributed, the demographic profiles of the participants served, the number of participants entering drug counseling and treatment, the number of participants receiving HIV, AIDS, or viral hepatitis testing, and other data deemed necessary for the pilot program. However, personal identifying information may not be collected from a participant for any purpose.

(e) State, county, or municipal funds may not be used to operate the pilot program. The pilot program shall be funded through grants and donations from private resources and funds.

(f) The pilot program expires July 1, 2021. Six months before the pilot program expires, the Office of Program Policy Analysis and Government Accountability shall submit a report to the President of the Senate and the Speaker of the House of Representatives that includes the data collection requirements

established in this subsection; the rates of HIV, AIDS, viral hepatitis, or other blood-borne diseases before the pilot program began and every subsequent year thereafter; and a recommendation on whether to continue the pilot program.

Section 3. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Section 4. This act shall take effect July 1, 2016.

Amendment No. 1

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

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Edwards offered the following:

Amendment (with title amendment)

Remove lines 97-133 and insert:

3. Make available educational materials and referrals to education regarding the transmission of HIV, viral hepatitis, and other blood-borne diseases; provide referrals to drug abuse prevention and treatment; and provide or refer for HIV and viral hepatitis screening.

(b) The possession, distribution, or exchange of needles or syringes as part of the pilot program established under this subsection is not a violation of any part of chapter 893 or any other law.

(c) A pilot program staff member, volunteer, or participant is not immune from criminal prosecution for:

1. The possession of needles or syringes that are not a part of the pilot program; or

2. Redistribution of needles or syringes in any form, if acting outside the pilot program.

(d) The pilot program shall collect data for quarterly, annual and final reporting purposes. The reports shall include information on the number of participants served, the number of needles and syringes exchanged and distributed, the demographic profiles of the participants served, the number of participants entering drug counseling and treatment, the number of participants receiving HIV, AIDS, or viral hepatitis testing, and other data deemed necessary for the pilot program. However, personal identifying information may not be collected from a participant for any purpose. Quarterly reports shall be submitted to the Department of Health in Miami-Dade County by October 15, January 15, April 15 and July 15 of each year. The first quarterly report shall be submitted on October 15, 2016. An annual report shall be submitted to the Department of Health by August 1 every year until the program expires. A final report is due on August 1, 2021, to the Department of Health and shall describe the performance and outcomes of the pilot program and include a summary of the information in the annual reports for all pilot program years.

(e) State, county, or municipal funds may not be used to operate the pilot program. The pilot program shall be funded through grants and donations from private resources and funds.

(f) The pilot program expires July 1, 2021.

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

Remove lines 15-24 and insert:

participant may be prosecuted; requiring the pilot program to collect data and issue reports; prohibiting the collection of identifying information from program participants; providing funding for the pilot program through private grants and donations; providing for the expiration of the pilot program; providing severability; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 293 Public Records/Juvenile Criminal History Records
SPONSOR(S): Criminal Justice Subcommittee; Pritchett and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 700

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N, As CS	Cox	White
2) Government Operations Subcommittee	10 Y, 0 N	Williamson	Williamson
3) Judiciary Committee		Cox JLC	Havlicak RH

SUMMARY ANALYSIS

Section 985.04(1), F.S., specifies that all records obtained under ch. 985, F.S., as a result of a juvenile being involved in the juvenile justice system, are confidential. However, s. 985.04(2), F.S., creates exceptions if the juvenile is:

- Taken into custody for a violation of law which, if committed by an adult, would be a felony;
- Found by a court to have committed three or more violations of law which, if committed by an adult, would be misdemeanors; or
- Transferred to the adult system.

Section 943.053, F.S., allows a juvenile's criminal history information to be disseminated in the same manner as that of an adult.

A recent ruling by Florida's First District Court of Appeal highlighted the inconsistency that exists between s. 985.04(1), F.S., (making most juvenile records confidential) and s. 943.053, F.S. (allowing a juvenile's record to be disseminated in the same manner as that of an adult). The bill addresses these inconsistencies by:

- Making the records of juveniles who have been found to have committed three or more misdemeanors confidential and exempt (currently they are not);
- Ensuring that the list of juvenile records that are not confidential and exempt under s. 985.04(2), F.S., is identical to the list of juvenile records deemed not to be confidential and exempt under s. 943.053, F.S.;
- Requiring the Florida Department of Law Enforcement (FDLE) to release juvenile criminal history records in a manner that takes into account the records' confidential and exempt status; and
- Specifying how FDLE must release juvenile criminal history records.

The bill provides that the exemptions repeal on October 2, 2021, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

FDLE reports that the bill may have a minimal fiscal impact on the department, which can be absorbed by existing resources. *See* the fiscal section of this bill analysis.

The bill is effective upon becoming a law.

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill expands current public records exemptions; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Public Records

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Art. I, s. 24(a) of the State Constitution provided the exemption passes by two-thirds vote of each chamber, states with specificity the public necessity justifying the exemption (public necessity statement), and is no broader than necessary to accomplish its purpose.[1]

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act[2] provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:[3]

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

The Open Government Sunset Review Act requires the automatic repeal of a public records exemption on October 2nd of the 5th year after its creation or substantial amendment, unless reenacted by the Legislature.[4] The Act also requires specified questions to be considered during the review process.

Confidential Information of Juveniles

Section 985.04(1), F.S., provides that all records obtained under ch. 985, F.S., resulting from a juvenile's involvement in the juvenile justice system, are confidential. However, several exceptions to the confidentiality of these records are provided. For example, s. 985.04(2), F.S., provides in part that the name, photograph, address, and crime or arrest report of certain juveniles is not confidential and exempt from s. 119.07(1), F.S., solely because of the juvenile's age, if the juvenile is:

- Taken into custody by a law enforcement officer for a violation of law which, if committed by an adult, would be a felony;
- Found by a court to have committed three or more violations of law which, if committed by an adult, would be misdemeanors;
- Transferred to the adult system under s. 985.557, s. 985.56, s. or 985.556, F.S.;
- Taken into custody by a law enforcement officer for a violation of law subject to s. 985.557(2)(b) or (d), F.S.; or
- Transferred to the adult system but sentenced to the juvenile system under s. 985.565, F.S.

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

Criminal Justice Information Program

Section 943.05, F.S., creates the Criminal Justice Information Program (CJIP) within the Florida Department of Law Enforcement (FDLE) to act as the state's central criminal justice information[5] repository. Law enforcement agencies, clerks of the court, the Department of Corrections (DOC), and the Department of Juvenile Justice (DJJ) are required to submit specified information on offenders they have had contact with for inclusion in CJIP.[6] This information can then be transmitted between criminal justice agencies.[7]

Currently, s. 943.051, F.S., requires state, county, municipal, or other law enforcement agencies to capture and electronically submit to FDLE the fingerprints, palm prints, and facial images of:

- Each adult person charged with or convicted of a felony, misdemeanor, or violation of a comparable ordinance;
- A juvenile who is charged with or found to have committed an offense which, if committed by an adult, would be a felony; or
- A minor who is charged with or found to have committed an enumerated offense, unless the minor is issued a civil citation pursuant to s. 985.12, F.S.

Dissemination of Criminal History Information under Chapter 943, F.S.

Criminal history information[8] compiled by CJIP may be released to criminal justice agencies, noncriminal justice agencies, and the private sector upon request in accordance with s. 943.053, F.S. Criminal justice agencies are provided criminal history information free of charge on a priority basis.[9] With some exceptions, noncriminal justice agencies and persons in the private sector are charged $24 per name submitted.[10]

Currently, s. 943.053, F.S., allows a juvenile's criminal history information to be disseminated in the same manner as that of an adult.[11] The statute is silent as to the release of a juvenile's information, which has been made confidential pursuant to s. 985.04, F.S.

G.G. v. FDLE

In *G.G. v. FDLE,*[12] a juvenile with no prior criminal history record was arrested for petit theft – a first degree misdemeanor. Several weeks after the arrest, G.G.'s attorney received G.G.'s criminal history information from FDLE, and discovered that it included information relating to the petit theft arrest.[13] G.G. filed suit, claiming that the petit theft information should be confidential and exempt pursuant to s. 985.04(1), F.S.[14] The trial court disagreed, holding that s. 943.053(3), F.S., creates an exception to confidentiality established for juvenile criminal history records in s. 985.04(1), F.S.[15]

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[5] Section 943.045(12), F.S., provides that the term "criminal justice information" means information on individuals collected or disseminated as a result of arrest, detention, or the initiation of a criminal proceeding by criminal justice agencies, including arrest record information, correctional and release information, criminal history record information, conviction record information, offender registration information, identification record information, and wanted persons record information. The term does not include statistical or analytical records or reports in which individuals are not identified and from which their identities are not ascertainable. The term does not include criminal intelligence information or criminal investigative information.

[6] s. 943.052, F.S.

[7] s. 985.051, F.S.

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

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

[10] s. 943.053(3)(b), F.S. The guardian ad litem program; vendors of the Department of Children and Families, DJJ, and the Department of Elderly Affairs; the Department of Agriculture and Consumer Services; and other qualified entities are charged a lesser amount.

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

[12] 97 So. 3d 268 (Fla. 1st DCA 2012).

[13] *Id.* at 269.

[14] *Id.*

[15] *Id.*

On appeal, the First District Court of Appeal reversed the trial court's decision and held that FDLE's authority to disseminate criminal justice information under s. 943.053(3), F.S., is expressly limited by s. 985.04, F.S., which, with very few exceptions, makes juvenile records confidential.[16]

FDLE – Release of Juvenile Information since G.G.

As noted above, s. 985.04(1), F.S., makes the majority of juvenile records confidential. However, s. 985.04(2), F.S., creates exceptions to the confidentiality requirements for records if the juvenile is:

- Taken into custody for a violation of law which, if committed by an adult, would be a felony;
- Found by a court to have committed three or more violations of law which, if committed by an adult, would be misdemeanors; or
- Transferred to the adult system.

In an effort to comply with the ruling in *G.G. v. FDLE*, FDLE is ensuring that only the above-described records are released. However, because of programming limitations[17] and incomplete reporting of juvenile disposition information,[18] FDLE reports that it is unable to accurately and fairly assess whether a juvenile has been found by a court to have committed three or more misdemeanors.[19] As such, FDLE currently only releases juvenile records to private entities and non-criminal justice agencies if the juvenile is:

- Taken into custody or charged with a crime that would be a felony if committed by an adult; and
- Treated as an adult.[20]

Effect of the Bill

The ruling in *G.G. v. FDLE* highlighted the inconsistency that exists between s. 985.04(1), F.S., (making the majority of juvenile records confidential) and s. 943.053, F.S. (allowing a juvenile's criminal history information to be disseminated in the same manner as that of an adult). The bill addresses these inconsistencies by:

- Ensuring that the specified juvenile records deemed not to be confidential and exempt under s. 943.053, F.S., are identical to the juvenile records deemed not to be confidential and exempt under s. 985.04, F.S.; and
- Requiring FDLE to release juvenile criminal history records in a manner that takes into account the confidential and exempt status of the record.

Section 985.04, F.S.

The bill amends s. 985.04(1), F.S., clarifying that juvenile records obtained under ch. 985, F.S., are confidential and exempt (rather than just confidential),[21] and provides that the public records exemption applies retroactively.

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[16] *Id.* at 273.

[17] FDLE cites that there would be extensive programming changes required to ensure that the records of juveniles found to have committed three or more misdemeanors were available for dissemination. Florida Department of Law Enforcement, Agency Bill Analysis for HB 7103 (2015), which is identical to this bill (on file with the Criminal Justice Subcommittee)(hereinafter cited as "FDLE Analysis").

[18] Disposition, or charge outcome, reporting for juvenile arrests was not legislatively mandated until July 1, 2008. This has resulted in much lower arrest-disposition reporting rates for juveniles. (The juvenile reporting rate for all arrests is currently 48.5 percent, while the adult rate is 72.2 percent.). FDLE Analysis.

[19] FDLE Analysis, p. 3.

[20] *Id.*

[21] There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *See WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in statute. *See* 85-62 Fla. Op. Att'y Gen. (August 1, 1985).

The bill also amends s. 985.04(2), F.S., to specify that the following juvenile records are not confidential and exempt:

- Records where a juvenile has been taken into custody by a law enforcement officer for a violation of law which, if committed by an adult, would be a felony;
- Records where a juvenile has been charged with a violation of law which, if committed by an adult, would be a felony;
- Records where a juvenile has been found to have committed an offense which, if committed by an adult, would be a felony; or
- Records where a juvenile has been transferred to adult court pursuant to part X of ch. 985, F.S.

Notably, the bill removes language specifying that the records of juveniles who have been found to have committed three or more misdemeanor violations are not confidential and exempt. These records will now be confidential and exempt.

Section 943.053, F.S.

The bill amends s. 943.053, F.S., so that the list of juvenile records deemed not to be confidential and exempt under s. 985.04(2), F.S., is identical to the list of juvenile records deemed not to be confidential and exempt under s. 943.053, F.S. Because the language regarding three or more misdemeanors is not included on the list, FDLE will no longer be tasked with determining whether the juvenile had three or more misdemeanors before releasing such records to the private sector and noncriminal justice agencies.

The bill further amends s. 943.053, F.S., to establish a separate process for the dissemination of *juvenile* criminal history information. Under this process, juvenile criminal history information, including the information that is confidential and exempt, is available to:

- A criminal justice agency for criminal justice purposes on a priority basis and free of charge;
- The person to whom the record relates, or his or her attorney;
- The parent, guardian, or legal custodian of the person to whom the record relates, provided such person has not reached the age of majority, been emancipated by a court, or been legally married; or
- An agency or entity specified in s. 943.0585(4) or s. 943.059(4), F.S.,[22] for the purposes specified therein, and to any person within such agency or entity who has direct responsibility for employment, access authorization, or licensure decisions.

Juvenile criminal history information that is not confidential and exempt may be released to the private sector and noncriminal justice agencies upon tender of fees and in the same manner that criminal history information relating to adults is released.

The bill provides that juvenile records deemed confidential and exempt under the provisions of s. 943.053, F.S., which are released by the sheriff, DOC, or DJJ to private entities under contract with each entity retain their confidential status upon release to these private entities.

The bill repeals all new public records exemptions provided for in the bill on October 2, 2021, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the State Constitution.[23]

Lastly, the bill makes conforming changes to ss. 496.4101 and 943.056, F.S., to reflect changes made in the act and reenacts ss. 110.1127, 373.6055, 408.809, 943.046, 943.05, 943.0542, 943.0543, 985.045, and 985.11, F.S., to incorporate amendments by the bill to statutes that are cross-referenced in the reenacted sections.

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[22] These sections require persons who are seeking employment with specified agencies (e.g., DCF, Department of Health, or DJJ) to acknowledge their criminal history record, even if such record has been sealed or expunged.

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

B. SECTION DIRECTORY:

Section 1. Amends s. 985.04, F.S., relating to oaths; records; confidential information.

Section 2. Amends s. 943.053, F.S., relating to dissemination of criminal justice information; fees.

Section 3. Amends s. 496.4101, F.S., relating to licensure of professional solicitors and certain employees thereof.

Section 4. Amends s. 943.056, F.S., relating to criminal history records; access, review, and challenge.

Section 5. Reenacts s. 110.1127, F.S., relating to employee background screening and investigations.

Section 6. Reenacts s. 373.6055, F.S., relating to criminal history checks for certain water management district employees and others.

Section 7. Reenacts s. 408.809, F.S., relating to background screening; prohibited offenses.

Section 8. Reenacts s. 943.046, F.S., relating to notification of criminal offender information.

Section 9. Reenacts s. 943.05, F.S., relating to Criminal Justice Information Program; duties; crime reports.

Section 10. Reenacts s. 943.0542, F.S., relating to access to criminal history information provided by the department to qualified entities.

Section 11. Reenacts s. 943.0543, F.S., relating to National Crime Prevention and Privacy Compact; ratification and implementation.

Section 12. Reenacts s. 985.045, F.S., relating to court records.

Section 13. Reenacts s. 985.11, F.S., relating to fingerprinting and photographing.

Section 14. Provides a public necessity statement.

Section 15. Provides an effective date of upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

   FDLE reports that the Computerized Criminal History System requires an update to comply with the ruling or to implement the bill, which will require 891 hours of programming at $85 dollars per hour for a total of $75,877.[24] Additionally, the bill may require staff training related to the expansion of the public records exemption, which will likely result in an insignificant fiscal impact to FDLE. FDLE indicates that these costs, however, will be absorbed, as they are part of the day-to-day responsibilities of the agency.[25]

[24] FDLE Analysis, p. 6.
[25] Email from Ronald Draa, Legislative Affairs Director, FDLE, HB 293 (November 10, 2015).

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

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

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

Breadth of Exemption
Article I, section 24(c) of the Florida Constitution requires a newly created public records or public meetings exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill's expanded public records exemptions do not appear to be in conflict with the constitutional requirement that the exemptions be no broader than necessary to accomplish their purpose.

B. RULE-MAKING AUTHORITY:

The bill provides that all criminal history information relating to juveniles must be provided upon tender of fees and in the manner prescribed by rules of the FDLE.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On November 17, 2015, the Criminal Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment reenacts necessary cross-referenced provisions of statute that are impacted by changes made in the act.

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

A bill to be entitled

An act relating to public records; amending s. 985.04, F.S.; specifying that certain confidential information obtained under chapter 985, F.S., relating to juvenile justice, is exempt from public records requirements; providing applicability; revising applicability of public records requirements with respect to the arrest records of certain juvenile offenders; providing for future review and repeal of such applicability provisions; amending s. 943.053, F.S.; providing an exemption from public records requirements for juvenile information compiled by the Criminal Justice Information Program from intrastate sources; providing exceptions; providing for future review and repeal of the exemption; providing for release by the Department of Law Enforcement of the criminal history information of a juvenile which has been deemed confidential and exempt under certain circumstances; amending ss. 496.4101 and 943.056, F.S.; conforming provisions to changes made by the act; reenacting s. 110.1127(4), F.S., relating to employee background screening and investigations, to incorporate the amendment made by the act to s. 943.053, F.S., in a reference thereto; reenacting s. 373.6055(3)(a), F.S., relating to criminal history checks for certain water management district employees and others, to incorporate the

amendment made by the act to s. 943.053, F.S., in a reference thereto; reenacting s. 408.809(6), F.S., relating to background screening, to incorporate the amendment made by the act to s. 943.053, F.S., in a reference thereto; reenacting s. 943.046(1), F.S., relating to notification of criminal offender information, to incorporate the amendment made by the act to s. 943.053, F.S., in a reference thereto; reenacting s. 943.05(2)(h), F.S., relating to the Criminal Justice Information Program, to incorporate the amendment made by the act to s. 943.053, F.S., in a reference thereto; reenacting s. 943.0542(2)(c), F.S., relating to access to criminal history information provided by the Department of Law Enforcement to qualified entities, to incorporate the amendment made by the act to s. 943.053, F.S., in a reference thereto; reenacting s. 943.0543(5), F.S., relating to the National Crime Prevention and Privacy Compact, to incorporate the amendment made by the act to s. 943.053, F.S., in a reference thereto; reenacting s. 985.045(2), F.S., relating to court records, to incorporate the amendments made by the act to ss. 943.053 and 985.04, F.S., in references thereto; reenacting s. 985.11(1)(b), F.S., relating to fingerprinting and photographing juveniles, to incorporate the amendments made by the act to ss.

943.053 and 985.04, F.S., in references thereto; providing a statement of public necessity; providing an effective date.

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

Section 1. Subsections (1) and (2) of section 985.04, Florida Statutes, are amended to read:

985.04 Oaths; records; confidential information.—

(1)(a) Except as provided in subsections (2), (3), (6), and (7) and s. 943.053, all information obtained under this chapter in the discharge of official duty by any judge, any employee of the court, any authorized agent of the department, the Florida Commission on Offender Review, the Department of Corrections, the juvenile justice circuit boards, any law enforcement agent, or any licensed professional or licensed community agency representative participating in the assessment or treatment of a juvenile is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. This exemption applies to information obtained before, on, or after the effective date of this exemption.

(b) Such confidential and exempt information ~~and~~ may be disclosed only to the authorized personnel of the court, the department and its designees, the Department of Corrections, the Florida Commission on Offender Review, law enforcement agents, school superintendents and their designees, any licensed

professional or licensed community agency representative participating in the assessment or treatment of a juvenile, and others entitled under this chapter to receive that information, or upon order of the court.

(c) Within each county, the sheriff, the chiefs of police, the district school superintendent, and the department shall enter into an interagency agreement for the purpose of sharing information about juvenile offenders among all parties. The agreement must specify the conditions under which summary criminal history information is to be made available to appropriate school personnel, and the conditions under which school records are to be made available to appropriate department personnel. Such agreement shall require notification to any classroom teacher of assignment to the teacher's classroom of a juvenile who has been placed in a probation or commitment program for a felony offense. The agencies entering into such agreement must comply with s. 943.0525, and must maintain the confidentiality of information that is otherwise exempt from s. 119.07(1), as provided by law.

(2)(a) Notwithstanding any other provisions of this chapter, the name, photograph, address, and crime or arrest report of a child:

1.~~(a)~~ Taken into custody ~~if the child has been taken into custody~~ by a law enforcement officer for a violation of law which, if committed by an adult, would be a felony;

2. Charged with a violation of law which, if committed by

an adult, would be a felony;

3. Found to have committed an offense which, if committed by an adult, would be a felony; or

4. Transferred to adult court pursuant to part X of this chapter,

~~(b) Found by a court to have committed three or more violations of law which, if committed by an adult, would be misdemeanors;~~

~~(c) Transferred to the adult system under s. 985.557, indicted under s. 985.56, or waived under s. 985.556;~~

~~(d) Taken into custody by a law enforcement officer for a violation of law subject to s. 985.557(2)(b) or (d); or~~

~~(e) Transferred to the adult system but sentenced to the juvenile system under s. 985.565~~

are ~~shall~~ not ~~be~~ considered confidential and exempt from s. 119.07(1) solely because of the child's age.

(b) This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. Subsections (3), (8), (9), and (10) of section 943.053, Florida Statutes, are amended to read:

943.053 Dissemination of criminal justice information; fees.—

(3)(a) Criminal history information~~, including information~~

relating to an adult ~~minors~~, compiled by the Criminal Justice Information Program from intrastate sources shall be available on a priority basis to criminal justice agencies for criminal justice purposes free of charge. After providing the program with all known personal identifying information, persons in the private sector and noncriminal justice agencies may be provided criminal history information upon tender of fees as established in this subsection and in the manner prescribed by rule of the Department of Law Enforcement. ~~Any access to criminal history information by the private sector or noncriminal justice agencies as provided in this subsection shall be assessed without regard to the quantity or category of criminal history record information requested.~~

(b)1. Criminal history information relating to a juvenile compiled by the Criminal Justice Information Program from intrastate sources shall be released as provided in this section. Such information is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, unless such juvenile has been:

a. Taken into custody by a law enforcement officer for a violation of law which, if committed by an adult, would be a felony;

b. Charged with a violation of law which, if committed by an adult, would be a felony;

c. Found to have committed an offense which, if committed by an adult, would be a felony; or

d. Transferred to adult court pursuant to part X of chapter 985,

and provided the criminal history record has not been expunged or sealed under any law applicable to such record.

2. This paragraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.

(c)1. Criminal history information relating to juveniles, including criminal history information consisting in whole or in part of information that is confidential and exempt under paragraph (b), shall be available to:

a. A criminal justice agency for criminal justice purposes on a priority basis and free of charge;

b. The person to whom the record relates, or his or her attorney;

c. The parent, guardian, or legal custodian of the person to whom the record relates, provided such person has not reached the age of majority, been emancipated by a court, or been legally married; or

d. An agency or entity specified in s. 943.0585(4) or s. 943.059(4), for the purposes specified therein, and to any person within such agency or entity who has direct responsibility for employment, access authorization, or licensure decisions.

2. After providing the program with all known personal identifying information, the criminal history information relating to a juvenile which is not confidential and exempt under this subsection may be released to the private sector and noncriminal justice agencies not specified in s. 943.0585(4) or s. 943.059(4) in the same manner as provided in paragraph (a). Criminal history information relating to a juvenile which is not confidential and exempt under this subsection is the entire criminal history information relating to a juvenile who satisfies any of the criteria listed in sub-subparagraphs (b)1.a. through (b)1.d., except for any portion of such juvenile's criminal history record which has been expunged or sealed under any law applicable to such record.

3. All criminal history information relating to juveniles, other than that provided to criminal justice agencies for criminal justice purposes, shall be provided upon tender of fees as established in this subsection and in the manner prescribed by rule of the Department of Law Enforcement.

(d) The fee for access to criminal history information by the private sector or a noncriminal justice agency shall be assessed without regard to the size or category of criminal history record information requested.

(e)~~(b)~~ The fee per record for criminal history information provided pursuant to this subsection and s. 943.0542 is $24 per name submitted, except that the fee for the guardian ad litem program and vendors of the Department of Children and Families,

the Department of Juvenile Justice, and the Department of Elderly Affairs shall be $8 for each name submitted; the fee for a state criminal history provided for application processing as required by law to be performed by the Department of Agriculture and Consumer Services shall be $15 for each name submitted; and the fee for requests under s. 943.0542, which implements the National Child Protection Act, shall be $18 for each volunteer name submitted. The state offices of the Public Defender shall not be assessed a fee for Florida criminal history information or wanted person information.

(8) Notwithstanding ~~the provisions of~~ s. 943.0525, and any user agreements adopted pursuant thereto, and notwithstanding the confidentiality of sealed records as provided for in s. 943.059 and juvenile records as provided for in paragraph (3)(b), the sheriff of any county that has contracted with a private entity to operate a county detention facility pursuant to ~~the provisions of~~ s. 951.062 shall provide that private entity, in a timely manner, copies of the Florida criminal history records for its inmates. The sheriff may assess a charge for the Florida criminal history records pursuant to ~~the provisions of~~ chapter 119. Sealed records and confidential juvenile records received by the private entity under this section remain confidential and exempt from ~~the provisions of~~ s. 119.07(1).

(9) Notwithstanding ~~the provisions of~~ s. 943.0525, and any user agreements adopted pursuant thereto, and notwithstanding

the confidentiality of sealed records as provided for in s. 943.059 and juvenile records as provided for in paragraph (3)(b), the Department of Corrections shall provide, in a timely manner, copies of the Florida criminal history records for inmates housed in a private state correctional facility to the private entity under contract to operate the facility pursuant to ~~the provisions of~~ s. 944.105. The department may assess a charge for the Florida criminal history records pursuant to ~~the provisions of~~ chapter 119. Sealed records and confidential juvenile records received by the private entity under this section remain confidential and exempt from ~~the provisions of~~ s. 119.07(1).

(10) Notwithstanding ~~the provisions of~~ s. 943.0525 and any user agreements adopted pursuant thereto, and notwithstanding the confidentiality of sealed records as provided for in s. 943.059 or of juvenile records as provided for in paragraph (3)(b), the Department of Juvenile Justice or any other state or local criminal justice agency may provide copies of the Florida criminal history records for juvenile offenders currently or formerly detained or housed in a contracted juvenile assessment center or detention facility or serviced in a contracted treatment program and for employees or other individuals who will have access to these facilities, only to the entity under direct contract with the Department of Juvenile Justice to operate these facilities or programs pursuant to ~~the provisions of~~ s. 985.688. The criminal justice agency providing such data

may assess a charge for the Florida criminal history records pursuant to ~~the provisions of~~ chapter 119. Sealed records and confidential juvenile records received by the private entity under this section remain confidential and exempt from ~~the provisions of~~ s. 119.07(1). Information provided under this section shall be used only for the criminal justice purpose for which it was requested and may not be further disseminated.

Section 3. Paragraph (b) of subsection (3) of section 496.4101, Florida Statutes, is amended to read:

496.4101 Licensure of professional solicitors and certain employees thereof.—

(3)

(b) Fees for state and federal fingerprint processing and fingerprint retention fees shall be borne by the applicant. The state cost for fingerprint processing is that authorized in s. 943.053(3)(e) ~~943.053(3)(b)~~ for records provided to persons or entities other than those specified as exceptions therein.

Section 4. Subsection (1) of section 943.056, Florida Statutes, is amended to read:

943.056 Criminal history records; access, review, and challenge.—

(1) For purposes of verification of the accuracy and completeness of a criminal history record, the Department of Law Enforcement shall provide, in the manner prescribed by rule, such record for review upon verification, by fingerprints, of the identity of the requesting person. If a minor, or the parent

or legal guardian of a minor, requests a copy of the minor's criminal history record, the Department of Law Enforcement shall provide such copy, including any portions of the record which may be confidential under s. 943.053(3)(b), for review upon verification, by fingerprints, of the identity of the minor. The providing of such record shall not require the payment of any fees, except those provided for by federal regulations.

Section 5. For the purpose of incorporating the amendment made by this act to section 943.053, Florida Statutes, in a reference thereto, subsection (4) of section 110.1127, Florida Statutes, is reenacted to read:

110.1127 Employee background screening and investigations.—

(4) Background screening and investigations shall be conducted at the expense of the employing agency. If fingerprinting is required, the fingerprints shall be taken by the employing agency, a law enforcement agency, or a vendor as authorized pursuant to s. 435.04, submitted to the Department of Law Enforcement for state processing, and forwarded by the Department of Law Enforcement to the Federal Bureau of Investigation for national processing. The agency or vendor shall remit the processing fees required by s. 943.053 to the Department of Law Enforcement.

Section 6. For the purpose of incorporating the amendment made by this act to section 943.053, Florida Statutes, in a reference thereto, paragraph (a) of subsection (3) of section

373.6055, Florida Statutes, is reenacted to read:

373.6055 Criminal history checks for certain water management district employees and others.—

(3)(a) The fingerprint-based criminal history check shall be performed on any person described in subsection (1) pursuant to the applicable water management district's security plan for buildings, facilities, and structures. With respect to employees or others with regular access, such checks shall be performed at least once every 5 years or at other more frequent intervals as provided by the water management district's security plan for buildings, facilities, and structures. Each individual subject to the criminal history check shall file a complete set of fingerprints which are taken in a manner required by the Department of Law Enforcement and the water management district security plan. Fingerprints shall be submitted to the Department of Law Enforcement for state processing and to the Federal Bureau of Investigation for federal processing. The results of each fingerprint-based check shall be reported to the requesting water management district. The costs of the checks, consistent with s. 943.053(3), shall be paid by the water management district or other employing entity or by the individual checked.

Section 7. For the purpose of incorporating the amendment made by this act to section 943.053, Florida Statutes, in a reference thereto, subsection (6) of section 408.809, Florida Statutes, is reenacted to read:

408.809 Background screening; prohibited offenses.—

(6) The costs associated with obtaining the required screening must be borne by the licensee or the person subject to screening. Licensees may reimburse persons for these costs. The Department of Law Enforcement shall charge the agency for screening pursuant to s. 943.053(3). The agency shall establish a schedule of fees to cover the costs of screening.

Section 8. For the purpose of incorporating the amendment made by this act to section 943.053, Florida Statutes, in a reference thereto, subsection (1) of section 943.046, Florida Statutes, is reenacted to read:

943.046 Notification of criminal offender information.—

(1) Any state or local law enforcement agency may release to the public any criminal history information and other information regarding a criminal offender, including, but not limited to, public notification by the agency of the information, unless the information is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. However, this section does not contravene any provision of s. 943.053 which relates to the method by which an agency or individual may obtain a copy of an offender's criminal history record.

Section 9. For the purpose of incorporating the amendment made by this act to section 943.053, Florida Statutes, in a reference thereto, paragraph (h) of subsection (2) of section 943.05, Florida Statutes, is reenacted to read:

943.05 Criminal Justice Information Program; duties; crime

reports.—

(2) The program shall:

(h) For each agency or qualified entity that officially requests retention of fingerprints or for which retention is otherwise required by law, search all arrest fingerprint submissions received under s. 943.051 against the fingerprints retained in the statewide automated biometric identification system under paragraph (g).

1. Any arrest record that is identified with the retained fingerprints of a person subject to background screening as provided in paragraph (g) shall be reported to the appropriate agency or qualified entity.

2. To participate in this search process, agencies or qualified entities must notify each person fingerprinted that his or her fingerprints will be retained, pay an annual fee to the department unless otherwise provided by law, and inform the department of any change in the affiliation, employment, or contractual status of each person whose fingerprints are retained under paragraph (g) if such change removes or eliminates the agency or qualified entity's basis or need for receiving reports of any arrest of that person, so that the agency or qualified entity is not obligated to pay the upcoming annual fee for the retention and searching of that person's fingerprints to the department. The department shall adopt a rule setting the amount of the annual fee to be imposed upon each participating agency or qualified entity for performing

these searches and establishing the procedures for the retention of fingerprints and the dissemination of search results. The fee may be borne by the agency, qualified entity, or person subject to fingerprint retention or as otherwise provided by law. Consistent with the recognition of criminal justice agencies expressed in s. 943.053(3), these services shall be provided to criminal justice agencies for criminal justice purposes free of charge. Qualified entities that elect to participate in the fingerprint retention and search process are required to timely remit the fee to the department by a payment mechanism approved by the department. If requested by the qualified entity, and with the approval of the department, such fees may be timely remitted to the department by a qualified entity upon receipt of an invoice for such fees from the department. Failure of a qualified entity to pay the amount due on a timely basis or as invoiced by the department may result in the refusal by the department to permit the qualified entity to continue to participate in the fingerprint retention and search process until all fees due and owing are paid.

3. Agencies that participate in the fingerprint retention and search process may adopt rules pursuant to ss. 120.536(1) and 120.54 to require employers to keep the agency informed of any change in the affiliation, employment, or contractual status of each person whose fingerprints are retained under paragraph (g) if such change removes or eliminates the agency's basis or need for receiving reports of any arrest of that person, so that

the agency is not obligated to pay the upcoming annual fee for the retention and searching of that person's fingerprints to the department.

Section 10. For the purpose of incorporating the amendment made by this act to section 943.053, Florida Statutes, in a reference thereto, paragraph (c) of subsection (2) of section 943.0542, Florida Statutes, is reenacted to read:

943.0542 Access to criminal history information provided by the department to qualified entities.—

(2)

(c) Each such request must be accompanied by payment of a fee for a statewide criminal history check by the department established by s. 943.053, plus the amount currently prescribed by the Federal Bureau of Investigation for the national criminal history check in compliance with the National Child Protection Act of 1993, as amended. Payments must be made in the manner prescribed by the department by rule.

Section 11. For the purpose of incorporating the amendment made by this act to section 943.053, Florida Statutes, in a reference thereto, subsection (5) of section 943.0543, Florida Statutes, is reenacted to read:

943.0543 National Crime Prevention and Privacy Compact; ratification and implementation.—

(5) This compact and this section do not affect or abridge the obligations and responsibilities of the department under other provisions of this chapter, including s. 943.053, and do

not alter or amend the manner, direct or otherwise, in which the public is afforded access to criminal history records under state law.

Section 12. For the purpose of incorporating the amendments made by this act to sections 943.053 and 985.04, Florida Statutes, in references thereto, subsection (2) of section 985.045, Florida Statutes, is reenacted to read:

985.045 Court records.—

(2) The clerk shall keep all official records required by this section separate from other records of the circuit court, except those records pertaining to motor vehicle violations, which shall be forwarded to the Department of Highway Safety and Motor Vehicles. Except as provided in ss. 943.053 and 985.04(6)(b) and (7), official records required by this chapter are not open to inspection by the public, but may be inspected only upon order of the court by persons deemed by the court to have a proper interest therein, except that a child and the parents, guardians, or legal custodians of the child and their attorneys, law enforcement agencies, the Department of Juvenile Justice and its designees, the Florida Commission on Offender Review, the Department of Corrections, and the Justice Administrative Commission shall always have the right to inspect and copy any official record pertaining to the child. Public defender offices shall have access to official records of juveniles on whose behalf they are expected to appear in detention or other hearings before an appointment of

representation. The court may permit authorized representatives of recognized organizations compiling statistics for proper purposes to inspect, and make abstracts from, official records under whatever conditions upon the use and disposition of such records the court may deem proper and may punish by contempt proceedings any violation of those conditions.

Section 13. For the purpose of incorporating the amendments made by this act to sections 943.053 and 985.04, Florida Statutes, in references thereto, paragraph (b) of subsection (1) of section 985.11, Florida Statutes, is reenacted to read:

985.11 Fingerprinting and photographing.—

(1)

(b) Unless the child is issued a civil citation or is participating in a similar diversion program pursuant to s. 985.12, a child who is charged with or found to have committed one of the following offenses shall be fingerprinted, and the fingerprints shall be submitted to the Department of Law Enforcement as provided in s. 943.051(3)(b):

1. Assault, as defined in s. 784.011.

2. Battery, as defined in s. 784.03.

3. Carrying a concealed weapon, as defined in s. 790.01(1).

4. Unlawful use of destructive devices or bombs, as defined in s. 790.1615(1).

5. Neglect of a child, as defined in s. 827.03(1)(e).

6. Assault on a law enforcement officer, a firefighter, or other specified officers, as defined in s. 784.07(2)(a).

7. Open carrying of a weapon, as defined in s. 790.053.

8. Exposure of sexual organs, as defined in s. 800.03.

9. Unlawful possession of a firearm, as defined in s. 790.22(5).

10. Petit theft, as defined in s. 812.014.

11. Cruelty to animals, as defined in s. 828.12(1).

12. Arson, resulting in bodily harm to a firefighter, as defined in s. 806.031(1).

13. Unlawful possession or discharge of a weapon or firearm at a school-sponsored event or on school property as defined in s. 790.115.

A law enforcement agency may fingerprint and photograph a child taken into custody upon probable cause that such child has committed any other violation of law, as the agency deems appropriate. Such fingerprint records and photographs shall be retained by the law enforcement agency in a separate file, and these records and all copies thereof must be marked "Juvenile Confidential." These records are not available for public disclosure and inspection under s. 119.07(1) except as provided in ss. 943.053 and 985.04(2), but shall be available to other law enforcement agencies, criminal justice agencies, state attorneys, the courts, the child, the parents or legal custodians of the child, their attorneys, and any other person

authorized by the court to have access to such records. In addition, such records may be submitted to the Department of Law Enforcement for inclusion in the state criminal history records and used by criminal justice agencies for criminal justice purposes. These records may, in the discretion of the court, be open to inspection by anyone upon a showing of cause. The fingerprint and photograph records shall be produced in the court whenever directed by the court. Any photograph taken pursuant to this section may be shown by a law enforcement officer to any victim or witness of a crime for the purpose of identifying the person who committed such crime.

Section 14. The Legislature finds that it is a public necessity that the criminal history information of juveniles, who have not been adjudicated delinquent of a felony or who have been found only to have committed misdemeanor offenses and certain criminal history information relating to a juvenile compiled by the Criminal Justice Information Program be made confidential and exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution under ss. 985.04 and 943.053, Florida Statutes. Many individuals who have either completed their sanctions and received treatment or who were never charged in the juvenile justice system have found it difficult to obtain employment. The presence of an arrest or a misdemeanor record in these individuals' juvenile past and certain criminal history information relating to a juvenile compiled by the Criminal Justice Information Program creates an

unnecessary barrier to becoming productive members of society, thus frustrating the rehabilitative purpose of the juvenile system. The Legislature therefore finds that it is in the best interest of the public that individuals with juvenile misdemeanor records are given the opportunity to become contributing members of society. Therefore, prohibiting the unfettered release of juvenile misdemeanor records and certain criminal history information relating to a juvenile compiled by the Criminal Justice Information Program is of greater importance than any public benefit that may be derived from the full disclosure and release of such arrest records and information.

Section 15. This act shall take effect upon becoming a law.

Amendment No. 1

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

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Fitzenhagen offered the following:

Amendment (with title amendment)

Remove line 121 and insert:

119.07(1) solely because of the child's age. For arrest or booking photographs of a child not considered confidential and exempt under this section, a custodian of public records may choose not to electronically post such arrest or booking photograph on the custodian's website, although this shall not restrict public access to records as provided by s. 119.07.

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

Remove line 8 and insert:

records of certain juvenile offenders; authorizing records custodians to not electronically publish specified juvenile's arrest or booking photos; providing for

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 379 Transfers of Structured Settlement Payment Rights
SPONSOR(S): Insurance & Banking Subcommittee; Civil Justice Subcommittee; Santiago
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 458

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 0 N, As CS	King	Bond
2) Insurance & Banking Subcommittee	12 Y, 0 N, As CS	Lloyd	Luczynski
3) Judiciary Committee		King	Havlicak

SUMMARY ANALYSIS

A structured settlement agreement is an arrangement for the periodic payment of damages for personal injuries in connection with a personal injury claim or lawsuit. Payees under such arrangements sometimes wish to forgo future payments in favor of an immediate cash payout. In short, current law requires certain disclosures and court approval before a payee may transfer his or her rights under a structured settlement.

The bill:

- Repeals the requirement to disclose the quotient;
- Requires the petition to the court for approval of the transfer to be filed in the county where the payee lives, or to the circuit where the underlying tort occurred if the payee is not a state resident;
- Allows a court to authorize assignment of the rights under a structured settlement notwithstanding a non-assignment clause;
- Requires the payee to attend the hearing;
- Declares that transfers pursuant to s. 626.99296, F.S., are not authorized if such transfer is in contravention of applicable law;
- Requires additional information to be included in the petition for authority to transfer; and
- Makes other technical and style changes and other clarifications to the statute.

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

The bill is effective upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

A structured settlement is an agreement for the periodic future payment of damages in a personal injury case.[1] This arrangement often involves the at-fault party in the personal injury claim or lawsuit paying a lump-sum premium to an insurance company to purchase an annuity in the name of and for the benefit of the injured party (the payee). Once the annuity is purchased, the insurance company begins to make periodic payments to the payee for the negotiated period of time. A structured settlement arrangement provides the payee long-term financial stability, and may provide tax benefits for beneficiaries[2] and annuity issuers.[3]

For some payee's, however, their personal financial circumstances may change, or they may simply want to "cash out" the future annuity. As such, instead of receiving payments under a structured settlement plan, the payee may wish to transfer his or her rights to future payments to another organization—known as a transferee—in exchange for a lump sum.[4]

In 2001, the Legislature created s. 626.99296, F.S., to regulate the transfer of structured settlements. Fundamentally, the statute requires such transfers to receive prior court approval.[5] This approval must be conditioned upon statutorily-enumerated factors, including an explicit finding by the court that the transfer is "in the best interests of the" individual opting to sell his or her settlement rights in order to receive a lump sum.[6] The entity contracting to receive the structured settlement rights must file an application with the court at least 20 days before the application hearing[7] and must make a series of disclosures to the payee.[8]

Disclosure of the Quotient

One of the required disclosures that must be made to a payee is the "quotient" of the transaction.[9] The "quotient" is described by statute as "a percentage, obtained by dividing the net payment amount by the discounted present value of the payments."[10] The bill repeals the requirement that the quotient be disclosed to the payee as a part of the pre-transfer disclosures.

Venue

The legal term "venue" refers to the place in which a case can be filed and pursued. In general, venue is proper where the cause of action accrued[11] or where the defendant resides. However, the plaintiff

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[1] *See* s. 626.99296(2)(m), F.S. Structured settlements occur in all forms of personal injury matters, including worker's compensation claims.
[2] 26 U.S.C. § 104 (providing that, for taxation purposes, gross income does not include the amount of damages received on account of personal physical injuries or physical sickness); s. 626.99296(2)(j), F.S. (defining "payee" as an individual receiving tax-free damage payments under a structured settlement).
[3] *See* 26 U.S.C. § 130; *First Providian, LLC v. Evans*, 852 So. 2d 908 (Fla. 4th DCA 2003).
[4] *See, e.g., First Providian, LLC v. Evans*, 852 So. 2d 908 (Fla. 4th DCA 2003).
[5] s. 626.99296(3)(a), F.S.; *Rapid Settlements, Ltd. v. Dickerson*, 941 So. 2d 1275, 1276-77 (Fla. 4th DCA 2006) (affirming lower court decision to deny petition, noting that "[t]ransfers of structured settlement rights are regulated by statute and court approval is required before a transfer may go forward.").
[6] s. 626.99296(3)(a)3., F.S.
[7] s. 626.99296(4), F.S.
[8] s. 626.99296(3), F.S.
[9] s. 626.99296(3)(a)2.g., F.S.
[10] *Id.*
[11] The structured settlements referenced in this bill arise from tort claims. The cause of action for a tort claim accrues in the jurisdiction where the injury occurs.

picks a venue by the act of filing the case, and if the defendant does not object then it is said that venue is waived and the case proceeds where it was filed. Thus, where the parties agree, and unless a statute provides otherwise, a case can be filed in any court that has jurisdiction.

The bill limits venue of a case regarding approval of the transfer of a structured settlement to the circuit court where the payee resides. If the payee is not domiciled in the state, then venue is proper in the circuit court that approved the structured settlement or the circuit court where the case was pending when the parties agreed to a structured settlement.

Non-Assignment Clauses

A structured settlement is a contract that is initially one between the original payor and the original payee. The parties to a contract are generally free to include any term they wish into the contract. At common law, a party to most contracts is free to assign his or her rights and obligations under the contract to another unless there is a statute or contract clause that limits or prohibits assignment. Many structured settlement contracts prohibit the payee from assigning (selling) the right to future payments.[12]

Like all contract terms, a non-assignment clause is not absolute. It is also a fundamental concept of contract law that the parties to a contract may agree to modify or change the terms of the contract. Thus, the parties to a structured settlement agreement may agree to waive a non-assignment clause.

The bill adds that, where the structured settlement prohibits transfer of the payment rights, a court nonetheless may conduct a hearing regarding transfer, the parties to the structured settlement may waive or assert their right under the clause, and the court may rule on the merits of the application for transfer. Further, the bill provides that s. 626.99296, F.S., shall not be construed to authorize transfers in contravention of law.

Procedural Changes

Current law provides procedural requirements related to a court approval of the transfer of a structured settlement.[13] The bill:

- changes the time for filing of a written response to a petition for approval of transfer from "within 15 days after service of the petition" to at least 5 days prior to the hearing;[14]
- adds that the transferee is the person responsible for filing the petition;
- requires the payee to appear in person at the hearing, absent good cause; and
- requires the petition to include certain information regarding the payee and the transaction.

The information regarding the payee and the transaction is:

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[12] One reason for such clauses was a provision in federal tax law, now repealed, that penalized the payor should the payee take a lump sum payout. Another significant reason for a non-assignment clause is that one goal of a structured settlement arrangement is the protection of a payee who may be naïve, financially unsophisticated, or who relies on the periodic payments as his or her sole means of support.

[13] s. 626.99296(4), F.S.

[14] *E.g.*, *First Providian, LLC v. Evans*, 852 So. 2d 908, 908 (Fla. 4th DCA 2003) (where the court dealt with a late filed response by a defendant insurance company). The change from "within 15 days after service of the transferee's notice" to "at least 5 days before the date of the scheduled hearing" could extend the period an interested party has to file a response, or it may leave it unchanged. A transferee must give notice at least 20 days before the hearing. If the transferee only gave the minimum 20 day notice, the time period would remain unchanged (e.g., 20 day notice - 5 days before hearing = 15 day period to respond). If the transferee gave more than 20 days notice, the interested party would have more than a 15 day window. The window would increase by the difference between the length of the notice given and the 20 day minimum (e.g., 30 day notice - 5 days before hearing = 25 day period to respond). In sum, the change could increase the interested party's period to respond to the notice, and could never make it shorter than it already is.

- the payee's name, age, domicile, and ages of the payee's dependents;
- a copy of the transfer agreement and disclosure statement;
- the reasons why the payee seeks to transfer the right to future payment under the structured settlement; and
- a summary statement of:
    - completed financial transactions between the payee and the transferee (or related entities) during the past 4 years;
    - denied transfers in the past 2 years;
    - all other transfers in the past 3 years; and
    - proposed transfers.

Other Changes Made by the Bill

The transfer of a structured settlement is, at its core, simply a form of a contract. The parties to a contract can specify the law that will apply in interpreting the contract, which will prevail in the absence of a controlling statute. Current law defines "applicable law" to limit the use of applicable law to only be those of the United States, Florida, the payee, any interested party, a court that approved a structured settlement, or a court in which the underlying tort claim was pending at settlement. The bill repeals the reference to laws of "any other interested party."

Included within the statute on transfer of structured settlements are disclosure requirements that apply to the creation of a structured settlement agreement.[15] The bill repeals from that paragraph the requirement to disclose that transfer of the structured settlement rights may have "serious adverse tax consequences."[16]

Current law provides that the provisions of s. 626.99296, F.S., cannot be waived by any person; the bill provides that this protection and limitation only applies to a payee.

The bill specifies that compliance with the contract, notice and court approval requirements is solely the responsibility of the transferee. The other parties to the transaction do not incur liability for noncompliance.

The bill specifies that a structured settlement obligor and an annuity issuer may rely on the court order approving transfer, and are only legally liable for paying according to the court order.

The bill requires that a waiver of the right to receive independent professional advice must be in writing.

The bill repeals the requirement that the court find that the transferee has given notice to the payor of the transferee's name, address and taxpayer identification number.

The bill also makes technical, grammatical and style changes to the statute.

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[15] s. 626.99296(3)(d), F.S.

[16] While a transfer of a structured settlement right may have significant federal income tax consequences, there are many instances where the transfer would have little impact. In general, personal injury proceeds for medical bills, property loss and pain and suffering damages are not considered income and thus the payee pays no income tax upon receipt. Personal injury proceeds that reimburse the claimant for lost wages, however, are taxable. Since a structured settlement is an agreement, the parties can usually designate the type of payout and thus avoid characterization as taxable income. However, where the facts require designation as income, the payments are taxable in the year received. Where a structured settlement for future lost wages is transferred in exchange for a lump sum, the payee may face a significant tax bill compounded by several factors, such as moving into a higher tax bracket and a large tax bill that may be forgotten until April 15 of the following year.

B. SECTION DIRECTORY:

Section 1 amends s. 626.99296, F.S., regarding transfers of structured settlement payments.

Section 2 provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate fiscal impact on persons owning a structured settlement and on the companies that purchase to rights to those future payments.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 13, 2016, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- changes the effective date to upon becoming law;
- repeals a requirement in current law regarding notice of the transferee's name, address and taxpayer identification number; and
- makes technical and style changes conforming the bill to the Senate companion bill.

On February 1, 2016, the Insurance & Banking Subcommittee considered the bill, adopted one amendment, and reported the bill favorably with a committee substitute. The amendment provides that provisions of s. 626.99296, F.S., shall not be construed to authorize transfers in contravention of law.

This analysis is drafted to the committee substitute as passed by the Insurance & Banking Subcommittee.

A bill to be entitled

An act relating to transfers of structured settlement payment rights; amending s. 626.99296, F.S.; revising definitions; revising specified disclosures and notices that are or may be required to be given in order to effect transfers of structured settlement payment rights and payments under such rights; revising the time limit by which a written response to an application for transferring such rights must be filed; providing requirements for the filing and contents of the application; requiring the court to hold a hearing on the application; requiring a payee to appear in person unless the court determines that good cause exists to excuse the payee; providing that the transferee is solely responsible for compliance with certain requirements; providing that following issuance of a court order approving the transfer, the structured settlement obligor and annuity issuer may rely on the order in redirecting certain payments and are released and discharged from certain liability; providing for construction if the terms of the structured settlement prohibit transfer for payment rights; providing construction; conforming provisions to changes made by the act; providing an effective date.

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

Section 1. Subsection (2) of section 626.99296, Florida Statutes, is reordered and amended, and paragraphs (a) and (d) of subsection (3), subsections (4) and (5), and paragraphs (a) and (b) of subsection (6) of that section are amended, to read:

626.99296 Transfers of structured settlement payment rights.—

(2) DEFINITIONS.—As used in this section, the term:

(a) "Annuity issuer" means an insurer that has issued an annuity contract to be used to fund periodic payments under a structured settlement.

(b) ~~(c)~~ "Applicable federal rate" means the most recently published applicable rate for determining the present value of an annuity, as issued by the United States Internal Revenue Service pursuant to s. 7520 of the United States Internal Revenue Code, as amended.

(c) ~~(b)~~ "Applicable law" means any of the following, as applicable in interpreting the terms of a structured settlement:

1. The laws of the United States;

2. The laws of this state, including principles of equity applied in the courts of this state; and

3. The laws of any other jurisdiction:

a. That is the domicile of the payee ~~or any other interested party~~;

b. Under whose laws a structured settlement agreement was

approved by a court; or

c. In whose courts a settled claim was pending when the parties entered into a structured settlement agreement.

(d) "Assignee" means any party that acquires structured settlement payment rights directly or indirectly from a transferee of such rights.

(e) "Dependents" means a payee's spouse and minor children and all other family members and other persons for whom the payee is legally obligated to provide support, including spousal maintenance.

(f) "Discount and finance charge" means the sum of all charges that are payable directly or indirectly from assigned structured settlement payments and imposed directly or indirectly by the transferee and that are incident to a transfer of structured settlement payment rights, including:

1. Interest charges, discounts, or other compensation for the time value of money;

2. All application, origination, processing, underwriting, closing, filing, and notary fees and all similar charges, however denominated; and

3. All charges for commissions or brokerage, regardless of the identity of the party to whom such charges are paid or payable.

The term does not include any fee or other obligation incurred by a payee in obtaining independent professional advice

concerning a transfer of structured settlement payment rights.

(g) "Discounted present value" means, with respect to a proposed transfer of structured settlement payment rights, the fair present value of future payments, as determined by discounting the payments to the present using the most recently published applicable federal rate as the discount rate.

(h) "Independent professional advice" means advice of an attorney, certified public accountant, actuary, or other licensed professional adviser:

1. Who is engaged by a payee to render advice concerning the legal, tax, and financial implications of a transfer of structured settlement payment rights;

2. Who is not in any manner affiliated with or compensated by the transferee of the transfer; and

3. Whose compensation for providing the advice is not affected by whether a transfer occurs or does not occur.

(i) "Interested parties" means:

1. The payee;

2. Any beneficiary irrevocably designated under the annuity contract to receive payments following the payee's death or, if such designated beneficiary is a minor, the designated beneficiary's parent or guardian;

3. The annuity issuer;

4. The structured settlement obligor; or

5. Any other party <u>to the structured settlement</u> who has continuing rights or obligations <u>to receive or make payments</u>

under the structured settlement.

(j) "Payee" means an individual who is receiving tax-free damage payments under a structured settlement and proposes to make a transfer of payment rights under the structured settlement.

(k) "Qualified assignment agreement" means an agreement providing for a qualified assignment, as authorized by 26 U.S.C. s. 130 of the United States Internal Revenue Code, as amended.

(l) "Settled claim" means the original tort claim resolved by a structured settlement.

(m) "Structured settlement" means an arrangement for periodic payment of damages for personal injuries established by settlement or judgment in resolution of a tort claim.

(n) "Structured settlement agreement" means the agreement, judgment, stipulation, or release embodying the terms of a structured settlement, including the rights of the payee to receive periodic payments.

(o) "Structured settlement obligor" means the party who is obligated to make continuing periodic payments to the payee under a structured settlement agreement or a qualified assignment agreement.

(p) "Structured settlement payment rights" means rights to receive periodic payments, including lump-sum payments under a structured settlement, whether from the structured settlement obligor or the annuity issuer, if:

1. The payee ~~or any other interested party~~ is domiciled in

this state;

2. The structured settlement agreement was approved by a court of this state; or

3. The settled claim was pending before the courts of this state when the parties entered into the structured settlement agreement.

(q) "Terms of the structured settlement" means the terms of the structured settlement agreement; the annuity contract; a qualified assignment agreement; or an order or approval of a court or other government authority authorizing or approving the structured settlement.

(r) "Transfer" means a sale, assignment, pledge, hypothecation, or other form of alienation or encumbrance made by a payee for consideration.

(s) "Transfer agreement" means the agreement providing for transfer of structured settlement payment rights from a payee to a transferee.

(t) "Transferee" means a person who is receiving or who will receive structured settlement payment rights resulting from a transfer.

(3) CONDITIONS TO TRANSFERS OF STRUCTURED SETTLEMENT PAYMENT RIGHTS AND STRUCTURED SETTLEMENT AGREEMENTS.—

(a) A direct or indirect transfer of structured settlement payment rights is not effective and a structured settlement obligor or annuity issuer is not required to make a payment directly or indirectly to a transferee or assignee of structured

settlement payment rights unless the transfer is authorized in advance in a final order by a court of competent jurisdiction which is based on the written express findings by the court that:

1. The transfer complies with this section and does not contravene other applicable law;

2. At least 10 days before the date on which the payee first incurred an obligation with respect to the transfer, the transferee provided to the payee a disclosure statement in bold type, no smaller than 14 points in size, which specifies:

a. The amounts and due dates of the structured settlement payments to be transferred;

b. The aggregate amount of the payments;

c. The discounted present value of the payments, together with the discount rate used in determining the discounted present value;

d. The gross amount payable to the payee in exchange for the payments;

e. An itemized listing of all brokers' commissions, service charges, application fees, processing fees, closing costs, filing fees, referral fees, administrative fees, legal fees, and notary fees and other commissions, fees, costs, expenses, and charges payable by the payee or deductible from the gross amount otherwise payable to the payee;

f. The net amount payable to the payee after deducting all commissions, fees, costs, expenses, and charges described in

sub-subparagraph e.;

g. ~~The quotient, expressed as a percentage, obtained by dividing the net payment amount by the discounted present value of the payments, which must be disclosed in the following statement: "The net amount that you will receive from us in exchange for your future structured settlement payments represent .... percent of the estimated current value of the payments based upon the discounted value using the applicable federal rate";~~

~~h.~~ The effective annual interest rate, which must be disclosed in the following statement: "Based on the net amount that you will receive from us and the amounts and timing of the structured settlement payments that you are turning over to us, you will, in effect, be paying interest to us at a rate of .... percent per year"; and

h.~~i.~~ The amount of any penalty and the aggregate amount of any liquidated damages, including penalties, payable by the payee in the event of a breach of the transfer agreement by the payee;

3. The payee has established that the transfer is in the best interests of the payee, taking into account the welfare and support of the payee's dependents;

4. The payee has received, or waived in writing his or her right to receive, independent professional advice regarding the legal, tax, and financial implications of the transfer;

~~5. The transferee has given written notice of the~~

~~transferee's name, address, and taxpayer identification number to the annuity issuer and the structured settlement obligor and has filed a copy of the notice with the court;~~

5.~~6.~~ The transfer agreement provides that if the payee is domiciled in this state, any disputes between the parties will be governed in accordance with the laws of this state and that the domicile state of the payee is the proper venue to bring any cause of action arising out of a breach of the agreement; and

6.~~7.~~ The court has determined that the net amount payable to the payee is fair, just, and reasonable under the circumstances then existing.

(d) In negotiating a structured settlement of claims brought by or on behalf of a claimant who is domiciled in this state, the structured settlement obligor must disclose in writing to the claimant or the claimant's legal representative all of the following information that is not otherwise specified in the structured settlement agreement:

1. The amounts and due dates of the periodic payments to be made under the structured settlement agreement. In the case of payments that will be subject to periodic percentage increases, the amounts of future payments may be disclosed by identifying the base payment amount, the amount and timing of scheduled increases, and the manner in which increases will be compounded;

2. The amount of the premium payable to the annuity issuer;

3. The discounted present value of all periodic payments that are not life-contingent, together with the discount rate used in determining the discounted present value;

4. The nature and amount of any costs that may be deducted from any of the periodic payments; and

5. Where applicable, that any transfer of the periodic payments is prohibited by the terms of the structured settlement and may otherwise be prohibited or restricted under applicable law~~; and~~

~~6. That any transfer of the periodic payments by the claimant may subject the claimant to serious adverse tax consequences~~.

(4) VENUE ~~JURISDICTION~~; PROCEDURE FOR APPROVAL OF TRANSFERS; CONTENTS OF APPLICATION.—

(a) At least 20 days before the scheduled hearing on an application for authorizing a transfer of structured settlement payment rights under this section, the transferee must file with the court and provide to all interested parties a notice of the proposed transfer and the application for its authorization. The notice must include:

1.~~(a)~~ A copy of the transferee's application to the court;

2.~~(b)~~ A copy of the transfer agreement;

3.~~(c)~~ A copy of the disclosure statement required under subsection (3);

4.~~(d)~~ Notification that an interested party may support, oppose, or otherwise respond to the transferee's application, in

person or by counsel, by submitting written comments to the court or by participating in the hearing; and

5.~~(c)~~ Notification of the time and place of the hearing and notification of the manner in which and the time by which any written response to the application must be filed in order to be considered by the court. A written response to an application must be filed at least 5 ~~within 15~~ days before the date ~~after service~~ of the scheduled hearing in order to be considered by the court ~~transferee's notice~~.

(b) An application must be made by the transferee and filed in the circuit court of the county in which the payee is domiciled. However, if the payee is not domiciled in this state, the application may be filed in the court in this state which approved the structured settlement agreement or in the court in which the settled claim was pending when the parties entered into the structured settlement.

(c) The court shall hold a hearing on the application. The payee shall appear in person at the hearing unless the court determines that good cause exists to excuse the payee from appearing.

(d) In addition to complying with the other requirements of this section, the application must include:

1. The payee's name, age, and county of domicile and the number and ages of the payee's dependents;

2. A copy of the transfer agreement;

3. A copy of the disclosure statement required under

subsection (3);

4. An explanation of reasons as to why the payee is seeking approval of the proposed transfer; and

5. A summary of each of the following:

a. Any transfers by the payee to the transferee or an affiliate, or through the transferee or an affiliate to an assignee, within the 4 years before the date of the transfer agreement.

b. Any transfers within the 3 years before the date of the transfer agreement made by the payee to any person or entity other than the transferee or an affiliate, or an assignee of a transferee or an affiliate, to the extent such transfers were disclosed to the transferee by the payee in writing or are otherwise actually known by the transferee.

c. Any proposed transfers by the payee to the transferee or an affiliate, or through the transferee or an affiliate to an assignee, for which an application was denied within the 2 years before the date of the transfer agreement.

d. Any proposed transfers by the payee to any person or entity other than the transferee, or an assignee of a transferee or an affiliate, to the extent such proposed transfers were disclosed to the transferee by the payee in writing or are otherwise actually known by the transferee, for which applications were denied within the year before the date of the transfer agreement.

(5) WAIVER PROHIBITED; NO PENALTIES INCURRED BY PAYEE;

RELIANCE ON COURT ORDER; COMPLIANCE; RELEASE FROM LIABILITY; CONSTRUCTION.—

(a) The provisions of this section may not be waived by the payee.

(b) If a transfer of structured settlement payment rights fails to satisfy the conditions of subsection (3), the payee who proposed the transfer does not incur any penalty, forfeit any application fee or other payment, or otherwise incur any liability to the proposed transferee.

(c) In a transfer of structured settlement payment rights, the transferee is solely responsible for compliance with the requirements of paragraph (3)(a) and subsection (4), and neither the structured settlement obligor nor the annuity issuer shall incur any liability arising from noncompliance.

(d) After issuance of a court order approving a transfer of structured settlement payment rights under this section, the structured settlement obligor and annuity issuer:

1. May rely on the court order in redirecting future structured settlement payments to the transferee or an assignee in accordance with the order; and

2. Are released and discharged from any liability for the transferred payments to any party except the transferee or an assignee, notwithstanding the failure of any party to the transfer to comply with this section or with the orders of the court approving the transfer.

(e) If the terms of the structured settlement prohibit

transfer of payment rights:

1. A court is not precluded from hearing an application for approval of a transfer of such payment rights or ruling on the merits of the application and any objections to the application; and

2. The parties to such structured settlement are not precluded from waiving or asserting their rights under such terms.

(f) This section does not authorize the transfer of structured settlement payment rights in contravention of applicable law.

(6) NONCOMPLIANCE.—

(a) If a transferee violates the requirements for stipulating the discount and finance charge provided for in subsection (3), neither the transferee nor any assignee may collect from the transferred payments, or from the payee, any amount in excess of the net advance amount, and the payee may recover from the transferee or any assignee:

1. A refund of any excess amounts previously received by the transferee or any assignee;

2. A penalty in an amount determined by the court, but not in excess of three times the aggregate amount of the discount and finance charge; and

3. Reasonable costs and attorney ~~attorney's~~ fees.

(b) If the transferee violates the disclosure requirements in subsection (3), the transferee and any assignee are liable to

the payee for:

1. A penalty in an amount determined by the court, but not in excess of three times the amount of the discount and finance charge; and

2. Reasonable costs and attorney ~~attorney's~~ fees.

Section 2. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 403 Guardianship
SPONSOR(S): Health Care Appropriations Subcommittee; Children, Families & Seniors Subcommittee; Ahern and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/CS/CS/SB 232

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Children, Families & Seniors Subcommittee	11 Y, 0 N, As CS	Langston	Brazzell
2) Health Care Appropriations Subcommittee	12 Y, 0 N, As CS	Clark	Pridgeon
3) Judiciary Committee		Aziz PA	Havlicak RH

SUMMARY ANALYSIS

The bill substantially reorganizes ch. 744, F.S. It expands the duties of the Statewide Public Guardianship Office (SPGO) within the Department of Elder Affairs (DOEA) to oversee professional guardians as well as public guardians. The bill renames the SPGO as the Office of Public and Professional Guardian (OPPG).

The bill provides that the executive director of the new OPPG is appointed by the Secretary of DOEA. The bill sets out the new duties and responsibilities of the executive director of the OPPG, including for the oversight of professional guardians. It also requires the annual registration of professional guardians through the OPPG.

Currently, the SPGO only oversees registration of professional guardians, including the denial, suspension, or revocation of the registration. The new OPPG retains its duties relating to registration and becomes responsible for periodic monitoring and the discipline of professional guardians.

OPPG is directed to adopt rules to establish disciplinary oversight, including receiving and investigating complaints, conducting hearings, and taking administrative action pursuant to ch. 120, F.S.

The bill provides an appropriation in the sum of $698,153 in recurring funds and $123,157 in nonrecurring funds from the General Revenue Fund. The bill also provides associated salary rate of 242,345 and six full-time equivalent (FTE) positions for the purpose of carrying out this act. There is no fiscal impact on local governments.

The bill provides that it takes effect upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Guardianship

When an individual is unable to make legal decisions regarding his or her person or property, a guardian may be appointed to act on his or her behalf. A guardian is someone who has been appointed by the court to act on behalf of a ward (an individual who has been adjudicated incapacitated) regarding his or her person or property or both.[1]

The process to determine an individual's incapacity and the subsequent appointment of a guardian begins with a verified petition detailing the factual information supporting the reasons the petitioner believes the individual to be incapacitated, including the rights the alleged incapacitated person is incapable of exercising.[2] Once a person has been adjudicated incapacitated, the court may appoint a guardian. The order appointing a guardian must be consistent with the incapacitated person's welfare and safety, must be the least restrictive appropriate alternative, and must reserve to the incapacitated person the right to make decisions in all matters commensurate with the person's ability to do so.[3]

Who Can Be Appointed Guardian

The following may be appointed guardian of a ward:

- Any resident of Florida who is 18 years of age or older and has full legal rights and capacity;
- A nonresident if he or she is related to the ward by blood, marriage, or adoption;
- A trust company, a state banking corporation or state savings association authorized and qualified to exercise fiduciary powers in this state, or a national banking association or federal savings and loan association authorized and qualified to exercise fiduciary powers in Florida;
- A nonprofit corporation organized for religious or charitable purposes and existing under the laws of Florida;
- A judge who is related to the ward by blood, marriage, or adoption, or has a close relationship with the ward or the ward's family, and serves without compensation;
- A provider of health care services to the ward, whether direct or indirect, when the court specifically finds that there is no conflict of interest with the ward's best interests; or
- A for-profit corporation that meets certain qualifications, including being wholly owned by the person who is the circuit's public guardian in the circuit where the corporate guardian is appointed.[4]

Relationship Between Guardian and Ward

The relationship between a guardian and his or her ward is a fiduciary one.[5] A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of that relationship.[6] The guardian, as fiduciary, must:

- Act within the scope of the authority granted by the court and as provided by law;

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[1] S. 744.012(9), F.S.
[2] S. 744.3201, F.S.
[3] S. 744.344, F.S.
[4] S. 744.309, F.S.
[5] *Lawrence v. Norris,* 563 So. 2d 195, 197 (Fla. 1st DCA 1990); s. 744.361(1), F.S.
[6] *Doe v. Evans,* 814 So. 2d 370, 374 (Fla. 2002).

- Act in good faith;
- Not act in a manner contrary to the ward's best interests under the circumstances; and
- Use any special skills or expertise the guardian possesses when acting on behalf of the ward.

Additionally, s. 744.446, F.S., states that there is a fiduciary relationship, which exists between the guardian and the ward and that such relationship may not be used for the private gain of the guardian other than the remuneration for fees and expenses provided by law. Additionally, s. 744.362, F.S., imposes specific duties upon a guardian consistent with the basic duties of a fiduciary. The two most basic fiduciary duties are the duty of loyalty and the duty of care. As such, the guardian must act in the best interest of the ward and carry out his or her responsibilities in an informed and considered manner. Should a guardian breach his or her fiduciary duty to the ward, the court is authorized to intervene.[7]

Oversight of Guardians

Guardians are subject to the requirements of ch. 744, F.S. There are three main types of guardians: family or friends of the ward, professional guardians, and public guardians. The two types of guardians overseen by the Department of Elder Affairs (DOEA) are professional guardians and public guardians.

Professional Guardians

A professional guardian is a guardian who has at any time rendered services to three or more wards as their guardian; however, a person serving as a guardian for two or more relatives is not considered a professional guardian. A public guardian is considered a professional guardian for purposes of regulation, education, and registration.[8] There are currently 482 professional guardians registered with the Statewide Public Guardianship Office (SPGO).[9] The number of wards they serve is unknown.

Registration

A professional guardian must register with the SPGO established in part IX of ch. 744.[10] As part of the registration the professional guardian must:

- Provide sufficient information to identify the professional guardian;
- Complete a minimum of 40 hours of instruction and training through a course approved or offered by the SPGO;
- Complete a minimum of 16 hours of continuing education every 2 calendar years through a course approved or offered by the SPGO;
- Successfully pass an examination approved by DOEA[11] to demonstrate competency to act as a professional guardian;
- Undergo a criminal background check by the Federal Bureau of Investigation (FBI) and the Florida Department of Law Enforcement (FDLE);
- Submit to a credit history check; and
- Maintain a current blanket bond.[12]

The executive director of the SPGO may deny registration to a professional guardian if the executive director determines that the guardian's proposed registration, including the guardian's credit or criminal investigations, indicates that registering the professional guardian would violate any provision of ch. 744, F.S. If the executive director denies registration to a professional guardian, the SPGO must send

[7] S. 744.446(4), F.S.,
[8] S. 744.012(7), F.S
[9] Department of Elder Affairs, *2016 Legislative Bill Analysis HB 403*, November 4, 2015 (on file with Health Care Appropriations Subcommittee staff).
[10] S. 744.1083(1), F.S.
[11] The examination is currently administered by the University of South Florida's College of Education. University of South Florida, *Florida Professional Guardian Examination*, http://guardianship.usf.edu/index.html (last visited November 12, 2015).
[12] S. 744.1083(3), F.S.; s. 744.1085, F.S.; s. 744.3135, F.S.

written notification of the denial to the chief judge of each judicial circuit in which the guardian was serving on the day of the SPGO's decision to deny the registration.[13] The court is the only entity that can remove a guardian from a case to which he or she has been appointed.

Compensation

The guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf,[14] is entitled to a reasonable fee for services rendered and reimbursement for costs incurred on behalf of the assets of the guardianship estate unless the court finds the requested compensation to be substantially unreasonable.[15] Before the fees may be paid, a petition for fees or expenses must be filed with the court and accompanied by an itemized description of the services performed for the fees and expenses sought to be recovered.[16] When fees for a guardian or an attorney are submitted to the court for determination, the court shall consider:

- The time and labor required;
- The novelty and difficulty of the questions involved and the skill required to perform the services properly;
- The likelihood that the acceptance of the particular employment will preclude other employment of the person;
- The fee customarily charged in the locality for similar services;
- The nature and value of the incapacitated person's property, the amount of income earned by the estate, and the responsibilities and potential liabilities assumed by the person;
- The results obtained;
- The time limits imposed by the circumstances;
- The nature and length of the relationship with the incapacitated person; and
- The experience, reputation, diligence, and ability of the person performing the service.[17]

Powers and Duties of the Guardian

The guardian of an incapacitated person may exercise only those rights that have been removed from the ward and delegated to the guardian.[18] The guardian has a great deal of power when it comes to managing the ward's estate. Some of these powers require court approval before they may be exercised.

Examples of Powers That May Be Exercised By a Guardian	
Upon Court Approval[19]	**Without Court Approval[20]**
• Enter into contracts that are appropriate for, and in the best interest of, the ward. • Perform, compromise, or refuse performance of a ward's existing contracts. • Alter the ward's property ownership interests, including selling, mortgaging, or leasing any real property (including the homestead), personal property, or any interest therein • Borrow money to be repaid from the property of the ward or the ward's estate.	• Retain assets owned by the ward. • Receive assets from fiduciaries or other sources. • Insure the assets of the estate against damage, loss, and liability. • Pay taxes and assessments on the ward's property. • Pay reasonable living expenses for the ward, taking into consideration the ward's current finances. • Pay incidental expenses in the administration of the estate.

[13] S. 744.1083(5), F.S.
[14] Fees for legal services may include customary and reasonable charges for work performed by legal assistants employed by and working under the direction of the attorney. S. 744.108(4), F.S.
[15] S. 744.108(1), (8), F.S.
[16] S. 744.108(5), (7), F.S.
[17] S. 744.108(2), F.S.
[18] S. 744.361(1), F.S.
[19] S. 744.441, F.S.
[20] S. 744.444, F.S.

Powers Upon Court Approval, Continued	Powers Without Court Approval, Continued
• Renegotiate, extend, renew, or modify the terms of any obligation owing to the ward. • Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate. • Exercise any option contained in any policy of insurance payable to the ward. • Make gifts of the ward's property members of the ward's family in estate and income tax planning. • Pay reasonable funeral, interment, and grave marker expenses for the ward.	• Prudently invest liquid assets belonging to the ward. • Sell or exercise stock subscription or conversion rights. • Consent to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise of the ward. • Employ, pay, or reimburse persons, including attorneys, auditors, investment advisers, care managers, or agents, even if they are associated with the guardian, to advise or assist the guardian in the performance of his or her duties.

There are also a number of duties imposed on a guardian. The guardian must:

- File an initial report within 60 days after the letters of guardianship are signed;
- File an annual report consisting of an annual accounting and/or an annual guardianship plan.
- Implement the guardianship plan;
- Consult with other guardians appointed, if any;
- Protect and preserve the property of the ward; invest it prudently, apply income first to the ward before the ward's dependents, and account for it faithfully;
- Observe the standards in dealing with the guardianship property that would be observed by a prudent person dealing with the property of another;
- If authorized by the court, take possession of all of the ward's property and of the rents, income, issues, and profits from it, whether accruing before or after the guardian's appointment, and of the proceeds arising from the sale, lease, or mortgage of the property or of any part; and
- A guardian who is given authority over a ward's person shall, as appropriate under the circumstances:
    - Consider the expressed desires of the ward when making decisions that affect the ward;
    - Allow the ward to maintain contact with family and friends unless the guardian believes that such contact may cause harm to the ward;
    - Not restrict the physical liberty of the ward more than reasonably necessary to protect the ward or another person from serious physical injury, illness, or disease;
    - Assist the ward in developing or regaining capacity, if medically possible;
    - Notify the court if the guardian believes that the ward has regained capacity and that one or more of the rights that have been removed should be restored to the ward.;
    - To the extent applicable, make provision for the medical, mental, rehabilitative, or personal care services for the welfare of the ward;
    - To the extent applicable, acquire a clear understanding of the risks and benefits of a recommended course of health care treatment before making a health care decision;
    - Evaluate the ward's medical and health care options, financial resources, and desires when making residential decisions that are best suited for the current needs of the ward;
    - Advocate on behalf of the ward in institutional and other residential settings and regarding access to home and community-based services; and
    - When not inconsistent with the person's goals, needs, and preferences, acquire an understanding of the available residential options and give priority to home and other community-based services and settings. [21]

Additionally, a professional guardian must ensure that each of the guardian's wards is personally visited by the guardian or one of the guardian's professional staff at least once each calendar quarter.[22]

[21] S. 744.361, F.S.
[22] Id.

Abuse or Neglect by Guardian

A guardian may not abuse, neglect, or exploit a ward.[23] A person who believes that a guardian is abusing, neglecting, or exploiting a ward shall report the incident to the central abuse hotline of the Department of Children and Families.[24] A guardian has committed exploitation when the guardian:

- Commits fraud in obtaining appointment as a guardian;
- Abuses his or her powers; or
- Wastes, embezzles, or intentionally mismanages the assets of the ward.[25]

Discipline of Guardian

If a guardian who is currently registered with the SPGO violates a provision of ch. 744, F.S., the executive director of the SPGO may suspend or revoke the guardian's registration. SPGO does not have the authority to take any other disciplinary action against the professional guardian. Currently, the SPGO does not monitor professional guardians, nor does it conduct investigations into complaints received regarding professional guardians; it only undertakes those actions for public guardians.[26]

Once the executive director suspends or revokes a professional guardian's registration, the SPGO must send written notification of the suspension or revocation to the chief judge of each judicial circuit in which the guardian was serving on the day of the decision to suspend or revoke the registration.[27] SPGO has no authority to remove a guardian from cases to which he or she has been appointed; the court that appointed the guardian is the entity with the authority to remove a guardian. The court may remove a guardian for a number of reasons, including:

- Fraud in obtaining her or his appointment;
- Failure to discharge her or his duties;
- Abuse of her or his powers;
- An incapacity or illness, including substance abuse, which renders the guardian incapable of discharging her or his duties;
- Failure to comply with any order of the court;
- The wasting, embezzlement, or other mismanagement of the ward's property;
- Development of a conflict of interest between the ward and the guardian;
- A material failure to comply with the guardianship report;
- A failure to comply with the rules for timely filing the initial and annual guardianship reports; and
- A failure to fulfill the guardianship education requirements.[28]

Appointment of Professional Guardians

Except in the case of a standby or preneed guardian, the court is required to appoint professional guardians according to a rotation system. In each case when a court appoints a professional guardian and does not use a rotation system for such appointment, the court must make specific findings of fact stating why the person was selected as guardian in the particular matter involved.[29] The findings must reference the following factors that must be considered by the court:

- Whether the guardian is related by blood or marriage to the ward;
- Whether the guardian has educational, professional, or business experience relevant to the

[23] S. 744.359, F.S.
[24] Id.
[25] Id.
[26] Email from Department of Elder Affairs, *FW: DOEA Summary of Programs and Services (override)*, March 16, 2015. (on file with Children, Families, & Seniors Subcommittee staff).
[27] S. 744.1083(5), F.S.
[28] S. 744.477, F.S.
[29] S. 744.312(4)(a), F.S.

nature of the services sought to be provided;
- Whether the guardian has the capacity to manage the financial resources involved;
- Whether the guardian has the ability to meet the requirements of the law and the unique needs of the individual case;
- The wishes expressed by an incapacitated person as to who shall be appointed guardian;
- The preference of a minor who is age 14 or over as to who should be appointed guardian;
- Any person designated as guardian in any will in which the ward is a beneficiary; and
- The wishes of the ward's next of kin, when the ward cannot express a preference.[30]

Additionally, the court may not give preference to the appointment of a person based solely on the fact that such person was appointed by the court to serve as an emergency temporary guardian.[31] When a professional guardian is appointed as an emergency temporary guardian that professional guardian may not be appointed as the permanent guardian of a ward unless one of the next of kin of the alleged incapacitated person or the ward requests that the professional guardian be appointed as permanent guardian.[32] However, the court may waive this limitation if the special requirements of the guardianship demand that the court appoint a guardian because he or she has special talent or specific prior experience.[33]

Responsibilities of the Clerk of the Circuit Court

In addition to the duty to serve as the custodian of the guardianship files, the clerk shall review each initial and annual guardianship report to ensure that it contains required information about the ward.[34] The clerk is required to:

- Within 30 days after the date of filing of the initial or annual report of the guardian of the person, complete his or her review of the report.
- Within 90 days after the filing of the verified inventory and accountings by a guardian of the property, the clerk shall audit the verified inventory and the accountings and advise the court of the results of the audit.
- Report to the court when a report is not timely filed.

If the clerk has reason to believe further review is appropriate, the clerk may request and review records and documents that reasonably impact guardianship assets, including, but not limited to, the beginning inventory balance and any fees charged to the guardianship.[35]

Public Guardianship

The "Public Guardianship Act"[36] was created by the Florida Legislature in 1999 to help provide services to meet the needs of vulnerable persons who lack the capacity to make decisions on their own behalf.[37] SPGO is responsible for appointing and overseeing Florida's public guardians.[38]

The Public Guardianship Act authorizes the executive director of the SPGO, after consultation with the chief judge and other circuit judges within the judicial circuit and with appropriate advocacy groups to establish, within a county in the judicial circuit or within the judicial circuit, one or more offices of public

[30] S. 744.312(2)-(3), F.S.
[31] S. 744.312(5), F.S.
[32] S. 744.312(4)(b), F.S.
[33] Id.
[34] S. 744.368, F.S.
[35] Id.
[36] S. 744.701, F.S.
[37] Department of Elder Affairs, *2016 Legislative Bill Analysis HB 403*, November 4, 2015 (on file with Health Care Appropriations Subcommittee staff).
[38] S. 744.7021, F.S.

guardian.[39] Once established, the executive director must create a list of persons best qualified to serve as the public guardian.[40] The public guardian is directed to maintain a staff or contract with professionally qualified individuals to carry out the guardianship functions.[41] As of January 2013, there were 13 offices of public guardian that served 27 of 67 counties; by December of that year, SPGO expanded public guardianship services to cover all 67 counties.[42]

As of September 9, 2015, there were 60 public guardians, serving approximately 3,000 wards, overseen by SPGO. SPGO monitors the public guardians by conducting in-depth investigations into the local programs'[43] administration and use of financial resources.[44] SPGO's fiscal monitoring includes investigating whether public guardians are spending state resources reasonably and whether they are spending the wards' assets reasonably.[45] SPGO reviews the case files and notes if there are any show cause orders or other issues that need to be addressed; additionally, SPGO conducts random site visits for at least 20% of the wards belonging to each public guardian.[46]

Problems in the Guardianship System

In 2003, the Florida Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, conducted a review of how effectively guardians were fulfilling their duties and obligations.[47] At that time, Florida was already confronting issues such as how the courts would be able to adequately exercise their legal, ethical, and moral responsibilities to monitor guardianship cases and protect the incapacitated adults entrusted to their care.[48] The committee received input from citizens that there was abuse, neglect, and misuse of ward's funds.[49] As a result, the committee stated that, though the majority of guardians are law-abiding and are diligently fulfilling their complex responsibilities, a small percentage are not properly handling guardianship matters, and as a result, monitoring is necessary.[50]

In 2004, DOEA released the Final Report of its Guardianship Task Force[51] which also advocated for additional oversight of professional guardians. These reports prompted enactment into law a number of the requirements for professional guardian registration that are now in place. Since then, media outlets have continued to report on issues within the guardianship system. [52] [53]

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[39] S. 744.703(1), F.S.
[40] Id.
[41] Id.
[42] Florida is the only state, except for Delaware, which has three counties, to accomplish statewide coverage of public guardian services in every county. Florida Department of Elder Affairs, Summary of Programs and Services, February, 2014, *available at* http://elderaffairs.state.fl.us/doea/pubs/pubs/sops2014/2014%20SOPS_complete.pdf (last visited November 12, 2015).
[43] These are entities that have contracted with SPGO to provide public guardian services.
[44] Email from Department of Elder Affairs, *FW: DOEA Summary of Programs and Services (override)*, March 16, 2015. (on file with Children, Families, and Seniors Subcommittee staff).
[45] Id.
[46] Id.
[47] Florida Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, 2003, *available at* http://flcourts.org/core/fileparse.php/260/urlt/guardianshipmonitoring.pdf (last visited November 12, 2015).
[48] Id.
[49] Id.
[50] Id.
[51] Department of Elder Affairs, Guardianship Task Force – 2004 Final Report, *available at* http://elderaffairs.state.fl.us/doea/pubguard/GTF2004FinalReport.pdf (last visited November 12, 2015).
[52] An article from May 2014 provides anecdotal evidence of fraud within the guardianship system, noting that the appointed court monitor for Broward County has uncovered hundreds of thousands of dollars that guardians have misappropriated from their wards, and, over the course of two years, Palm Beach County's guardianship fraud hotline has investigated over 100 cases. Michael E. Miller, *Florida's Guardians Often Exploit the Vulnerable Residents They're Supposed to Protect*, MIAMI NEWTIMES, May 8, 2014, *available at* http://www.miaminewtimes.com/2014-05-08/news/florida-guardian-elderly-fraud/full/ (last visited November 12, 2015).
[53] A three-part series published in December 2014 details abuses occurring in guardianships based on an evaluation of guardianship court case files and interviews with wards, family and friends caught in the system against their will. Barbara Peters Smith, *the Kindness of Strangers – Inside Elder Guardianship in Florida,* SARASOTA HERALD-TRIBUNE, December 6, 2014, *available at* http://guardianship.heraldtribune.com/default.aspx (last visited November 12, 2015).

Effect of Proposed Changes

The bill substantially reorganizes ch. 744, F.S. The bill includes a legislative finding that private guardianship is inadequate where there is no willing and responsible family member or friend, other person, bank, or corporation available to serve as guardian for an incapacitated person and such person does not have adequate income or wealth for the compensation of the private guardian. The term "private guardian" is not presently defined in statute, nor is it defined by the bill.

Additionally, the bill provides that a public guardian will only be provided to those persons whose needs cannot be met through a less restrictive means of intervention. However, it also permits a public guardian to serve as a limited guardian or as a guardian advocate for individuals with developmental disabilities under s. 393.12, F.S.

Office of Public and Professional Guardian (OPPG)

The bill expands the responsibilities of SPGO within DOEA regarding oversight of professional guardians. The bill renames the SPGO as the Office of Public and Professional Guardian (OPPG), which is to facilitate the establishment of offices of public guardians for the purpose of providing guardianship services for incapacitated persons when no private guardian is available.

The bill provides that the executive director of the new OPPG is appointed by the Secretary of DOEA. The bill sets out the new duties and responsibilities of the executive director of the OPPG for the oversight of public and professional guardians. The executive director must review the standards and criteria for the education, registration, and certification of public and professional guardians in Florida. The executive director's oversight responsibilities for professional guardians include but are not limited to:

- Establishing standards of practice for public and professional guardians;
- Reviewing and approving the standards and criteria for the education, registration, and certification of public and professional guardians in Florida;
- Developing a guardianship training program curriculum that may be offered to all guardians;
- Developing and implementing a monitoring tool to use for periodic monitoring activities of professional guardians; however, this monitoring tool may not include a financial audit as required to be performed by the clerk of the circuit court under s. 744.368, F.S.;
- Developing procedures for the review of an allegation that a professional guardian has violated an applicable statute, fiduciary duty, standard of practice, rule, regulation, or other requirement governing the conduct of professional guardians; and
- Establishing disciplinary proceedings, conducting hearings, and taking administrative action under ch. 120, F.S.

The executive director is required to establish standards of practice for public and professional guardians, by rule, no later than October 1, 2016, in consultation with professional guardianship associations and other interested stakeholders. Additionally, a draft of these rules must be provided to the Governor, Legislature, and Secretary of DOEA by August 1, 2016.

Regulation and Appointment of Professional Guardians

The bill provides that a court may not appoint any professional guardian who is not registered by OPPG.

Discipline of Professional Guardians

The bill directs OPPG to establish standards and procedures in rule by October 1, 2016, and provide a draft of the standards and procedures to the Governor, the Legislature and the Secretary of DOEA for review by August 1, 2016. These rules shall provide for OPPG to:

- Review and investigate complaints against professional guardians;
- Initiate an investigation no later than 10 business days after OPPG receives a complaint;
- Complete and provide initial investigative findings and recommendations, if any, to the professional guardian and person filing the complaint within 60 days;
- Obtain supporting information, including interviewing the ward, family member, or interested party, or documentation to determine the legal sufficiency of a complaint;
- Dismiss any complaint that is not legally sufficient; and
- Coordinate with the clerks of the court to avoid duplication of duties.

OPPG must establish disciplinary proceedings, conduct hearings, and take administrative action pursuant to ch. 120, F.S. Disciplinary actions may include, but are not limited to, requiring professional guardians to participate in additional educational courses, imposing additional monitoring of the guardianships being served by the professional guardian; and suspending and revoking the guardian's registration. If the final determination from a disciplinary proceeding is to suspend or revoke the guardian's registration, the determination must be provided to any court that oversees any guardianship to which the professional guardian is appointed.

OPPG is required to report any suspected abuse, neglect or exploitation of a vulnerable adult as a result of a complaint, or investigation of a complaint, to the Department of Children and Families' central abuse hotline.

The bill directs DOEA to adopt rules to implement the standards and procedures outlined above by October 1, 2016.

Additionally, the bill sets forth the grounds for discipline. Disciplinary action may be taken against a professional guardian for:

- Making a misleading, deceptive, or fraudulent representation in or related to the practice of guardianship;
- Violating any rule governing guardians or guardianship adopted by OPPG;
- Being convicted or found guilty of, or entering a plea of guilty or nolo contendere to a crime which relates to the practice of, or ability to practice as a professional guardian;
- Failing to comply with the educational course requirements for professional guardians;
- Having a registration, license, or authority to practice a regulated profession revoked;
- Knowingly filing a false report or complaint with OPPG against another guardian;
- Attempting to obtain, obtaining, or renewing a registration or license to practice a profession by bribery, fraud, or a known error;
- Failing to report a violation of ch. 744, F.S. or the rules of OPPG to OPPG;
- Failing to perform a legal or statutory obligation;
- Making or filing a false report that is signed in the person's capacity as professional guardian;
- Using the position of guardian for financial gain;
- Violating or failing to comply with an order from OPPG;
- Improperly interfering with an investigation;
- Using the guardianship relationship to engage or attempt to engage in sexual activity;
- Failing to report to OPPG within 30 days being convicted or found guilty of, or enter a plea of guilty or nolo contendere to a crime;
- Being unable to perform the functions of guardian;
- Failing to post and maintain a blanket fiduciary bond;
- Failing to maintain all records relating to a guardianship for specified time; or
- Violating any provision of ch. 744, F.S., or any rules adopted thereunder.

When OPPG finds that a professional guardian is guilty of any of the grounds for discipline, it may take action against that guardian by entering an order imposing one or more penalties on the professional guardian. When determining what action is appropriate against a professional guardian, prior to

consideration of any mitigation or rehabilitation for the professional guardian, OPPG must first consider what sanctions are necessary to safeguard the wards and protect the public. The bill provides legislative intent that the disciplinary guidelines should specify a meaningful range of penalties based on the severity and repetition of offenses and that minor violations should be treated differently than those which endanger the ward or the public. OPPG may impose any combination of the following sanctions:

- Refuse to register an applicant as a professional guardian;
- Suspend or revoke of a professional guardian's registration;
- Issue of a reprimand;
- Require treatment, completion of continuing education courses, or reexamination;
- Require restitution; or
- Require remedial education.

The bill provides for ch. 120, F.S., rights for professional guardians who are subject to disciplinary procedures. OPPG is directed to adopt rules through DOEA that set forth the disciplinary guidelines applicable to each grounds for discipline, designate mitigating and aggravating circumstances, and otherwise administer this section.

Access to Records by OPPG

The bill provides OPPG access to financial audits prepared by the clerk of the court pursuant to s. 744.368, F.S., and held by the court that are necessary as part of an investigation of a guardian as a result of a complaint filed with OPPG.

Joining Forces Public Guardianship Grant Program

The bill amends the legislative intent for the existing Joining Forces for Public Guardianship matching grant program for the purpose of assisting counties in establishing and funding community-supported public guardianship programs.

Background Checks

The bill requires OPPG to adopt rules by October 1, 2016, that detail the acceptable methods for completing an electronic fingerprint criminal history record check and for completing a credit investigation for professional guardians and each employee of a professional guardian who has a fiduciary responsibility to the ward.

The bill takes effect upon becoming law.

B. SECTION DIRECTORY:

Section 1: Provides directives to the Division of Law Revision and Information.
Section 2: Provides directives to the Division of Law Revision and Information.
Section 3: Provides directives to the Division of Law Revision and Information.
Section 4: Amends s. 744.1012, F.S., relating to legislative intent.
Section 5: Renumbers s. 744.201, F.S., as s. 744.1096, F.S., relating to domicile of ward.
Section 6: Amends s. 744.202, F.S., renumbered as 744.1097, F.S., relating to venue.
Section 7: Renumbers s. 744.2025, F.S., as s. 744.1098, F.S., relating to change of ward's residence.
Section 8: Amends s. 744.7021, F.S., renumbering it as s. 744.2001, F.S., relating to the Office of Public and Professional Guardians.
Section 9: Amends s. 744.1083, F.S., renumbering it as s. 744.2002, F.S., relating to professional guardian registration.

Section 10: Amends s. 744.1085, F.S., renumbering it as s. 744.2003, F.S., relating to regulation of professional guardians; application; bond required; educational requirements.
Section 11: Creates s. 744.2004, F.S., relating to complaints; disciplinary proceedings; penalties; enforcement.
Section 12: Creates s. 744.20041, F.S., relating to grounds for discipline; penalties; enforcement.
Section 13: Amends s. 744.344, F.S., renumbering it as s. 744.2005, F.S., relating to order of appointment.
Section 14: Amend s. 744.703, F.S., renumbering it as s. 744.2006, F.S., relating to the Office of Public and Professional Guardians; appointment, notification.
Section 15: Renumbers s. 744.704, F.S., as s. 744.2007, F.S., relating to powers and duties.
Section 16: Renumbers s. 744.705, F.S., as s. 744.2008, F.S., relating to costs of the public guardian.
Section 17: Amends s. 744.706, F.S., renumbering it as s. 744.2009, F.S., relating to preparation of budget.
Section 18: Amends s. 744.707, F.S., renumbering it as s. 744.2101, F.S., relating to procedures and rules.
Section 19: Renumbers s. 744.709, F.S., as s. 744.2102, F.S., relating to surety bond.
Section 20: Amends s. 744.708, F.S., renumbering it as s. 744.2103, F.S., relating to reports and standards.
Section 21: Amends s. 744.7081, F.S., renumbering it as s. 744.2104, F.S., relating to access to records by the Office of Public and Professional Guardians; confidentiality.
Section 22: Amends s. 744.7082, F.S., renumbering it as s. 744.2105, F.S., relating to direct-support organization; definition; use of property; board of directors; audit; dissolution.
Section 23: Amends s. 744.712, F.S., renumbering it as s. 744.2106, F.S., relating to Joining Forces for Public Guardianship grant program; purpose.
Section 24: Amends. 744.713, F.S., renumbering it as s. 744.2107, F.S., relating to program administration; duties of the Office of Public and Professional Guardians.
Section 25: Amends s. 744.714, F.S., renumbering it as s. 744.2108, F.S., relating to eligibility.
Section 26: Amends s. 744.715, F.S., renumbering it as s. 744.2109, F.S., relating to grant application requirements; review criteria; award process.
Section 27: Amends s. 744.3135, F.S., relating to credit and criminal investigation.
Section 28: Repeals s. 744.701, F.S., relating to short title
Section 29: Repeals s. 744.702, F.S., relating to legislative intent.
Section 30: Repeals s. 744.7101, F.S., relating to short title.
Section 31: Repeals s. 744.711, F.S., relating to legislative findings and intent.
Section 32: Amends s. 400.148, F.S., relating to Medicaid "Up-or-Out" Quality of Care Contract Management Program.
Section 33: Amends s. 744.331, F.S., relating to procedures to determine incapacity.
Section 34: Amends s. 20.415, F.S., relating to Department of Elderly Affairs; trust funds.
Section 35: Amends s. 415.1102, F.S., relating to adult protection teams.
Section 36: Amends s. 744.309, F.S., relating to who may appoint guardian of a resident ward.
Section 37: Amends s. 744.524, F.S., relating to termination of guardianship on change of domicile of a resident ward.
Section 38: Provides an appropriation.
Section 39: Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill will have a significant negative fiscal impact on DOEA. DOEA will see increased costs associated with regulating professional guardians. DOEA would need funding and FTEs to perform the duties required by the bill. There would also be increased costs to DOEA's general counsel's office as the professional guardians will be able to challenge decisions by the new OPPG under ch. 120, F.S. The number of wards represented by the 482 guardians is unknown at this time.

DOEA estimated the total fiscal impact on the department to be $821,670. This includes $698,153 in recurring costs for six full-time equivalent positions (FTEs) and their associated travel expenses for the oversight of the 482 professional guardians. DOEA estimates this number of FTEs is needed on the assumption that the current workload would at least double. The total also includes funding for contracted services for forensic auditors to investigate potential issues with professional guardians; DOEA estimates there will be 3-5 forensic cases per year. The recurring costs are:

- Five complaint investigators: $298,471
- One senior attorney: $88,453
- Travel costs: $21,750
- Forensic auditors: $289,479

Additionally, DOEA estimates a non-recurring cost of $100,000 for a computer system to capture data related to the professional guardians activities, such as information related to complaints and investigations.

The Office of State Courts Administrator cannot accurately determine the fiscal impact of the bill because it cannot determine the revenues from increased filing fees nor the additional costs of appellate review of administrative actions.

The bill provides an appropriation in the sum of $698,153 in recurring funds and $123,157 in nonrecurring funds from the General Revenue Fund. The bill also provides associated salary rate of 242,345 and six full-time equivalent (FTE) positions.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not Applicable. This bill does not appear to affect county or municipal governments

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

The bill requires DOEA to promulgate rules relating to OPPG's handling of complaints, disciplinary proceedings, penalties, and enforcement.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On November 18, 2015, the Children, Families & Seniors Subcommittee adopted two amendments. The first amendment specifies that a public guardian may also serve as a limited guardian or a guardian advocate under s. 393.12, F.S., for individuals with developmental disabilities. The second amendment creates s. 744.20041, F.S., which:

- Establishes grounds for disciplining a professional guardian.
- Establishes the range of penalties available for professional guardians who have violated this section.
- Establishes the procedures for determining whether a professional guardian is guilty of a violation and what sanction is appropriate.
- Sets forth legislative intent for the establishment of the disciplinary guidelines.
- Directs DOEA to adopt rules to implement this section.

On January 28, 2016, the Health Care Appropriations Subcommittee adopted one amendment. The amendment provides six full-time equivalent (FTE) positions, with associated salary rate of 242,345, and the sums of $698,153 in recurring funds and $123,517 in nonrecurring funds from the General Revenue Fund to the Department of Elder Affairs for the purpose of carrying out this act.

The bill was reported favorably as a committee substitute to the committee substitute. The analysis is drafted to the committee substitute as passed by the Health Care Appropriations Subcommittee.

A bill to be entitled

An act relating to guardianship; providing directives to the Division of Law Revision and Information; amending s. 744.1012, F.S.; revising legislative intent; renumbering s. 744.201, F.S., relating to domicile of ward; transferring, renumbering, and amending s. 744.202, F.S.; conforming a cross-reference; renumbering s. 744.2025, F.S., relating to change of ward's residence; renumbering and amending s. 744.7021, F.S.; renaming the Statewide Public Guardianship Office to the Office of Public and Professional Guardians; revising the duties and responsibilities of the executive director for the Office of Public and Professional Guardians; conforming provisions to changes made by the act; renumbering and amending s. 744.1083, F.S.; providing that a guardian has standing to seek judicial review pursuant to ch. 120, F.S., if his or her registration is denied; removing a provision authorizing the executive director to suspend or revoke the registration of a guardian who commits certain violations; removing the requirement of written notification to the chief judge of the judicial circuit upon the executive director's denial, suspension, or revocation of a registration; conforming provisions to changes made by the act;

conforming a cross-reference; renumbering and amending s. 744.1085, F.S.; conforming provisions to changes made by the act; removing an obsolete provision; conforming a cross-reference; creating s. 744.2004, F.S.; requiring the Office of Public and Professional Guardians to establish certain procedures by a specified date; requiring the office to establish disciplinary proceedings, conduct hearings, and take administrative action pursuant to ch. 120, F.S.; requiring the Department of Elderly Affairs to provide certain written information in disciplinary proceedings; requiring that certain findings and recommendations be made within a certain time; requiring the office, under certain circumstances, to make a specified recommendation to a court of competent jurisdiction; requiring the office to report determination or suspicion of abuse to the Department of Children and Families' central abuse hotline under specified circumstances; requiring the Department of Elderly Affairs to adopt rules; creating s. 744.20041, F.S.; providing grounds for discipline of professional guardians by the Office of Public and Professional Guardians; providing penalties; providing procedures for determining which disciplinary action is appropriate; providing legislative intent and purpose; authorizing the office to seek an injunction or a writ

of mandamus against certain persons; providing for permanent revocation of a professional guardian's registration; providing procedures for suspension and revocation of such registrations; directing the office to adopt rules; renumbering and amending s. 744.344, F.S.; making technical changes; renumbering and amending s. 744.703, F.S.; conforming provisions to changes made by the act; renumbering ss. 744.704 and 744.705, F.S., relating to the powers and duties of public guardians and the costs of public guardians, respectively; renumbering and amending ss. 744.706 and 744.707, F.S.; conforming provisions to changes made by the act; renumbering s. 744.709, F.S., relating to surety bonds; renumbering and amending s. 744.708, F.S.; conforming provisions to changes made by the act; renumbering and amending s. 744.7081, F.S.; requiring that the Office of Public and Professional Guardians be provided financial audits upon its request as part of an investigation; conforming provisions to changes made by the act; renumbering and amending s. 744.7082, F.S.; conforming provisions to changes made by the act; renumbering and amending s. 744.712, F.S.; providing legislative intent; conforming provisions; renumbering and amending ss. 744.713, 744.714, and 744.715, F.S.; conforming provisions to changes made by the act; amending s.

744.3135, F.S.; requiring the office to adopt rules by a certain date; conforming provisions to changes made by the act; repealing s. 744.701, F.S., relating to a short title; repealing s. 744.702, F.S., relating to legislative intent; repealing s. 744.7101, F.S., relating to a short title; repealing s. 744.711, F.S., relating to legislative findings and intent; amending ss. 400.148 and 744.331, F.S.; conforming provisions to changes made by the act; amending ss. 20.415, 415.1102, 744.309, and 744.524, F.S.; conforming cross-references; making technical changes; providing an appropriation and authorizing positions; providing an effective date.

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

Section 1. The Division of Law Revision and Information is directed to add ss. 744.1096-744.1098, Florida Statutes, created by this act, to part I of chapter 744, Florida Statutes.

Section 2. The Division of Law Revision and Information is directed to rename part II of chapter 744, Florida Statutes, entitled "VENUE," as "PUBLIC AND PROFESSIONAL GUARDIANS," consisting of ss. 744.2001-744.2109, Florida Statutes.

Section 3. The Division of Law Revision and Information is directed to remove part IX of chapter 744, Florida Statutes.

Section 4. Section 744.1012, Florida Statutes, is amended

to read:

744.1012 Legislative intent.—The Legislature finds that:

(1) ~~That~~ Adjudicating a person totally incapacitated and in need of a guardian deprives such person of all her or his civil and legal rights and that such deprivation may be unnecessary.

(2) ~~The Legislature further finds that~~ It is desirable to make available the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs and that alternatives to guardianship and less restrictive means of assistance, including, but not limited to, guardian advocates, should always be explored before an individual's rights are removed through an adjudication of incapacity.

(3) By recognizing that every individual has unique needs and differing abilities, ~~the Legislature declares that~~ it is the purpose of this act to promote the public welfare by establishing a system that permits incapacitated persons to participate as fully as possible in all decisions affecting them; that assists such persons in meeting the essential requirements for their physical health and safety, in protecting their rights, in managing their financial resources, and in developing or regaining their abilities to the maximum extent possible; and that accomplishes these objectives through providing, in each case, the form of assistance that least interferes with the legal capacity of a person to act in her or

his own behalf. This act shall be liberally construed to accomplish this purpose.

(4) Private guardianship may be inadequate when there is no willing and responsible family member or friend, other person, bank, or corporation available to serve as guardian for an incapacitated person, and such person does not have adequate income or wealth for the compensation of a private guardian.

(5) Through the establishment of the Office of Public and Professional Guardians, the Legislature intends to permit the establishment of offices of public guardians for the purpose of providing guardianship services for incapacitated persons when no private guardian is available.

(6) A public guardian will be provided only to those persons whose needs cannot be met through less restrictive means of intervention. A public guardian may also serve in the capacity of a limited guardian under s. 744.102, or guardian advocate under s. 393.12, when the public guardian is the guardian of last resort as described in subsection (4).

Section 5. Section 744.201, Florida Statutes, is renumbered as section 744.1096, Florida Statutes.

Section 6. Section 744.202, Florida Statutes, is renumbered as section 744.1097, Florida Statutes, and subsection (3) of that section is amended, to read:

744.1097 ~~744.202~~ Venue.—

(3) When the residence of an incapacitated person is changed to another county, the guardian shall petition to have

the venue of the guardianship changed to the county of the acquired residence, except as provided in s. 744.1098 ~~s. 744.2025~~.

Section 7. Section 744.2025, Florida Statutes, is renumbered as section 744.1098, Florida Statutes.

Section 8. Section 744.7021, Florida Statutes, is renumbered as section 744.2001, Florida Statutes, and amended to read:

744.2001 ~~744.7021~~ ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians.—There is ~~hereby~~ created the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians within the Department of Elderly Affairs.

(1) The Secretary of Elderly Affairs shall appoint the executive director, who shall be the head of the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians. The executive director must be a member of The Florida Bar, knowledgeable of guardianship law and of the social services available to meet the needs of incapacitated persons, shall serve on a full-time basis, and shall personally, or through a representative ~~representatives~~ of the office, carry out the purposes and functions of the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians in accordance with state and federal law. The executive director shall serve at the pleasure of and report to the secretary.

(2) The executive director shall, within available resources:~~,~~

(a) Have oversight responsibilities for all public and professional guardians.

(b) Establish standards of practice for public and professional guardians by rule, in consultation with professional guardianship associations and other interested stakeholders, no later than October 1, 2016. The executive director shall provide a draft of the standards to the Governor, the Legislature, and the secretary for review by August 1, 2016.

(c) Review and approve the standards and criteria for the education, registration, and certification of public and professional guardians in Florida.

(3) The executive director's oversight responsibilities of professional guardians must be finalized by October 1, 2016, and shall include, but are not limited to:

(a) Developing and implementing a monitoring tool to ensure compliance of professional guardians with the standards of practice established by the Office of Public and Professional Guardians. This monitoring tool may not include a financial audit as required by the clerk of the circuit court under s. 744.368.

(b) Developing procedures, in consultation with professional guardianship associations and other interested stakeholders, for the review of an allegation that a professional guardian has violated the standards of practice established by the Office of Public and Professional Guardians governing the conduct of professional guardians.

(c) Establishing disciplinary proceedings, conducting hearings, and taking administrative action pursuant to chapter 120.

(4) The executive director's oversight responsibilities of public guardians shall include, but are not limited to:

(a) Reviewing ~~The executive director shall review~~ the current public guardian programs in Florida and other states.

(b) Developing ~~The executive director~~, in consultation with local guardianship offices and other interested stakeholders, ~~shall develop~~ statewide performance measures ~~and standards~~.

(c) Reviewing ~~The executive director shall review the~~ various methods of funding public guardianship programs, the kinds of services being provided by such programs, and the demographics of the wards. In addition, the executive director shall review and make recommendations regarding the feasibility of recovering a portion or all of the costs of providing public guardianship services from the assets or income of the wards.

(d) By January 1 of each year, providing ~~the executive director shall provide~~ a status report and ~~provide further~~ recommendations to the secretary which ~~that~~ address the need for public guardianship services and related issues.

(e) Developing a guardianship training program curriculum that may be offered to all guardians, whether public or private.

(5) ~~(e)~~ The executive director may provide assistance to local governments or entities in pursuing grant opportunities.

The executive director shall review and make recommendations in the annual report on the availability and efficacy of seeking Medicaid matching funds. The executive director shall diligently seek ways to use existing programs and services to meet the needs of public wards.

~~(f) The executive director, in consultation with the Florida Guardianship Foundation, shall develop a guardianship training program curriculum that may be offered to all guardians whether public or private.~~

(6)~~(3)~~ The executive director may conduct or contract for demonstration projects authorized by the Department of Elderly Affairs, within funds appropriated or through gifts, grants, or contributions for such purposes, to determine the feasibility or desirability of new concepts of organization, administration, financing, or service delivery designed to preserve the civil and constitutional rights of persons of marginal or diminished capacity. Any gifts, grants, or contributions for such purposes shall be deposited in the Department of Elderly Affairs Administrative Trust Fund.

Section 9. Section 744.1083, Florida Statutes, is renumbered as section 744.2002, Florida Statutes, subsections (1) through (5) of that section are amended, and subsections (7) and (10) of that section are republished, to read:

744.2002 ~~744.1083~~ Professional guardian registration.—

(1) A professional guardian must register with the ~~Statewide Public Guardianship~~ Office of Public and Professional

Guardians established in part II ~~IX~~ of this chapter.

(2) Annual registration shall be made on forms furnished by the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians and accompanied by the applicable registration fee as determined by rule. The fee may not exceed $100.

(3) Registration must include the following:

(a) Sufficient information to identify the professional guardian, as follows:

1. If the professional guardian is a natural person, the name, address, date of birth, and employer identification or social security number of the person.

2. If the professional guardian is a partnership or association, the name, address, and employer identification number of the entity.

(b) Documentation that the bonding and educational requirements of s. 744.2003 ~~s. 744.1085~~ have been met.

(c) Sufficient information to distinguish a guardian providing guardianship services as a public guardian, individually, through partnership, corporation, or any other business organization.

(4) Prior to registering a professional guardian, the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians must receive and review copies of the credit and criminal investigations conducted under s. 744.3135. The credit and criminal investigations must have been completed within the

previous 2 years.

(5) The executive director of the office may deny registration to a professional guardian if the executive director determines that the guardian's proposed registration, including the guardian's credit or criminal investigations, indicates that registering the professional guardian would violate any provision of this chapter. If a guardian's proposed registration is denied, the guardian has standing to seek judicial review of the denial pursuant to chapter 120 ~~If a guardian who is currently registered with the office violates a provision of this chapter, the executive director of the office may suspend or revoke the guardian's registration. If the executive director denies registration to a professional guardian or suspends or revokes a professional guardian's registration, the Statewide Public Guardianship Office must send written notification of the denial, suspension, or revocation to the chief judge of each judicial circuit in which the guardian was serving on the day of the office's decision to deny, suspend, or revoke the registration~~.

(7) A trust company, a state banking corporation or state savings association authorized and qualified to exercise fiduciary powers in this state, or a national banking association or federal savings and loan association authorized and qualified to exercise fiduciary powers in this state, may, but is not required to, register as a professional guardian under this section. If a trust company, state banking

corporation, state savings association, national banking association, or federal savings and loan association described in this subsection elects to register as a professional guardian under this subsection, the requirements of subsections (3) and (4) do not apply and the registration must include only the name, address, and employer identification number of the registrant, the name and address of its registered agent, if any, and the documentation described in paragraph (3)(b).

(10) A state college or university or an independent college or university that is located and chartered in Florida, that is accredited by the Commission on Colleges of the Southern Association of Colleges and Schools or the Accrediting Council for Independent Colleges and Schools, and that confers degrees as defined in s. 1005.02(7) may, but is not required to, register as a professional guardian under this section. If a state college or university or independent college or university elects to register as a professional guardian under this subsection, the requirements of subsections (3) and (4) do not apply and the registration must include only the name, address, and employer identification number of the registrant.

Section 10. Section 744.1085, Florida Statutes, is renumbered as section 744.2003, Florida Statutes, subsections (3), (6), and (9) of that section are amended, and subsection (8) of that section is republished, to read:

744.2003 ~~744.1085~~ Regulation of professional guardians; application; bond required; educational requirements.—

(3) Each professional guardian defined in s. 744.102(17) and public guardian must receive a minimum of 40 hours of instruction and training. Each professional guardian must receive a minimum of 16 hours of continuing education every 2 calendar years after the year in which the initial 40-hour educational requirement is met. The instruction and education must be completed through a course approved or offered by the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians. The expenses incurred to satisfy the educational requirements prescribed in this section may not be paid with the assets of any ward. This subsection does not apply to any attorney who is licensed to practice law in this state or an institution acting as guardian under s. 744.2002(7).

(6) ~~After July 1, 2005,~~ Each professional guardian is ~~shall be~~ required to demonstrate competency to act as a professional guardian by taking an examination approved by the Department of Elderly Affairs.

(a) The Department of Elderly Affairs shall determine the minimum examination score necessary for passage of guardianship examinations.

(b) The Department of Elderly Affairs shall determine the procedure for administration of the examination.

(c) The Department of Elderly Affairs or its contractor shall charge an examination fee for the actual costs of the development and the administration of the examination. The examination fee for a guardian may~~,~~ not ~~to~~ exceed $500.

(d) The Department of Elderly Affairs may recognize passage of a national guardianship examination in lieu of all or part of the examination approved by the Department of Elderly Affairs, except that all professional guardians must take and pass an approved examination section related to Florida law and procedure.

(8) The Department of Elderly Affairs shall waive the examination requirement in subsection (6) if a professional guardian can provide:

(a) Proof that the guardian has actively acted as a professional guardian for 5 years or more; and

(b) A letter from a circuit judge before whom the professional guardian practiced at least 1 year which states that the professional guardian had demonstrated to the court competency as a professional guardian.

(9) ~~After July 1, 2004,~~ The court may ~~shall~~ not appoint any professional guardian who is ~~has~~ not registered by the Office of Public and Professional Guardians ~~met the requirements of this section and s. 744.1083~~.

Section 11. Section 744.2004, Florida Statutes, is created to read:

744.2004 Complaints; disciplinary proceedings; penalties; enforcement.—

(1) By October 1, 2016, the Office of Public and Professional Guardians shall establish procedures to:

(a) Review and, if determined legally sufficient,

investigate any complaint that a professional guardian has violated the standards of practice established by the Office of Public and Professional Guardians governing the conduct of professional guardians. A complaint is legally sufficient if it contains ultimate facts that show a violation of a standard of practice by a professional guardian has occurred.

(b) Initiate an investigation no later than 10 business days after the Office of Public and Professional Guardians receives a complaint.

(c) Complete and provide initial investigative findings and recommendations, if any, to the professional guardian and the person who filed the complaint within 60 days of receipt.

(d) Obtain supporting information or documentation to determine the legal sufficiency of a complaint.

(e) Interview a ward, family member, or interested party to determine the legal sufficiency of a complaint.

(f) Dismiss any complaint if, at any time after legal sufficiency is determined, it is found there is insufficient evidence to support the allegations contained in the complaint.

(g) Coordinate, to the greatest extent possible, with the clerks of court to avoid duplication of duties with regard to the financial audits prepared by the clerks pursuant to s. 744.368.

(2) The Office of Public and Professional Guardians shall establish disciplinary proceedings, conduct hearings, and take administrative action pursuant to chapter 120. Disciplinary

actions may include, but are not limited to, requiring a professional guardian to participate in additional educational courses provided or approved by the Office of Public and Professional Guardians, imposing additional monitoring by the office of the guardianships to which the professional guardian is appointed, and suspension or revocation of a professional guardian's registration.

(3) In any disciplinary proceeding that may result in the suspension or revocation of a professional guardian's registration, the Department of Elderly Affairs shall provide the professional guardian and the person who filed the complaint:

(a) A written explanation of how an administrative complaint is resolved by the disciplinary process.

(b) A written explanation of how and when the person may participate in the disciplinary process.

(c) A written notice of any hearing before the Division of Administrative Hearings at which final agency action may be taken.

(4) If the office makes a final determination to suspend or revoke the professional guardian's registration, it must provide such determination to the court of competent jurisdiction for any guardianship case to which the professional guardian is currently appointed.

(5) If the office determines or has reasonable cause to suspect that a vulnerable adult has been or is being abused,

neglected, or exploited as a result of a filed complaint or during the course of an investigation of a complaint, it shall immediately report such determination or suspicion to the central abuse hotline established and maintained by the Department of Children and Families pursuant to s. 415.103.

(6) By October 1, 2016, the Department of Elderly Affairs shall adopt rules to implement the provisions of this section.

Section 12. Section 744.20041, Florida Statutes, is created to read:

744.20041 Grounds for discipline; penalties; enforcement.—

(1) It is the intent of the Legislature that the disciplinary guidelines in this section specify a meaningful range of designated penalties based upon the severity and repetition of specific offenses and that minor violations be distinguished from those which endanger the health, safety, or welfare of the ward or the public; that such guidelines provide reasonable and meaningful notice to the public of likely penalties which may be imposed for prohibited conduct; and that such penalties be consistently applied by the Office of Public and Professional Guardians.

(2) The purpose of this section is to facilitate uniform discipline for those actions made punishable under this section and, to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference.

(3) The following acts by a professional guardian

constitute grounds for which the disciplinary actions specified in subsection (4) may be taken:

(a) Making misleading, deceptive, or fraudulent representations in or related to the practice of guardianship.

(b) Violating any rule governing guardians or guardianships adopted by the Office of Public and Professional Guardians.

(c) Being convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which relates to the practice of, or the ability to practice as, a professional guardian.

(d) Failing to comply with the educational course requirements contained in s. 744.2003.

(e) Having a registration, a license, or the authority to practice a regulated profession revoked, suspended, or otherwise acted against, including the denial of registration or licensure, by the registering or licensing authority of any jurisdiction, including its agencies or subdivisions, for a violation of Florida law. The registering or licensing authority's acceptance of a relinquishment of registration or licensure, stipulation, consent order, or other settlement, offered in response to or in anticipation of the filing of charges against the registration or license, shall be construed as action against the registration or license.

(f) Knowingly filing a false report or complaint with the Office of Public and Professional Guardians against another

guardian.

(g) Attempting to obtain, obtaining, attempting to renew, or renewing a registration or license to practice a profession by bribery, by fraudulent misrepresentation, or as a result of an error by the Office of Public and Professional Guardians which error is known and not disclosed to the Office of Public and Professional Guardians.

(h) Failing to report to the Office of Public and Professional Guardians any person who the professional guardian knows is in violation of this chapter or the rules of the Office of Public and Professional Guardians.

(i) Failing to perform any statutory or legal obligation placed upon a professional guardian.

(j) Making or filing a report or record which the professional guardian knows to be false, intentionally or negligently failing to file a report or record required by state or federal law, or willfully impeding or obstructing another person's attempt to file a report or record required by state or federal law. Such reports or records shall include only those that are signed in the guardian's capacity as a professional guardian.

(k) Using the position of guardian for the purpose of financial gain by the guardian or for a third party other than the funds awarded to the guardian by the court pursuant to s. 744.108.

(l) Violating a lawful order, or failing to comply with a

lawfully issued subpoena, of the Office of Public and Professional Guardians.

(m) Improperly interfering with an investigation or inspection authorized by statute, by rule, or with any disciplinary proceeding.

(n) Using the guardian relationship to engage or attempt to engage the ward, or an immediate family member or representative of the ward, in verbal, written, electronic, or physical sexual activity.

(o) Failing to report to the Office of Pubic and Professional Guardians in writing within 30 days after being convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction.

(p) Being unable to perform the functions of a guardian with reasonable skill by reason of illness or use of alcohol, drugs, narcotics, chemicals, or any other type of material or as a result of any mental or physical condition.

(q) Failing to post and maintain a blanket fiduciary bond pursuant to the requirements for such bond in s. 744.2003.

(r) Failing to maintain all records pertaining to a guardianship for a period of time after the court has closed the guardianship matter.

(s) Violating any provision of this chapter or any rules adopted pursuant to this chapter.

(4) When the Office of Public and Professional Guardians

finds any professional guardian guilty of the grounds set forth in subsection (3), it may enter an order imposing one or more of the following penalties:

(a) Refusal to register an applicant for registration as a professional guardian.

(b) Suspension or permanent revocation of a professional guardian's registration.

(c) Issuance of a reprimand or letter of concern.

(d) Requirement that the professional guardian undergo treatment, attend continuing education courses, submit to reexamination, or satisfy any terms which are reasonably tailored to the violations found.

(e) Requirement that the professional guardian pay restitution of any funds obtained, disbursed, or obtained through a violation of a statute, rule, or other legal authority to a ward or the ward's estate, if applicable.

(f) Requirement that the professional guardian undergo remedial education.

(5) In determining which disciplinary action is appropriate, the Office of Public and Professional Guardians must first consider what sanctions are necessary to safeguard wards and protect the public. Only after those sanctions are imposed may the Office of Public and Professional Guardians consider and include in the order requirements designed to mitigate the circumstances and rehabilitate the professional guardian.

(6) The Office of Public and Professional Guardians shall adopt by rule and periodically review the disciplinary guidelines applicable to each ground for disciplinary action which may be imposed by the Office of Public and Professional Guardians pursuant to this chapter.

(7) The Office of Public and Professional Guardians shall designate by rule possible mitigating and aggravating circumstances, if applicable, and the variation and range of penalties permitted for such circumstances.

(a) The administrative law judge, in recommending penalties in any recommended order, must follow the disciplinary guidelines established by the Office of Public and Professional Guardians and must state in writing any mitigating or aggravating circumstances upon which a recommended penalty is based, if such circumstances cause the administrative law judge to recommend a penalty other than that provided in the disciplinary guidelines.

(b) A specific finding in the final order of mitigating or aggravating circumstances shall allow the Office of Public and Professional Guardians to impose a penalty other than that provided in the disciplinary guidelines.

(8) In addition to, or in lieu of, any other remedy or criminal prosecution, the Office of Public and Professional Guardians may file a proceeding in the name of the state seeking issuance of an injunction or a writ of mandamus against any person who violates this chapter or a provision of law with

respect to professional guardians or the rules adopted pursuant thereto.

(9) Notwithstanding any provision of chapter 120, if the Office of Public and Professional Guardians determines that revocation of a professional guardian's registration is the appropriate penalty, the revocation shall be permanent.

(10) If the Office of Public and Professional Guardians makes a final determination to suspend or revoke the professional guardian's registration, it must provide the determination to the court of competent jurisdiction for any guardianship case to which the professional guardian is currently appointed.

(11) The Office of Public and Professional Guardians shall adopt rules to administer the requirements of this section.

Section 13. Section 744.344, Florida Statutes, is transferred, renumbered as section 744.2005, Florida Statutes, and amended to read:

744.2005 ~~744.344~~ Order of appointment.—

(1) The court may hear testimony on the question of who is entitled to preference in the appointment of a guardian. Any interested person may intervene in the proceedings.

(2) The order appointing a guardian must state the nature of the guardianship as either plenary or limited. If limited, the order must state that the guardian may exercise only those delegable rights which have been removed from the incapacitated person and specifically delegated to the guardian. The order

shall state the specific powers and duties of the guardian.

(3)~~(2)~~ The order appointing a guardian must be consistent with the incapacitated person's welfare and safety, must be the least restrictive appropriate alternative, and must reserve to the incapacitated person the right to make decisions in all matters commensurate with the person's ability to do so.

(4)~~(3)~~ If a petition for appointment of a guardian has been filed, an order appointing a guardian must be issued contemporaneously with the order adjudicating the person incapacitated. The order must specify the amount of the bond to be given by the guardian and must state specifically whether the guardian must place all, or part, of the property of the ward in a restricted account in a financial institution designated pursuant to s. 69.031.

(5)~~(4)~~ If a petition for the appointment of a guardian has not been filed or ruled upon at the time of the hearing on the petition to determine capacity, the court may appoint an emergency temporary guardian in the manner and for the purposes specified in s. 744.3031.

(6)~~(5)~~ A plenary guardian shall exercise all delegable rights and powers of the incapacitated person.

(7)~~(6)~~ A person for whom a limited guardian has been appointed retains all legal rights except those that ~~which~~ have been specifically granted to the guardian in the court's written order.

Section 14. Section 744.703, Florida Statutes, is

renumbered as section 744.2006, Florida Statutes, and subsections (1) and (6) of that section are amended, to read:

744.2006 ~~744.703~~ Office of Public and Professional Guardians ~~guardian~~; appointment, notification.—

(1) The executive director of the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians, after consultation with the chief judge and other circuit judges within the judicial circuit and with appropriate advocacy groups and individuals and organizations who are knowledgeable about the needs of incapacitated persons, may establish, within a county in the judicial circuit or within the judicial circuit, one or more offices of public guardian and if so established, shall create a list of persons best qualified to serve as the public guardian, who have been investigated pursuant to s. 744.3135. The public guardian must have knowledge of the legal process and knowledge of social services available to meet the needs of incapacitated persons. The public guardian shall maintain a staff or contract with professionally qualified individuals to carry out the guardianship functions, including an attorney who has experience in probate areas and another person who has a master's degree in social work, or a gerontologist, psychologist, registered nurse, or nurse practitioner. A public guardian that is a nonprofit corporate guardian under s. 744.309(5) must receive tax-exempt status from the United States Internal Revenue Service.

(6) Public guardians who have been previously appointed by

a chief judge prior to the effective date of this act pursuant to this section may continue in their positions until the expiration of their term pursuant to their agreement. However, oversight of all public guardians shall transfer to the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians upon the effective date of this act. The executive director of the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians shall be responsible for all future appointments of public guardians pursuant to this act.

Section 15. Section 744.704, Florida Statutes, is renumbered as section 744.2007, Florida Statutes.

Section 16. Section 744.705, Florida Statutes, is renumbered as section 744.2008, Florida Statutes.

Section 17. Section 744.706, Florida Statutes, is renumbered as section 744.2009, Florida Statutes, and amended to read:

744.2009 ~~744.706~~ Preparation of budget.—Each public guardian, whether funded in whole or in part by money raised through local efforts, grants, or any other source or whether funded in whole or in part by the state, shall prepare a budget for the operation of the office of public guardian to be submitted to the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians. As appropriate, the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians will include such budgetary information in the Department of Elderly Affairs' legislative budget request. The office of public

guardian shall be operated within the limitations of the General Appropriations Act and any other funds appropriated by the Legislature to that particular judicial circuit, subject to the provisions of chapter 216. The Department of Elderly Affairs shall make a separate and distinct request for an appropriation for the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians. However, this section may ~~shall~~ not be construed to preclude the financing of any operations of the office of ~~the~~ public guardian by moneys raised through local effort or through the efforts of the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians.

Section 18. Section 744.707, Florida Statutes, is renumbered as section 744.2101, Florida Statutes, and amended to read:

744.2101 ~~744.707~~ Procedures and rules.—The public guardian, subject to the oversight of the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians, is authorized to:

(1) Formulate and adopt necessary procedures to assure the efficient conduct of the affairs of the ward and general administration of the office and staff.

(2) Contract for services necessary to discharge the duties of the office.

(3) Accept the services of volunteer persons or organizations and provide reimbursement for proper and necessary expenses.

Section 19. Section 744.709, Florida Statutes, is renumbered as section 744.2102, Florida Statutes.

Section 20. Section 744.708, Florida Statutes, is renumbered as section 744.2103, Florida Statutes, and subsections (3), (4), (5), and (7) of that section are amended, to read:

744.2103 ~~744.708~~ Reports and standards.—

(3) A public guardian shall file an annual report on the operations of the office of public guardian, in writing, by September 1 for the preceding fiscal year with the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians, which shall have responsibility for supervision of the operations of the office of public guardian.

(4) Within 6 months of his or her appointment as guardian of a ward, the public guardian shall submit to the clerk of the court for placement in the ward's guardianship file and to the executive director of the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians a report on his or her efforts to locate a family member or friend, other person, bank, or corporation to act as guardian of the ward and a report on the ward's potential to be restored to capacity.

(5)(a) Each office of public guardian shall undergo an independent audit by a qualified certified public accountant at least once every 2 years. A copy of the audit report shall be submitted to the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians.

(b) In addition to regular monitoring activities, the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians shall conduct an investigation into the practices of each office of public guardian related to the managing of each ward's personal affairs and property. If feasible, the investigation shall be conducted in conjunction with the financial audit of each office of public guardian under paragraph (a).

(7) The ratio for professional staff to wards shall be 1 professional to 40 wards. The ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians may increase or decrease the ratio after consultation with the local public guardian and the chief judge of the circuit court. The basis for the decision to increase or decrease the prescribed ratio must be included in the annual report to the secretary.

Section 21. Section 744.7081, Florida Statutes, is renumbered as section 744.2104, Florida Statutes, and amended to read:

744.2104 ~~744.7081~~ Access to records by the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians; confidentiality.—

(1) Notwithstanding any other provision of law to the contrary, any medical, financial, or mental health records held by an agency, or the court and its agencies, or financial audits prepared by the clerk of the court pursuant to s. 744.368 and held by the court, which are necessary as part of an

investigation of a guardian as a result of a complaint filed with the Office of Public and Professional Guardians to evaluate the public guardianship system, to assess the need for additional public guardianship, or to develop required reports, shall be provided to the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians upon that office's request. Any confidential or exempt information provided to the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians shall continue to be held confidential or exempt as otherwise provided by law.

(2) All records held by the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians relating to the medical, financial, or mental health of vulnerable adults as defined in chapter 415, persons with a developmental disability as defined in chapter 393, or persons with a mental illness as defined in chapter 394, shall be confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

Section 22. Section 744.7082, Florida Statutes, is renumbered as section 744.2105, Florida Statutes, and subsections (1) through (5) and (8) of that section are amended, to read:

744.2105 ~~744.7082~~ Direct-support organization; definition; use of property; board of directors; audit; dissolution.—

(1) DEFINITION.—As used in this section, the term "direct-support organization" means an organization whose sole purpose is to support the ~~Statewide Public Guardianship~~ Office of Public

and Professional Guardians and is:

(a) A not-for-profit corporation incorporated under chapter 617 and approved by the Department of State;

(b) Organized and operated to conduct programs and activities; to raise funds; to request and receive grants, gifts, and bequests of moneys; to acquire, receive, hold, invest, and administer, in its own name, securities, funds, objects of value, or other property, real or personal; and to make expenditures to or for the direct or indirect benefit of the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians; and

(c) Determined by the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians to be consistent with the goals of the office, in the best interests of the state, and in accordance with the adopted goals and mission of the Department of Elderly Affairs and the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians.

(2) CONTRACT.—The direct-support organization shall operate under a written contract with the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians. The written contract must provide for:

(a) Certification by the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians that the direct-support organization is complying with the terms of the contract and is doing so consistent with the goals and purposes of the office and in the best interests of the state. This

certification must be made annually and reported in the official minutes of a meeting of the direct-support organization.

(b) The reversion of moneys and property held in trust by the direct-support organization:

1. To the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians if the direct-support organization is no longer approved to operate for the office;

2. To the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians if the direct-support organization ceases to exist;

3. To the Department of Elderly Affairs if the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians ceases to exist; or

4. To the state if the Department of Elderly Affairs ceases to exist.

The fiscal year of the direct-support organization shall begin on July 1 of each year and end on June 30 of the following year.

(c) The disclosure of the material provisions of the contract, and the distinction between the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians and the direct-support organization, to donors of gifts, contributions, or bequests, including such disclosure on all promotional and fundraising publications.

(3) BOARD OF DIRECTORS.—The Secretary of Elderly Affairs shall appoint a board of directors for the direct-support

organization from a list of nominees submitted by the executive director of the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians.

(4) USE OF PROPERTY.—The Department of Elderly Affairs may permit, without charge, appropriate use of fixed property and facilities of the department or the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians by the direct-support organization. The department may prescribe any condition with which the direct-support organization must comply in order to use fixed property or facilities of the department or the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians.

(5) MONEYS.—Any moneys may be held in a separate depository account in the name of the direct-support organization and subject to the provisions of the written contract with the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians. Expenditures of the direct-support organization shall be expressly used to support the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians. The expenditures of the direct-support organization may not be used for the purpose of lobbying as defined in s. 11.045.

(8) DISSOLUTION.—A ~~After July 1, 2004, any~~ not-for-profit corporation incorporated under chapter 617 that is determined by a circuit court to be representing itself as a direct-support organization created under this section, but that does not have a written contract with the ~~Statewide Public Guardianship~~ Office

of Public and Professional Guardians in compliance with this section, is considered to meet the grounds for a judicial dissolution described in s. 617.1430(1)(a). The ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians shall be the recipient for all assets held by the dissolved corporation which accrued during the period that the dissolved corporation represented itself as a direct-support organization created under this section.

Section 23. Section 744.712, Florida Statutes, is renumbered as section 744.2106, Florida Statutes, and amended to read:

744.2106 ~~744.712~~ Joining Forces for Public Guardianship grant program; purpose.—The Legislature establishes the Joining Forces for Public Guardianship matching grant program for the purpose of assisting counties to establish and fund community-supported public guardianship programs. The Joining Forces for Public Guardianship matching grant program shall be established and administered by the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians within the Department of Elderly Affairs. The purpose of the program is to provide startup funding to encourage communities to develop and administer locally funded and supported public guardianship programs to address the needs of indigent and incapacitated residents.

(1) The ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians may distribute the grant funds as

follows:

(a) As initial startup funding to encourage counties that have no office of public guardian to establish an office, or as initial startup funding to open an additional office of public guardian within a county whose public guardianship needs require more than one office of public guardian.

(b) As support funding to operational offices of public guardian that demonstrate a necessity for funds to meet the public guardianship needs of a particular geographic area in the state which the office serves.

(c) To assist counties that have an operating public guardianship program but that propose to expand the geographic area or population of persons they serve, or to develop and administer innovative programs to increase access to public guardianship in this state.

Notwithstanding this subsection, the executive director of the office may award emergency grants if he or she determines that the award is in the best interests of public guardianship in this state. Before making an emergency grant, the executive director must obtain the written approval of the Secretary of Elderly Affairs. Subsections (2), (3), and (4) do not apply to the distribution of emergency grant funds.

(2) One or more grants may be awarded within a county. However, a county may not receive an award that equals, or multiple awards that cumulatively equal, more than 20 percent of

the total amount of grant funds appropriated during any fiscal year.

(3) If an applicant is eligible and meets the requirements to receive grant funds more than once, the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians shall award funds to prior awardees in the following manner:

(a) In the second year that grant funds are awarded, the cumulative sum of the award provided to one or more applicants within the same county may not exceed 75 percent of the total amount of grant funds awarded within that county in year one.

(b) In the third year that grant funds are awarded, the cumulative sum of the award provided to one or more applicants within the same county may not exceed 60 percent of the total amount of grant funds awarded within that county in year one.

(c) In the fourth year that grant funds are awarded, the cumulative sum of the award provided to one or more applicants within the same county may not exceed 45 percent of the total amount of grant funds awarded within that county in year one.

(d) In the fifth year that grant funds are awarded, the cumulative sum of the award provided to one or more applicants within the same county may not exceed 30 percent of the total amount of grant funds awarded within that county in year one.

(e) In the sixth year that grant funds are awarded, the cumulative sum of the award provided to one or more applicants within the same county may not exceed 15 percent of the total amount of grant funds awarded within that county in year one.

The ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians may not award grant funds to any applicant within a county that has received grant funds for more than 6 years.

(4) Grant funds shall be used only to provide direct services to indigent wards, except that up to 10 percent of the grant funds may be retained by the awardee for administrative expenses.

(5) Implementation of the program is subject to a specific appropriation by the Legislature in the General Appropriations Act.

Section 24. Section 744.713, Florida Statutes, is renumbered as section 744.2107, Florida Statutes, and amended to read:

744.2107 ~~744.713~~ Program administration; duties of the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians.—The ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians shall administer the grant program. The office shall:

(1) Publicize the availability of grant funds to entities that may be eligible for the funds.

(2) Establish an application process for submitting a grant proposal.

(3) Request, receive, and review proposals from applicants seeking grant funds.

(4) Determine the amount of grant funds each awardee may receive and award grant funds to applicants.

(5) Develop a monitoring process to evaluate grant awardees, which may include an annual monitoring visit to each awardee's local office.

(6) Ensure that persons or organizations awarded grant funds meet and adhere to the requirements of this act.

Section 25. Section 744.714, Florida Statutes, is renumbered as section 744.2108, Florida Statutes, and paragraph (b) of subsection (1) and paragraph (b) of subsection (2) of that section are amended, to read:

744.2108 ~~744.714~~ Eligibility.—

(1) Any person or organization that has not been awarded a grant must meet all of the following conditions to be eligible to receive a grant:

(b) The applicant must have already been appointed by, or is pending appointment by, the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians to become an office of public guardian in this state.

(2) Any person or organization that has been awarded a grant must meet all of the following conditions to be eligible to receive another grant:

(b) The applicant must have been appointed by, or is pending reappointment by, the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians to be an office of public guardian in this state.

Section 26. Section 744.715, Florida Statutes, is renumbered as section 744.2109, Florida Statutes, and amended to read:

744.2109 ~~744.715~~ Grant application requirements; review criteria; awards process.—Grant applications must be submitted to the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians for review and approval.

(1) A grant application must contain:

(a) The specific amount of funds being requested.

(b) The proposed annual budget for the office of public guardian for which the applicant is applying on behalf of, including all sources of funding, and a detailed report of proposed expenditures, including administrative costs.

(c) The total number of wards the applicant intends to serve during the grant period.

(d) Evidence that the applicant has:

1. Attempted to procure funds and has exhausted all possible other sources of funding; or

2. Procured funds from local sources, but the total amount of the funds collected or pledged is not sufficient to meet the need for public guardianship in the geographic area that the applicant intends to serve.

(e) An agreement or confirmation from a local funding source, such as a county, municipality, or any other public or private organization, that the local funding source will contribute matching funds to the public guardianship program

totaling not less than $1 for every $1 of grant funds awarded. For purposes of this section, an applicant may provide evidence of agreements or confirmations from multiple local funding sources showing that the local funding sources will pool their contributed matching funds to the public guardianship program for a combined total of not less than $1 for every $1 of grant funds awarded. In-kind contributions, such as materials, commodities, office space, or other types of facilities, personnel services, or other items as determined by rule shall be considered by the office and may be counted as part or all of the local matching funds.

(f) A detailed plan describing how the office of public guardian for which the applicant is applying on behalf of will be funded in future years.

(g) Any other information determined by rule as necessary to assist in evaluating grant applicants.

(2) If the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians determines that an applicant meets the requirements for an award of grant funds, the office may award the applicant any amount of grant funds the executive director deems appropriate, if the amount awarded meets the requirements of this act. The office may adopt a rule allocating the maximum allowable amount of grant funds which may be expended on any ward.

(3) A grant awardee must submit a new grant application for each year of additional funding.

(4)(a) In the first year of the Joining Forces for Public Guardianship program's existence, the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians shall give priority in awarding grant funds to those entities that:

1. Are operating as appointed offices of public guardians in this state;

2. Meet all of the requirements for being awarded a grant under this act; and

3. Demonstrate a need for grant funds during the current fiscal year due to a loss of local funding formerly raised through court filing fees.

(b) In each fiscal year after the first year that grant funds are distributed, the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians may give priority to awarding grant funds to those entities that:

1. Meet all of the requirements of this section and ss. 744.2106, 744.2107, and 744.2108 ~~this act~~ for being awarded grant funds; and

2. Submit with their application an agreement or confirmation from a local funding source, such as a county, municipality, or any other public or private organization, that the local funding source will contribute matching funds totaling an amount equal to or exceeding $2 for every $1 of grant funds awarded by the office. An entity may submit with its application agreements or confirmations from multiple local funding sources showing that the local funding sources will pool their

contributed matching funds to the public guardianship program for a combined total of not less than $2 for every $1 of grant funds awarded. In-kind contributions allowable under this section shall be evaluated by the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians and may be counted as part or all of the local matching funds.

Section 27. Subsection (3), paragraph (c) of subsection (4), and subsections (5) and (6) of section 744.3135, Florida Statutes, are amended to read:

744.3135 Credit and criminal investigation.—

(3) For professional guardians, the court and the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians shall accept the satisfactory completion of a criminal history record check by any method described in this subsection. A professional guardian satisfies the requirements of this section by undergoing an electronic fingerprint criminal history record check. A professional guardian may use any electronic fingerprinting equipment used for criminal history record checks. By October 1, 2016, the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians shall adopt a rule detailing the acceptable methods for completing an electronic fingerprint criminal history record check under this section. The professional guardian shall pay the actual costs incurred by the Federal Bureau of Investigation and the Department of Law Enforcement for the criminal history record check. The entity completing the record check must immediately send the results of

the criminal history record check to the clerk of the court and the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians. The clerk of the court shall maintain the results in the professional guardian's file and shall make the results available to the court.

(4)

(c) The Department of Law Enforcement shall search all arrest fingerprints received under s. 943.051 against the fingerprints retained in the statewide automated biometric identification system under paragraph (b). Any arrest record that is identified with the fingerprints of a person described in this paragraph must be reported to the clerk of court. The clerk of court must forward any arrest record received for a professional guardian to the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians within 5 days. Each professional guardian who elects to submit fingerprint information electronically shall participate in this search process by paying an annual fee to the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians of the Department of Elderly Affairs and by informing the clerk of court and the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians of any change in the status of his or her guardianship appointment. The amount of the annual fee to be imposed for performing these searches and the procedures for the retention of professional guardian fingerprints and the dissemination of search results shall be established by rule of

the Department of Law Enforcement. At least once every 5 years, the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians must request that the Department of Law Enforcement forward the fingerprints maintained under this section to the Federal Bureau of Investigation.

(5)(a) A professional guardian, and each employee of a professional guardian who has a fiduciary responsibility to a ward, must complete, at his or her own expense, an investigation of his or her credit history before and at least once every 2 years after the date of the guardian's registration with the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians.

(b) By October 1, 2016, the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians shall adopt a rule detailing the acceptable methods for completing a credit investigation under this section. If appropriate, the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians may administer credit investigations. If the office chooses to administer the credit investigation, the office may adopt a rule setting a fee, not to exceed $25, to reimburse the costs associated with the administration of a credit investigation.

(6) The ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians may inspect at any time the results of any credit or criminal history record check of a public or professional guardian conducted under this section. The office shall maintain copies of the credit or criminal history record

check results in the guardian's registration file. If the results of a credit or criminal investigation of a public or professional guardian have not been forwarded to the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians by the investigating agency, the clerk of the court shall forward copies of the results of the investigations to the office upon receiving them.

Section 28. Section 744.701, Florida Statutes, is repealed.

Section 29. Section 744.702, Florida Statutes, is repealed.

Section 30. Section 744.7101, Florida Statutes, is repealed.

Section 31. Section 744.711, Florida Statutes, is repealed.

Section 32. Subsection (5) of section 400.148, Florida Statutes, is amended to read:

400.148 Medicaid "Up-or-Out" Quality of Care Contract Management Program.—

(5) The agency shall, jointly with the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians, develop a system in the pilot project areas to identify Medicaid recipients who are residents of a participating nursing home or assisted living facility who have diminished ability to make their own decisions and who do not have relatives or family available to act as guardians in nursing homes listed on the

Nursing Home Guide Watch List. The agency and the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians shall give such residents priority for publicly funded guardianship services.

Section 33. Paragraph (d) of subsection (3) of section 744.331, Florida Statutes, is amended to read:

744.331 Procedures to determine incapacity.—

(3) EXAMINING COMMITTEE.—

(d) A member of an examining committee must complete a minimum of 4 hours of initial training. The person must complete 2 hours of continuing education during each 2-year period after the initial training. The initial training and continuing education program must be developed under the supervision of the ~~Statewide Public Guardianship~~ Office of Public and Professional Guardians, in consultation with the Florida Conference of Circuit Court Judges; the Elder Law and the Real Property, Probate and Trust Law sections of The Florida Bar; and the Florida State Guardianship Association~~; and the Florida Guardianship Foundation~~. The court may waive the initial training requirement for a person who has served for not less than 5 years on examining committees. If a person wishes to obtain his or her continuing education on the Internet or by watching a video course, the person must first obtain the approval of the chief judge before taking an Internet or video course.

Section 34. Paragraph (a) of subsection (1) of section

20.415, Florida Statutes, is amended to read:

20.415 Department of Elderly Affairs; trust funds.—The following trust funds shall be administered by the Department of Elderly Affairs:

(1) Administrative Trust Fund.

(a) Funds to be credited to and uses of the trust fund shall be administered in accordance with ss. 215.32, 744.534, and 744.2001 ~~744.7021~~.

Section 35. Paragraph (e) of subsection (2) of section 415.1102, Florida Statutes, is amended to read:

415.1102 Adult protection teams.—

(2) Such teams may be composed of, but need not be limited to:

(e) Public and professional guardians as described in part II ~~IX~~ of chapter 744.

Section 36. Paragraph (a) of subsection (7) of section 744.309, Florida Statutes, is amended to read:

744.309 Who may be appointed guardian of a resident ward.—

(7) FOR-PROFIT CORPORATE GUARDIAN.—A for-profit corporate guardian existing under the laws of this state is qualified to act as guardian of a ward if the entity is qualified to do business in the state, is wholly owned by the person who is the circuit's public guardian in the circuit where the corporate guardian is appointed, has met the registration requirements of s. 744.2002 ~~s. 744.1083~~, and posts and maintains a bond or insurance policy under paragraph (a).

(a) The for-profit corporate guardian must meet one of the following requirements:

1. Post and maintain a blanket fiduciary bond of at least $250,000 with the clerk of the circuit court in the county in which the corporate guardian has its principal place of business. The corporate guardian shall provide proof of the fiduciary bond to the clerks of each additional circuit court in which he or she is serving as a guardian. The bond must cover all wards for whom the corporation has been appointed as a guardian at any given time. The liability of the provider of the bond is limited to the face value of the bond, regardless of the number of wards for whom the corporation is acting as a guardian. The terms of the bond must cover the acts or omissions of each agent or employee of the corporation who has direct contact with the ward or access to the assets of the guardianship. The bond must be payable to the Governor and his or her successors in office and be conditioned on the faithful performance of all duties of a guardian under this chapter. The bond is in lieu of and not in addition to the bond required under s. 744.2003 ~~s. 744.1085~~ but is in addition to any bonds required under s. 744.351. The expenses incurred to satisfy the bonding requirements of this section may not be paid with the assets of any ward; or

2. Maintain a liability insurance policy that covers any losses sustained by the guardianship caused by errors, omissions, or any intentional misconduct committed by the

corporation's officers or agents. The policy must cover all wards for whom the corporation is acting as a guardian for losses up to $250,000. The terms of the policy must cover acts or omissions of each agent or employee of the corporation who has direct contact with the ward or access to the assets of the guardianship. The corporate guardian shall provide proof of the policy to the clerk of each circuit court in which he or she is serving as a guardian.

Section 37. Section 744.524, Florida Statutes, is amended to read:

744.524 Termination of guardianship on change of domicile of resident ward.—When the domicile of a resident ward has changed as provided in s. 744.1098 ~~s. 744.2025~~, and the foreign court having jurisdiction over the ward at the ward's new domicile has appointed a guardian and that guardian has qualified and posted a bond in an amount required by the foreign court, the guardian in this state may file her or his final report and close the guardianship in this state. The guardian of the property in this state shall cause a notice to be published once a week for 2 consecutive weeks, in a newspaper of general circulation published in the county, that she or he has filed her or his accounting and will apply for discharge on a day certain and that jurisdiction of the ward will be transferred to the state of foreign jurisdiction. If an objection is filed to the termination of the guardianship in this state, the court shall hear the objection and enter an order either sustaining or

overruling the objection. Upon the disposition of all objections filed, or if no objection is filed, final settlement shall be made by the Florida guardian. On proof that the remaining property in the guardianship has been received by the foreign guardian, the guardian of the property in this state shall be discharged. The entry of the order terminating the guardianship in this state shall not exonerate the guardian or the guardian's surety from any liability previously incurred.

Section 38. For the 2016-2017 fiscal year, the sums of $698,153 in recurring funds and $123,517 in nonrecurring funds are appropriated from the General Revenue Fund to the Department of Eldery Affairs, and six full-time equivalent positions with associated salary rate of 242,345 are authorized, to implement the requirements of this act.

Section 39. This act shall take effect upon becoming a law.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

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

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Ahern offered the following:

Amendment

Remove lines 116-118 and insert:

guardian advocates, be explored before a plenary guardian is appointed.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 439 Mental Health Services in Criminal Justice System
SPONSOR(S): Appropriations Committee; Children, Families & Seniors Subcommittee; McBurney & others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 604

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 0 N	White	White
2) Children, Families & Seniors Subcommittee	11 Y, 0 N, As CS	McElroy	Brazzell
3) Appropriations Committee	25 Y, 0 N, As CS	Smith	Leznoff
4) Judiciary Committee		White	Havlicak

SUMMARY ANALYSIS

To address mental health issues in the criminal justice system, Florida has multiple programs, some of which operate on a statewide basis, e.g., state-administered forensic and civil mental health programs, and others which are only available in certain counties or circuits, e.g., mental health courts and veterans' courts. This bill amends statute governing these programs by:

- Creating the Forensic Hospital Diversion Pilot Program which is to be modeled after the Miami-Dade Forensic Alternative Center.
- Allows the Department of Children and Families to implement the pilot program in Duval, Broward, and Miami-Dade Counties, if existing recurring resources are available.
- Authorizing county court judges to order misdemeanants to involuntary outpatient placement if the misdemeanant meets the criteria for involuntary outpatient placement under s. 394.4655, F.S.;
- Creating statutory authority for each county to establish a mental health court program (MHCP) that provides pretrial intervention and post-adjudicatory programs.
- Authorizing courts to order adult offenders with mental illnesses to participate in pretrial intervention and post-adjudicatory programs and to admit juvenile offenders with mental illnesses into delinquency pretrial MHCPs.
- Expanding the definition of "veteran," for the purpose of eligibility for veterans' court, to include veterans who were discharged or released under a general discharge.
- Expanding the statutory authorization for certain offenders to transfer to a "problem-solving court" in another county to also include transfer to delinquency pretrial intervention programs.

The bill makes conforming changes to child welfare statutes to incorporate references to mental health treatment and mental health courts.

This bill has an indeterminate fiscal impact on local revenues and expenses.

This bill has an indeterminate fiscal impact on state expenditures.

The bill takes effect July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Mental Health and Substance Use of Offenders in the Criminal Justice System

On any given day in Florida, it is estimated that there are 17,000 prison inmates, 15,000 jail detainees, and 40,000 individuals under correctional supervision who experience serious mental illness.[1] Each year, as many as 125,000 adults with mental illnesses or substance use disorders, who require immediate treatment, are arrested and booked into Florida jails.[2] Further, of the 150,000 juveniles who are referred to Florida's Department of Juvenile Justice each year, more than 70 percent have at least one mental health disorder.[3]

Between 2002 and 2010, the population of inmates with mental illnesses or substance use disorders in Florida increased from 8,000 to 17,000 inmates.[4] By 2020, the number of inmates with these types of disorders is expected to reach at least 35,000, with an average annual increase of 1,700 individuals.[5] Between 2002 and 2010 forensic commitments increased from 863 to 1,549 and are projected to reach 2,800 by 2016.[6]

The majority of individuals with serious mental illnesses or substance use disorders who become involved with the criminal justice system are charged with minor misdemeanor and low-level felony offenses that are often a direct result of their untreated condition.[7] These individuals are typically poor, uninsured, homeless, minorities who are experiencing co-occurring mental health or substance use disorders.[8]

To address mental health issues in the criminal justice system, Florida has multiple programs, some of which operate on a statewide basis, e.g., forensic and civil mental health programs, and others which are only available in certain counties or circuits, e.g., mental health courts and veterans' courts,

State Forensic System -- Mental Health Treatment for Criminal Defendants

Chapter 916, F.S., governs the state forensic system, which is a network of state facilities and community services for persons who have mental health issues and who are involved with the criminal justice system. Offenders who are charged with a felony and adjudicated incompetent to proceed[9] and offenders who are adjudicated not guilty by reason of insanity may be involuntarily committed to state civil[10] and forensic[11] treatment facilities by the circuit court,[12, 13] or in lieu of such commitment, may be

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[1] The Florida Senate, *Forensic Hospital Diversion Pilot Program, Interim Report 2011-106*, (Oct. 2010).
[2] *Id.* at p. 1.
[3] Florida Department of Children and Families, Agency Analysis of 2009 Senate Bill 2018 (Mar. 2, 2009).
[4] The Florida Senate, *supra* note 1, at 1.
[5] *Id.*
[6] *Id.* at p. 2.
[7] *Id.*
[8] *Id.*
[9] "Incompetent to proceed" means "the defendant does not have sufficient present ability to consult with her or his lawyer with a reasonable degree of rational understanding" or "the defendant has no rational, as well as factual, understanding of the proceedings against her or him." s. 916.12(1), F.S.
[10] A "civil facility" is: a mental health facility established within the Department of Children and Families (DCF) or by contract with DCF to serve individuals committed pursuant to chapter 394, F.S., and defendants pursuant to chapter 916, F.S., who do not require the security provided in a forensic facility; or an intermediate care facility for the developmentally disabled, a foster care facility, a group home facility, or a supported living setting designated by the Agency for Persons with Disabilities (APD) to serve defendants who do not require the security provided in a forensic facility. s. 916.106(4), F.S.
[11] A "forensic facility" is a separate and secure facility established within DCF or APD to service forensic clients. A separate and secure facility means a security-grade building for the purpose of separately housing persons who have mental illness from persons who have

released on conditional release by the circuit court if the person is not serving a prison sentence.[14] Conditional release is release into the community accompanied by outpatient care and treatment.[15] The committing court retains jurisdiction over the defendant while the defendant is under involuntary commitment or conditional release.[16]

The Department of Children and Families (DCF) oversees two state-operated forensic facilities, Florida State Hospital and North Florida Evaluation and Treatment Center, and two privately-operated, maximum security forensic treatment facilities, South Florida Evaluation and Treatment Center and Treasure Coast Treatment Center.

Miami-Dade Forensic Alternative Center

The Miami-Dade Forensic Alternative Center (MDFAC) opened in 2009 as a community-based, forensic commitment program. The intent of the program is to serve offenders who have mental illnesses or co-occurring mental illnesses and substance use disorders and who are involved in or at risk of entering state forensic mental health treatment facilities, prisons, jails, or state civil mental health treatment facilities. The MDFAC serves adults:

- Age 18 years or older;
- Who have been found by a court to be incompetent to proceed due to serious mental illness or not guilty by reason of insanity for a second or third degree felony; and
- Who do not have a significant history of violence.[17]

The MDFAC provides competency restoration and a continuum of care during commitment and after reentry into the community. It currently operates its 16-bed facility for a daily cost of $284.81 per bed.[18]

Between August 2009 and August 2010, a total of 111 individuals were accepted and admitted to the program. [19] As of 2010, 38 individuals either stepped down from forensic commitment or completed the program. Of those individuals, 27 remained actively linked to the MDFAC and 11 did not.[20] Of the 27 individuals, 19 individuals did not recidivate.[21] Of recidivating individuals, only one individual was charged with committing a new offense (misdemeanor petit theft), while seven were rebooked into jail for non-compliance with conditions of release.[22]

As a result of the MDFAC program:

- The average number of days to restore competency has been reduced, as compared to forensic treatment facilities. The MDFAC on average restored competency within 99.3 days, while forensic treatment facilities required an average of 138.9 days.[23]

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intellectual disabilities or autism and separately housing persons who have been involuntarily committed pursuant to chapter 916, F.S., from non-forensic residents. s. 916.106(10), F.S.

[12] "Court" is defined to mean the circuit court. s. 916.106, F.S.

[13] ss. 916.13, 916.15, and 916.302, F.S.

[14] s. 916.17(1), F.S.

[15] *Id.*

[16] s. 916.16(1), F.S.

[17] Florida Department of Children and Families, Agency Analysis of 2015 House Bill 7113, p. 2 (Mar. 19, 2015) .

[18] *Id.* at 2 and 4.

[19] Miami-Dade Forensic Alternative Ctr., *Pilot Program Status Report*, (Aug. 2010) (on file with the House Judiciary Comm.).

[20] *Id.* at 5-6.

[21] *Id.*

[22] *Id.* The individuals who remained linked to MDFAC services accounted for 11 jail bookings and spent a total of 85 days in jail after stepping down from forensic commitment; in contrast, of the 11 individuals who did not remain linked with the program, nine were rebooked for a total of 23 bookings resulting from new offenses and 15 resulting from technical violations. The nine individuals who recidivated accounted for 1,435 days in jail since stepping down from forensic commitment. *Id.*

[23] *Id.* "[I]ndividuals enrolled in MDFAC are not rebooked into the jail following restoration of competency. Instead, they remain at the treatment program where they are re-evaluated by court appointed experts while the treatment team develops a comprehensive transition plan for eventual step-down into a less restrictive community placement. When court hearings are held to determine competency and/or authorize step-down into community placements, individuals are brought directly to court by MDFAC staff. This not only reduces burdens on the county jail, but eliminates the possibility that individuals will decompensate while incarcerated and require subsequent readmission to state treatment facilities. It also ensures that individuals remain linked to the service provider through the

- The burden on local jails has been reduced, as individuals served by MDFAC are not returned to jail upon restoration of competency.[24]
- As individuals are not returned to jail, the individual's symptoms are prevented from worsening while incarcerated, which could possibly require readmission to state treatment facilities.[25]
- Individuals access treatment more quickly and efficiently because of the ongoing assistance, support, and monitoring following discharge from inpatient treatment and community re-entry.[26]
- Individuals in the program receive additional services not provided in the state treatment facilities, such as intensive services targeting competency restoration, as well as community-living and re-entry skills.[27]
- It is standard practice at MDFAC to provide assistance to all individuals in accessing federal entitlement benefits that pay for treatment and housing upon discharge.[28]

Mental Health Courts

Currently, the establishment of mental health courts in this state is not addressed in statute. Such courts, however, have been created in the majority of local jurisdictions for purposes of holding offenders accountable while connecting them to the treatment services necessary to address their mental illness.[29] Mental health courts typically share the following goals:

- To improve public safety by reducing criminal recidivism;
- To improve the quality of life of people with mental illnesses and to increase their participation in effective treatment; and
- To reduce court- and corrections-related costs through administrative efficiencies and often by providing an alternative to incarceration.[30]

As of March 2015, there were 27 mental health courts operating in 15 of the state's 20 judicial circuits.[31] Due to the fact that there is no statutory framework for these courts, eligibility criteria, program requirements, and other processes differ throughout the state. For example, to be eligible to participate in Alachua County's Mental Health Court, a defendant must be diagnosed with a mental illness or developmental disability and be arrested for certain misdemeanor or criminal traffic offenses.[32] Distinguishably, to be eligible to participate in Duval County's and Nassau County's Mental Health Courts, a defendant must have a mental health diagnosis of bipolar, schizophrenia, or anxiety and have been arrested for a misdemeanor or third or second degree felony.[33]

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community re-entry and re-integration process." *Id.* It should be noted, however, that individuals diverted to MDFAC have to meet certain criteria, which may result in participation in the program by individuals who present with less severe cases of mental illness or those with less serious charges going to MDFAC as compared to the population placed in state hospitals.

[24] MDFAC program staff provides ongoing assistance, support and monitoring following an individual's discharge from inpatient treatment and community re-entry. Additionally, individuals are less likely to return to state hospitals, emergency rooms, and other crisis settings. *Id.*

[25] Of the 44 individuals referred to MDFAC between 2009 and 2010, 23 percent had one or more previous admissions to a state forensic hospital for competency restoration and subsequent readmission to the Miami-Dade County Jail. *Id.*

[26] The Florida Senate, supra note 1, at 9.

[27] *Id.*

[28] *Id.*

[29] Florida Courts, *Mental Health Courts,* http://www.flcourts.org/resources-and-services/court-improvement/problem-solving-courts/mental-health-courts.stml (last visited Nov. 14, 2015).

[30] *Id.*

[31] *Id.*

[32] Office of the State Attorney Eighth Judicial Circuit, *Alachua County Mental Health Court*, http://sao8.org/Mental%20Health.htm (last visited Nov. 14, 2015).

[33] Fourth Judicial Circuit Courts of Florida, *Duval County Mental Health Court,* http://www.jud4.org/Court-Programs/Drug,-Mental-Health,-and-Veterans-Treatment-Courts/Mental-Health-Court-Programs/Duval-County-Mental-Health-Court.aspx (last visited Nov. 14, 2015); Fourth Judicial Circuit Courts of Florida, *Nassau County Mental Health Court,* http://www.jud4.org/Court-Programs/Drug,-Mental-Health,-and-Veterans-Treatment-Courts/Mental-Health-Court-Programs/Nassau-County-Mental-Health-Court.aspx (last visited Nov. 14, 2015).

Veterans' Courts

Veterans' courts are modeled after other specialty courts, such as drug courts and mental health courts. The goal of such courts is to provide treatment interventions to resolve underlying causes of criminal behavior to "reintegrate court participants into society, reduce future involvement with the criminal justice system, and promote public safety."[34]

Pursuant to s. 394.47891, F.S., the chief judge in each judicial circuit of this state is authorized to establish a Military Veterans and Servicemembers Court Program (hereafter referred to as "veterans' courts"). To be eligible for veterans' court, an individual must have been charged with a criminal offense, must have a military-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem, and must be a:

- Servicemember, which means "any person serving as a member of the United States Armed Forces on active duty or state active duty and all members of the Florida National Guard and United States Reserve Forces."[35]
- Veteran, which means "a person who served in the active military, naval, or air service and who was ***discharged or released under honorable conditions*** only or who later received an upgraded discharge under honorable conditions...."[36, 37] Typically, veterans who receive honorable or general discharges are eligible for VA benefits while veterans who receive dishonorable, bad conduct, or dishonorable discharges are not.[38]

A servicemember or veteran who meets the qualifications and agrees to participate may be placed in a pretrial diversion program if the offense charged is a misdemeanor or a felony other than a felony listed in s. 948.06(8)(c), F.S.,[39, 40] or a post-adjudicatory program for crimes committed on or after July 1, 2012.[41]

For a pretrial diversion program, a treatment intervention team must develop an individualized coordinated strategy for the servicemember or veteran which must be presented to the servicemember or veteran before he or she agrees to enter the program. The court retains jurisdiction in the case throughout the pretrial intervention period. At the end of the program, the court considers recommendations for disposition by the state attorney and the program administrator. If the veteran successfully completes the treatment program, the court must dismiss the criminal charges. If the court finds that the veteran did not successfully complete the program, the court may order the veteran to continue in education and treatment or authorize the state attorney to proceed with prosecution.[42]

For a post-adjudicatory program, the court may require a servicemember or veteran to participate in a treatment program capable of treating his or her mental illness, traumatic brain injury, substance abuse disorder, or psychological program as a condition of probation or community control.[43]

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[34] Office of Program Policy Analysis & Government Accountability, Research Memorandum, *State-Funded Veterans' Courts in Florida*, (Jan. 30, 2015).
[35] s..250.01(19), F.S.
[36] s. 1.01(14), F.S. (emphasis added).
[37] ss. 394.47891, 948.08(7), 948.16(2)(a), and 948.21, F.S.
[38] Office of Program Policy Analysis & Government Accountability, *supra* note 34.
[39] ss. 948.08(7) and 948.16(2), F.S.
[40] The disqualifying offenses listed in s. 948.06(8)(c), F.S., include: (a) kidnapping, false imprisonment of a child under the age of 13, or luring or enticing a child; (b) murder, felony murder, or manslaughter; (c) aggravated battery; (d) sexual battery; (e) certain lewd or lascivious offenses; (f) robbery, carjacking, or home invasion robbery; (g) sexual performance by a child; (h) computer pornography, transmission of child pornography, or selling or buying of minors; (i) poisoning food or water; (j) abuse of a dead human body; (k) certain burglary offenses; (l) arson; (m) aggravated assault; (n) aggravated stalking; (o) aircraft piracy; (p) unlawful throwing, placing, or discharging of a destructive device or bomb; and (q) treason..
[41] s. 948.21, F.S.
[42] ss. 948.08(7)(b) and (c), and 948.16(2) and (3), F.S.
[43] s. 948.21, F.S.

As of March 2015, Florida had 22 veterans' courts operating in 13 circuits,[44] which includes courts in eight counties that received state general revenue funding for Fiscal Year 2015-2016.[45] Six counties in Florida received state general revenue funding for Fiscal Year 2014-2015, for veterans' courts.[46]

According to data from a January 2015, research memorandum drafted by the Office of Program Policy Analysis and Government Accountability, 45 participants graduated from the state-funded veterans' courts between July 2013 and October 2014. Fifty-two percent of the participants had felony charges, mainly third-degree felony offenses for grand theft, burglary, felony battery, and drug possession.[47] The remaining 48 percent had first and second degree misdemeanor charges, the most common of which were battery and driving under the influence. Sixty-two percent of the participants had a dual diagnosis of mental health issues and substance abuse.[48]

Transfer for Participation in a Problem-Solving Court

A "problem-solving court" is defined to mean specified drug courts, veterans' courts pursuant to ss. 394.47891, 948.08, 948.16, or 948.21, F.S., or mental health courts.[49] A person who eligible for participation in a problem-solving court shall have his or case transferred to a county other than that in which the charge arose if:

- Requested by the person or a court;
- The person agrees to the transfer;
- The authorized representative of the trial court consults with the authorized representative of the problem-solving court in the county to which transfer is desired; and
- Both representatives agree to the transfer.[50]

The jurisdiction to which the case has been transferred is required to dispose of the case.[51]

Involuntary Outpatient Placement

Involuntary outpatient placement, also known as assisted outpatient treatment, is a court ordered community-based treatment program for individuals with severe mental illness. These programs are designed to assist individuals with severe mental illness who have a history of treatment and medication noncompliance but do not require hospitalization. Involuntary outpatient treatment has shown to be effective in reducing the incidence and duration of hospitalization, homelessness, arrests and incarcerations, victimization, and violent episodes.[52] It has also been shown to increase treatment compliance and promotes long-term voluntary compliance, while reducing caregiver stress.[53]

There are strict legal requirements for individuals to be ordered into involuntary outpatient placement. The individual must be an adult with mental illness for whom all available, less restrictive alternatives that would offer an opportunity for improvement of his or her condition have been judged to be inappropriate or unavailable and who:[54]

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[44] Florida Courts, *Veterans Courts,* http://www.flcourts.org/resources-and-services/court-improvement/problem-solving-courts/veterans-court.stml (last visited Nov. 14, 2015).
[45] The following eight counties were appropriated recurring general revenue funds for Fiscal Year 2015-2016: Clay, Okaloosa, Pasco, Pinellas, and Escambia Counties each received $150,000; Leon County received $125,000; and Duval and Orange Counties each received $200,000. Senate Bill 2500-A (2015), Specific Appropriation 3169.
[46] The following six counties were appropriated recurring general revenue funds for Fiscal Year 2014-2015: Clay, Okaloosa, Pasco, and Pinellas Counties each received $150,000; and Duval and Orange Counties each received $200,000. House Bill 5001 (2014), Specific Appropriation 3193.
[47] *Id.* at 5.
[48] Office of Program Policy Analysis & Government Accountability, *supra* note 34.
[49] s. 910.035(5)(a), F.S.
[50] s. 910.035(5)(b), F.S.
[51] s. 910.035(5)(f), F.S.
[52] Assisted Outpatient Treatment Laws, Treatment Advocacy Center. http://www.treatmentadvocacycenter.org/solution/assisted-outpatient-treatment-laws (last visited on December 9, 2015).
[53] *Id.*
[54] s. 394.4655(1), F.S.

- Is unlikely to survive safely in the community without supervision;
- Has a history of lack of compliance with treatment for mental illness;
- Has within the preceding 36 months-
    - Been involuntarily committed to a treatment or receiving facility,
    - Received mental health treatment in a forensic or correctional facility, or
    - Engaged in acts of serious violent behavior toward self or others, or attempts at serious bodily harm to himself or herself or others;
- Is unlikely to voluntarily participate in the recommended treatment plan and has refused voluntary placement for treatment or is unable to determine for himself or herself whether placement is necessary;
- Is in need of involuntary outpatient placement in order to prevent a relapse or deterioration that would be likely to result in serious bodily harm to himself or herself or others, or a substantial harm to his or her well-being; and
- Is likely to benefit from involuntary outpatient placement.

Only circuit judges have the authority to order an individual into involuntary outpatient placement.[55] However, the court may not order DCF or the service provider to provide services if the program or service is not available in the patient's local community, if there is no space available in the program or service for the patient, or if funding is not available for the program or service.[56]

Child Welfare

DCF is responsible for the administration of Florida's child welfare program. The goals of the child welfare program are:[57]

- The prevention of separation of children from their families;
- The protection of children alleged to be dependent or dependent children including provision of emergency and long-term alternate living arrangements;
- The reunification of families who have had children placed in foster homes or institutions;
- The permanent placement of children who cannot be reunited with their families or when reunification would not be in the best interest of the child;
- The transition to self-sufficiency for older children who continue to be in foster care as adolescents;
- The preparation of young adults that exit foster care at age 18 to make the transition to self-sufficiency as adults; and
- The prevention and remediation of the consequences of substance abuse on families.[58]

To advance the goal of combating substance abuse in families, ss. 39.507, F.S., and 39.512, F.S., authorize dependency courts to order an individual undergo a substance abuse disorder assessment. The statutes additionally authorize a dependency court to order an individual to participate in and comply with a treatment-based drug court program.[59] Treatment-based drug court is an alternative to incarceration for defendants who enter the judicial system because of addiction and consists of an intensive, judicially monitored treatment program. [60]

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[55] s. 394.455 (7), F.S.
[56] s. 394.4655(6)(b)2, F.S.
[57] *Child Welfare*, Department of Children and Families. http://www.myflfamilies.com/service-programs/child-welfare (last visited on December 9, 2015).
[58] s. 39.001(6), F.S.
[59] ss. 39.507 and 39.512, F.S.
[60] *Drug Court*, First Judicial Circuit Court of Florida. http://www.firstjudicialcircuit.org/programs-and-services/drug-court (last visited on December 9, 2015).

Effect of Bill

Forensic Hospital Diversion Pilot Program

This bill creates s. 916.185, F.S., to establish the Forensic Hospital Diversion Pilot Program, which is to be modeled after the Miami-Dade Forensic Alternative Center. The intent of the pilot program is to serve offenders who have mental illnesses or co-occurring mental illnesses and substance use disorders and who are involved in or at risk of entering state forensic mental health treatment facilities, prisons, jails, or state civil mental health treatment facilities.

Under the bill, DCF may implement the pilot program in Duval, Broward, and Miami-Dade counties. If DCF chooses to implement the pilot program, it must include a comprehensive continuum of care and services that use evidence-based practices and best practices.[61] The DCF and corresponding judicial circuits may implement the pilot program if there are existing resources available on a recurring basis. The DCF may also request budget amendments to realign funds between mental health services and community substance abuse, and mental health services.

Participation in the program is limited to persons who:

- Are 18 years of age and older;
- Are charged with a second or third degree felony;
- Do not have a significant history of violent criminal offenses;
- Have been adjudicated either incompetent to proceed to trial or not guilty by reason of insanity;
- Meet safety and treatment criteria established by DCF for placement in the community; and
- Would otherwise be admitted to a state mental health treatment facility.

The bill encourages the Florida Supreme Court, in conjunction with the Supreme Court Task Force on Substance Abuse and Mental Health in the Courts, to develop educational training for judges in the pilot program counties on the community forensic system.

The DCF is authorized to adopt rules to administer the section.

Mental Health Court Programs

The bill creates s. 394.47892, F.S., to authorize each county to fund a mental health court program (MHCP) under which defendants in the justice system who are assessed with a mental illness will be processed in a manner that appropriately addresses the severity of the mental illness through treatment services tailored to the participant. If a county chooses to fund a MHCP, it must secure funding from sources other than the state for costs not otherwise assumed by the state; however, counties may use funds for treatment and other services provided through state executive branch agencies and may provide, by interlocal agreement, for the collective funding of the programs.

The bill specifies that a MHCP may include:

- Pretrial intervention programs under ss. 948.08, 948.16, and 985.345, F.S.
- Post-adjudicatory mental health court programs under ss. 948.01 and 948.06, F.S.
- Review of the status of compliance or noncompliance of sentenced defendants in the program.

Under the bill, entry into a:

- Pretrial MHCP must be voluntary.
- Post-adjudicatory MHCP must be based on the sentencing court's assessment of:

[61] The bill defines the terms "best practices," "community forensic system," and "evidence-based practices" for purposes of the section in s. 916.185(2)(a)-(c), F.S., respectively.

- The defendant's criminal history, mental health screening outcome, amenability to the services of the program, total sentence points, and agreement to enter the program.
- The recommendation of the state attorney and the victim, if any.

If a defendant, while participating in a post-adjudicatory MHCP, is subject to a violation of probation or community control under s. 948.06, such violation must be heard by the judge presiding over the MHCP. The judge is authorized to dispose of the violation as he or she deems appropriate if the resulting sentence or conditions are lawful.

Contingent on annual appropriation, the bill requires each judicial circuit to establish at least one coordinator position for the MHCP and establishes the coordinator's duties and responsibilities.

Further, each circuit is required to annually report sufficient client-level and programmatic data to the Office of State Courts Administrator annually for the purposes of program evaluation. Client-level data include:

- Primary offenses that resulted in the mental health court referral or sentence;
- Treatment compliance;
- Completion status and reasons for failure to complete;
- Offenses committed during treatment and sanctions imposed;
- Frequency of court appearances; and
- Units of service.

Programmatic data include referral and screening procedures, eligibility criteria, type and duration of treatment offered, and residential treatment resources.

The bill also authorizes the chief judge of each judicial circuit to appoint an advisory committee for the MHCP and specifies who may serve on such committee.

Finally, the bill amends various sections of law, as described below, to authorize courts to order defendants into pretrial and post-adjudicatory MHCPs.

- Pretrial MHCPs
  - Section 948.08(8), F.S., is amended to authorize a defendant to be voluntarily admitted into a *felony pretrial MHCP*, upon motion of either party or the court, if the defendant has a mental illness, has not been convicted of a felony, and is charged with:
    - A nonviolent felony that includes a third degree felony violation of chapter 810[62] or any other felony offense that is not a forcible felony as defined in s. 776.08;
    - Resisting an officer with violence under s. 843.01, or battery on a law enforcement officer under s. 784.07, if the law enforcement officer and state attorney consent to the defendant's participation; or
    - Aggravated assault if the victim and state attorney consent to the defendant's participation.[63]
  - Section 948.16(3), is amended to authorize a defendant to be voluntarily admitted into a *misdemeanor pretrial MHCP,* upon motion of either party or the court, if the defendant has a mental illness.
  - Section 985.345(4), F.S., is amended to authorize a child to be voluntarily admitted to a *delinquency pretrial MHCP*, upon motion of either party or the court, if the child has a mental illness, has not been previously adjudicated for a felony, and is charged with:
    - A misdemeanor;

[62] ch. 810, F.S., addresses burglary and trespass.

[63] The bill specifies that at the end of the pretrial intervention period, the court must consider the recommendations of the treatment provider and state attorney as to disposition of the pending charges. The court shall determine, by written finding, if the defendant has successfully completed program. If unsuccessful, the court may order the person to continue in education and treatment or order that the charges revert to normal channels for prosecution. If successful, the court shall dismiss the charges. s. 948.08(8)(b), F.S.

        - A nonviolent felony meaning a third degree felony violation of chapter 810 or any other felony offense that is not a forcible felony as defined in s. 776.08;
        - Resisting an officer with violence under s. 843.01, F.S., or battery on a law enforcement officer under s. 784.07, F.S., if the law enforcement officer and state attorney consent to the child's participation; or
        - Aggravated assault, if the victim and state attorney consent to the child's participation.[64]
- Post-adjudicatory treatment based MHCPs
    - Section 948.01(8), F.S., is amended to authorize a court to place a defendant into a post-adjudicatory MHCP, as a condition of the defendant's probation or community control, and s. 948.06(2)(j), F.S., is amended to authorize a court to order the successful completion of post-adjudicatory MHCP when an offender admits that he or she has violated his or her community control or probation, if:
        - The offense is a nonviolent felony;[65]
        - The defendant is amenable to mental health treatment, including taking prescribed medications;
        - The defendant is otherwise qualified under s. 394.47892(4), based on his or her criminal history, mental health screening outcome, amenability to the services of the program, total sentence points, and agreement to enter the program, and the recommendation of the state attorney and the victim, if any; and
        - The defendant, after being fully advised of the purpose of the program, agrees to enter the program.[66]

Veterans' Courts

The bill amends ss. 394.47891, 948.08(7)(a), 948.16(2), and 948.21, F.S., to expand the pool of veterans who are eligible for veterans' courts from only those who have been discharged or released under honorable conditions to also include veterans who have been discharged or released under a general discharge. With respect to post-adjudication diversion programs imposed as a condition of probation or community control, the bill specifies in s. 948.21(2), F.S., that the expanded eligibility criteria for general discharges applies to crimes committed on or after July 1, 2016.

The bill also amends s. 948.06(2)(j), F.S., to permit a court to order an offender to a veterans' court program when the offender admits that he or she has violated his or her community control or probation if:

- The offense is a nonviolent felony;
- The offender is amenable to a veterans' court program;
- The offender, after being fully advised of the purpose of the program, agrees to enter the program; and
- The offender is otherwise qualified for a veterans' court program under s. 394.47891, F.S.[67]

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[64] The bill specifies that at the end of the delinquency pretrial intervention period, the court must consider the recommendations of the state attorney and the program administrator as to disposition of the pending charges. The court shall determine, by written finding, if the child has successfully completed the program. If unsuccessful, the court may order the child to continue in an education, treatment, or monitoring program if resources and funding are available or order that the charges revert to normal channels for prosecution. If successful, the court may dismiss the charges. If charges are dismissed, the child may, if otherwise eligible, have his or her arrest record and plea of nolo contendere to the dismissed charges expunged under s. 943.0585, F.S. *See,* s. 985.345(5) and (6), F.S.

[65] The bill defines the term "nonviolent felony" as "a third degree felony violation under chapter 810 or any other felony offense that is not a forcible felony as defined in s. 776.08." It further specifies that, "[d]efendants charged with resisting an officer with violence under s. 843.01, battery on a law enforcement officer under s. 784.07, or aggravated assault may participate in the mental health court program if the court so orders after the victim is given his or her right to provide testimony or written statement to the court as provided in s. 921.143." ss. 948.01(8)(a) and 948.06(2)(j)1., F.S.

[66] When a post-adjudicatory treat-based MCHP is ordered, the original sentencing court must relinquish jurisdiction of the defendant's case to the MHCP until the defendant is no longer active in the program, the case is returned to the sentencing court due to the defendant's termination from the program for failure to comply, or the defendant's sentence is completed. The Department of Corrections is authorized by the bill to establish designated mental health probation officers to support individuals under supervision of the MHCP. *See,* ss. 948.01(8)(b) and (c) and 948.06(2)(j)2., F.S.

Transfer to Participate in a Problem-Solving Court

The bill amends the definition of "problem-solving court" set forth in s. 910.035(5), F.S., to: (a) clarify that under existing law service members are included in "veterans' courts"; (b) make conforming changes for the bill's authorization of MHCPs by specifying the citations for the sections of law created or amended by the bill to reference mental health courts; and (c) add delinquency pretrial intervention court programs under s. 985.345, F.S.

Involuntary Outpatient Placement

Currently, only circuit court judges have the authority to order an individual into involuntary outpatient placement. The bill amends s. 394.4655, F.S., to authorize county court judges exercising original jurisdiction in a misdemeanor cases to order individuals into involuntary outpatient treatment if criteria is met.

Child Welfare

The bill makes conforming changes to child welfare statutes to incorporate references to mental health treatment and mental health courts.

B. SECTION DIRECTORY:

Section 1. Amending s. 39.001, F.S., relating to purposes and intent; personnel standards and screening.

Section 2. Amending s. 39.507, F.S., relating to adjudicatory hearings and orders of adjudication.

Section 3. Amending s. 39.521, F.S., relating to disposition hearings and powers of disposition.

Section 4. Amending s. 394.4655, F.S., relating to involuntary outpatient placement.

Section 5. Amending s. 394.4599, F.S., relating to notice.

Section 6. Amending s. 394.463, F.S., relating to involuntary examination.

Section 7. Amending s. 394.455, F.S., relating to definitions.

Section 8. Amending s. 394.4615, F.S., relating to clinical records and confidentiality.

Section 9. Amending s. 394.47891, F.S., relating to military veterans and servicemembers court programs.

Section 10. Creating s. 394.47892, F.S., relating to mental health court programs.

Section 11. Amending s. 910.035(5), F.S., relating to transfer for participation in a problem-solving court.

Section 12. Creating s. 916.185, F.S., relating to the Forensic Hospital Diversion Pilot Program.

Section 13. Amending s. 948.001, F.S., relating to definitions.

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[67] The provisions discussed in Footnotes 65 and 66 also apply when a court orders an offender to a veterans' court program for a violation of the offender's community control or probation. *See,* s. 948.06(2)(j), F.S.

Section 14. Amending s. 948.01, F.S., relating to when court may place defendant on probation or into community control.

Section 15. Amending s. 948.06, F.S., relating to violations of probation or community control.

Section 16. Amending s. 948.08, F.S., relating to felony pretrial intervention programs.

Section 17. Amending s. 948.16, F.S., relating to misdemeanor pretrial intervention programs.

Section 18. Amending s. 948.21, F.S., relating to conditions of community control or probation for military servicemembers and veterans.

Section 19. Amending s. 985.345, F.S., relating to delinquency pretrial intervention programs.

Section 20. Reenacting s. 397.334, F.S., for the purpose of incorporating the amendments made by this act to ss. 948.01 and 948.06, F.S.

Section 21. Reenacting s. 948.12, F.S., for the purpose of incorporating the amendments made by this act to s. 948.06, F.S.

Section 22. Providing an effective date of July 1, 2016.

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 has an indeterminate fiscal impact to state expenditures.

   Veterans' Courts

   This bill expands the definition of the term "veteran" for purposes of veterans' courts to include veterans who were discharged or released under a general discharge. This may increase the number of veterans eligible to participate in veterans' court programs, which could increase the costs associated with these programs; however, such costs will be limited by the amount of state funds appropriated to such programs. Additionally, such costs may be offset to the extent that the need for prison beds is reduced by placement in veterans' court programs.

   Forensic Hospital Diversion Pilot Program

   The proposed legislation gives DCF the discretion to implement three pilot programs in Duval, Broward and Miami-Dade Counties, if existing recurring resources are available. If DCF chooses to implement the pilot program, the estimated annual cost of the three additional pilot programs is $4,788,000 to fund all three pilot programs.

Mental Health Court Programs

An increased number of MHCPs will increase judicial and court workload on the front end because such programs require more hearings and monitoring; however, such increase may be mitigated by a decrease in recidivism which may be generated by additional MHCPs.[68]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill has an indeterminate fiscal impact to local government revenues.

The bill encourages counties to establish mental health court programs, and establishes guidelines for those programs. The counties which choose to establish the programs will be required to fund it with alternate sources of funding from other than the State, unless expenses are pursuant to F.S. 29.004. Since it is the option of each county court to establish such a program, the impact on revenues, if any, cannot be determined at this time.

2. Expenditures:

This bill has an indeterminate fiscal impact to local government expenditures.

This bill changes the hearing and petitioning process for continuing an involuntary outpatient treatment order. The bill requires the petition be filed or hearing be held with the court, which originally issued the order, instead of the circuit court as is currently required by s. 394.4655(7)(a)1, F.S. This may shift an indeterminate amount of workload to county criminal courts, from the circuit courts.

This bill expands the definition of the term "veteran" for purposes of veterans' courts to include veterans who were discharged or released under a general discharge. This may increase the number of veterans eligible to participate in veterans' court programs, which could increase the costs associated with these programs for counties that choose to fund such programs. Such costs may be offset, however, to the extent that the need for jail beds is reduced by placement in veterans' court programs. The precise effect cannot be determined because these programs are discretionary with the courts and are limited by available resources.[69]

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

[68] Office of the State Courts Administrator, *HB 439 Judicial Impact Statement*, Dated December 1, 2015, on file with the House Appropriations Committee.
[69] Id.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities. Additionally, 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 authorizes DCF to adopt rules to administer s. 916.185, F.S., which establishes the Forensic Hospital Diversion Pilot Program.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On December 2, 2015, the Children, Families & Seniors Subcommittee adopted three amendments to HB 439. The amendments:

- Made conforming changes to child welfare statutes to incorporate references to mental health treatment and mental health courts;
- Authorized criminal county courts to order misdemeanants to involuntary outpatient placement if the misdemeanant meets the criteria for involuntary outpatient placement under s. 394.4655, F.S.;
- Removed proposed language which authorized county courts to order the conditional release of misdemeanants for the purpose of competency restoration. Per DCF's analysis, the proposed language could have created a fiscal impact of approximately $74 million.
- Defined "mental health probation";
- Amended language to align with the language utilized in the Senate companion bill, CS/SB 604.

On January 27, 2015, the Appropriations Committee adopted one amendment to CS/HB 439. The amendment:

- Amends the language which requires implementation of the Forensic Hospital Diversion Pilot Program by the Department of Children and Families, making it optional at the discretion of the department.

This analysis is drafted to the committee substitute as passed by the Appropriations Committee.

A bill to be entitled

An act relating to mental health services in the criminal justice system; amending ss. 39.001, 39.507, and 39.521, F.S.; conforming provisions to changes made by the act; amending s. 394.4655, F.S.; defining the terms "court" and "criminal county court" for purposes of involuntary outpatient placement; conforming provisions to changes made by act; amending ss. 394.4599 and 394.463, F.S.; conforming provisions to changes made by act; conforming cross-references; amending s. 394.455 and 394.4615, F.S.; conforming cross-references; amending s. 394.47891, F.S.; expanding eligibility for military veterans and servicemembers court programs; creating s. 394.47892, F.S.; amending s. 910.035, F.S.; revising the definition of the term "problem-solving court"; creating s. 916.185, F.S.; creating the Forensic Hospital Diversion Pilot Program; providing legislative findings and intent; providing definitions; authorizing the Department of Children and Families to implement a Forensic Hospital Diversion Pilot Program in specified judicial circuits; authorizing the department to request specified budget amendments; providing for eligibility for the program; providing legislative intent concerning training; authorizing rulemaking; amending

s. 948.001, F.S.; defining the term "mental health probation"; amending ss. 948.01 and 948.06, F.S.; authorizing courts to order certain offenders on probation or community control to postadjudicatory mental health court programs; amending s. 948.08, F.S.; expanding eligibility requirements for certain pretrial intervention programs; providing for voluntary admission into a pretrial mental health court program; creating s. 916.185, F.S.; creating the Forensic Hospital Diversion Pilot Program; providing legislative findings and intent; providing definitions; requiring the Department of Children and Families to implement a Forensic Hospital Diversion Pilot Program in specified judicial circuits; providing for eligibility for the program; providing legislative intent concerning training; authorizing rulemaking; amending ss. 948.01 and 948.06, F.S.; providing for courts to order certain defendants on probation or community control to postadjudicatory mental health court programs; amending s. 948.08, F.S.; expanding eligibility requirements for certain pretrial intervention programs; providing for voluntary admission into pretrial mental health court program; amending s. 948.16, F.S.; expanding eligibility of veterans for a misdemeanor pretrial veterans' treatment intervention program; providing

eligibility of misdemeanor defendants for a misdemeanor pretrial mental health court program; amending s. 948.21, F.S.; expanding veterans' eligibility for participating in treatment programs while on court-ordered probation or community control; amending s. 985.345, F.S.; authorizing pretrial mental health court programs for certain juvenile offenders; providing for disposition of pending charges after completion of the pretrial intervention program; reenacting s. 397.334(3)(a) and (5), F.S., relating to treatment-based drug court programs, to incorporate the amendments made by the act to ss. 948.01 and 948.06, F.S., in references thereto; reenacting s. 948.012(2)(b), F.S., relating to split sentence probation or community control and imprisonment, to incorporate the amendment made by the act to s. 948.06, F.S., in a reference thereto; providing an effective date.

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

Section 1. Subsection (6) of section 39.001, Florida Statutes, is amended to read:

39.001 Purposes and intent; personnel standards and screening.—

(6) MENTAL HEALTH AND SUBSTANCE ABUSE SERVICES.—

(a) The Legislature recognizes that early referral and comprehensive treatment can help combat mental illnesses and substance abuse disorders in families and that treatment is cost-effective.

(b) The Legislature establishes the following goals for the state related to mental illness and substance abuse treatment services in the dependency process:

1. To ensure the safety of children.

2. To prevent and remediate the consequences of mental illnesses and substance abuse disorders on families involved in protective supervision or foster care and reduce the occurrences of mental illnesses and substance abuse disorders, including alcohol abuse or related disorders, for families who are at risk of being involved in protective supervision or foster care.

3. To expedite permanency for children and reunify healthy, intact families, when appropriate.

4. To support families in recovery.

(c) The Legislature finds that children in the care of the state's dependency system need appropriate health care services, that the impact of mental illnesses and substance abuse disorders on health indicates the need for health care services to include treatment for mental health and substance abuse disorders for ~~services to~~ children and parents, where appropriate, and that it is in the state's best interest that such children be provided the services they need to enable them to become and remain independent of state care. In order to

provide these services, the state's dependency system must have the ability to identify and provide appropriate intervention and treatment for children with personal or family-related mental illness and substance abuse problems.

(d) It is the intent of the Legislature to encourage the use of the mental health court program model established under s. 394.47892 and the drug court program model established under ~~by~~ s. 397.334 and authorize courts to assess children and persons who have custody or are requesting custody of children where good cause is shown to identify and address mental illnesses and substance abuse disorders ~~problems~~ as the court deems appropriate at every stage of the dependency process. Participation in treatment, including a mental health court program or a treatment-based drug court program, may be required by the court following adjudication. Participation in assessment and treatment before ~~prior to~~ adjudication is ~~shall be~~ voluntary, except as provided in s. 39.407(16).

(e) It is therefore the purpose of the Legislature to provide authority for the state to contract with mental health service providers and community substance abuse treatment providers for the development and operation of specialized support and overlay services for the dependency system, which will be fully implemented and used as resources permit.

(f) Participation in a mental health court program or a ~~the~~ treatment-based drug court program does not divest any public or private agency of its responsibility for a child or

adult, but is intended to enable these agencies to better meet their needs through shared responsibility and resources.

Section 2. Subsection (10) of section 39.507, Florida Statutes, is amended to read:

39.507 Adjudicatory hearings; orders of adjudication.—

(10) After an adjudication of dependency, or a finding of dependency where adjudication is withheld, the court may order a person who has custody or is requesting custody of the child to submit to a mental health or substance abuse disorder assessment or evaluation. The assessment or evaluation must be administered by a qualified professional, as defined in s. 397.311. The court may also require such person to participate in and comply with treatment and services identified as necessary, including, when appropriate and available, participation in and compliance with a mental health court program established under s. 394.47892 or a treatment-based drug court program established under s. 397.334. In addition to supervision by the department, the court, including the mental health court program or treatment-based drug court program, may oversee the progress and compliance with treatment by a person who has custody or is requesting custody of the child. The court may impose appropriate available sanctions for noncompliance upon a person who has custody or is requesting custody of the child or make a finding of noncompliance for consideration in determining whether an alternative placement of the child is in the child's best interests. Any order entered under this subsection may be

made only upon good cause shown. This subsection does not authorize placement of a child with a person seeking custody, other than the parent or legal custodian, who requires mental health or substance abuse disorder treatment.

Section 3. Paragraph (b) of subsection (1) of section 39.521, Florida Statutes, is amended to read:

39.521 Disposition hearings; powers of disposition.—

(1) A disposition hearing shall be conducted by the court, if the court finds that the facts alleged in the petition for dependency were proven in the adjudicatory hearing, or if the parents or legal custodians have consented to the finding of dependency or admitted the allegations in the petition, have failed to appear for the arraignment hearing after proper notice, or have not been located despite a diligent search having been conducted.

(b) When any child is adjudicated by a court to be dependent, the court having jurisdiction of the child has the power by order to:

1. Require the parent and, when appropriate, the legal custodian and the child to participate in treatment and services identified as necessary. The court may require the person who has custody or who is requesting custody of the child to submit to a mental health or substance abuse disorder assessment or evaluation. The assessment or evaluation must be administered by a qualified professional, as defined in s. 397.311. The court may also require such person to participate in and comply with

treatment and services identified as necessary, including, when appropriate and available, participation in and compliance with a mental health court program established under s. 394.47892 or a treatment-based drug court program established under s. 397.334. In addition to supervision by the department, the court, including the mental health court program or the treatment-based drug court program, may oversee the progress and compliance with treatment by a person who has custody or is requesting custody of the child. The court may impose appropriate available sanctions for noncompliance upon a person who has custody or is requesting custody of the child or make a finding of noncompliance for consideration in determining whether an alternative placement of the child is in the child's best interests. Any order entered under this subparagraph may be made only upon good cause shown. This subparagraph does not authorize placement of a child with a person seeking custody of the child, other than the child's parent or legal custodian, who requires mental health or substance abuse disorder treatment.

2. Require, if the court deems necessary, the parties to participate in dependency mediation.

3. Require placement of the child either under the protective supervision of an authorized agent of the department in the home of one or both of the child's parents or in the home of a relative of the child or another adult approved by the court, or in the custody of the department. Protective supervision continues until the court terminates it or until the

child reaches the age of 18, whichever date is first. Protective supervision shall be terminated by the court whenever the court determines that permanency has been achieved for the child, whether with a parent, another relative, or a legal custodian, and that protective supervision is no longer needed. The termination of supervision may be with or without retaining jurisdiction, at the court's discretion, and shall in either case be considered a permanency option for the child. The order terminating supervision by the department shall set forth the powers of the custodian of the child and shall include the powers ordinarily granted to a guardian of the person of a minor unless otherwise specified. Upon the court's termination of supervision by the department, no further judicial reviews are required, so long as permanency has been established for the child.

Section 4. Subsections (1) through (7) of section 394.4655, F.S., are renumbered as subsections (2) through (8), respectively, paragraph (b) of present subsection (3), paragraph (b) of present subsection (6), and paragraphs (a) and (c) of present subsection (7) are amended, and a new subsection (1) is added to that section, to read:

394.4655 Involuntary outpatient placement.—

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

(a) "Court" means a circuit court or a criminal county court.

(b) "Criminal county court" means a county court

exercising its original jurisdiction in a misdemeanor case under s. 34.01.

(4)~~(3)~~ PETITION FOR INVOLUNTARY OUTPATIENT PLACEMENT.—

(b) Each required criterion for involuntary outpatient placement must be alleged and substantiated in the petition for involuntary outpatient placement. A copy of the certificate recommending involuntary outpatient placement completed by a qualified professional specified in subsection (3) ~~(2)~~ must be attached to the petition. A copy of the proposed treatment plan must be attached to the petition. Before the petition is filed, the service provider shall certify that the services in the proposed treatment plan are available. If the necessary services are not available in the patient's local community to respond to the person's individual needs, the petition may not be filed.

(7)~~(6)~~ HEARING ON INVOLUNTARY OUTPATIENT PLACEMENT.—

(b)1. If the court concludes that the patient meets the criteria for involuntary outpatient placement pursuant to subsection (2) ~~(1)~~, the court shall issue an order for involuntary outpatient placement. The court order shall be for a period of up to 6 months. The order must specify the nature and extent of the patient's mental illness. The order of the court and the treatment plan shall be made part of the patient's clinical record. The service provider shall discharge a patient from involuntary outpatient placement when the order expires or any time the patient no longer meets the criteria for involuntary placement. Upon discharge, the service provider

shall send a certificate of discharge to the court.

2. The court may not order the department or the service provider to provide services if the program or service is not available in the patient's local community, if there is no space available in the program or service for the patient, or if funding is not available for the program or service. A copy of the order must be sent to the Agency for Health Care Administration by the service provider within 1 working day after it is received from the court. After the placement order is issued, the service provider and the patient may modify provisions of the treatment plan. For any material modification of the treatment plan to which the patient or the patient's guardian advocate, if appointed, does agree, the service provider shall send notice of the modification to the court. Any material modifications of the treatment plan which are contested by the patient or the patient's guardian advocate, if appointed, must be approved or disapproved by the court consistent with subsection (3) ~~(2)~~.

3. If, in the clinical judgment of a physician, the patient has failed or has refused to comply with the treatment ordered by the court, and, in the clinical judgment of the physician, efforts were made to solicit compliance and the patient may meet the criteria for involuntary examination, a person may be brought to a receiving facility pursuant to s. 394.463. If, after examination, the patient does not meet the criteria for involuntary inpatient placement pursuant to s.

394.467, the patient must be discharged from the receiving facility. The involuntary outpatient placement order shall remain in effect unless the service provider determines that the patient no longer meets the criteria for involuntary outpatient placement or until the order expires. The service provider must determine whether modifications should be made to the existing treatment plan and must attempt to continue to engage the patient in treatment. For any material modification of the treatment plan to which the patient or the patient's guardian advocate, if appointed, does agree, the service provider shall send notice of the modification to the court. Any material modifications of the treatment plan which are contested by the patient or the patient's guardian advocate, if appointed, must be approved or disapproved by the court consistent with subsection (3) ~~(2)~~.

(8)~~(7)~~ PROCEDURE FOR CONTINUED INVOLUNTARY OUTPATIENT PLACEMENT.—

(a)1. If the person continues to meet the criteria for involuntary outpatient placement, the service provider shall, before the expiration of the period during which the treatment is ordered for the person, file in the ~~circuit~~ court that issued the order for involuntary outpatient treatment a petition for continued involuntary outpatient placement.

2. The existing involuntary outpatient placement order remains in effect until disposition on the petition for continued involuntary outpatient placement.

3. A certificate shall be attached to the petition which includes a statement from the person's physician or clinical psychologist justifying the request, a brief description of the patient's treatment during the time he or she was involuntarily placed, and an individualized plan of continued treatment.

4. The service provider shall develop the individualized plan of continued treatment in consultation with the patient or the patient's guardian advocate, if appointed. When the petition has been filed, the clerk of the court shall provide copies of the certificate and the individualized plan of continued treatment to the department, the patient, the patient's guardian advocate, the state attorney, and the patient's private counsel or the public defender.

(c) Hearings on petitions for continued involuntary outpatient placement shall be before the ~~circuit~~ court that issued the order for involuntary outpatient treatment. The court may appoint a master to preside at the hearing. The procedures for obtaining an order pursuant to this paragraph shall be in accordance with subsection (7) ~~(6)~~, except that the time period included in paragraph (2)(e) ~~(1)(c)~~ is not applicable in determining the appropriateness of additional periods of involuntary outpatient placement.

Section 5. Paragraph (d) of subsection (2) of section 394.4599, Florida Statutes, is amended to read:

394.4599 Notice.—

(2) INVOLUNTARY ADMISSION.—

(d) The written notice of the filing of the petition for involuntary placement of an individual being held must contain the following:

1. Notice that the petition for:

a. Involuntary inpatient treatment pursuant to s. 394.467 has been filed with the circuit court in the county in which the individual is hospitalized and the address of such court; or

b. Involuntary outpatient treatment pursuant to s. 394.4655 has been filed with the criminal county court, as defined in s. 394.4655(1), or the circuit court, as applicable, in the county in which the individual is hospitalized and the address of such court.

2. Notice that the office of the public defender has been appointed to represent the individual in the proceeding, if the individual is not otherwise represented by counsel.

3. The date, time, and place of the hearing and the name of each examining expert and every other person expected to testify in support of continued detention.

4. Notice that the individual, the individual's guardian, guardian advocate, health care surrogate or proxy, or representative, or the administrator may apply for a change of venue for the convenience of the parties or witnesses or because of the condition of the individual.

5. Notice that the individual is entitled to an independent expert examination and, if the individual cannot afford such an examination, that the court will provide for one.

Section 6. Paragraphs (g) and (i) of subsection (2) of section 394.463, Florida Statutes, are amended to read:

394.463 Involuntary examination.—

(2) INVOLUNTARY EXAMINATION.—

(g) A person for whom an involuntary examination has been initiated who is being evaluated or treated at a hospital for an emergency medical condition specified in s. 395.002 must be examined by a receiving facility within 72 hours. The 72-hour period begins when the patient arrives at the hospital and ceases when the attending physician documents that the patient has an emergency medical condition. If the patient is examined at a hospital providing emergency medical services by a professional qualified to perform an involuntary examination and is found as a result of that examination not to meet the criteria for involuntary outpatient placement pursuant to s. 394.4655(2) ~~394.4655(1)~~ or involuntary inpatient placement pursuant to s. 394.467(1), the patient may be offered voluntary placement, if appropriate, or released directly from the hospital providing emergency medical services. The finding by the professional that the patient has been examined and does not meet the criteria for involuntary inpatient placement or involuntary outpatient placement must be entered into the patient's clinical record. Nothing in this paragraph is intended to prevent a hospital providing emergency medical services from appropriately transferring a patient to another hospital prior to stabilization, provided the requirements of s. 395.1041(3)(c)

have been met.

(i) Within the 72-hour examination period or, if the 72 hours ends on a weekend or holiday, no later than the next working day thereafter, one of the following actions must be taken, based on the individual needs of the patient:

1. The patient shall be released, unless he or she is charged with a crime, in which case the patient shall be returned to the custody of a law enforcement officer;

2. The patient shall be released, subject to the provisions of subparagraph 1., for voluntary outpatient treatment;

3. The patient, unless he or she is charged with a crime, shall be asked to give express and informed consent to placement as a voluntary patient, and, if such consent is given, the patient shall be admitted as a voluntary patient; or

4. A petition for involuntary placement shall be filed in the circuit court <u>if</u> ~~when outpatient or~~ inpatient treatment is deemed necessary <u>or with the criminal county court, as defined in s. 394.4655(1), as applicable</u>. <u>If</u> ~~When~~ inpatient treatment is deemed necessary, the least restrictive treatment consistent with the optimum improvement of the patient's condition shall be made available. When a petition is to be filed for involuntary outpatient placement, it shall be filed by one of the petitioners specified in s. <u>394.4655(4)(a)</u> ~~394.4655(3)(a)~~. A petition for involuntary inpatient placement shall be filed by the facility administrator.

Section 7. Subsection (34) of section 394.455, Florida Statutes, is amended to read:

394.455 Definitions.—As used in this part, unless the context clearly requires otherwise, the term:

(34) "Involuntary examination" means an examination performed under s. 394.463 to determine if an individual qualifies for involuntary inpatient treatment under s. 394.467(1) or involuntary outpatient treatment under s. 394.4655(2) ~~394.4655(1)~~.

Section 8. Subsection (3) of section 394.4615, Florida Statutes, is amended to read:

394.4615 Clinical records; confidentiality.—

(3) Information from the clinical record may be released in the following circumstances:

(a) When a patient has declared an intention to harm other persons. When such declaration has been made, the administrator may authorize the release of sufficient information to provide adequate warning to the person threatened with harm by the patient.

(b) When the administrator of the facility or secretary of the department deems release to a qualified researcher as defined in administrative rule, an aftercare treatment provider, or an employee or agent of the department is necessary for treatment of the patient, maintenance of adequate records, compilation of treatment data, aftercare planning, or evaluation of programs.

For the purpose of determining whether a person meets the criteria for involuntary outpatient placement or for preparing the proposed treatment plan pursuant to s. 394.4655, the clinical record may be released to the state attorney, the public defender or the patient's private legal counsel, the court, and to the appropriate mental health professionals, including the service provider identified in s. 394.4655(7)(b)2. ~~394.4655(6)(b)2.~~, in accordance with state and federal law.

Section 9. Section 394.47891, Florida Statutes, is amended to read:

394.47891 Military veterans and servicemembers court programs.—The chief judge of each judicial circuit may establish a Military Veterans and Servicemembers Court Program under which veterans, as defined in s. 1.01, including veterans who were discharged or released under a general discharge, and servicemembers, as defined in s. 250.01, who are charged or convicted of a criminal offense and who suffer from a military-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem can be sentenced in accordance with chapter 921 in a manner that appropriately addresses the severity of the mental illness, traumatic brain injury, substance abuse disorder, or psychological problem through services tailored to the individual needs of the participant. Entry into any Military Veterans and Servicemembers Court Program must be based upon the sentencing court's

assessment of the defendant's criminal history, military service, substance abuse treatment needs, mental health treatment needs, amenability to the services of the program, the recommendation of the state attorney and the victim, if any, and the defendant's agreement to enter the program.

Section 10. Section 394.47892, Florida Statutes, is created to read:

394.47892 Mental health court programs.—

(1) Each county may fund a mental health court program under which a defendant in the justice system assessed with a mental illness shall be processed in such a manner as to appropriately address the severity of the identified mental illness through treatment services tailored to the individual needs of the participant. The Legislature intends to encourage the department, the Department of Corrections, the Department of Juvenile Justice, the Department of Health, the Department of Law Enforcement, the Department of Education, and other such agencies, local governments, law enforcement agencies, interested public or private entities, and individuals to support the creation and establishment of problem-solving court programs. Participation in a mental health court program does not relieve a public or private agency of its responsibility for a child or an adult, but enables such agency to better meet the child's or adult's needs through shared responsibility and resources.

(2) Mental health court programs may include pretrial

intervention programs as provided in ss. 948.08, 948.16, and 985.345, postadjudicatory mental health court programs as provided in ss. 948.01 and 948.06, and review of the status of compliance or noncompliance of sentenced defendants through a mental health court program.

(3) Entry into a pretrial mental health court program is voluntary.

(4)(a) Entry into a postadjudicatory mental health court program as a condition of probation or community control pursuant to s. 948.01 or s. 948.06 must be based upon the sentencing court's assessment of the defendant's criminal history, mental health screening outcome, amenability to the services of the program, and total sentence points; the recommendation of the state attorney and the victim, if any; and the defendant's agreement to enter the program.

(b) A defendant who is sentenced to a postadjudicatory mental health court program and who, while a mental health court program participant, is the subject of a violation of probation or community control under s. 948.06 shall have the violation of probation or community control heard by the judge presiding over the postadjudicatory mental health court program. After a hearing on or admission of the violation, the judge shall dispose of any such violation as he or she deems appropriate if the resulting sentence or conditions are lawful.

(5)(a) Contingent upon an annual appropriation by the Legislature, the state courts system shall establish, at a

minimum, one coordinator position in each mental health court program to coordinate the responsibilities of the participating agencies and service providers. Each coordinator shall provide direct support to the mental health court program by providing coordination between the multidisciplinary team and the judiciary, providing case management, monitoring compliance of the participants in the mental health court program with court requirements, and managing the collection of data for program evaluation and accountability.

(b) Each mental health court program shall collect sufficient client-level data and programmatic information for purposes of program evaluation. Client-level data includes primary offenses that resulted in the mental health court program referral or sentence, treatment compliance, completion status and reasons for failure to complete, offenses committed during treatment and the sanctions imposed, frequency of court appearances, and units of service. Programmatic information includes referral and screening procedures, eligibility criteria, type and duration of treatment offered, and residential treatment resources. The programmatic information and aggregate data on the number of mental health court program admissions and terminations by type of termination shall be reported annually by each mental health court program to the Office of the State Courts Administrator.

(6) If a county chooses to fund a mental health court program, the county must secure funding from sources other than

the state for those costs not otherwise assumed by the state pursuant to s. 29.004. However, this subsection does not preclude counties from using funds for treatment and other services provided through state executive branch agencies. Counties may provide, by interlocal agreement, for the collective funding of these programs.

(7) The chief judge of each judicial circuit may appoint an advisory committee for the mental health court program. The committee shall be composed of the chief judge, or his or her designee, who shall serve as chair; the judge or judges of the mental health court program, if not otherwise designated by the chief judge as his or her designee; the state attorney, or his or her designee; the public defender, or his or her designee; the mental health court program coordinator or coordinators; community representatives; treatment representatives; and any other persons who the chair deems appropriate.

Section 11. Paragraph (a) of subsection (5) of section 910.035, Florida Statutes, is amended to read:

910.035 Transfer from county for plea, sentence, or participation in a problem-solving court.—

(5) TRANSFER FOR PARTICIPATION IN A PROBLEM-SOLVING COURT.—

(a) For purposes of this subsection, the term "problem-solving court" means a drug court pursuant to s. 948.01, s. 948.06, s. 948.08, s. 948.16, or s. 948.20; a military veterans' and servicemembers' court pursuant to s. 394.47891, s. 948.08,

s. 948.16, or s. 948.21; ~~or~~ a mental health court program pursuant to s. 394.47892, s. 948.01, s. 948.06, s. 948.08, or s. 948.16; or a delinquency pretrial intervention court program pursuant to s. 985.345.

Section 12. Section 916.185, Florida Statutes, is created to read:

916.185 Forensic Hospital Diversion Pilot Program.—

(1) LEGISLATIVE FINDINGS AND INTENT.—The Legislature finds that many jail inmates who have serious mental illnesses and who are committed to state forensic mental health treatment facilities for restoration of competency to proceed could be served more effectively and at less cost in community-based alternative programs. The Legislature further finds that many people who have serious mental illnesses and who have been discharged from state forensic mental health treatment facilities could avoid returning to the criminal justice and forensic mental health systems if they received specialized treatment in the community. Therefore, it is the intent of the Legislature to create the Forensic Hospital Diversion Pilot Program to serve offenders who have mental illnesses or co-occurring mental illnesses and substance use disorders and who are involved in or at risk of entering state forensic mental health treatment facilities, prisons, jails, or state civil mental health treatment facilities.

(2) DEFINITIONS.—As used in this section, the term:

(a) "Best practices" means treatment services that

incorporate the most effective and acceptable interventions available in the care and treatment of offenders who are diagnosed as having mental illnesses or co-occurring mental illnesses and substance use disorders.

(b) "Community forensic system" means the community mental health and substance use forensic treatment system, including the comprehensive set of services and supports provided to offenders involved in or at risk of becoming involved in the criminal justice system.

(c) "Evidence-based practices" means interventions and strategies that, based on the best available empirical research, demonstrate effective and efficient outcomes in the care and treatment of offenders who are diagnosed as having mental illnesses or co-occurring mental illnesses and substance use disorders.

(3) CREATION.—There is authorized a Forensic Hospital Diversion Pilot Program to provide competency-restoration and community-reintegration services in either a locked residential treatment facility when appropriate or a community-based facility based on considerations of public safety, the needs of the individual, and available resources.

(a) The department may implement a Forensic Hospital Diversion Pilot Program modeled after the Miami-Dade Forensic Alternative Center, taking into account local needs and resources in Duval County, in conjunction with the Fourth Judicial Circuit in Duval County; in Broward County, in

conjunction with the Seventeenth Judicial Circuit in Broward County; and in Miami-Dade County, in conjunction with the Eleventh Judicial Circuit in Miami-Dade County.

(b) If the department elects to create and implement the program, the department shall include a comprehensive continuum of care and services that use evidence-based practices and best practices to treat offenders who have mental health and co-occurring substance use disorders.

(c) The department and the corresponding judicial circuits may implement this section if existing resources are available to do so on a recurring basis. The department may request budget amendments pursuant to chapter 216 to realign funds between mental health services and community substance abuse and mental health services in order to implement this pilot program.

(4) ELIGIBILITY.—Participation in the Forensic Hospital Diversion Pilot Program is limited to offenders who:

(a) Are 18 years of age or older.

(b) Are charged with a felony of the second degree or a felony of the third degree.

(c) Do not have a significant history of violent criminal offenses.

(d) Are adjudicated incompetent to proceed to trial or not guilty by reason of insanity pursuant to this part.

(e) Meet public safety and treatment criteria established by the department for placement in a community setting.

(f) Otherwise would be admitted to a state mental health

treatment facility.

(5) TRAINING.—The Legislature encourages the Florida Supreme Court, in consultation and cooperation with the Florida Supreme Court Task Force on Substance Abuse and Mental Health Issues in the Courts, to develop educational training for judges in the pilot program areas which focuses on the community forensic system.

(6) RULEMAKING.—The department may adopt rules to administer this section.

Section 13. Subsections (6) through (13) of section 948.001, Florida Statutes, are renumbered as subsections (7) through (14), respectively, and a new subsection (6) is added to that section, to read:

948.001 Definitions.—As used in this chapter, the term:

(6) "Mental health probation" means a form of specialized supervision that emphasizes mental health treatment and working with treatment providers to focus on underlying mental health disorders and compliance with a prescribed psychotropic medication regimen in accordance with individualized treatment plans. Mental health probation shall be supervised by officers with restricted caseloads who are sensitive to the unique needs of individuals with mental health disorders, and who will work in tandem with community mental health case managers assigned to the defendant. Caseloads of such officers should be restricted to a maximum of 50 cases per officer in order to ensure an adequate level of staffing and supervision.

Section 14. Subsection (8) is added to section 948.01, Florida Statutes, to read:

948.01 When court may place defendant on probation or into community control.—

(8)(a) Notwithstanding s. 921.0024 and effective for offenses committed on or after July 1, 2016, the sentencing court may place the defendant into a postadjudicatory mental health court program if the offense is a nonviolent felony, the defendant is amenable to mental health treatment, including taking prescribed medications, and the defendant is otherwise qualified under s. 394.47892(4). The satisfactory completion of the program must be a condition of the defendant's probation or community control. As used in this subsection, the term "nonviolent felony" means a third degree felony violation under chapter 810 or any other felony offense that is not a forcible felony as defined in s. 776.08. Defendants charged with resisting an officer with violence under s. 843.01, battery on a law enforcement officer under s. 784.07, or aggravated assault may participate in the mental health court program if the court so orders after the victim is given his or her right to provide testimony or written statement to the court as provided in s. 921.143.

(b) The defendant must be fully advised of the purpose of the mental health court program and the defendant must agree to enter the program. The original sentencing court shall relinquish jurisdiction of the defendant's case to the

postadjudicatory mental health court program until the defendant is no longer active in the program, the case is returned to the sentencing court due to the defendant's termination from the program for failure to comply with the terms thereof, or the defendant's sentence is completed.

(c) The Department of Corrections may establish designated and trained mental health probation officers to support individuals under supervision of the mental health court program.

Section 15. Paragraph (j) is added to subsection (2) of section 948.06, Florida Statutes, to read:

948.06 Violation of probation or community control; revocation; modification; continuance; failure to pay restitution or cost of supervision.—

(2)

(j)1. Notwithstanding s. 921.0024 and effective for offenses committed on or after July 1, 2016, the court may order the offender to successfully complete a postadjudicatory mental health court program under s. 394.47892 or a military veterans and servicemembers court program under s. 394.47891 if:

a. The court finds or the offender admits that the offender has violated his or her community control or probation;

b. The underlying offense is a nonviolent felony. As used in this subsection, the term "nonviolent felony" means a third degree felony violation under chapter 810 or any other felony offense that is not a forcible felony as defined in s. 776.08.

Offenders charged with resisting an officer with violence under s. 843.01, battery on a law enforcement officer under s. 784.07, or aggravated assault may participate in the mental health court program if the court so orders after the victim is given his or her right to provide testimony or written statement to the court as provided in s. 921.143;

c. The court determines that the offender is amenable to the services of a postadjudicatory mental health court program, including taking prescribed medications, or a military veterans and servicemembers court program;

d. The court explains the purpose of the program to the offender and the offender agrees to participate; and

e. The offender is otherwise qualified to participate in a postadjudicatory mental health court program under s. 394.47892(4) or a military veterans and servicemembers court program under s. 394.47891.

2. After the court orders the modification of community control or probation, the original sentencing court shall relinquish jurisdiction of the offender's case to the postadjudicatory mental health court program until the offender is no longer active in the program, the case is returned to the sentencing court due to the offender's termination from the program for failure to comply with the terms thereof, or the offender's sentence is completed.

Section 16. Subsection (8) of section 948.08, Florida Statutes, is renumbered as subsection (9), paragraph (a) of

subsection (7) is amended, and a new subsection (8) is added to that section, to read:

948.08 Pretrial intervention program.—

(7)(a) Notwithstanding any provision of this section, a person who is charged with a felony, other than a felony listed in s. 948.06(8)(c), and identified as a veteran, as defined in s. 1.01, <u>including a veteran who is discharged or released under a general discharge,</u> or servicemember, as defined in s. 250.01, who suffers from a military service-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem, is eligible for voluntary admission into a pretrial veterans' treatment intervention program approved by the chief judge of the circuit, upon motion of either party or the court's own motion, except:

1. If a defendant was previously offered admission to a pretrial veterans' treatment intervention program at any time before trial and the defendant rejected that offer on the record, the court may deny the defendant's admission to such a program.

2. If a defendant previously entered a court-ordered veterans' treatment program, the court may deny the defendant's admission into the pretrial veterans' treatment program.

<u>(8)(a) Notwithstanding any provision of this section, a defendant is eligible for voluntary admission into a pretrial mental health court program established pursuant to s. 394.47892 and approved by the chief judge of the circuit for a period to</u>

be determined by the court, based on the clinical needs of the defendant, upon motion of either party or the court's own motion if:

1. The defendant is identified as having a mental illness;

2. The defendant has not been convicted of a felony; and

3. The defendant is charged with:

a. A nonviolent felony that includes a third degree felony violation of chapter 810 or any other felony offense that is not a forcible felony as defined in s. 776.08;

b. Resisting an officer with violence under s. 843.01, if the law enforcement officer and state attorney consent to the defendant's participation;

c. Battery on a law enforcement officer under s. 784.07, if the law enforcement officer and state attorney consent to the defendant's participation; or

d. Aggravated assault, if the victim and state attorney consent to the defendant's participation.

(b) At the end of the pretrial intervention period, the court shall consider the recommendation of the program administrator and the recommendation of the state attorney as to disposition of the pending charges. The court shall determine, by written finding, whether the defendant has successfully completed the pretrial intervention program. If the court finds that the defendant has not successfully completed the pretrial intervention program, the court may order the person to continue in education and treatment, which may include a mental health

program offered by a licensed service provider, as defined in s. 394.455, or order that the charges revert to normal channels for prosecution. The court shall dismiss the charges upon a finding that the defendant has successfully completed the pretrial intervention program.

Section 17. Subsections (3) and (4) of section 948.16, Florida Statutes, are renumbered as subsections (4) and (5), respectively, paragraph (a) of subsection (2) and present subsection (4) of that section are amended, and a new subsection (3) is added to that section, to read:

948.16 Misdemeanor pretrial substance abuse education and treatment intervention program; misdemeanor pretrial veterans' treatment intervention program; misdemeanor pretrial mental health court program.—

(2)(a) A veteran, as defined in s. 1.01, including a veteran who is discharged or released under a general discharge, or servicemember, as defined in s. 250.01, who suffers from a military service-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem, and who is charged with a misdemeanor is eligible for voluntary admission into a misdemeanor pretrial veterans' treatment intervention program approved by the chief judge of the circuit, for a period based on the program's requirements and the treatment plan for the offender, upon motion of either party or the court's own motion. However, the court may deny the defendant admission into a misdemeanor pretrial veterans' treatment intervention program

if the defendant has previously entered a court-ordered veterans' treatment program.

(3) A defendant who is charged with a misdemeanor and identified as having a mental illness is eligible for voluntary admission into a misdemeanor pretrial mental health court program established pursuant to s. 394.47892, approved by the chief judge of the circuit, for a period to be determined by the court, based on the clinical needs of the defendant, upon motion of either party or the court's own motion.

(5)~~(4)~~ Any public or private entity providing a pretrial substance abuse education and treatment program or mental health court program under this section shall contract with the county or appropriate governmental entity. The terms of the contract shall include, but not be limited to, the requirements established for private entities under s. 948.15(3). This requirement does not apply to services provided by the Department of Veterans' Affairs or the United States Department of Veterans Affairs.

Section 18. Section 948.21, Florida Statutes, is amended to read:

948.21 Condition of probation or community control; military servicemembers and veterans.—

(1) Effective for a probationer or community controllee whose crime is ~~was~~ committed on or after July 1, 2012, and who is a veteran, as defined in s. 1.01, or servicemember, as defined in s. 250.01, who suffers from a military service-

related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem, the court may, in addition to any other conditions imposed, impose a condition requiring the probationer or community controllee to participate in a treatment program capable of treating the probationer's ~~probationer~~ or community controllee's mental illness, traumatic brain injury, substance abuse disorder, or psychological problem.

(2) Effective for a probationer or community controllee whose crime is committed on or after July 1, 2016, and who is a veteran, as defined in s. 1.01, including a veteran who is discharged or released under a general discharge, or servicemember, as defined in s. 250.01, who suffers from a military service-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem, the court may, in addition to any other conditions imposed, impose a condition requiring the probationer or community controllee to participate in a treatment program capable of treating the probationer or community controllee's mental illness, traumatic brain injury, substance abuse disorder, or psychological problem.

(3) The court shall give preference to treatment programs for which the probationer or community controllee is eligible through the United States Department of Veterans Affairs or the Florida Department of Veterans' Affairs. The Department of Corrections is not required to spend state funds to implement

this section.

Section 19. Subsection (3) of section 985.345, Florida Statutes, is amended, subsection (4) is renumbered as subsection (7) and amended, and new subsections (4) through (6) are added to that section, to read:

985.345 Delinquency pretrial intervention program.—

(3) At the end of the delinquency pretrial intervention period, the court shall consider the recommendation of the state attorney and the program administrator as to disposition of the pending charges. The court shall determine, by written finding, whether the child has successfully completed the delinquency pretrial intervention program. Notwithstanding the coordinated strategy developed by a drug court team pursuant to s. 397.334(4), if the court finds that the child has not successfully completed the delinquency pretrial intervention program, the court may order the child to continue in an education, treatment, or drug testing ~~urine monitoring~~ program if resources and funding are available or order that the charges revert to normal channels for prosecution. The court may dismiss the charges upon a finding that the child has successfully completed the delinquency pretrial intervention program.

(4) Notwithstanding any other provision of law, a child who has been identified as having a mental illness and who has not been previously adjudicated for a felony is eligible for voluntary admission into a delinquency pretrial mental health court program, established pursuant to s. 394.47892, approved by

the chief judge of the circuit, for a period to be determined by the court, based on the clinical needs of the child, upon motion of either party or the court's own motion if the child is charged with:

(a) A misdemeanor;

(b) A nonviolent felony; as defined in s. 948.01(8);

(c) Resisting an officer with violence under s. 843.01, if the law enforcement officer and state attorney consent to the child's participation;

(d) Battery on a law enforcement officer under 784.07, if the law enforcement officer and state attorney consent to the child's participation; or

(e) Aggravated assault, if the victim and state attorney consent to the child's participation.

(5) At the end of the delinquency pretrial intervention period, the court shall consider the recommendation of the state attorney and the program administrator as to disposition of the pending charges. The court shall determine, by written finding, whether the child has successfully completed the delinquency pretrial intervention program. If the court finds that the child has not successfully completed the delinquency pretrial intervention program, the court may order the child to continue in an education, treatment, or monitoring program if resources and funding are available or order that the charges revert to normal channels for prosecution. The court may dismiss the charges upon a finding that the child has successfully completed

the delinquency pretrial intervention program.

(6) A child whose charges are dismissed after successful completion of the mental health court program, if otherwise eligible, may have his or her arrest record and plea of nolo contendere to the dismissed charges expunged under s. 943.0585.

(7)~~(4)~~ Any entity, whether public or private, providing pretrial substance abuse education, treatment intervention, drug testing, or a mental health court ~~and a urine monitoring~~ program under this section must contract with the county or appropriate governmental entity, and the terms of the contract must include, but need not be limited to, the requirements established for private entities under s. 948.15(3). It is the intent of the Legislature that public or private entities providing substance abuse education and treatment intervention programs involve the active participation of parents, schools, churches, businesses, law enforcement agencies, and the department or its contract providers.

Section 20. For the purpose of incorporating the amendments made by this act to sections 948.01 and 948.06, Florida Statutes, in references thereto, paragraph (a) of subsection (3) and subsection (5) of section 397.334, Florida Statutes, are reenacted to read:

397.334 Treatment-based drug court programs.—

(3)(a) Entry into any postadjudicatory treatment-based drug court program as a condition of probation or community control pursuant to s. 948.01, s. 948.06, or s. 948.20 must be

based upon the sentencing court's assessment of the defendant's criminal history, substance abuse screening outcome, amenability to the services of the program, total sentence points, the recommendation of the state attorney and the victim, if any, and the defendant's agreement to enter the program.

(5) Treatment-based drug court programs may include pretrial intervention programs as provided in ss. 948.08, 948.16, and 985.345, treatment-based drug court programs authorized in chapter 39, postadjudicatory programs as provided in ss. 948.01, 948.06, and 948.20, and review of the status of compliance or noncompliance of sentenced offenders through a treatment-based drug court program. While enrolled in a treatment-based drug court program, the participant is subject to a coordinated strategy developed by a drug court team under subsection (4). The coordinated strategy may include a protocol of sanctions that may be imposed upon the participant for noncompliance with program rules. The protocol of sanctions may include, but is not limited to, placement in a substance abuse treatment program offered by a licensed service provider as defined in s. 397.311 or in a jail-based treatment program or serving a period of secure detention under chapter 985 if a child or a period of incarceration within the time limits established for contempt of court if an adult. The coordinated strategy must be provided in writing to the participant before the participant agrees to enter into a treatment-based drug court program.

Section 21. For the purpose of incorporating the amendment made by this act to section 948.06, Florida Statutes, in a reference thereto, paragraph (b) of subsection (2) of section 948.012, Florida Statutes, is reenacted to read:

948.012 Split sentence of probation or community control and imprisonment.—

(2) The court may also impose a split sentence whereby the defendant is sentenced to a term of probation which may be followed by a period of incarceration or, with respect to a felony, into community control, as follows:

(b) If the offender does not meet the terms and conditions of probation or community control, the court may revoke, modify, or continue the probation or community control as provided in s. 948.06. If the probation or community control is revoked, the court may impose any sentence that it could have imposed at the time the offender was placed on probation or community control. The court may not provide credit for time served for any portion of a probation or community control term toward a subsequent term of probation or community control. However, the court may not impose a subsequent term of probation or community control which, when combined with any amount of time served on preceding terms of probation or community control for offenses pending before the court for sentencing, would exceed the maximum penalty allowable as provided in s. 775.082. Such term of incarceration shall be served under applicable law or county ordinance governing service of sentences in state or county

jurisdiction. This paragraph does not prohibit any other sanction provided by law.

Section 22. This act shall take effect July 1, 2016.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

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

Committee/Subcommittee hearing bill: Judiciary Committee
Representative McBurney offered the following:

Amendment (with title amendment)

Between lines 562 and 563, insert:

Section 11. Paragraph (a) of subsection (2) of section 790.065, Florida Statutes, is amended to read:

790.065 Sale and delivery of firearms.—

(2) Upon receipt of a request for a criminal history record check, the Department of Law Enforcement shall, during the licensee's call or by return call, forthwith:

(a) Review any records available to determine if the potential buyer or transferee:

1. Has been convicted of a felony and is prohibited from receipt or possession of a firearm pursuant to s. 790.23;

2. Has been convicted of a misdemeanor crime of domestic violence, and therefore is prohibited from purchasing a firearm;

3. Has had adjudication of guilt withheld or imposition of sentence suspended on any felony or misdemeanor crime of domestic violence unless 3 years have elapsed since probation or any other conditions set by the court have been fulfilled or expunction has occurred; or

4. Has been adjudicated mentally defective or has been committed to a mental institution by a court or as provided in sub-sub-subparagraph b.(II), and as a result is prohibited by state or federal law from purchasing a firearm.

a. As used in this subparagraph, "adjudicated mentally defective" means a determination by a court that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease, is a danger to himself or herself or to others or lacks the mental capacity to contract or manage his or her own affairs. The phrase includes a judicial finding of incapacity under s. 744.331(6)(a), an acquittal by reason of insanity of a person charged with a criminal offense, and a judicial finding that a criminal defendant is not competent to stand trial.

b. As used in this subparagraph, "committed to a mental institution" means:

(I) Involuntary commitment, commitment for mental defectiveness or mental illness, and commitment for substance abuse. The phrase includes involuntary inpatient placement as defined in s. 394.467, involuntary outpatient placement as defined in s. 394.4655, involuntary assessment and stabilization

under s. 397.6818, and involuntary substance abuse treatment under s. 397.6957, but does not include a person in a mental institution for observation or discharged from a mental institution based upon the initial review by the physician or a voluntary admission to a mental institution; or

(II) Notwithstanding sub-sub-subparagraph (I), voluntary admission to a mental institution for outpatient or inpatient treatment of a person who had an involuntary examination under s. 394.463, where each of the following conditions have been met:

(A) An examining physician found that the person is an imminent danger to himself or herself or others.

(B) The examining physician certified that if the person did not agree to voluntary treatment, a petition for involuntary outpatient or inpatient treatment would have been filed under s. 394.463(2)(i)4., or the examining physician certified that a petition was filed and the person subsequently agreed to voluntary treatment prior to a court hearing on the petition.

(C) Before agreeing to voluntary treatment, the person received written notice of that finding and certification, and written notice that as a result of such finding, he or she may be prohibited from purchasing a firearm, and may not be eligible to apply for or retain a concealed weapon or firearms license under s. 790.06 and the person acknowledged such notice in writing, in substantially the following form:

"I understand that the doctor who examined me believes I am a danger to myself or to others. I understand that if I do not agree to voluntary treatment, a petition will be filed in court to require me to receive involuntary treatment. I understand that if that petition is filed, I have the right to contest it. In the event a petition has been filed, I understand that I can subsequently agree to voluntary treatment prior to a court hearing. I understand that by agreeing to voluntary treatment in either of these situations, I may be prohibited from buying firearms and from applying for or retaining a concealed weapons or firearms license until I apply for and receive relief from that restriction under Florida law."

(D) A judge or a magistrate has, pursuant to sub-sub-subparagraph c.(II), reviewed the record of the finding, certification, notice, and written acknowledgment classifying the person as an imminent danger to himself or herself or others, and ordered that such record be submitted to the department.

c. In order to check for these conditions, the department shall compile and maintain an automated database of persons who are prohibited from purchasing a firearm based on court records of adjudications of mental defectiveness or commitments to mental institutions.

(I) Except as provided in sub-sub-subparagraph (II), clerks of court shall submit these records to the department within 1 month after the rendition of the adjudication or

commitment. Reports shall be submitted in an automated format. The reports must, at a minimum, include the name, along with any known alias or former name, the sex, and the date of birth of the subject.

(II) For persons committed to a mental institution pursuant to sub-sub-subparagraph b.(II), within 24 hours after the person's agreement to voluntary admission, a record of the finding, certification, notice, and written acknowledgment must be filed by the administrator of the receiving or treatment facility, as defined in s. 394.455, with the clerk of the court for the county in which the involuntary examination under s. 394.463 occurred. No fee shall be charged for the filing under this sub-sub-subparagraph. The clerk must present the records to a judge or magistrate within 24 hours after receipt of the records. A judge or magistrate is required and has the lawful authority to review the records ex parte and, if the judge or magistrate determines that the record supports the classifying of the person as an imminent danger to himself or herself or others, to order that the record be submitted to the department. If a judge or magistrate orders the submittal of the record to the department, the record must be submitted to the department within 24 hours.

d. A person who has been adjudicated mentally defective or committed to a mental institution, as those terms are defined in this paragraph, may petition the ~~circuit~~ court that made the adjudication or commitment, or the court that ordered that the

record be submitted to the department pursuant to sub-sub-subparagraph c.(II), for relief from the firearm disabilities imposed by such adjudication or commitment. A copy of the petition shall be served on the state attorney for the county in which the person was adjudicated or committed. The state attorney may object to and present evidence relevant to the relief sought by the petition. The hearing on the petition may be open or closed as the petitioner may choose. The petitioner may present evidence and subpoena witnesses to appear at the hearing on the petition. The petitioner may confront and cross-examine witnesses called by the state attorney. A record of the hearing shall be made by a certified court reporter or by court-approved electronic means. The court shall make written findings of fact and conclusions of law on the issues before it and issue a final order. The court shall grant the relief requested in the petition if the court finds, based on the evidence presented with respect to the petitioner's reputation, the petitioner's mental health record and, if applicable, criminal history record, the circumstances surrounding the firearm disability, and any other evidence in the record, that the petitioner will not be likely to act in a manner that is dangerous to public safety and that granting the relief would not be contrary to the public interest. If the final order denies relief, the petitioner may not petition again for relief from firearm disabilities until 1 year after the date of the final order. The petitioner may seek judicial review of a final order denying

relief in the district court of appeal having jurisdiction over the court that issued the order. The review shall be conducted de novo. Relief from a firearm disability granted under this sub-subparagraph has no effect on the loss of civil rights, including firearm rights, for any reason other than the particular adjudication of mental defectiveness or commitment to a mental institution from which relief is granted.

e. Upon receipt of proper notice of relief from firearm disabilities granted under sub-subparagraph d., the department shall delete any mental health record of the person granted relief from the automated database of persons who are prohibited from purchasing a firearm based on court records of adjudications of mental defectiveness or commitments to mental institutions.

f. The department is authorized to disclose data collected pursuant to this subparagraph to agencies of the Federal Government and other states for use exclusively in determining the lawfulness of a firearm sale or transfer. The department is also authorized to disclose this data to the Department of Agriculture and Consumer Services for purposes of determining eligibility for issuance of a concealed weapons or concealed firearms license and for determining whether a basis exists for revoking or suspending a previously issued license pursuant to s. 790.06(10). When a potential buyer or transferee appeals a nonapproval based on these records, the clerks of court and mental institutions shall, upon request by the department,

provide information to help determine whether the potential buyer or transferee is the same person as the subject of the record. Photographs and any other data that could confirm or negate identity must be made available to the department for such purposes, notwithstanding any other provision of state law to the contrary. Any such information that is made confidential or exempt from disclosure by law shall retain such confidential or exempt status when transferred to the department.

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

Remove line 15 and insert:

F.S.; amending s. 790.065, F.S.; conforming a provision to changes made by this act; amending s. 910.035, F.S; revising the

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	_____

Committee/Subcommittee hearing bill: Judiciary Committee
Representative McBurney offered the following:

Amendment (with title amendment)

Remove lines 886-942 and insert:

Section 19. Section 985.345, Florida Statutes, is amended to read:

985.345 Delinquency pretrial intervention programs ~~program~~.—

(1)(a) Notwithstanding any other ~~provision of~~ law ~~to the contrary~~, a child who is charged with a felony of the second or third degree for purchase or possession of a controlled substance under chapter 893; tampering with evidence; solicitation for purchase of a controlled substance; or obtaining a prescription by fraud, and who has not previously been adjudicated for a felony, is eligible for voluntary admission into a delinquency pretrial substance abuse education

and treatment intervention program, including a treatment-based drug court program established pursuant to s. 397.334, approved by the chief judge or alternative sanctions coordinator of the circuit to the extent that funded programs are available, for a period based on the program requirements and the treatment services that are suitable for the offender, upon motion of either party or the court's own motion. However, if the state attorney believes that the facts and circumstances of the case suggest the child's involvement in the dealing and selling of controlled substances, the court shall hold a preadmission hearing. If the state attorney establishes by a preponderance of the evidence at such hearing that the child was involved in the dealing and selling of controlled substances, the court shall deny the child's admission into a delinquency pretrial intervention program.

(b) ~~(2)~~ While enrolled in a delinquency pretrial intervention program authorized by this subsection ~~section~~, a child is subject to a coordinated strategy developed by a drug court team under s. 397.334(4). The coordinated strategy may include a protocol of sanctions that may be imposed upon the child for noncompliance with program rules. The protocol of sanctions may include, but is not limited to, placement in a substance abuse treatment program offered by a licensed service provider as defined in s. 397.311 or serving a period of secure detention under this chapter. The coordinated strategy must be provided in writing to the child before the child agrees to

enter the pretrial treatment-based drug court program or other pretrial intervention program. A ~~Any~~ child whose charges are dismissed after successful completion of the treatment-based drug court program, if otherwise eligible, may have his or her arrest record and plea of nolo contendere to the dismissed charges expunged under s. 943.0585.

(c)~~(3)~~ At the end of the delinquency pretrial intervention period, the court shall consider the recommendation of the state attorney and the program administrator as to disposition of the pending charges. The court shall determine, by written finding, whether the child has successfully completed the delinquency pretrial intervention program. Notwithstanding the coordinated strategy developed by a drug court team pursuant to s. 397.334(4), if the court finds that the child has not successfully completed the delinquency pretrial intervention program, the court may order the child to continue in an education, treatment, or drug testing ~~urine monitoring~~ program if resources and funding are available or order that the charges revert to normal channels for prosecution. The court may dismiss the charges upon a finding that the child has successfully completed the delinquency pretrial intervention program.

(2)(a) Notwithstanding any other law, a child who has been identified as having a mental illness and who has not been previously adjudicated for a felony is eligible for voluntary admission into a delinquency pretrial mental health court intervention program, established pursuant to s. 394.47892,

approved by the chief judge of the circuit, for a period to be determined by the court, based on the clinical needs of the child, upon motion of either party or the court's own motion if the child is charged with:

1. A misdemeanor;

2. A nonviolent felony, as defined in s. 948.01(8);

3. Resisting an officer with violence under s. 843.01, if the law enforcement officer and state attorney consent to the child's participation;

4. Battery on a law enforcement officer under 784.07, if the law enforcement officer and state attorney consent to the child's participation; or

5. Aggravated assault, if the victim and state attorney consent to the child's participation.

(b) At the end of the delinquency pretrial mental health court intervention period, the court shall consider the recommendation of the state attorney and the program administrator as to disposition of the pending charges. The court shall determine, by written finding, whether the child has successfully completed the delinquency pretrial mental health court intervention program. If the court finds that the child has not successfully completed the program, the court may order the child to continue in an education, treatment, or monitoring program if resources and funding are available or order that the charges revert to normal channels for prosecution. The court may dismiss the charges upon a finding that the child has

successfully completed the program.

(c) A child whose charges are dismissed after successful completion of the delinquency pretrial mental health court intervention program, if otherwise eligible, may have his or her criminal history record for such charges expunged under s. 943.0585.

(3) ~~(4)~~ Any entity, whether public or private, providing

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

Remove lines 58-61 and insert:

amending s. 985.345, F.S.; authorizing delinquency pretrial mental health court intervention programs for certain juvenile offenders; providing for disposition of pending charges after completion of the program; authorizing expunction of specified criminal history records after successful completion of the program;

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 713 Consumer Debt Collection
SPONSOR(S): Insurance & Banking Subcommittee; Passidomo
TIED BILLS: None **IDEN./SIM. BILLS:** CS/CS/SB 562

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	12 Y, 0 N, As CS	Bauer	Luczynski
2) Judiciary Committee		Aziz PA	Havlicak RH
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

Consumer debt covers non-business debt such as mortgages, credit cards, medical debts, and other debts mainly for personal, family, or household purposes. If a borrower defaults on a consumer debt, the lender will initiate collection efforts, usually through the sale or assignment of the asset to a third-party debt collector. State and federal debt collection laws provide consumer protection against deceptive, unfair, or abusive collection practices that can occur before the debtor is sued, as well as during the litigation process.

At the state level, the Florida Consumer Collection Practices Act (the Act) regulates consumer collection agencies and prohibits many of the same debt collection practices prohibited by the federal Fair Debt Collection Practices Act. The Act gives primary oversight authority to the Office of Financial Regulation (OFR). Both acts contain civil remedies for debtors, providing that any person who commits a prohibited practice is liable for up to $1,000 in statutory damages and attorney's fees and costs.

Both federal and Florida law prohibit communications with a debtor if the person *knows* that the debtor is represented by an attorney with respect to such debt, and has knowledge of or can readily ascertain such attorney's name and address, subject to certain exceptions. However, while the federal law only applies to third-party debt collectors, Florida law prohibits "any person" from engaging in certain collection practices such as knowingly communicating with represented debtors. As a result, original creditors in Florida have asserted that they have been exposed to litigation after sending invoices to debtors and without receiving clear and adequate notice of the debtor's representation by legal counsel.

The bill clarifies how a debtor or his or her attorney may provide notice of representation by legal counsel by:

- Providing that the *debtor*, individually, may notify such person (i.e., the original creditor or debt collector) of the legal representation by way of any reasonable means, including verbal notices.
- Providing that the *debtor's attorney* may notify the original creditor that he or she represents the debtor with respect to such debt through one of three means: service of pleadings in a filed action, written notice by certified mail to the original creditor's registered agent, or other written notification means designated by an original creditor in a bill statement.

Secondly, the bill prohibits any person from using any false representation or deceptive or unfair means to collect or attempt to collect any debt or to obtain information concerning a consumer. Similar prohibitions currently exist in the federal Act as applied to third-party debt collectors and in the federal Dodd-Frank Act as applied to both original creditors and debt collectors.

The bill has no impact on local governments, and an indeterminate impact on state governments and the private sector. The extent of administrative fines that could be assessed and civil cases initiated as a result of the new prohibited practice is unknown.

The bill has an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Consumer debt covers non-business debt such as mortgages, credit cards, medical debts, and other debts mainly for personal, family, or household purposes. Depending on the terms of the loan, a grace period may be provided before a debt becomes delinquent. Generally, most credit issuers will attempt to collect on a delinquent debt between 120-180 days after delinquency, before it is deemed uncollectible and is "charged-off" corporate records.[1] Typically, the charged-off debt is then either assigned or sold as part of a portfolio to a third-party collection agency or collection law firm, which can in turn use a variety of collection methods and judgment remedies to recover the asset, subject to applicable statutes of limitations. These remedies enable creditors to minimize losses due to non-repayment by borrowers, and help ensure the availability and affordability of consumer credit.

Among all consumer debt types, medical debt dominates the list. Nationally, 52 percent of all collection accounts on credit reports are medical, compared to unclassified debt (17.3 percent), cable or cellular debt (8.2 percent), utilities debt (7.3 percent), and retail debt (7.2 percent). An estimated 43 million consumers with a credit report at a nationwide consumer reporting agency have one or more medical accounts in collection.[2] Based on 2013 statistics from U.S. bankruptcy courts, one study estimated medical bankruptcy rates to be 57.1 percent of U.S. bankruptcies. California, Illinois, and Florida account for over a quarter of those living in medical-related bankruptcy.[3]

State and federal debt collection laws provide consumer protections against certain abusive, harassing, and intrusive collection practices that may occur before the debtor is sued, as well as during the litigation process. Both federal and Florida law define "debt collector" as any person who uses any instrumentality of interstate commerce in any business the principal purpose of which is the collection of debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due to asserted to be owed or due another.[4] The definition of "debt collector" under both federal and Florida law excludes persons such as original creditors and their in-house collectors and persons serving legal process in connection with the judicial enforcement of any debt.

Since September 2013, debt collection has been the top consumer complaint at the federal Consumer Financial Protection Bureau (CFPB), the primary federal agency which enforces the federal Fair Debt Collection Practices Act.[5] Among the CFPB's data on consumer complaints regarding debt collection, the most common type of debt collection complaint is about continued attempts to collect a debt that the consumer reports is not owed (37 percent), followed by communications tactics, particularly phone calls (20 percent). One of the least common complaints received by the CFPB relates to consumers reporting that they are contacted directly, instead of the debt collector contacting their attorney (2 percent).[6]

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[1] The Uniform Retail Credit Classification and Account Management Policy, set forth by the Federal Financial Institutions Examination Council, established uniform guidelines for issuers of retail credit regarding the charge-off timeframes for open-end and closed-end credit. 65 Fed. Reg. 36,903 (Jun 12, 2000). It should be noted that a "charge-off" does not mean the debtor is discharged from repaying the loan; in fact, a charge-off is reported as an adverse event to credit reporting agencies.

[2] CONSUMER FINANCIAL PROTECTION BUREAU, *Here's how medical debt hurts your credit report*, at http://www.consumerfinance.gov/blog/heres-how-medical-debt-hurts-your-credit-report/ (last visited Jan. 28, 2016).

[3] NerdWallet, *NerdWallet Health Finds Medical Bankruptcy Accounts for Majority of Personal Bankruptcy*, at http://www.nerdwallet.com/blog/health/medical-bankruptcy/ (last visited Jan. 28, 2016).

[4] Section 559.55(6), F.S., and 15 U.S.C. § 1692a(6).

[5] See footnote 2, *supra*.

[6] CONSUMER FINANCIAL PROTECTION BUREAU, *Fair Debt Collection Practices Act Annual Report* (2015) (pp. 12-15), at http://files.consumerfinance.gov/f/201503_cfpb-fair-debt-collection-practices-act.pdf.

Federal Regulation of Debt Collection

Fair Debt Collection Practices Act

In 1977, Congress enacted the Fair Debt Collection Practices Act (the federal Act) to "eliminate abusive debt collection practices...to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses."[7] The Act is primarily enforced by the CFPB, in coordination with the Federal Trade Commission. The federal Act is also enforced by other federal agencies with respect to specific industries subject to other federal laws, such as financial institutions (e.g., banks, savings associations, and credit unions).[8] As a result of the federal Dodd-Frank Wall Street Reform Act of 2010, the CFPB was given rulemaking authority to define and supervise "larger participants" of certain nonbank consumer financial product and service markets, including debt collection. The CFPB test to define these "larger participants" means the covered person's annual receipts resulting from consumer debt collection exceed $10 million.

The federal Act prohibits third-party debt collectors from engaging in certain types of abusive, harassing, unfair, or deceptive conduct in collecting or attempting to collect a debt. However, the federal Act does not apply to original creditors.

Dodd-Frank Wall Street Reform and Consumer Protection Act

On July 21, 2010, the federal Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111-203, H.R. 4173, commonly referred to as "Dodd-Frank") was signed into law. It has widely been described as the most expansive financial regulatory legislation since the 1930s, and was formed with the intent "to focus directly on consumers, rather than on bank safety and soundness or on monetary policy."[9] Title X of Dodd-Frank created the Consumer Financial Protection Bureau (CFPB) as an independent bureau housed within the Federal Reserve System.

Dodd-Frank also granted enforcement and rulemaking authority to the CFPB to protect consumers from unfair, deceptive, or abusive acts or practices (UDAAP) committed by "covered persons or service providers""[10] which include *both* third-party debt collectors and original creditors collecting debt related to certain consumer financial products or services. In July 2013, the CFPB issued a bulletin regarding UDAAP in the collection of consumer debts to give guidance regarding the applicable UDAAP standards.[11]

State Regulation of Debt Collection

Florida Consumer Collection Practices Act

In 1972, Florida enacted the Florida Consumer Collection Practices Act (the Act), codified in part VI of ch. 559, F.S.[12] The Florida Act gives primary regulatory authority to the Florida Office of Financial Regulation (OFR), and some enforcement authority to the Office of the Attorney General over out-of-state consumer debt collectors.[13] The Act defines "*consumer collection agency*" (CCA) as any debt collector or business entity engaged in the business of soliciting consumer debts for collection or of

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[7] 15 U.S.C. 1692(e). The FDCPA is codified at 15 U.S.C. §§ 1692-1692p.
[8] Pub. L. 111-201, 124 Stat. 1376.
[9] CONSUMER FINANCIAL PROTECTION BUREAU, *Creating the Consumer Bureau*, at http://www.consumerfinance.gov/the-bureau/creatingthebureau/ (last visited Jan. 26, 2016).
[10] 12 U.S.C. §5531.
[11] CONSUMER FINANCIAL PROTECTION BUREAU, *CFPB Bulletin 2013-07: Prohibition of Unfair, Deceptive, or Abusive Practices in the Collection of Consumer Debts* (Jul. 10, 2013), at: http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf.
[12] Ch. 72-81, Laws of Fla.
[13] s. 559.563, F.S.

collecting consumer debts. CCAs must register with the OFR, unless expressly exempted by the Act.[14] The OFR may also examine and investigate potential violations of the Act, and may impose administrative fines of up to $10,000 for each count or offense and up to $1,000 per day of unregistered activity; may deny, suspend, or revoke CCA registration; may impose reprimand, cease and desist orders, and emergency suspension orders.[15]

The Act prohibits many of the same debt collection practices prohibited by the federal Act, such as the use or threat to use force or violence, impersonating law enforcement or attorneys, communicating between 9 p.m. and 8 a.m. without the debtor's consent, and the disclosure of the debtor's debt except for legitimate purposes such as credit reporting agencies. However, Florida law does not specifically prohibit false, deceptive, or unfair practices the way the federal Act does.[16]

While the federal Act only applies to third-party debt collectors, Florida law provides that "no person shall" engage in the prohibited acts. As such, while the Florida act may exempt original creditors from registration with the OFR, original creditors may still be held liable (civilly and administratively) under Florida law for engaging in certain prohibited acts.

In terms of the federal Act's relation to Florida law, both acts were designed to work harmoniously, except to the extent state law conflicts with the federal Act.[17] The Act also provides that in the event of an inconsistency with the federal law, the provision which is more protective of the consumer or debtor shall prevail.[18] Finally, the Act provides that in construing its provisions, "due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to the federal Fair Debt Collection Practices Act."[19] The Act also does not preclude any person from pursuing remedies under the federal Act for any violation.[20]

Civil Remedies

The Act provides private civil remedies to debtors that are identical to those available under its federal counterpart.[21] Any person who violates the prohibited practices statute, s. 559.72, F.S., is liable to the consumer for actual and additional statutory damages up to $1,000 and reasonable attorney's fees and costs. In determining whether any additional statutory damages should be awarded to the debtor, the court may consider the nature of the defendant's noncompliance with s. 559.72, F.S., the frequency and persistence of the noncompliance, and the extent to which the noncompliance was intentional. The Act also permits class action suits and punitive damages in certain instances.

However, if the court finds that the debtor-plaintiff's suit fails to raise a justiciable issue of law or fact, the debtor-plaintiff is liable for court costs and reasonable attorney's fees incurred by the defendant.[22] Also, both acts provide a safe harbor for "bona fide errors," in that a person may not be held liable in any civil action under the acts if the person shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid such error.

Florida Deceptive and Unfair Trade Practices Act

The Florida Deceptive and Unfair Trade Practices Act (pt. II, ch. 501, F.S.) is intended to protect consumers and legitimate business enterprises from those who engage in unfair methods of

[14] ss. 559.55(3) and 559.553, F.S.
[15] ss. 559.5541, 559.727, and 559.730, F.S.
[16] *See* 15 U.S.C. §§ 1692e and1692f.
[17] 15 U.S.C. § 1692n.
[18] s. 559.552, F.S.
[19] s. 559.77(5), F.S.
[20] s. 559.730(8), F.S.
[21] 15 U.S.C. §1692k.
[22] s. 559.77, F.S. and 15 U.S.C. § 1692k.

competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce, consistent with established policies of federal law relating to consumer protection.[23] It is enforced by the Department of Legal Affairs of the Office of the Attorney General, which may seek an action for damages as well as declaratory and injunctive relief.[24] In addition, Florida Deceptive and Unfair Trade Practices Act allows any aggrieved persons to seek civil penalties of up to $10,000 for each willful violation, and also provides for attorney's fees to be awarded to the prevailing party in any civil litigation under this part.[25]

However, the Florida Deceptive and Unfair Trade Practices Act does not apply to certain entities, including state and federally chartered financial institutions and insurance companies and other entities regulated by the Office of Insurance Regulation.[26]

Prohibited Communications with Represented Debtors

The Act prohibits any person from communicating with a debtor if the person *knows* that the debtor is represented by an attorney with respect to such debt, and has knowledge of or can readily ascertain such attorney's name and address. The federal Act also prohibits such communication, although it applies only to debt collectors.[27] Courts have generally interpreted this provision as requiring *actual* knowledge by the debt collector of the debtor's representation by legal counsel in order for a communication with a debtor to constitute a violation.[28]

Both acts contain three identical exceptions to this prohibited communication:

- The debtor's attorney fails to respond within 30 days to a communication from the person,
- The debtor's attorney consents to a direct communication with the debtor, or
- The debtor initiates the communication.

Original creditors and debt collectors in Florida have indicated that the Act's applicability to "any person" has resulted in abusive or frivolous litigation arising from alleged violations of this provision. Industry representatives have noted current problems in the industry:

- Some law firms send vague notices of representation via facsimile to creditors and debt collectors, which raise two concerns: (1) questions of receipt and (2) questions regarding the scope of representation.[29]
- Original creditors, such as hospitals, have noted that the statute does not clearly state how the debtor is required to provide notification that he or she has retained an attorney, and has exposed them to litigation merely for sending an invoice to a debtor-patient.[30]

As such, proponents have advocated for statutory clarification of how debtors and their attorneys should communicate the legal representation to creditors and debt collectors so that they have the requisite "knowledge" of the representation. Consumer advocates argue that current law already provides substantial protections for persons collecting debts and that requirements such as certified mail notifications place a greater burden and cost on consumers, because it requires the consumer and

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[23] s. 501.201, F.S.
[24] s. 501.207, F.S.
[25] ss. 501.2075 and 501.2105, F.S.
[26] s. 501.212, F.S.
[27] 15 U.S.C. § 1692c(a)(2).
[28] *Erickson v. General Elec. Co.*, 854 F.Supp.2d 1178, 1181-1182 (M.D. Fla. 2012); *Bacelli v. MFP, Inc.*, 729 F.Supp.2d 1328, 1343 (M.D. Fla. 2010). In another industry context, "actual knowledge" of a person's representation by legal counsel is also the standard applied to Florida Bar lawyers who are otherwise generally prohibited from communicating with represented persons. Florida Bar Rule of Professional Conduct § 4-4.2 and Preamble: Terminology.
[29] FLORIDA COLLECTORS ASSOCIATION, *White Paper: Attorney Representation of Consumers Under the Florida Consumer Collection Practices Act – 559.72(18)*, on file with the Insurance & Banking Subcommittee staff.
[30] BAYCARE, *Proposed Florida Consumer Collection Practices Act (FCCPA) Reform* (Jan. 22, 2016) and Florida Hospital Government Relations, *Florida's Consumer Collection Practices Act* (Dec. 18, 2015), on file with the Insurance & Banking Subcommittee staff.

his or her attorney to ascertain the address for the person collecting the debt (which is the address the person "designates to receive regarding the debt" and may be buried in fine print), and also requires notice by certified mail to this address, which is an additional cost to the consumer.[31]

Effect of the Bill

The bill amends s. 559.72(18), F.S., to clarify how a debtor or his or her attorney may provide notice of representation by legal counsel, by:

- Providing that the *debtor*, individually, may notify such person (i.e., the original creditor or debt collector) of the legal representation by way of any reasonable means, including verbal notices.
- Providing that the debtor's attorney may notify the original creditor that he or she represents the debtor with respect to such debt through one of three means:
    - Service of pleadings in a filed action,
    - Written notice of representation by certified mail to the original creditor's registered agent, which states that the debtor is represented by an attorney with respect to such debt and which discloses the attorney's name and address; or
    - Providing written notice of representation by mail, fax, email, or other electronic format in a manner designated on a billing statement which discloses the debtor's representation with respect to such debt and the attorney's name and mailing address.

While the bill creates notification procedures giving rise to a creditor's "knowledge" of a debtor's representation, they do not toll the debt or prevent a creditor from reporting the debt to a credit reporting agency or pursuing legal remedies. However, these procedures should provide more clarity to creditors and debt collectors in avoiding liability and may reduce possible overreaching, interference, and uncounseled disclosure of information by creditors and debt collectors.

The bill also retains the three exceptions in current law, regarding debtor-initiated communications, direct communications with the debtor consented to by the debtor's attorney, and communications to which the debtor's attorney does not respond within 30 days.

Secondly, the bill creates s. 559.72(20), F.S., to prohibit any person from using false representation or deceptive or unfair means to collect or attempt to collect any debt or to obtain information concerning a consumer. As described above, similar prohibitions exist in the federal Act as applied to third-party debt collectors and in Dodd-Frank as applied to both original creditors and debt collectors.

B. SECTION DIRECTORY:

Section 1. Amends s. 559.72, F.S., relating to prohibited practices generally.

Section 2. Provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   Indeterminate. The extent of administrative fines that could be assessed and civil cases initiated as a result of the new prohibited practice is unknown.

2. Expenditures:

   See above.

[31] FLORIDA ALLIANCE FOR CONSUMER PROTECTION, *White Paper: Consumer Debt Collection* (Dec. 30, 2015), on file with the Insurance & Banking Subcommittee staff.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. The bill's clarification of prohibited communications with represented debtors may result in positive impact to original creditors and debt collectors, and the new prohibition on false, deceptive, or unfair collection practices may provide greater protection for consumers.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None provided by the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 1, 2016, the Insurance & Banking Subcommittee considered and adopted a proposed committee substitute (PCS) and reported the bill favorably as a committee substitute. The PCS:

- Clarified that a debtor (individually) may provide notice of representation by any reasonable means;
- Clarified the ways in which a debtor's attorney may provide notice of representation to an original creditor, by:
  - Retaining service of pleadings in a filed action and written notice via certified mail as two options; and
  - Permitting written notice of representation through other ways (mail, fax, email, or other electronic format), in a manner designated by the original creditor on a billing statement that contains certain information;
- Removed electronic delivery as prescribed by the OFR as an option for debtor's attorneys to provide notice of representation to original creditors; and
- Added a new provision prohibiting the use of any false representation or deceptive or unfair means to collect or attempt to collect any debt or to obtain information a consumer.

The staff analysis is drafted to reflect the committee substitute as passed by the Insurance & Banking Subcommittee.

A bill to be entitled

An act relating to consumer debt collection; amending s. 559.72, F.S.; revising provisions relating to communication with a debtor who is represented by an attorney; specifying methods by which an attorney representing a debtor may provide notice of such representation; prohibiting false representations or deceptive or unfair debt collection practices; providing an effective date.

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

Section 1. Subsection (18) of section 559.72, Florida Statutes, is amended, and subsection (20) is added to that section, to read:

559.72 Prohibited practices generally.—In collecting consumer debts, no person shall:

(18) Communicate with a debtor if the person has knowledge ~~knows~~ that the debtor is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address. A debtor, individually, may notify such person of attorney representation by way of any reasonable means, including verbal notice.

(a) This subsection does not apply if:~~, unless~~

1. The debtor's attorney fails to respond within 30 days to a communication from the person;~~, unless~~

2. The debtor's attorney consents to a direct communication with the debtor;~~,~~ or

3. ~~unless~~ The debtor initiates the communication.

(b) A debtor's attorney may notify the original creditor that the debtor is represented by an attorney with respect to such debt by:

1. Service of pleadings in a filed action;

2. Providing written notice of representation by certified mail to the registered agent of the original creditor which states that the debtor is represented by an attorney with respect to such debt and which discloses the attorney's name and address; or

3. Providing written notice of representation by mail, facsimile, e-mail, or other electronic format in a manner designated by the original creditor on a billing statement which states that the debtor is represented by an attorney with respect to such debt, and which discloses the attorney's name and mailing address.

(20) Use any false representation or deceptive or unfair means to collect or attempt to collect any debt or to obtain information concerning a consumer.

Section 2. This act shall take effect July 1, 2016.

Amendment No. 1

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

Committee/Subcommittee hearing bill: Judiciary Committee
Representative Passidomo offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Subsection (18) of section 559.72, Florida Statutes, is amended to read:

559.72 Prohibited practices generally.—In collecting consumer debts, no person shall:

(18) Communicate with a debtor if the person knows that the debtor is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address.

(a) This subsection does not apply if:~~, unless~~

1. The debtor's attorney fails to respond within 30 days to a communication from the person;~~, unless~~

2. The debtor's attorney consents to a direct communication with the debtor~~;~~ or

3. ~~unless~~ The debtor initiates the communication.

(b) With respect to notice of representation by a debtor, an original creditor has knowledge that a debtor is represented by an attorney if the debtor, individually, has provided notice of representation by any reasonable means, including oral notice to a creditor if such oral notice is provided in response to a communication initiated by the creditor.

(c) With respect to notice of representation by a debtor's attorney, an original creditor has knowledge that a debtor is represented by an attorney if the attorney representing the debtor has provided notice of such representation by:

1. Service of pleadings in a filed action;

2. Providing written notice of representation that the debtor is represented by an attorney with respect to such debt to a location or person mutually agreed to by the original creditor and the debtor's attorney;

3. Providing written notice of representation by certified mail to the registered agent of the original creditor which states that the debtor is represented by an attorney with respect to such debt and which discloses the attorney's name and address; or

4. Providing written notice of representation by mail, facsimile, email, or other electronic format designated by the original creditor on a billing statement or other written

communication pertaining to the debt which states that the debtor is represented by an attorney with respect to such debt, and which discloses the attorney's name and mailing address. To avoid liability under this subsection, the original creditor shall designate at least one of the following communication methods for notice of representation on a billing statement or other written communication pertaining to the debt: a mailing address, facsimile, email, or other electronic format.

(d) For the purposes of this subsection, an original creditor must cease direct communication with the debtor subject to the limitations and exceptions of this subsection within 5 business days upon receiving notice of representation from the attorney representing the debtor.

Section 2. This act shall take effect July 1, 2016.

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

Remove everything before the enacting clause and insert: An act relating to consumer debt collection; amending s. 559.72, F.S.; specifying methods by which a debtor, represented by an attorney, may notify a creditor of such representation; specifying methods by which an attorney representing a debtor may notify a creditor of such representation; providing that a creditor may identify the manner by which a debtor may communicate notice of representation; providing that an original

creditor must cease direct communication with the debtor under certain circumstances; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 821 Reimbursement of Assessments
SPONSOR(S): Civil Justice Subcommittee; Rooney
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1692

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N, As CS	Bond	Bond
2) Judiciary Committee		Bond	Havlicak

SUMMARY ANALYSIS

The Department of Veterans Affairs has a process for an individual to become an "accredited representative." These representatives assist a claimant (a veteran) in applying for veterans benefits or appealing a denial of such benefits. If successful, the department may withhold and pay to the accredited representative the representative's fee. The department assesses and deducts an administrative fee from the representative's fee equal to the lesser of 5% of the representation fee or $100. The representative is prohibited from directly or indirectly charging the veteran for this administrative fee.

This bill provides that it is a second degree misdemeanor for any accredited representative to request, receive or obtain reimbursement of the administrative fee from the veteran.

This bill may have an insignificant fiscal impact on state or local governments.

The effective date of the bill is October 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The United States Department of Veterans Affairs (VA) provides our veterans with various benefits, including disability, pension, health care, and life insurance benefits. Since the VA is an agency of the Federal government, disputes as to a veteran's entitlement to benefits are resolved through an administrative process rather than a judicial process. The VA determines who is qualified to represent or assist veterans in their claim for benefits. Therefore, a person must apply and be approved by the VA in order to assist or advise a person who is considering bringing a claim for benefits before the VA.[1] A representative does not need to be an attorney, though the accreditation requirements for attorneys and non-attorneys are different. Any non-attorney who meets certain character and fitness requirements, passes a written examination, and shows that he or she "is qualified to render valuable assistance to claimants, and is otherwise competent to advise and assist claimants in the preparation, presentation, and prosecution of their claim(s) before the Department" can be approved to assist veterans with claims.[2] The VA refers to an approved attorney or approved claim agent as an "accredited representative."

An accredited representative may charge and collect a fee for his or her work representing a veteran, but that fee must be reasonable.[3] A fee is presumed to be reasonable if the fee is under 20% and presumed to be unreasonable if it's over 33 1/3% of the past due benefits.[4] The fee agreement between the veteran and the representative may provide for the VA to pay the representation fee directly to the accredited representative out of the benefit award if the fee is 20% or less of the total benefit award.[5] For making a direct payment of the representative's fee, the VA charges the accredited representative an assessment[6] equal to the lesser of 5% of the fee award or $100.[7] Federal law prohibits an accredited representative from directly or indirectly charging the claimant for this assessment.[8]

The statute also provides that "[w]hoever wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due to the claimant or beneficiary, shall be fined as provided in title 18,[9] or imprisoned not more than one year, or both."[10] It is possible that the action of an accredited representative in collecting a reimbursement of the representative's administrative fee would be a criminal offense under federal law.

Effect of the Bill

The bill provides that it is a second degree misdemeanor for any accredited person to request, receive or obtain reimbursement of the administrative fee from the veteran. A second degree misdemeanor is punishable by up to 60 days in jail or a $500 fine or both.[11]

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[1] 38 U.S.C. §§ 5901-04; 38 C.F.R. § 14.629(b)(1).
[2] 38 C.F.R. § 14.629(b)(1)(i), (b)(2).
[3] 38 U.S.C. § 5904(a)(5)
[4] 38 C.F.R. § 14.636(e) and (f)
[5] 38 C.F.R. § 14.636(h)(i).
[6] 38 U.S.C. § 5904(a)(6)(A).
[7] 38 U.S.C. § 5904(a)(6)(B).
[8] 38 U.S.C. § 5904(a)(6)(D).
[9] Title 18 of the United States Code delineates federal crimes.
[10] 38 U.S.C. § 5905.
[11] ss. 775.082(4)(b), 775.083(1)(e), F.S.

B. SECTION DIRECTORY:

Section 1 creates s. 295.24, F.S., regarding prohibited reimbursements.

Section 2 provides an effective date of October 1, 2016.

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 may does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

Article V, section 15 of the Florida Constitution vests the power to discipline lawyers in the Florida Supreme Court, and Florida Bar Rule 4-1.5(a) prohibits fees that are illegal. Since charging the claimant this fee is already illegal under Federal law, the Florida Bar rules regulate this conduct. A court may find that this law is an indirect attempt to discipline a lawyer for what is otherwise an unethical billing practice that subjects the attorney to professional discipline. If so, the court could find the statute to violate the court's exclusive jurisdiction to discipline attorneys.

On the other hand, this law is applied equally to individuals who are not attorneys. An accredited representative does not have to be an attorney. Also, the law does not speak to whether or not an attorney found guilty of charging the administrative fee to the claimant must be professionally disciplined. Therefore, a court may find that the law does not regulate attorneys at all.

B. RULE-MAKING AUTHORITY:

This 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 January 13, 2016, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment corrected the effective date to October 1, 2016, and reduced the penalty from a felony to a misdemeanor. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

A bill to be entitled

An act relating to reimbursement of assessments; creating s. 295.24, F.S.; prohibiting an agent or attorney representing a claimant from directly or indirectly requesting, receiving, or obtaining reimbursement from the claimant for assessments charged to the agent or attorney by the United States Department of Veterans Affairs; providing penalties; providing an effective date.

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

Section 1. Section 295.24, Florida Statutes, is created to read:

295.24 Prohibited reimbursement of assessments; penalty.—A person who is recognized as an agent or attorney pursuant to 38 U.S.C. s. 5904 and representing a claimant may not, directly or indirectly, request, receive, or obtain reimbursement from the claimant for assessments charged to the agent or attorney by the United States Department of Veterans Affairs pursuant to 38 U.S.C. s. 5904(6)(A). A person who violates this section commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Section 2. This act shall take effect October 1, 2016.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1087 Protection of Motor Vehicle Dealers' Consumer Data
SPONSOR(S): Highway & Waterway Safety Subcommittee; Rooney, Jr. and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 960

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Highway & Waterway Safety Subcommittee	13 Y, 0 N, As CS	Johnson	Smith
2) Judiciary Committee		Aziz PA	Havlicak RH
3) Economic Affairs Committee			

SUMMARY ANALYSIS

Since 1970, Florida has substantially regulated the relationship between motor vehicle manufacturers and motor vehicle dealers. Manufacturers, distributors, and importers, collectively referred to as licensees, enter into contractual agreements with dealers to sell particular vehicles that the licensee manufactures, distributes, or imports. Chapter 320, F.S., provides, in part, for the regulation of the relationship between manufacturers and dealers. Existing law requires the licensing of manufacturers, and regulates numerous aspects of the contracts between manufacturers and dealers.

The bill requires a licensee or third party acting on behalf of a licensee to comply with certain restrictions on sharing or reusing consumer data provided by motor vehicle dealers. Specifically, the bill requires a licensee:

- Comply with all laws on the reuse or disclosure of data, not knowingly cause a dealer to violate any applicable restrictions on the reuse or disclosure of consumer data, and, if requested by the dealer, provide a written statement specifying established procedures to safeguard consumer data;
- Provide a written list of consumer data obtained by a dealer and all persons who the data has been provided to during the previous six months, if requested by the dealer, exempting certain individuals who need not be included in the list;
- May not require that a dealer grant the licensee or third party acting on behalf of the licensee direct access to the dealer's data management system to collect consumer data;
- Must allow a dealer to furnish consumer data in a widely accepted file format and through a third-party dealer selected by the dealer; and
- Must compensate the dealer for any third-party claims asserted against or damages incurred by the dealer from the licensee's or third party's access, use, or disclosure of the consumer data.

The bill also provides that any cause of action against a licensee for a violation of the prohibitions or requirements established in the bill, the person bringing the action has the burden of proving that the violation was willful or with sufficient frequency to establish a pattern of wrongdoing.

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

The bill takes effect upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Since 1970, Florida has substantially regulated the relationship between motor vehicle manufacturers and motor vehicle dealers. Manufacturers, distributors, and importers, collectively referred to as licensees, enter into contractual agreements with dealers to sell particular vehicles that the licensee manufactures, distributes, or imports. Chapter 320, F.S., provides, in part, for the regulation of the relationship between manufacturers and dealers. Existing law requires the licensing of manufacturers, and regulates numerous aspects of the contracts between manufacturers and dealers.

Florida Automobile Dealers Act

A manufacturer, factory branch, distributor, or importer must be licensed to engage in business in this state.[1] The requirements regulating the contractual business relationship between a dealer and a manufacturer are primarily found in ss. 320.60 through 320.70, F.S., known as the Florida Automobile Dealers Act.[2] These sections of law specify, in part:

- The conditions and situations under which the Department of Highway Safety and Motor Vehicles (DHSMV) may deny, suspend, or revoke a license;
- The process, timing, and notice requirements for licensees wanting to discontinue, cancel, modify, or otherwise replace a franchise agreement with a dealer, and the conditions under which DHSMV may deny such a change;
- The procedures a licensee must follow if it wants to add a dealership in an area already served by a franchised dealer, the protest process, and DHSMV's role in these circumstances;
- Amounts of damages that can be assessed against a licensee in violation of Florida Statutes; and
- The DHSMV's authority to adopt rules to implement these sections of law.

Applicability

Section 320.6992, F.S., provides that ss. 320.60 through 320.70, F.S., applies to all presently existing or hereafter established systems of distribution of motor vehicles in this state, except to the extent that such application would impair valid contractual agreements in violation of the State Constitution or Federal Constitution. The provisions do not apply to any judicial or administrative proceeding pending as of October 1, 1988, but all agreements renewed, amended, or entered into subsequent to October 1, 1988, shall be governed by ss. 320.60 through 320.70, F.S, including amendments, unless specifically providing otherwise.[3]

In 2009, DHSMV held, in an administrative proceeding, amendments to the Florida Automobile Dealers Act do not apply to dealers having franchise agreements which were signed prior to the effective date of various amendments to that Act.[4]

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[1] Section 320.61(1), F.S.

[2] Walter E. Forehand and John W. Forehand, *Motor Vehicle Dealer and Motor Vehicle Manufacturers: Florida Reacts to Pressures in the Marketplace,* 29 Fla. St. Univ. Law Rev. 1058 (2002) (No section of the statute provides a short title; however, many courts have referred to the provisions as such.), http://law-wss-01.law.fsu.edu/journals/lawreview/downloads/293/Forehand.pdf (last visited Feb. 8, 2016).

[3] Section 320.6992, F.S.

[4] *See Motorsports of Delray, LLC v. Yamaha Motor Corp., U.S.A.*, Case No. 09-0935 (Fla. DOAH Dec. 9, 2009). The DHSMV ruled that a 2006 amendment to the Florida Automobile Dealers Act does not apply to a dealer terminated in 2008 because the dealer's franchise agreement was entered into prior to the effective date of the amendment. This Final Order was initially appealed but was later voluntarily dismissed. *See also, In re Am. Suzuki Motor Corp.*, 494 B.R. 466, 480 (Bankr. C.D. Cal. 2013).

Civil Damages
Section 320.697, F.S., provides that any person who has suffered pecuniary loss or who has been otherwise affected because of a violation by a licensee, notwithstanding any other remedies under the Florida Automobile Dealers Act, has a cause of action against the licensee for damages and may recover damages in the amount of three times the loss, with costs and a reasonable attorney's fee to be assessed by the court. The licensee has the burden of proving that such violation did not occur upon a prima facie showing by the person bringing the action.

Consumer Data Protection
Consumer data can refer to a variety of information, including, but not limited to data such as one's:

- Personal-identifying data: name, address, telephone number, or email address;
- Demographic data: age, race, occupation, income, or education;
- Retail data: purchase history, credit card numbers, or bank account information; and
- Government data: social security or driver license numbers.

In the United States there are no all-encompassing laws regulating the acquisition, storage, or use of consumer data in general terms. However, partial regulations do exist in state and federal law, including in the Federal Trade Commission (FTC) Privacy and Safeguards Rule, the Gramm-Leach-Bliley Act, and state law.

Gramm-Leach Bliley Act (GLBA)[5]
The GLBA, also known as the Financial Services Modernization Act of 1999, implemented laws regarding the protection and disclosure of nonpublic personal information obtained by financial institutions, limits on reuse of information, and privacy notice requirements. The GLBA gave the FTC the authority to prescribe rules necessary to carry out certain purposes of the Act.

The FTC is the chief federal agency on privacy policy and enforcement. The FTC's Privacy Rule (*The Financial Privacy Rule*) is a principle part of the GLBA, and applies to vehicle dealers who extend credit to someone, arrange for someone to finance or lease a car, or provide financial advice or counseling to individuals.[6] Personal information collected by a dealer to provide these services is covered under the Privacy Rule, which outlines when privacy notices are required to be given to consumers, information to be included in the privacy notices, limits on the disclosure and reuse of non-public personal information, and opt out requirements.[7]

The FTC's Safeguards Rule, also part of the GLBA, outlines standards for safeguarding customer information.[8] The rule requires service providers who handle or are permitted access to customer information through its services directly to a financial institution must have a written security plan to protect the confidentiality and integrity of customer data.[9]

Florida Information Protection Act of 2014[10]
The Florida Information Protection Act of 2014 provides the procedure for protection and security of confidential personal information[11] in the possession of covered entities.[12] Covered entities,

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[5] 15 U.S.C. ss. 6801 *et. seq.*
[6] Federal Trade Commission, *FTC's Privacy Rule and Auto Dealers: FAQ*, (January 2005), https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-privacy-rule-auto-dealers-faqs (last visited Feb. 8, 2016).
[7] *See* 16 C.F.R. part 313.
[8] *See* 16 C.F.R. part 314
[9] *Id.*
[10] Section 501.171, F.S.
[11] "Personal information" includes an individual's first name or first initial and last name in combination with one of the following: a social security number; driver license or identification card number, passport number, military identification number, or other number issued by a governmental entity used to verify identity; a financial account number or credit or debit card number, in combination with any required security code, access code, or password needed to permit access to the financial account; an individual's medical history, mental or physical condition, or medical treatment or diagnosis; or an individual's health insurance policy number or subscriber identification number and any unique identifier used by a health insurer. A user name or e-mail address, in combination with a

governmental entities, and third-party agents are required to take reasonable measures to protect and secure electronic data containing personal information. When the security of a data system is breached, a covered entity must provide notice to the Department of Legal Affairs and effected individuals unless an investigation and consultation with relevant law enforcement agencies determines the breach has not and will not likely result in identity theft or financial harm to the individuals whose personal information has been accessed.[13] If a covered entity fails to provide the required notices, it may face civil penalties.

Proposed Changes

The bill creates, s. 320.646,F.S., within the "Florida Automobile Dealers Act" to address consumer data protection.

The bill defines "consumer data" as "nonpublic personal information" as such term is defined in 15 U.S.C. s. 6809(4)[14] collected by a motor vehicle dealer and which is provided by the motor vehicle dealer directly to a licensee or third party acting on behalf of a licensee. Consumer data does not include the same or similar data which is obtained by a licensee from any other source.

The bill defines "data management system" as a computer hardware or software system that is owned, leased, or licensed by a motor vehicle dealer, including a system of web-based applications, computer software, or computer hardware, whether located at the motor vehicle dealership or hosted remotely, and that stores and provides access to consumer data collected or stored by a motor vehicle dealer. The term includes, but is not limited to, dealership management systems and customer relations management systems.

The bill provides that notwithstanding the provisions of any franchise agreement, a licensee that receives consumer data from a motor vehicle dealer or requires that a motor vehicle dealer provide consumer data to a third party:

- Shall comply with all, and not knowingly cause a motor vehicle dealer to violate any, applicable restrictions on reuse or disclosure of data established by federal and state law and must provide a written statement to the motor vehicle dealer upon request describing the established procedures adopted by the licensee or a third party acting on behalf of the licensee which meet or exceed any federal or state requirements to safeguard consumer data, including, but not limited to, those established in the Gramm-Leach-Bliley Act.[15]
- Shall, upon the written request of the motor vehicle dealer, provide a written list of the consumer data obtained from a motor vehicle dealer and all persons to whom any of the consumer data has been provided by the licensee or a third party acting on behalf of the licensee, during the preceding six months. The dealer may make such a request no more than once every six months. The list must indicate the specific fields of the consumer data which were provided to each person. Notwithstanding the foregoing, the list need not include:
    - A person to whom consumer data was provided, or the specific consumer data provided to such person, if the person was, at the time the consumer data was provided, one of the licensee's service providers, subcontractors or consultants acting in the course of such person's performance of services on behalf of or for the benefit of the licensee or motor vehicle dealer, provided that the licensee has entered into an agreement with such person requiring that the person comply with the safeguard requirements of

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password or security question and answer is also considered "personal information." Information that is publicly available from a federal, state, or local governmental entity or information that is encrypted, secured, or modified by a method or technology that removes personally identifiable information is not considered "personal information." *See* s. 501.171(1)(g), F.S.

[12] A "covered entity" is a sole proprietorship, partnership, corporation, trust, estate, cooperative, association, or other commercial entity that acquires, maintains, stores, or uses personal information. *See* s. 501.171(1)(b), F.S.

[13] Section 501.171(4), F.S.

[14] "Nonpublic personal information" means "personally identifiable financial information provided by a consumer to a financial institution; resulting from any transaction with the consumer or any service performed for the consumer; or otherwise obtained by the financial institution." 15 U.S.C. s. 6809(4).

[15] 15 U.S.C. ss. 6801 et. seq.

applicable state and federal law, including, but not limited to, those established in the Gramm-Leach-Bliley Act, or
    - A person to whom consumer data was provided, or the specific consumer data provided to such person, if the motor vehicle dealer has previously consented in writing to such person receiving the consumer data provided and the motor vehicle dealer has not withdrawn such consent in writing.
- May not require that a motor vehicle dealer grant the licensee or a third party direct or indirect access to the dealer's data management system to collect consumer data. A licensee must permit a motor vehicle dealer to furnish consumer data in a widely accepted file format, such as comma delimited, and through a third-party vendor selected by the motor vehicle dealer. However, a licensee may access or obtain consumer data directly from a motor vehicle dealer's data management system with the express consent of the dealer. The consent is required to be in the form of a written document that is separate from the parties' franchise agreement, is executed by the motor vehicle dealer, and may be withdrawn by the dealer upon 30 days' written notice to the licensee.
- Must indemnify the motor vehicle dealer for any third party claims asserted against or damages incurred by the motor vehicle dealer as a result of the licensee's or a third party's access to, use of, or disclosure of the consumer data in violation of s. 320.646,F.S., by the licensee, a third party acting on behalf of the licensee, or a third party to whom the licensee has provided consumer data.

The bill provides that in any action against a licensee pursuant to the provisions above, the person bringing the action has the burden of proving that the violation was willful or with sufficient frequency to establish a pattern of wrongdoing with respect to such person's consumer data.

The bill also reenacts s. 320.6992, F.S., incorporating the newly created section.

The bill takes effect upon becoming law.

B. SECTION DIRECTORY:

Section 1 Creates s. 320.646, F.S, relating to consumer data protection.

Section 2 Reenacts s. 320.6992, F.S., relating to application.

Section 3 Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill could positively impact motor vehicle dealers who will be compensated by a licensee for any damages incurred as a result of the licensee's or a third party's access, use, or disclosure of consumer data. For that reason, the bill could also have a negative impact to the licensees.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect municipal or county governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

While the bill does not specifically provide rulemaking authority, s. 320.69, F.S., provides rulemaking authority to DHSMV for ss. 320.60 through 320.70, F.S., which includes the newly created statute.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 1, 2016, the Highway & Waterway Safety Subcommittee adopted a strike-all amendment. The amendment:

- Changed the definition of "consumer data" from information collected or record created by a motor vehicle dealer which contains personal information from which the consumer's identity could be derived, to the definition of "nonpublic personal information" as defined in 15 U.S.C. s. 6809(4), collected by the dealer and provided to the licensee or third party acting on behalf of the licensee.
- Added that the definition of "consumer data" does not include the same or similar data obtained by a licensee from any source other than the dealer.
- Clarified in the bill that the consumer data restrictions apply to a third party *acting on behalf of the licensee.*
- Added that a licensee may not *knowingly* cause a dealer to violate any applicable restrictions on the reuse or disclosure of consumer data.
- Added *upon request* from the dealer, the licensee or third party acting on behalf on the licensee must provide a written statement describing the established procedures to safeguard consumer data.
- Regarding the dealer requesting a list of consumer data obtained by the licensee and all persons the dealer's consumer data has been provided to by the licensee or third party acting on behalf of the licensee, the amendment lowered the preceding period of time the list must include, from 12 to 6 months.

- Added that the list need not include a licensee's service providers, subcontractors or consultants acting in the course of his or her performance of services on behalf of or for the benefit of the licensee or dealer, or the data provided, if the person also has agreed to comply with applicable consumer data laws. The list also need not include persons or the data provided to a person if the dealer has consented in writing that such person may receive consumer data.
- Made a technical change regarding widely accepted file formats, from comma delineated to comma delimited.
- Concerning a dealer granting a licensee access to the dealer's data management system to obtain consumer data, the amendment added that the dealer must provide the licensee 30 days' written notice to withdraw such consent.
- Added a section to the bill providing in any cause of action against a licensee for prohibitions or requirements within the bill, the person bringing the action has the burden of proving that the violation was willful or with sufficient frequency to establish a pattern of wrongdoing.

The analysis is written to the committee substitute as reported favorably by the Highway & Waterway Safety Subcommittee.

A bill to be entitled

An act relating to protection of motor vehicle dealers' consumer data; creating s. 320.646, F.S.; defining the terms "consumer data" and "data management system"; requiring that a licensee or a third party comply with certain restrictions on reuse or disclosure of consumer data received from a motor vehicle dealer; requiring that such person provide a written statement to the motor vehicle dealer delineating the established procedures adopted by the person which meet or exceed certain requirements to safeguard consumer data; requiring that upon request of a motor vehicle dealer a licensee provide a list of the consumer data obtained and all persons to whom any of the data has been disclosed, subject to certain requirements; prohibiting a licensee from requiring a motor vehicle dealer to grant the licensee or third party access to the dealer's data management system; requiring a licensee to permit a motor vehicle dealer to furnish consumer data in a widely accepted file format and through a third-party vendor selected by the motor vehicle dealer; authorizing a licensee to access or obtain consumer data from a motor vehicle dealer's data management system with the dealer's express written consent, subject to certain requirements; requiring the licensee to indemnify the

motor vehicle dealer for certain claims or damages; providing that a person bringing a specified cause of action for certain violations must meet certain requirements; reenacting s. 320.6992, F.S., relating to the provisions that apply to established systems of distribution of motor vehicles in this state, to incorporate s. 320.646, F.S., as created by the act, in a reference thereto; providing an effective date.

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

Section 1. Section 320.646, Florida Statutes, is created to read:

320.646 Consumer data protection.—

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

(a) "Consumer data" means "nonpublic personal information" as such term is defined in 15 U.S.C. s. 6809(4) collected by a motor vehicle dealer and which is provided by the motor vehicle dealer directly to a licensee or third party acting on behalf of a licensee. Consumer data does not include the same or similar data which is obtained by a licensee from any other source.

(b) "Data management system" means a computer hardware or software system that is owned, leased, or licensed by a motor vehicle dealer, including a system of web-based applications, computer software, or computer hardware, whether located at the motor vehicle dealership or hosted remotely, and that stores and

provides access to consumer data collected or stored by a motor vehicle dealer. The term includes, but is not limited to, dealership management systems and customer relations management systems.

(2) Notwithstanding the provisions of any franchise agreement, with respect to consumer data a licensee or a third party acting on behalf of a licensee:

(a) Shall comply with all, and not knowingly cause a motor vehicle dealer to violate any, applicable restrictions on reuse or disclosure of the consumer data established by federal or state law and must provide a written statement to the motor vehicle dealer upon request describing the established procedures adopted by the licensee or third party acting on behalf of the licensee which meet or exceed any federal or state requirements to safeguard the consumer data, including, but not limited to, those established in the Gramm-Leach-Bliley Act, 15 U.S.C. ss. 6801 et seq.

(b) Shall, upon the written request of the motor vehicle dealer, provide a written list of the consumer data obtained from the motor vehicle dealer and all persons to whom any consumer data has been provided by the licensee or a third party acting on behalf of a licensee during the preceding 6 months. The dealer may make such a request no more than once every 6 months. The list must indicate the specific fields of consumer data which were provided to each person. Notwithstanding the foregoing, such a list need not include:

1. A person to whom consumer data was provided, or the specific consumer data provided to such person, if the person was, at the time the consumer data was provided, one of the licensee's service providers, subcontractors or consultants acting in the course of such person's performance of services on behalf of or for the benefit of the licensee or motor vehicle dealer, provided that the licensee has entered into an agreement with such person requiring that the person comply with the safeguard requirements of applicable state and federal law, including, but not limited to, those established in the Gramm-Leach-Bliley Act, 15 U.S.C. ss. 6801 et seq.; or

2. A person to whom consumer data was provided, or the specific consumer data provided to such person, if the motor vehicle dealer has previously consented in writing to such person receiving the consumer data provided and the motor vehicle dealer has not withdrawn such consent in writing.

(c) May not require that a motor vehicle dealer grant the licensee or a third party direct or indirect access to the dealer's data management system to obtain consumer data. A licensee must permit a motor vehicle dealer to furnish consumer data in a widely accepted file format, such as comma delimited, and through a third-party vendor selected by the motor vehicle dealer. However, a licensee may access or obtain consumer data directly from a motor vehicle dealer's data management system with the express consent of the dealer. The consent must be in the form of a written document that is separate from the

parties' franchise agreement, is executed by the motor vehicle dealer, and may be withdrawn by the dealer upon 30 days' written notice to the licensee.

(d) Must indemnify the motor vehicle dealer for any third-party claims asserted against or damages incurred by the motor vehicle dealer to the extent caused by access to, use of, or disclosure of consumer data in violation of this section by the licensee, a third party acting on behalf of the licensee, or a third party to whom the licensee has provided consumer data.

(3) In any cause of action against a licensee pursuant to s. 320.697 for a violation of paragraph (2)(a), paragraph (2)(b), or paragraph (2)(c), the person bringing the action has the burden of proving that the violation was willful or with sufficient frequency to establish a pattern of wrongdoing with respect to such person's consumer data.

Section 2. For the purpose of incorporating section 320.646, Florida Statutes, as created by this act, in a reference thereto, section 320.6992, Florida Statutes, is reenacted to read:

320.6992 Application.—Sections 320.60-320.70, including amendments to ss. 320.60-320.70, apply to all presently existing or hereafter established systems of distribution of motor vehicles in this state, except to the extent that such application would impair valid contractual agreements in violation of the State Constitution or Federal Constitution. Sections 320.60-320.70 do not apply to any judicial or

administrative proceeding pending as of October 1, 1988. All agreements renewed, amended, or entered into subsequent to October 1, 1988, shall be governed by ss. 320.60-320.70, including any amendments to ss. 320.60-320.70 which have been or may be from time to time adopted, unless the amendment specifically provides otherwise, and except to the extent that such application would impair valid contractual agreements in violation of the State Constitution or Federal Constitution.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7101 PCB CRJS 16-07 Sentencing for Capital Felonies
SPONSOR(S): Criminal Justice Subcommittee; Trujillo and Spano
TIED BILLS: None **IDEN./SIM. BILLS:** SPB 7068

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Criminal Justice Subcommittee	11 Y, 2 N	Aziz	White
1) Judiciary Committee		Aziz DA	Havlicak RH

SUMMARY ANALYSIS

Under current law, when a defendant is convicted of a capital offense, a separate sentencing proceeding is conducted before the trial jury to determine whether the defendant should be sentenced to death or life imprisonment. After hearing the evidence, the jury renders an advisory sentence to the judge based on whether sufficient aggravating circumstances exist, whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances, and based on these considerations, whether the defendant should be sentenced to life imprisonment or death. A simple majority vote of the jury is necessary to recommend the death penalty. Juries are not required to list on the verdict aggravating and mitigating circumstances that the jury finds persuasive or to disclose the number of jurors making these findings.

The judge may sentence a defendant as recommended by the jury or may override the jury's recommendation. If the judge sentences a defendant to death, the judge must make written findings, which indicate that there are sufficient aggravating circumstances and insufficient mitigating circumstances to outweigh the aggravating circumstances.

On January 12, 2016, the United States Supreme Court held Florida's capital sentencing scheme unconstitutional. The Court ruled that, under the Sixth Amendment of the United States Constitution, a jury, not a judge, must find each fact necessary to impose a sentence of death as a jury's "mere recommendation is not enough."

The bill amends Florida's capital sentencing scheme to comply with the United States Supreme Court's ruling. Under the new sentencing scheme, the jury will continue to determine whether an aggravating factor exists, but will be required to make that determination unanimously. If the jury:

- Does not unanimously find at least one aggravating factor, the jury may only recommend a sentence of life imprisonment without the possibility of parole.
- Unanimously finds one or more aggravating factors, the jury may recommend a sentence of death or a life imprisonment without the possibility of parole. To recommend a sentence of death, a minimum of nine jurors must concur in the recommendation. If fewer than nine jurors concur, a sentence of life imprisonment without the possibility of parole will be the jury's recommendation to the court.

If the jury recommends life imprisonment without the possibility of parole, the judge must impose the recommended sentence. If the jury recommends a sentence of death, the judge may impose a sentence of death or a sentence of life imprisonment without the possibility of parole after considering each aggravating factor found by the jury and all mitigating circumstances. The judge may only consider an aggravating factor that was unanimously found by the jury.

The bill does not appear to have a fiscal impact.

The bill takes effect upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Death Penalty - Background

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

Florida was the first state to reenact a death penalty statute in the wake of *Furman*. This occurred in the fall of 1972, when House Bill 1-A was enacted during a Special Session of the Legislature.[2] While many statutory changes have been made over the years, this legislation formed the basis for Florida's current capital sentencing proceedings.

Current Death Row Statistics

Florida is currently one of 31 states that impose the death penalty.[3] As of January 31, 2016, there were 389 people on death row in Florida – more than any other state aside from California.[4] Of the 389 inmates on death row, 157 have been on death row for more than 20 years.[5]

Since 1976, Florida has executed 91 inmates.[6] During the same period, Texas has executed 525 inmates, Oklahoma has executed 112 inmates, and Virginia has executed 110.[7] Florida executed two death row inmates in 2015, and eight in 2014.[8]

Capital Sentencing Proceedings

Sections 921.141 and 921.142, F.S.,[9] govern Florida's death penalty. Under these sections, if a defendant is convicted of a capital felony,[10] a separate sentencing proceeding is conducted before the trial jury or, if the defendant pled, before a jury impaneled for that purpose.[11, 12] During the sentencing proceeding, the jury must determine whether the defendant should be sentenced to death or to life imprisonment.[13]

After hearing all the evidence, the jury is required to render an advisory sentence to the judge based on the following factors:

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

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

[3] The other states are Alabama, Arizona, Arkansas, California, Colorado, Delaware, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nevada New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming. *Facts About the Death Penalty* (updated June 2, 2015), Death Penalty Information Center, www.deathpenaltyinfo.org/FactSheet.pdf (last visited on January 31, 2016).

[4] California has 746 inmates on death row. *Id. See* "Death Row Roster" Florida Department of Corrections, http://www.dc.state.fl.us/activeinmates/deathrowroster.asp (last visited on January 31, 2016).

[5] *Id.*

[6] *"Death Row"* Florida Department of Corrections http://www.dc.state.fl.us/oth/deathrow/#Statistics (last visited January 31, 2016).

[7] *Facts About the Death Penalty* (updated June 2, 2015), *supra* note 3.

[8] *"Death Row"*, supra note 6.

[9] Section 921.142, F.S., addresses capital drug trafficking felonies specified in s. 893.135, F.S., and s. 921.141, F.S., addresses capital premeditated, felony, and other murder offenses. *See* ss. 782.04(1)(a), 782.09(1)(a), 790.161(4), and 790.166(2), F.S. (specifying capital murder offenses).

[10] s. 893.135, F.S.

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

[12] A defendant may waive his or her right to a sentencing proceeding before a jury and, in such case, the judge determines the sentence by following the same process the judge must follow when determining the sentence to impose after receipt of a jury recommendation. *Id.*

[13] *Id.*

- Whether sufficient aggravating circumstances[14] exist;
- Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
- Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.[15]

A simple majority vote of the jury is necessary to recommend the death penalty. Juries are not required to list on the verdict aggravating and mitigating circumstances that the jury finds persuasive or to disclose the number of jurors making these findings.[16] However, aggravating circumstances must be proven beyond a reasonable doubt.[17]

The aggravating circumstances that may be considered are limited by statute. Section 921.141(5), F.S., which addresses sentencing proceedings for capital murder offenses, provides for the following aggravating circumstances:

- The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.
- The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
- The defendant knowingly created a great risk of death to many persons.
- The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.
- The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- The capital felony was committed for pecuniary gain.
- The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- The capital felony was especially heinous, atrocious, or cruel.
- The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
- The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.
- The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.
- The victim of the capital felony was a person less than 12 years of age.
- The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.
- The capital felony was committed by a criminal gang member, as defined in s. 874.03, F.S.

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

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

[16] "If a majority of the jury, seven or more, determine that (defendant) should be sentenced to death, your advisory sentence will be: A majority of the jury by a vote of _____ to _____ advise and recommend to the court that it impose the death penalty upon (defendant).

On the other hand, if by six or more votes the jury determines that (defendant) should not be sentenced to death, your advisory sentence will be:

The jury advises and recommends to the court that it impose a sentence of life imprisonment upon (defendant) without possibility of parole." *Fla. Standard Jury Instructions, Criminal Cases, Penalty Proceedings Capital Cases, Instr. 7.11.*

[17] *Id.*

- The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21, F.S., or a person previously designated as a sexual predator who had the sexual predator designation removed.
- The capital felony was committed by a person subject to specified injunctions or foreign protection orders and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

Section 921.142(6), F.S., which addresses sentencing proceedings for capital drug trafficking offenses, provides for the following aggravating circumstances:

- The capital felony was committed by a person under a sentence of imprisonment.
- The defendant was previously convicted of another capital felony or of a state or federal offense involving the distribution of a controlled substance that is punishable by a sentence of at least one year of imprisonment.
- The defendant knowingly created grave risk of death to one or more persons such that participation in the offense constituted reckless indifference or disregard for human life.
- The defendant used a firearm or knowingly directed, advised, authorized, or assisted another to use a firearm to threaten, intimidate, assault, or injure a person in committing the offense or in furtherance of the offense.
- The offense involved the distribution of controlled substances to persons under the age of 18 years, the distribution of controlled substances within school zones, or the use or employment of persons under the age of 18 years in aid of distribution of controlled substances.
- The offense involved distribution of controlled substances known to contain a potentially lethal adulterant.
- The defendant intentionally killed the victim, intentionally inflicted serious bodily injury which resulted in the death of the victim, or intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim.
- The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.
- The defendant committed the offense after planning and premeditation.
- The defendant committed the offense in a heinous, cruel, or depraved manner in that the offense involved torture or serious physical abuse to the victim.

Mitigating circumstances are not limited by statute. Sections 921.141(6) and s. 921.142(7), F.S., specify that mitigating circumstances for capital offenses shall include:

- The defendant has no significant history of prior criminal activity.
- The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- The victim was a participant in the defendant's conduct or consented to the act.
- The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.
- The defendant acted under extreme duress or under the substantial domination of another person.
- The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.
- The age of the defendant at the time of the crime.
- The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

The following may also constitute a mitigating circumstance: (a) the victim was a participant in the defendant's conduct or consented to the act for a capital murder offense;[18] and (b) the defendant could

[18] s. 921.141(6)(c), F.S.

not have reasonably foreseen that her or his conduct during the commission of the offense would cause or create a grave risk of death to one or more persons for a capital trafficking offense.[19]

The judge is not required to sentence a defendant as recommended by the jury. The judge conducts an independent analysis of the aggravating and mitigating circumstances. The recommendation of the jury must be given great weight in the judge's decision-making process on the ultimate sentence rendered by the judge.[20] The judge may override the jury's decision. If the judge sentences a person to death, he or she must make written findings that there are sufficient aggravating circumstances and insufficient mitigating circumstances to outweigh the aggravating circumstances.[21]

In sum, Florida does not require a unanimous jury recommendation or a unanimous finding by the jury that any aggravating circumstance has been proved.[22] A Florida jury may recommend a death sentence to the trial judge on a simple majority vote of the 12 jurors, and there is no special verdict required to reflect the vote on the aggravating circumstances.[23] From 2000-2012, only 20 percent of jury recommendations were unanimous.

Distribution of Jury Votes in Death Cases by Calendar Year of Disposition by Florida Supreme Court[24] (N=296)

Original Jury Vote	'00	'01	'02	'03	'04	'05	'06	'07	'08	'09	'10	'11	'12	Total	%[25]	Cum %
7-5	6	1	4	4	0	3	0	2	4	1	3	2	2	32	11%	11%
8-4	4	6	2	6	2	0	3	0	2	9	2	1	5	42	14%	25%
9-3	4	4	3	6	2	2	11	3	5	6	6	9	5	66	22%	47%
10-2	3	12	4	3	3	3	2	2	2	5	11	1	3	54	18%	66%
11-1	2	8	5	5	3	1	1	2	1	5	5	1	3	42	14%	80%
12-0	9	6	8	4	2	3	6	7	6	0	1	6	2	60	20%	100%
Subtotal	28	37	26	28	12	12	23	16	20	26	28	20	20	296	100%	
Other[26]	3	1	2	3	4	2	0	0	1	4	3	1	0	24		
TOTAL	31	38	28	31	16	14	23	16	21	30	31	21	20	320		

Each sentence of death is subject to automatic review by the Supreme Court of Florida.[27] The sentence, and the reasons for it, must be reduced to writing so that the Florida Supreme Court can engage in meaningful review.[28] The Florida Supreme Court engages in a proportionality review in all cases in which the death penalty is handed down. Proportionality review is the comparison of one case in which the defendant was sentenced to death to other similar death sentence cases.

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[19] s. 921.142(7)(g), F.S.,

[20] What is referred to as the *Tedder "Great Weight" Standard* was announced by the Florida Supreme Court in *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975). In that case, the court determined that "[a] jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."

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

[22] Even in 1976, Florida's capital sentencing scheme was particularly unique in that the jury only recommended a sentence, its recommendation need not be unanimous or by any particular numerical vote, and the trial judge was permitted to override the jury's sentencing vote, whether for a life or death sentence. *See Proffitt v. Florida*, 428 U.S. 242, 252 (1976); *Spaziano v. Florida*, 468 U.S. 447 (1984). *See also Wilcox v. State*, 143 So.3d 359, 389 (Fla. 2014)(Death sentence involving a seven-to-five jury recommendation was not unconstitutional on that basis); *Kimbrough v. State*, 125 So.3d 752, 754 (Fla. 2013) and Mann *v. State, 112 So.3d 1158 (Fla. 2013)* (Non-unanimous jury recommendations to impose sentence of death are not unconstitutional).

[23] ss. 921.141(2)-(3) and 921.142(3)-(4), F.S.; American Bar Association, *Death Penalty Due Process Review Project Section of Individual Rights and Responsibilities, Report to the House of Delegates (108A);* http://www.americanbar.org/news/reporter_resources/midyear-meeting-2015/house-of-delegates-resolutions/108a.html.

[24] Thirteen years of data compiled by the Supreme Court Clerk's Office. Fla. S. Comm. on Criminal Justice, SB 664 (2015) Staff Analysis 8 (March 9, 2015), *available at* http://www.flsenate.gov/Session/Bill/2015/0664/Analyses/2015s0664.pre.cj.PDF.

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

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

[27] Section 921.141(4), F.S.

[28] *State v. Dixon*, 283 So.2d 1, 8 (Fla. 1973).

The Sixth Amendment, *Ring*, and *Hurst*

The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."[29] This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt.[30] Applying this right, the United States Supreme Court held in 2000 that any facts increasing the penalty for a defendant must be submitted to a jury and proved beyond a reasonable doubt.[31] Two years later, the Court in *Ring v. Arizona*, applied this right to Arizona's capital sentencing scheme, which required a judge to determine the presence of aggravating and mitigating factors and to only sentence a defendant to death if the judge found at least one aggravating factor.[32] The Court struck the sentencing scheme down, finding it to be a violation of the Sixth Amendment because it permitted sentencing judges, without a jury, to find aggravating circumstances justifying imposition of the death penalty.[33] This ruling was subsequently held to not apply retroactively to cases already final on direct review.[34]

In the years following *Ring*, the Florida Supreme Court has repeatedly held that the state's capital sentencing scheme did not violate the Sixth Amendment under *Ring* since s. 921.141, F.S., is unique in allowing the jury to recommend death and the judge impose the sentence.[35]

Hurst v. Florida

In this case, Timothy Lee Hurst was convicted of first-degree murder for fatally stabbing his co-worker in 1998 with a box cutter.[36] A jury recommended a sentence of death by a seven-to-five vote; thereafter, the trial court entered a sentence of death.[37] Hurst challenged his sentence arguing that the jury was required to find specific aggravators and to issue a unanimous advisory sentence recommendation.[38] The Florida Supreme Court denied Hurst's claims that his sentence violated *Ring* by adhering to Florida's precedent of not adopting *Ring* and citing to the Eleventh Circuit's recent approval of the capital sentencing scheme.[39] Hurst appealed this denial to the United States Supreme Court arguing that Florida's capital sentencing scheme violated *Ring* because the jury recommends the sentence with only a simple majority, the judge finds the facts necessary for imposition of the death penalty, and the judge imposes the death penalty.[40]

On January 12, 2016, the United States Supreme Court held Florida's capital sentencing scheme unconstitutional in an eight-to-one opinion.[41] The Court ruled that the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death as a jury's "mere recommendation is not enough."[42] The Court compared Florida's sentencing scheme to Arizona's in *Ring* and found Florida's distinctive factor of the advisory jury verdict immaterial. Like the unconstitutional practice in *Ring*, the judge in *Hurst* performed her own fact finding and increased *Hurst's* authorized punishment, thereby violating the Sixth Amendment.[43] The Court also expressly

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[29] U.S. CONST. Amend. VI.
[30] *United States v. Gaudin*, 515 U.S. 506, 510 (1995).
[31] *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).
[32] *Ring v. Arizona*, 536 U.S. 584, 592 (2002).
[33] *Id.* at 609.
[34] *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004).
[35] *Bottoson v. Moore,* 833 So.2d 693 (Fla. 2002) cert. denied, 537 U.S. 1070 (2002); *King v. Moore*, 831 So. 2d 143 (Fla. 2002) *cert. denied*, 537 U.S. 1067 (2002); and *State v. Steele*, 921 So. 2d 538, 548 (Fla. 2005).
[36] *Hurst v. State*, 147 So. 3d 435, 437 (Fla. 2014), *rev'd and remanded*, No. 14-7505, 2016 WL 112683 (U.S. Jan. 12, 2016).
[37] *Id.* at 440.
[38] *Id.* at 446.
[39] *Id.* at 446-47. *See Evans v. Secretary, Fla. Dep't of Corrections*, 699 F.3d 1249(11th Cir. 2012), *cert. denied*, 133 S.Ct. 2393 (2013)(Citing *Hildwin v. Florida*, 490 U.S. 638 (1989), where the United States Supreme Court upheld Florida capital sentencing scheme thirteen years before *Ring*).
[40] Brief for Petitioner at 17-52 *Hurst v. Florida*, 2016 WL 112683 (2016) (No. 14-7505), 2015 WL 3542784.
[41] *Hurst v. Florida*, 2016 WL 112683, at *3 (2016) .
[42] *Id.* at *5.
[43] *Id.* at *6.

overruled its past decisions upholding Florida's capital sentencing scheme which were issued prior to *Ring*.[44]

The Court's opinion did not address Hurst's contention that a jury's advisory verdict must be greater than a simple majority in order to comport with the Sixth and Eighth Amendments. Neither the United States Supreme Court nor the Florida Supreme Court has required unanimity in a jury's capital sentencing recommendation. Alabama's capital sentencing scheme allows the imposition of the death penalty with a 10-2 jury sentencing recommendation.[45] Similarly, Delaware requires unanimity regarding the finding of aggravating factors, but does not require unanimity in a sentencing recommendation.[46] Furthermore, in the 2006 Legislative Session, the Florida House of Representatives passed a resolution stating the House "believes that the public policy of this state should be that unanimous jury recommendations not be required in death penalty cases."[47] The Resolution provided that requiring unanimity is inappropriate since it allows a "single juror the ability to override the reasoned judgment of all other jurors weighing and considering the same facts and circumstances."[48] In support of a non-unanimous jury recommendation, the resolution states some of Florida's most notorious murderers were sentenced with a less than unanimous recommendation, such as Theodore Bundy and Ailen Wuornos.[49]

Effect of the Bill

The bill amends ss. 921.141 and 921.142, F.S., to comply with the United States Supreme Court's holding that a jury, not a judge, must find each fact necessary to impose a sentence of death. Under the bill, the jury, after hearing all of the evidence presented on aggravating factors and mitigating circumstances, must determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor and must return findings identifying each aggravating factor found. Such findings must be unanimous. If the jury:

- Does not unanimously find an aggravating factor, the defendant is ineligible for a sentence of death.
- Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury must recommend to the court whether the defendant shall be sentenced to life imprisonment without the possibility of parole or death.

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

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

To recommend a sentence of death, a minimum of nine jurors must concur in the recommendation. If fewer than nine jurors concur, a sentence of life imprisonment without the possibility of parole will be the jury's recommendation to the court.

If the jury recommends life imprisonment without the possibility of parole, the judge must impose the recommended sentence. If the jury recommends a sentence of death, the judge may impose a

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[44] *Id.* at *7.

[45] ALA. CODE § 13A-5-46(f)("The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors."). *See also Gobble v. State*, 104 So. 3d 920, 977 (Ala. Crim. App. 2010)("*Ring* does not require a unanimous recommendation for the death penalty before a defendant may be sentenced to death.").

[46] DEL. CODE ANN. tit. 11, § 4209.

[47] Fla. HR 1627 (2006).

[48] *Id.*

[49] *Id.* The Staff Analysis states Bundy, Wuornos, and Joe Nixon all received a 10-2 recommendation. Fla. H.R. Justice Council, HR 1627 (2006) Staff Analysis 6 (April 10, 2006) *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h1627b.JC.doc&DocumentType=Analysis&BillNumber=1627&Session=2006 .

sentence of death or a sentence of life imprisonment without the possibility of parole. The judge may only consider an aggravating factor that was unanimously found by the jury. If the defendant waived his or her right to a sentencing proceeding by a jury, the court may impose a sentence of death or life imprisonment without the possibility of parole. The court, sitting without a jury, still must weigh aggravating factors against mitigating circumstances and may only impose death if the court finds at least one aggravating factor to have been proven beyond a reasonable doubt.

To impose the jury's recommendation, the judge must enter a written order imposing the sentence for the defendant. In writing the order, the judge must consider the records of the trial and sentencing proceedings and address the aggravating factors found to exist by the jury and mitigating circumstances reasonably established by the evidence. If the court does not issue its order requiring the death sentence within 30 days after the judgment and sentence were rendered, the court must impose a sentence of life imprisonment without the possibility of parole.

The bill also amends s. 775.082, F.S, relating to penalties, to reflect that a person who has been convicted of a capital felony will be punished by death if the capital punishment scheme in s. 921.141, F.S., results in a determination that the person will be punished by death. The bill also reenacts ss. 782.04, 794.011, and 893.135, F.S., to incorporate the amendments made by the bill.

The bill is effective upon becoming law.

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

Section 3. Amends s. 921.142, F.S., relating to the sentence of death or life imprisonment for capital drug trafficking felonies.

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

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

Section 6. Reenacts s. 893.135, F.S., relating to trafficking; mandatory sentences; suspension or reduction of sentences; conspiracy to engage in trafficking.

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

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

Retroactivity

Any decision of the United States Supreme Court which results in a "new rule" of constitutional law applies retroactively to all criminal cases still pending direct review.[50] It is likely the Court's ruling in *Hurst* will apply retroactively to pending or future appeals on direct review.[51]

Whether *Hurst* will apply retroactively to death row appeals on collateral review or inmates who have exhausted their appeals will depend on whether the holding in *Hurst* is determined to be substantive or a watershed rule of criminal procedure.[52] For example, in *Schriro v. Summerlin*, the United States Supreme Court held that the *Ring* decision was not retroactive.[53] In determining that *Ring's* holding was merely procedural, rather than substantive or a watershed rule, the Court stated:[54]

> *Ring* held that "a sentencing judge, sitting without a jury, [may not] find an aggravating circumstance necessary for imposition of the death penalty." 536 U.S., at 609. Rather, "the Sixth Amendment requires that [those circumstances]

[50] *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)(holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past); *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004)(stating that "when a decision of this Court results in a 'new rule,' that rule applies to all criminal cases still pending on direct review."); *Johnson v. State*, 904 So. 2d 400, 407 (Fla. 2005)(stating "It is clear that new law announced by this Court or the United States Supreme Court applies to all non-final criminal cases – that is, to all cases involving convictions for which an appellate court mandate has not yet issued.").

[51] Currently, there are 43 cases involving a sentence of death that is on direct review. E-mail from the Department of Legal Affairs dated January 27, 2016 (on file with the Criminal Justice Subcommittee).

[52] *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). Retroactivity only applies to: (1) a substantive rule that "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or if it prohibits a certain category of punishment for a class of defendants because of their status or offense"; and (2) a procedural rule which constitutes a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Teague v. Lane*, 498 U.S. 288, 310-13 (1989).

[53] *Schriro*, 542 U.S. at 358.

[54] *Id.*

> be found by a jury." *Ibid.* This holding did not alter the range of conduct Arizona law subjected to the death penalty. It could not have; it rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has nothing to do with the range of conduct a State may criminalize. Instead, *Ring* altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment. Rules that allocate decisionmaking authority in this fashion are prototypical procedural rules.

Given this ruling by the Court and the fact that the holding in *Hurst* is effectively the same as the holding in *Ring*, it seems probable that the Florida Supreme Court, under the precedent of *Summerlin,* would find that *Hurst* does not meet the test for retroactivity on collateral review.[55]

The Florida Supreme Court held oral arguments on the applicability of *Hurst* to pending collateral appeals on February 2, 2016.[56] They have since stayed the execution of Cary Michael Lambrix.[57]

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

None.

[55] *See Schiro*, 542 U.S. at 358 ("The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart. Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review."). In 2005, the Florida Supreme Court held that *Ring* did not apply retroactively in Florida to defendants whose convictions were final when that decision was rendered. *Johnson v. State*, 904 So. 2d 400 (Fla. 2005).

[56] *Lambrix v. Florida*, Case No. SC16-8 & SC 16-56, Order Jan. 15, 2016 (available at https://efactssc-public.flcourts.org/casedocuments/2016/8/2016-8_order_208838.pdf).

[57] *Lambrix v. Florida*, Case No. SC16-8 & SC 16-56, Order Feb. 2, 2016 (available at https://efactssc-public.flcourts.org/casedocuments/2016/8/2016-8_order_209322.pdf).

A bill to be entitled

An act relating to sentencing for capital felonies; amending s. 775.082, F.S.; conforming a provision to changes made by the act; amending ss. 921.141 and 921.142, F.S.; deleting provisions relating to advisory sentencing by juries and findings by the court in support of sentences of death; requiring juries to find aggravating factors, if any, in the penalty phase of capital cases; specifying a standard of proof for such factors; requiring unanimity for such findings; requiring a jury to make a recommendation to the court whether the defendant shall be sentenced to life imprisonment or death; specifying considerations for such a recommendation; requiring a minimum number of jurors to support a recommendation of a sentence of death; requiring a sentence of life imprisonment without the possibility of parole in certain circumstances; requiring the court to enter an order meeting specified requirements in each case in which it imposes a death sentence; reenacting ss. 782.04(1)(b) and 794.011(2)(a), F.S., relating to murder and sexual battery, respectively, for the purpose of incorporating amendments made by the act to s. 921.141, F.S., in references thereto; reenacting s. 893.135(1)(b), (c), (d), (e), (f), (g), (h), (i), (j), (k), and (l), F.S., relating to

trafficking in controlled substances, for the purpose of incorporating amendments made by the act to s. 921.142, F.S., in references thereto; providing an effective date.

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

Section 1. Paragraph (a) of subsection (1) of section 775.082, Florida Statutes, is amended to read:

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

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

Section 2. Section 921.141, Florida Statutes, is amended to read:

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

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding

to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating factors or mitigating circumstances enumerated in subsections ~~(5) and~~ (6) and (7). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

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

(a) After hearing all of the evidence presented in aggravation and mitigation, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6).

(b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:

1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.

2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or death. The recommendation shall be based on a weighing of the following:

a. Whether sufficient aggravating factors exist.

b. Whether sufficient mitigating circumstances exist that outweigh the aggravating factors found to exist.

c. Based on these considerations, whether the defendant should be sentenced to life imprisonment without the possibility of parole or death.

(c) If at least nine jurors determine that the defendant

should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If fewer than nine jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.

(3) IMPOSITION OF LIFE OR DEATH SENTENCE.—

(a) If the jury has recommended a sentence of:

1. Life imprisonment without the possibility of parole, the court shall impose the recommended sentence.

2. Death, the court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may only consider an aggravating factor if the factor was unanimously found by the jury to exist.

(b) If the defendant waived his or her right to a sentencing proceeding by a jury, the court, after considering all aggravating factors and mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may only impose a sentence of death if the court finds at least one aggravating factor has been proven beyond a reasonable doubt to exist.

(4) ORDER OF THE COURT IN SUPPORT OF SENTENCE OF DEATH.—In each case in which the court imposes a death sentence, the court shall, considering the records of the trial and the sentencing proceedings, enter a written order addressing the aggravating

factors set forth in subsection (6) found to exist, the mitigating circumstances in subsection (7) reasonably established by the evidence, whether there are sufficient aggravating factors to warrant the death penalty, and whether the mitigating circumstances reasonably established by the evidence outweigh the aggravating factors. If the court does not issue its order requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose a sentence of life imprisonment without the possibility of parole in accordance with s. 775.082.

~~(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:~~

~~(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);~~

~~(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and~~

~~(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.~~

~~(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:~~

~~(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and~~

~~(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.~~

~~In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.~~

(5)~~(4)~~ REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(6)~~(5)~~ AGGRAVATING FACTORS ~~CIRCUMSTANCES~~.—Aggravating factors ~~circumstances~~ shall be limited to the following:

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(l) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal gang member, as defined in s. 874.03.

(o) The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

(p) The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30 or s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

(7) ~~(6)~~ MITIGATING CIRCUMSTANCES.—Mitigating circumstances

shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

(8) ~~(7)~~ VICTIM IMPACT EVIDENCE.—Once the prosecution has provided evidence of the existence of one or more aggravating factors ~~circumstances~~ as described in subsection (6) ~~(5)~~, the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being

and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

(9) ~~(8)~~ APPLICABILITY.—This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under s. 893.135.

Section 3. Section 921.142, Florida Statutes, is amended to read:

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

(1) FINDINGS.—The Legislature finds that trafficking in cocaine or opiates carries a grave risk of death or danger to the public; that a reckless disregard for human life is implicit in knowingly trafficking in cocaine or opiates; and that persons who traffic in cocaine or opiates may be determined by the trier of fact to have a culpable mental state of reckless indifference or disregard for human life.

(2) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony under s. 893.135, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through

impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating factors or mitigating circumstances enumerated in subsections ~~(6) and~~ (7) and (8). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

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

(a) After hearing all of the evidence presented in

aggravation and mitigation, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (7).

(b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:

1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.

2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or death. The recommendation shall be based on a weighing of the following:

a. Whether sufficient aggravating factors exist.

b. Whether sufficient mitigating circumstances exist that outweigh the aggravating factors found to exist.

c. Based on these considerations, whether the defendant should be sentenced to life imprisonment without the possibility of parole or death.

(c) If at least nine jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If fewer than nine jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life

imprisonment without the possibility of parole.

(4) IMPOSITION OF LIFE OR DEATH SENTENCE.—

(a) If the jury has recommended a sentence of:

1. Life imprisonment without the possibility of parole, the court shall impose the recommended sentence.

2. Death, the court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may only consider an aggravating factor if the factor was unanimously found by the jury to exist.

(b) If the defendant waived his or her right to a sentencing proceeding by a jury, the court, after considering all aggravating factors and mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may only impose a sentence of death if the court finds at least one aggravating factor has been proven beyond a reasonable doubt to exist.

(5) ORDER OF THE COURT IN SUPPORT OF SENTENCE OF DEATH.—In each case in which the court imposes a death sentence, the court shall, considering the records of the trial and the sentencing proceedings, enter a written order addressing the aggravating factors set forth in subsection (7) found to exist, the mitigating circumstances in subsection (8) reasonably established by the evidence, whether there are sufficient aggravating factors to warrant the death penalty, and whether

the mitigating circumstances reasonably established by the evidence outweigh the aggravating factors. If the court does not issue its order requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose a sentence of life imprisonment without the possibility of parole in accordance with s. 775.082.

~~(3) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:~~

~~(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);~~

~~(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and~~

~~(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.~~

~~(4) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:~~

~~(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and~~

~~(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.~~

~~In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082, and that person shall be ineligible for parole.~~

(6) ~~(5)~~ REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review and disposition rendered by the Supreme Court of Florida within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(7) ~~(6)~~ AGGRAVATING FACTORS ~~CIRCUMSTANCES~~.—Aggravating factors ~~circumstances~~ shall be limited to the following:

(a) The capital felony was committed by a person under a sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a state or federal offense involving the distribution of a controlled substance that is punishable by a sentence of at least 1 year of imprisonment.

(c) The defendant knowingly created grave risk of death to

one or more persons such that participation in the offense constituted reckless indifference or disregard for human life.

(d) The defendant used a firearm or knowingly directed, advised, authorized, or assisted another to use a firearm to threaten, intimidate, assault, or injure a person in committing the offense or in furtherance of the offense.

(e) The offense involved the distribution of controlled substances to persons under the age of 18 years, the distribution of controlled substances within school zones, or the use or employment of persons under the age of 18 years in aid of distribution of controlled substances.

(f) The offense involved distribution of controlled substances known to contain a potentially lethal adulterant.

(g) The defendant:

1. Intentionally killed the victim;

2. Intentionally inflicted serious bodily injury which resulted in the death of the victim; or

3. Intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim.

(h) The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

(i) The defendant committed the offense after planning and premeditation.

(j) The defendant committed the offense in a heinous,

cruel, or depraved manner in that the offense involved torture or serious physical abuse to the victim.

(8) ~~(7)~~ MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall include the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The defendant was an accomplice in the capital felony committed by another person, and the defendant's participation was relatively minor.

(d) The defendant was under extreme duress or under the substantial domination of another person.

(e) The capacity of the defendant to appreciate the criminality of her or his conduct or to conform her or his conduct to the requirements of law was substantially impaired.

(f) The age of the defendant at the time of the offense.

(g) The defendant could not have reasonably foreseen that her or his conduct in the course of the commission of the offense would cause or would create a grave risk of death to one or more persons.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

(9) ~~(8)~~ VICTIM IMPACT EVIDENCE.—Once the prosecution has

provided evidence of the existence of one or more aggravating factors ~~circumstances~~ as described in subsection (7) ~~(6)~~, the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

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

782.04 Murder.—

(1)

(b) In all cases under this section, the procedure set forth in s. 921.141 shall be followed in order to determine sentence of death or life imprisonment.

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

794.011 Sexual battery.—

(2)(a) A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age

commits a capital felony, punishable as provided in ss. 775.082 and 921.141.

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

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

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

(b)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine, as described in s. 893.03(2)(a)4., or of any mixture containing cocaine, but less than 150 kilograms of cocaine or any such mixture, commits a felony of the first degree, which felony shall be known as "trafficking in cocaine," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

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

b. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of

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

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

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

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

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

such person commits the capital felony of trafficking in cocaine, punishable as provided in ss. 775.082 and 921.142. Any

person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

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

(c)1. A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of any morphine, opium, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b), (2)(a), (3)(c)3., or (3)(c)4., or 4 grams or more of any mixture containing any such substance, but less than 30 kilograms of such substance or mixture, commits a felony of the first degree, which felony shall be known as "trafficking in illegal drugs," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

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

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

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

2. A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 14 grams or more of hydrocodone, or any salt, derivative, isomer, or salt of an isomer thereof, or 14 grams or more of any mixture containing any such substance, commits a felony of the first degree, which felony shall be known as "trafficking in hydrocodone," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

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

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

c. Is 50 grams or more, but less than 200 grams, such

person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and shall be ordered to pay a fine of $500,000.

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

3. A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 7 grams or more of oxycodone, or any salt, derivative, isomer, or salt of an isomer thereof, or 7 grams or more of any mixture containing any such substance, commits a felony of the first degree, which felony shall be known as "trafficking in oxycodone," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

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

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

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

$500,000.

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

4. A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 30 kilograms or more of any morphine, opium, oxycodone, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b), (2)(a), (3)(c)3., or (3)(c)4., or 30 kilograms or more of any mixture containing any such substance, commits the first degree felony of trafficking in illegal drugs. A person who has been convicted of the first degree felony of trafficking in illegal drugs under this subparagraph shall be punished by life imprisonment and is ineligible for any form of discretionary early release except pardon or executive clemency or conditional medical release under s. 947.149. However, if the court determines that, in addition to committing any act specified in this paragraph:

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

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

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

5. A person who knowingly brings into this state 60 kilograms or more of any morphine, opium, oxycodone, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b), (2)(a), (3)(c)3., or (3)(c)4., or 60 kilograms or more of any mixture containing any such substance, and who knows that the probable result of such importation would be the death of a person, commits capital importation of illegal drugs, a capital felony punishable as provided in ss. 775.082 and 921.142. A person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

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

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

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

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

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

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

methaqualone," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

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

b. Is 5 kilograms or more, but less than 25 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of $100,000.

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

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

(f)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 14 grams or more of amphetamine, as described in s. 893.03(2)(c)2., or

methamphetamine, as described in s. 893.03(2)(c)4., or of any mixture containing amphetamine or methamphetamine, or phenylacetone, phenylacetic acid, pseudoephedrine, or ephedrine in conjunction with other chemicals and equipment utilized in the manufacture of amphetamine or methamphetamine, commits a felony of the first degree, which felony shall be known as "trafficking in amphetamine," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

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

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

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

2. Any person who knowingly manufactures or brings into this state 400 grams or more of amphetamine, as described in s. 893.03(2)(c)2., or methamphetamine, as described in s. 893.03(2)(c)4., or of any mixture containing amphetamine or methamphetamine, or phenylacetone, phenylacetic acid, pseudoephedrine, or ephedrine in conjunction with other chemicals and equipment used in the manufacture of amphetamine

or methamphetamine, and who knows that the probable result of such manufacture or importation would be the death of any person commits capital manufacture or importation of amphetamine, a capital felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

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

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

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

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

2. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state or who is knowingly in actual or constructive possession of 30 kilograms or more of flunitrazepam or any mixture containing flunitrazepam as described in s. 893.03(1)(a) commits the first degree felony of trafficking in flunitrazepam. A person who has been convicted of the first degree felony of trafficking in flunitrazepam under this subparagraph shall be punished by life imprisonment and is ineligible for any form of discretionary early release except pardon or executive clemency or conditional medical release under s. 947.149. However, if the court determines that, in addition to committing any act specified in this paragraph:

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

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

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

(h)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is

knowingly in actual or constructive possession of, 1 kilogram or more of gamma-hydroxybutyric acid (GHB), as described in s. 893.03(1)(d), or any mixture containing gamma-hydroxybutyric acid (GHB), commits a felony of the first degree, which felony shall be known as "trafficking in gamma-hydroxybutyric acid (GHB)," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

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

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

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

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

sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

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

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

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

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

2. Any person who knowingly manufactures or brings into the state 150 kilograms or more of gamma-butyrolactone (GBL), as described in s. 893.03(1)(d), or any mixture containing gamma-

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

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

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

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

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

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

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

a. 3,4-Methylenedioxymethamphetamine (MDMA);

b. 4-Bromo-2,5-dimethoxyamphetamine;

c. 4-Bromo-2,5-dimethoxyphenethylamine;

d. 2,5-Dimethoxyamphetamine;

e. 2,5-Dimethoxy-4-ethylamphetamine (DOET);

f. N-ethylamphetamine;

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

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

i. 4-methoxyamphetamine;

j. 4-methoxymethamphetamine;

k. 4-Methyl-2,5-dimethoxyamphetamine;

l. 3,4-Methylenedioxy-N-ethylamphetamine;

m. 3,4-Methylenedioxyamphetamine;

n. N,N-dimethylamphetamine;

o. 3,4,5-Trimethoxyamphetamine;

p. 3,4-Methylenedioxymethcathinone;

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

r. Methylmethcathinone,

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

2. If the quantity involved:

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

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

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

3. A person who knowingly manufactures or brings into this

state 30 kilograms or more of any of the following substances described in s. 893.03(1)(c):

a. 3,4-Methylenedioxymethamphetamine (MDMA);

b. 4-Bromo-2,5-dimethoxyamphetamine;

c. 4-Bromo-2,5-dimethoxyphenethylamine;

d. 2,5-Dimethoxyamphetamine;

e. 2,5-Dimethoxy-4-ethylamphetamine (DOET);

f. N-ethylamphetamine;

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

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

i. 4-methoxyamphetamine;

j. 4-methoxymethamphetamine;

k. 4-Methyl-2,5-dimethoxyamphetamine;

l. 3,4-Methylenedioxy-N-ethylamphetamine;

m. 3,4-Methylenedioxyamphetamine;

n. N,N-dimethylamphetamine;

o. 3,4,5-Trimethoxyamphetamine;

p. 3,4-Methylenedioxymethcathinone;

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

r. Methylmethcathinone,

individually or analogs thereto or isomers thereto or in any combination of or any mixture containing any substance listed in sub-subparagraphs a.-r., and who knows that the probable result of such manufacture or importation would be the death of any person commits capital manufacture or importation of

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

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

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

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

c. Is 7 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of $500,000.

2. Any person who knowingly manufactures or brings into this state 7 grams or more of lysergic acid diethylamide (LSD)

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

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

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

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

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Rodríguez, J. offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Paragraph (a) of subsection (1) of section 775.082, Florida Statutes, is amended to read:

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

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

Section 2. Subsection (1) of section 782.04, Florida Statutes, is amended to read:

782.04 Murder.—

(1)(a) The unlawful killing of a human being:

1. When perpetrated from a premeditated design to effect the death of the person killed or any human being;

2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:

a. Trafficking offense prohibited by s. 893.135(1),

b. Arson,

c. Sexual battery,

d. Robbery,

e. Burglary,

f. Kidnapping,

g. Escape,

h. Aggravated child abuse,

i. Aggravated abuse of an elderly person or disabled adult,

j. Aircraft piracy,

k. Unlawful throwing, placing, or discharging of a destructive device or bomb,

l. Carjacking,

m. Home-invasion robbery,

n. Aggravated stalking,

o. Murder of another human being,

p. Resisting an officer with violence to his or her person,

q. Aggravated fleeing or eluding with serious bodily injury or death,

r. Felony that is an act of terrorism or is in furtherance of an act of terrorism; or

3. Which resulted from the unlawful distribution of any substance controlled under s. 893.03(1), cocaine as described in s. 893.03(2)(a)4., opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or methadone by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,

is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.

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

Section 3. Section 921.141, Florida Statutes, is amended to read:

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

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating factors enumerated in subsection (6) and for which notice has been provided pursuant to s. 782.04(1)(b) or mitigating circumstances enumerated in subsection (7) ~~subsections (5) and (6)~~. Any such evidence that ~~which~~ the court deems to have probative value may be received,

regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

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

(a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6).

(b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:

1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.

2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility

of parole or to death. The recommendation shall be based on a weighing of all of the following:

a. Whether sufficient aggravating factors exist.

b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.

c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

(c) If a unanimous jury determines that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If a less than unanimous jury determines that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.

(3) IMPOSITION OF SENTENCE OF LIFE IMPRISONMENT OR DEATH.—

(a) If the jury has recommended a sentence of:

1. Life imprisonment without the possibility of parole, the court shall impose the recommended sentence.

2. Death, the court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury.

(b) If the defendant waived his or her right to a sentencing proceeding by a jury, the court, after considering

all aggravating factors and mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may impose a sentence of death only if the court finds that at least one aggravating factor has been proven to exist beyond a reasonable doubt.

(4) ORDER OF THE COURT IN SUPPORT OF SENTENCE OF DEATH.--In each case in which the court imposes a sentence of death, the court shall, considering the records of the trial and the sentencing proceedings, enter a written order addressing the aggravating factors set forth in subsection (6) found to exist, the mitigating circumstances in subsection (7) reasonably established by the evidence, whether there are sufficient aggravating factors to warrant the death penalty, and whether the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence. If the court does not issue its order requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose a sentence of life imprisonment without the possibility of parole in accordance with s. 775.082.

~~(2) ADVISORY SENTENCE BY THE JURY.-After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:~~

~~(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);~~

~~(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and~~

~~(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.~~

~~(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.~~ ~~Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:~~

~~(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and~~

~~(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.~~

~~In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.~~

(5) ~~(4)~~ REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such

review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules adopted ~~promulgated~~ by the Supreme Court.

(6) ~~(5)~~ AGGRAVATING FACTORS ~~CIRCUMSTANCES~~.—Aggravating factors ~~circumstances~~ shall be limited to the following:

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(l) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal gang member, as defined in s. 874.03.

(o) The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a

person previously designated as a sexual predator who had the sexual predator designation removed.

(p) The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30 or s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

(7) ~~(6)~~ MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

(8) ~~(7)~~ VICTIM IMPACT EVIDENCE.—Once the prosecution has provided evidence of the existence of one or more aggravating factors ~~circumstances~~ as described in subsection (6) ~~(5)~~, the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

(9) ~~(8)~~ APPLICABILITY.—This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under s. 893.135.

Section 4. Section 921.142, Florida Statutes, is amended to read:

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

(1) FINDINGS.—The Legislature finds that trafficking in cocaine or opiates carries a grave risk of death or danger to the public; that a reckless disregard for human life is implicit in knowingly trafficking in cocaine or opiates; and that persons who traffic in cocaine or opiates may be determined by the trier

of fact to have a culpable mental state of reckless indifference or disregard for human life.

(2) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony under s. 893.135, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating factors enumerated in subsection (7) and for which notice has been provided pursuant to s. 782.04(1)(b) or mitigating circumstances enumerated in subsection (8) ~~subsections (6) and (7)~~. Any such evidence that ~~which~~ the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided

the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

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

(a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (7).

(b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:

1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.

2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all of the following:

a. Whether sufficient aggravating factors exist.

b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.

c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

(c) If a unanimous jury determines that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If less than a unanimous jury determines that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.

(4) IMPOSITION OF SENTENCE OF LIFE IMPRISONMENT OR DEATH.—

(a) If the jury has recommended a sentence of:

1. Life imprisonment without the possibility of parole, the court shall impose the recommended sentence.

2. Death, the court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury.

(b) If the defendant waived his or her right to a sentencing proceeding by a jury, the court, after considering all aggravating factors and mitigating circumstances, may impose a sentence of life imprisonment without the possibility of

parole or a sentence of death. The court may impose a sentence of death only if the court finds at least one aggravating factor has been proven to exist beyond a reasonable doubt.

(5) ORDER OF THE COURT IN SUPPORT OF SENTENCE OF DEATH.—In each case in which the court imposes a death sentence, the court shall, considering the records of the trial and the sentencing proceedings, enter a written order addressing the aggravating factors set forth in subsection (7) found to exist, the mitigating circumstances in subsection (8) reasonably established by the evidence, whether there are sufficient aggravating factors to warrant the death penalty, and whether the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence. If the court does not issue its order requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose a sentence of life imprisonment without the possibility of parole in accordance with s. 775.082.

~~(3) ADVISORY SENTENCE BY THE JURY.-After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:~~

~~(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);~~

~~(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and~~

~~(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.~~

~~(4) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:~~

~~(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and~~

~~(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.~~

~~In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082, and that person shall be ineligible for parole.~~

(6) ~~(5)~~ REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review and disposition rendered by the Supreme Court of Florida within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other

cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(7) ~~(6)~~ AGGRAVATING FACTORS ~~CIRCUMSTANCES~~.—Aggravating factors ~~circumstances~~ shall be limited to the following:

(a) The capital felony was committed by a person under a sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a state or federal offense involving the distribution of a controlled substance which ~~that~~ is punishable by a sentence of at least 1 year of imprisonment.

(c) The defendant knowingly created grave risk of death to one or more persons such that participation in the offense constituted reckless indifference or disregard for human life.

(d) The defendant used a firearm or knowingly directed, advised, authorized, or assisted another to use a firearm to threaten, intimidate, assault, or injure a person in committing the offense or in furtherance of the offense.

(e) The offense involved the distribution of controlled substances to persons under the age of 18 years, the distribution of controlled substances within school zones, or the use or employment of persons under the age of 18 years in aid of distribution of controlled substances.

(f) The offense involved distribution of controlled substances known to contain a potentially lethal adulterant.

(g) The defendant:

1. Intentionally killed the victim;

2. Intentionally inflicted serious bodily injury that ~~which~~ resulted in the death of the victim; or

3. Intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim.

(h) The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

(i) The defendant committed the offense after planning and premeditation.

(j) The defendant committed the offense in a heinous, cruel, or depraved manner in that the offense involved torture or serious physical abuse to the victim.

(8) ~~(7)~~ MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall include the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The defendant was an accomplice in the capital felony committed by another person, and the defendant's participation was relatively minor.

(d) The defendant was under extreme duress or under the substantial domination of another person.

(e) The capacity of the defendant to appreciate the criminality of her or his conduct or to conform her or his conduct to the requirements of law was substantially impaired.

(f) The age of the defendant at the time of the offense.

(g) The defendant could not have reasonably foreseen that her or his conduct in the course of the commission of the offense would cause or would create a grave risk of death to one or more persons.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

(9) ~~(8)~~ VICTIM IMPACT EVIDENCE.—Once the prosecution has provided evidence of the existence of one or more aggravating factors ~~circumstances~~ as described in subsection (7) ~~(6)~~, the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

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

794.011 Sexual battery.—

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

Section 6. For the purpose of incorporating the amendment made by this act to section 921.142, Florida Statutes, in references thereto, paragraphs (b) through (l) of subsection (1) of section 893.135, Florida Statutes, are reenacted to read:

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

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

(b)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine, as described in s. 893.03(2)(a)4., or of any mixture containing cocaine, but less than 150 kilograms of cocaine or any such mixture, commits a felony of the first degree, which felony shall be known as "trafficking in cocaine," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

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

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

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

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

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

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

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

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

(c)1. A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of any morphine, opium, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b), (2)(a), (3)(c)3., or (3)(c)4., or 4 grams or more of any mixture containing any such substance, but less than 30 kilograms of such substance or mixture, commits a felony of the first degree, which felony shall be known as "trafficking in illegal drugs," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

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

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

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

2. A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 14 grams or more of hydrocodone, or any salt, derivative, isomer, or salt of an isomer thereof, or 14 grams or more of any mixture containing any such substance, commits a felony of the first degree, which felony shall be known as "trafficking in hydrocodone," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

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

b. Is 28 grams or more, but less than 50 grams, such person shall be sentenced to a mandatory minimum term of

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

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

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

3. A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 7 grams or more of oxycodone, or any salt, derivative, isomer, or salt of an isomer thereof, or 7 grams or more of any mixture containing any such substance, commits a felony of the first degree, which felony shall be known as "trafficking in oxycodone," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

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

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

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

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

4. A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 30 kilograms or more of any morphine, opium, oxycodone, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b), (2)(a), (3)(c)3., or (3)(c)4., or 30 kilograms or more of any mixture containing any such substance, commits the first degree felony of trafficking in illegal drugs. A person who has been convicted of the first degree felony of trafficking in illegal drugs under this subparagraph shall be punished by life imprisonment and is ineligible for any form of discretionary early release except pardon or executive clemency or conditional medical release under s. 947.149. However, if the court determines that, in addition to committing any act specified in this paragraph:

a. The person intentionally killed an individual or counseled, commanded, induced, procured, or caused the

intentional killing of an individual and such killing was the result; or

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

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

5. A person who knowingly brings into this state 60 kilograms or more of any morphine, opium, oxycodone, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b), (2)(a), (3)(c)3., or (3)(c)4., or 60 kilograms or more of any mixture containing any such substance, and who knows that the probable result of such importation would be the death of a person, commits capital importation of illegal drugs, a capital felony punishable as provided in ss. 775.082 and 921.142. A person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(d)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of phencyclidine or of any mixture containing

phencyclidine, as described in s. 893.03(2)(b), commits a felony of the first degree, which felony shall be known as "trafficking in phencyclidine," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

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

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

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

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

(e)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is

knowingly in actual or constructive possession of, 200 grams or more of methaqualone or of any mixture containing methaqualone, as described in s. 893.03(1)(d), commits a felony of the first degree, which felony shall be known as "trafficking in methaqualone," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

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

b. Is 5 kilograms or more, but less than 25 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of $100,000.

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

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

(f)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 14 grams or more of amphetamine, as described in s. 893.03(2)(c)2., or methamphetamine, as described in s. 893.03(2)(c)4., or of any mixture containing amphetamine or methamphetamine, or phenylacetone, phenylacetic acid, pseudoephedrine, or ephedrine in conjunction with other chemicals and equipment utilized in the manufacture of amphetamine or methamphetamine, commits a felony of the first degree, which felony shall be known as "trafficking in amphetamine," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

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

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

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

2. Any person who knowingly manufactures or brings into this state 400 grams or more of amphetamine, as described in s. 893.03(2)(c)2., or methamphetamine, as described in s.

893.03(2)(c)4., or of any mixture containing amphetamine or methamphetamine, or phenylacetone, phenylacetic acid, pseudoephedrine, or ephedrine in conjunction with other chemicals and equipment used in the manufacture of amphetamine or methamphetamine, and who knows that the probable result of such manufacture or importation would be the death of any person commits capital manufacture or importation of amphetamine, a capital felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

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

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

b. Is 14 grams or more but less than 28 grams, such person shall be sentenced to a mandatory minimum term of imprisonment

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

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

2. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state or who is knowingly in actual or constructive possession of 30 kilograms or more of flunitrazepam or any mixture containing flunitrazepam as described in s. 893.03(1)(a) commits the first degree felony of trafficking in flunitrazepam. A person who has been convicted of the first degree felony of trafficking in flunitrazepam under this subparagraph shall be punished by life imprisonment and is ineligible for any form of discretionary early release except pardon or executive clemency or conditional medical release under s. 947.149. However, if the court determines that, in addition to committing any act specified in this paragraph:

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

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

such person commits the capital felony of trafficking in flunitrazepam, punishable as provided in ss. 775.082 and

921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

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

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

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

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

2. Any person who knowingly manufactures or brings into this state 150 kilograms or more of gamma-hydroxybutyric acid (GHB), as described in s. 893.03(1)(d), or any mixture

containing gamma-hydroxybutyric acid (GHB), and who knows that the probable result of such manufacture or importation would be the death of any person commits capital manufacture or importation of gamma-hydroxybutyric acid (GHB), a capital felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

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

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

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

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

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

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

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

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

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

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

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

a. 3,4-Methylenedioxymethamphetamine (MDMA);

b. 4-Bromo-2,5-dimethoxyamphetamine;

c. 4-Bromo-2,5-dimethoxyphenethylamine;

d. 2,5-Dimethoxyamphetamine;

e. 2,5-Dimethoxy-4-ethylamphetamine (DOET);

f. N-ethylamphetamine;

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

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

i. 4-methoxyamphetamine;

j. 4-methoxymethamphetamine;

k. 4-Methyl-2,5-dimethoxyamphetamine;

l. 3,4-Methylenedioxy-N-ethylamphetamine;

m. 3,4-Methylenedioxyamphetamine;

n. N,N-dimethylamphetamine;

o. 3,4,5-Trimethoxyamphetamine;

p. 3,4-Methylenedioxymethcathinone;

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

r. Methylmethcathinone,

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

2. If the quantity involved:

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

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

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

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

a. 3,4-Methylenedioxymethamphetamine (MDMA);

b. 4-Bromo-2,5-dimethoxyamphetamine;

c. 4-Bromo-2,5-dimethoxyphenethylamine;

d. 2,5-Dimethoxyamphetamine;

e. 2,5-Dimethoxy-4-ethylamphetamine (DOET);

f. N-ethylamphetamine;

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

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

i. 4-methoxyamphetamine;

j. 4-methoxymethamphetamine;

k. 4-Methyl-2,5-dimethoxyamphetamine;

l. 3,4-Methylenedioxy-N-ethylamphetamine;

m. 3,4-Methylenedioxyamphetamine;

n. N,N-dimethylamphetamine;

o. 3,4,5-Trimethoxyamphetamine;

p. 3,4-Methylenedioxymethcathinone;

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

r. Methylmethcathinone,

individually or analogs thereto or isomers thereto or in any combination of or any mixture containing any substance listed in sub-subparagraphs a.-r., and who knows that the probable result of such manufacture or importation would be the death of any person commits capital manufacture or importation of Phenethylamines, a capital felony punishable as provided in ss. 775.082 and 921.142. A person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

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

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

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

c. Is 7 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of $500,000.

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

Section 7. The amendments made by this act to ss. 775.082, 782.04, 921.141, and 921.142, Florida Statutes, shall apply only to criminal acts that occur on or after the effective date of this act.

Section 8. This act shall take effect upon becoming a law.

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

Remove everything before the enacting clause and insert:

A bill to be entitled

An act relating to sentencing for capital felonies; amending s. 775.082, F.S.; conforming a provision to changes made by the act; amending s. 782.04, F.S.; requiring the prosecutor to give notice to the defendant and to file the notice with the court within a certain timeframe if the prosecutor intends to seek the death penalty; amending ss. 921.141 and 921.142, F.S.; requiring juries to determine the existence of aggravating factors, if any, in the penalty phase of capital cases; specifying a standard of proof for such factors; requiring unanimity for such findings; requiring a jury to make a recommendation to the court whether the defendant shall be sentenced to life imprisonment or death; specifying considerations for such a recommendation; requiring unanimity to support a recommendation of a sentence of death; requiring a sentence of life imprisonment without the possibility of parole in certain circumstances; requiring the court to enter an order meeting specified requirements in each case in which it imposes a death sentence; deleting provisions relating to advisory sentencing by juries and findings by the court in support of sentences of death; reenacting s. 794.011(2)(a), F.S., relating to sexual battery, to incorporate the amendment made to s. 921.141, F.S., in a reference

thereto; reenacting s. 893.135(1)(b) through (l), F.S., relating to trafficking in controlled substances, to incorporate the amendment made to s. 921.142, F.S., in references thereto; providing applicability; providing an effective date.