The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

CRIMINAL JUSTICE
Senator Evers, Chair
Senator Dean, Vice Chair

MEETING DATE: Tuesday, March 22, 2011
TIME: 8:00 —10:00 a.m.
PLACE: *Mallory Horne Committee Room,* 37 Senate Office Building

MEMBERS: Senator Evers, Chair; Senator Dean, Vice Chair; Senators Dockery, Margolis, and Smith

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	**SB 336** Fasano (Compare CS/H 39, H 1039, CS/CS/S 204, S 1886)	Controlled Substances; Revises the list of controlled substances included in Schedules I, II, III, IV, and V. CJ 03/22/2011 HR JU BC	
2	**SB 372** Bogdanoff (Similar H 1379)	Pretrial Programs; Requires each pretrial release program established by ordinance of a county commission, by administrative order of a court, or by any other means in order to assist in the release of a defendant from pretrial custody to conform to the eligibility criteria set forth by the act. Preempts any conflicting local ordinances, orders, or practices. Requires that the defendant satisfy certain eligibility criteria in order to be assigned to a pretrial release program, etc. CJ 03/22/2011 JU BC	
3	**SB 556** Oelrich (Compare CS/H 353)	Drug Screening/Beneficiaries/Temporary Assistance; Requires the Department of Children and Family Services (DCFS) to establish a drug-screening program . Requires consent to drug screening as a condition to eligibility for or receipt of temporary cash assistance. Limits screening to certain persons. Provides terms of disqualification for temporary cash assistance. Requires the DCFS to supply information concerning substance abuse treatment. Revises requirements for determination of eligibility for temporary cash assistance to conform to changes made by the act, etc. CJ 03/22/2011 BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
4	**SB 608** Evers (Similar H 403)	Traffic Offenses; Provides criminal penalties for a person who commits a moving violation that causes serious bodily injury to, or causes or contributes to the death of, a person operating or riding in a motor vehicle or operating or riding on a motorcycle. Requires that the person pay a specified fine, serve a minimum period of incarceration, and attend a driver improvement course. Requires the court to revoke the person's driver's license for a specified period, etc. TR 03/09/2011 Favorable CJ 03/22/2011 BC	
5	**CS/SB 818** Health Regulation / Fasano (Compare S 1386)	Controlled Substances; Authorizes certain health care practitioners to complete a continuing education course relating to the prescription drug monitoring program. Creates a felony of the third degree for any person to register or attempt to register a pain-management clinic through misrepresentation or fraud. Revises the list of entities that are not required to register as a pain-management clinic. Requires that the prescription drug monitoring program comply with the minimum requirements of the National All Schedules Prescription Electronic Reporting Act, etc. HR 03/14/2011 Fav/CS CJ 03/22/2011 BC	
6	**SB 844** Benacquisto (Compare H 575)	Violations/Probation/Community Control/Widman Act; Creates the "Officer Andrew Widman Act." Authorizes a circuit court judge, after making a certain finding, to issue a warrant for the arrest of a probationer or offender who has violated the terms of probation or community control. Authorizes the court to commit or release the probationer or offender under certain circumstances. Authorizing the court, in determining whether to require or set the amount of bail, to consider the likelihood that the person will be imprisoned for the violation of probation or community control, etc. CJ 03/22/2011 JU BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
7	**SB 920** Ring (Compare CS/H 339)	Possession of Stolen Credit or Debit Cards; Prohibits possession of a stolen credit or debit card in specified circumstances. Provides penalties. Provides that a retailer who takes, accepts, retains, or possesses a stolen credit or debit card without knowledge that the card is stolen and who is authorized to process transactions by the company issuing the credit or debit card does not commit a violation under certain circumstances. Provides an exception for certain retail employees. CJ 03/22/2011 CM AG	
8	**SB 1060** Lynn (Compare H 4035, S 104, S 1628)	Programs for Misdemeanor Offenders; Provides for defendants found guilty of certain misdemeanor drug offenses to be placed into licensed substance abuse education and treatment intervention programs. Authorizes private or public entities to provide such programs. Requires that a private entity provide such programs under contract and comply with applicable laws. Removes certain eligibility criteria prohibiting such placement if the defendant has previously been admitted to a pretrial program. CJ 03/22/2011 BC	
9	**SB 1114** Detert	Verification of a Prisoner's Immigration Status; Requires the staff of a jail or other detention center or facility to make a reasonable effort to determine the citizenship status of a person charged with specified crimes. Requires the facility staff to make a reasonable effort to verify whether the prisoner is lawfully present in the United States. Requires facility staff to request the assistance of the United States Department of Homeland Security to verify the immigration status of a person within 48 hours after the person is confined in the jail or other detention center or facility, etc. CJ 03/22/2011 MS CA BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
10	**SB 1300** Storms (Identical H 997, Compare H 839)	Juvenile Civil Citations; Requires that a juvenile civil citation program be established at the local level with the concurrence of the chief judge of the circuit and other designated persons. Authorizes a law enforcement agency, the Department of Juvenile Justice, a juvenile assessment center, the county or municipality, or an entity selected by the county or municipality to operate the program. Restricts eligibility of participants for the civil citation program to first-time misdemeanor offenders, etc.. CJ 03/22/2011 JU BC	
11	**SB 1494** Evers (Similar H 1029)	Interstate Compact for Juveniles; Reenacts provisions which expired by operation of law on August 26, 2010. Provides purpose of the compact. Provides for an Interstate Commission for Juveniles. Provides for the activities of the Interstate Commission to be financed by an annual assessment from each compacting state. Provides for judicial enforcement. Provides for dissolution of the compact. Reenacts provisions which expired by operation of law on August 26, 2010. Creates the State Council for Interstate Juvenile Offender Supervision to oversee state participation in the compact, etc. CJ 03/22/2011 BC	
12	**SB 1932** Evers	Justice Reinvestment Commission; Creates said commission within the Executive Office of the Governor. Requires the commission, within available resources, to conduct comprehensive analytical research of criminal and juvenile justice data, evaluations of relevant criminal and juvenile justice policies, and current state corrections and juvenile justice funding in order to develop practical, data-driven policy options that can increase public safety, improve offender accountability, reduce recidivism, and mange the growth of spending on correction and juvenile justice programs, etc. CJ 03/22/2011 GO BC	

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LEGISLATIVE ACTION

Senate . House

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The Committee on Criminal Justice (Dockery) recommended the following:

Senate Amendment

Delete lines 195 - 203.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL:	SB 336
INTRODUCER:	Senator Fasano
SUBJECT:	Controlled Substances
DATE:	March 10, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	**Pre-meeting**
2.			HR	
3.			JU	
4.			BC	
5.				
6.				

I. Summary:

The bill schedules a number of chemicals as controlled substances. The proposed scheduling of these chemicals is consistent with federal scheduling of these chemicals.

This bill substantially amends section 893.03, Florida Statutes.

II. Present Situation:

Chapter 893, F.S., sets forth the Florida Comprehensive Drug Abuse Prevention and Control Act. The chapter classifies controlled substances into five schedules in order to regulate the manufacture, distribution, preparation, and dispensing of the substances. Provided below is a description of the different schedules:

- Schedule I (s. 893.03(1), F.S.): A substance in Schedule I has a high potential for abuse and has no currently accepted medical use in treatment in the United States and in its use under medical supervision does not meet accepted safety standards.
- Schedule II (s. 893.03(2), F.S.): A substance in Schedule II has a high potential for abuse and has a currently accepted but severely restricted medical use in treatment in the United States, and abuse of the substance may lead to severe psychological or physical dependence.
- Schedule III (s. 893.03(3), F.S.): A substance in Schedule III has a potential for abuse less than the substances contained in Schedules I and II and has a currently accepted medical use in treatment in the United States, and abuse of the substance may lead to moderate or low physical dependence or high psychological dependence or, in the case of anabolic steroids, may lead to physical damage.

- Schedule IV (s. 893.03(4), F.S.): A substance in Schedule IV has a low potential for abuse relative to the substances in Schedule III and has a currently accepted medical use in treatment in the United States, and abuse of the substance may lead to limited physical or psychological dependence relative to the substances in Schedule III.
- Schedule V (s. 893.03(5), F.S.): A substance, compound, mixture, or preparation of a substance in Schedule V has a low potential for abuse relative to the substances in Schedule IV and has a currently accepted medical use in treatment in the United States, and abuse of such compound, mixture, or preparation may lead to limited physical or psychological dependence relative to the substances in Schedule IV.

The U.S. Drug Enforcement Administration (DEA) has temporarily scheduled five synthetic cannabinoids as Schedule I controlled substances. Florida law does not currently schedule any of these synthetic cannabinoids (the bill schedules some of the synthetic cannabinoids). The synthetic cannabinoids temporarily scheduled by the DEA are:

- 1-pentyl-3-(1- naphthoyl)indole (JWH-018).
- 1-butyl-3-(1-naphthoyl)indole (JWH-073).
- [2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole (JWH-200).
- 5-(1,1- dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (CP-47,497).
- 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol; CP-47,497 C8 homologue).[1]

Mephedrone is not specifically scheduled under federal law but the DEA has indicated that the chemical "can be considered an analogue of methcathinone (schedule I substance) under the analogue provision of the CSA (Title 21 United States Code 813). Therefore, law enforcement cases involving mephedrone can be prosecuted under the Federal Analog Act of the CSA."[2] Further, the Florida Office of the Attorney General, through emergency rulemaking, has temporarily scheduled this substance along with a number of similar substances as Schedule I controlled substances.[3]

The following table provides information about the chemicals proposed for scheduling as controlled substances by the bill (excluding synthetic cannabinoids and mephedrone):

[1] 21 CFR Part 1308 (effective March 1, 2011); *Federal Register*, vol. 76, n. 40 (March 1, 2011), http://www.deadiversion.usdoj.gov/fed_regs/rules/2011/fr0301.htm (last accessed on March 15, 2011).
[2] Drugs and Chemicals of Concern, Office of Diversion Control, U.S. Drug Enforcement Administration, http://www.deadiversion.usdoj.gov/drugs_concern/mephedrone.htm (last accessed on March 15, 2011).
[3] Notice of Emergency Rule, 2ER11-1 (effective January 26, 2011), *Florida Administrative Weekly*, vol. 37/06 (published February 11, 2011), https://www.flrules.org/gateway/ruleNo.asp?id=2ER11-1 (last accessed on March 15, 2011).

CHEMICALS REFERENCED IN SB 336
(EXCLUDING SYNTHETIC CANNABINOIDS AND MEPHEDRONE)[4]

CHEMICAL	DESCRIPTION	FEDERAL SCHEDULE	PROPOSED FLORIDA SCHEDULE
Alpha-Methyltryptamine	Tryptamine derivative that shares pharmacological similarities with Schedule I hallucinogens.	I	I
1- (1-Phenylcyclohexyl) pyrrolidine	Pyrrolidine analog of phencyclidine, a controlled substance.	I	I
2, 5-Dimethoxy-4- (n) - Propylthiophenethylamine	Phenthylamine hallucinogen that is structurally related to Schedule I hallucinogens.	I	I
5-Methoxy-N, N-Diisopropyltryptamine	Tryptamine derivative that elicits subjective effects, including hallucinations, similar to those produced by several Schedule I hallucinogens.	I	I
N-Benzylpiperazine	Piperazine derivative that is used as an intermediate in chemical synthesis but has no approved medical use. Pharmacological effects are qualitatively similar to those of amphetamine, a controlled substance.	I	I
Lisdexamfetamine	Central nervous system stimulant that is used as part of a treatment program to control symptoms of attention deficit hyperactivity disorder (Vyvanse®).	II	II
Dihydroetorphine	Derivative of thebaine, a controlled substance. Not currently marketed or used medically in the U.S.	II	II
Remifentanil	Opioid analgesic (Ultiva®).	II	II

[4] Unless otherwise indicated, information in this table relevant to the description of chemicals was compiled from numerous Internet search inquiries of the following sources (last accessed on March 11, 2011): Office of Diversion Control, U.S. Drug Enforcement Administration, http://www.deadiversion.usdoj.gov/index.html; U.S. Food and Drug Administration, http://www.fda.gov; United States National Library of Medicine of the National Institutes of Health, http://www.nlm.nih.gov; Online Encyclopedia of Chemistry of Chemie.DE Information Service GmbH (a Life Science Network Division), http://www.chemie.de/lexikon/e/; and PubChem Public Chemical Database of the National Center for Biotechnology Information, http://www.ncbi.nlm.nih.gov/.

Unless otherwise indicated, information regarding federal scheduling of these chemicals is from 21 CFR §§ 1308.11, 1308.12, 1308.13, 1308.14, and 1308.15.

CHEMICAL	DESCRIPTION	FEDERAL SCHEDULE	PROPOSED FLORIDA SCHEDULE
Embutramide	Central nervous system depressant and derivative of gamma hydroxybutyric acid, a controlled substance. Used in veterinary euthanasia (Tributame® Euthanasia Solution).	III	III
Zopiclone	Central nervous system depressant. Eszopiclone, an active isomer of zopiclone, is used for short-term treatment of insomnia (Lunesta®). Pharmacological properties are substantially similar to benzodiazepines.	IV	IV
Zaleplon	Central nervous system depressant that is used for short-term treatment of insomnia (Sonata®).	IV	IV
Zolpidem	Central nervous system depressant that is used for short-term treatment of insomnia (Ambien®).	IV	IV
Modafinil	Central nervous system stimulant and neuroprotective agent that is used in the treatment of excessive daytime sleepiness associated with narcolepsy (Provigil®).	IV	IV
Petrichloral	Sedative/hypnotic (Periclor®).[5]	IV	IV
Sibutramine	Blocks the uptake of various neurotransmitters and is used in the management of obesity (Meridia®).	IV	IV
Dichloralphenazone	Sedative that is typically used in combination with other chemicals in formulating prescription pharmaceuticals for the relief of tension and vascular headaches (Iso-Acetazone®, Isocom®, Midchlor®, Midrin®, Migratine®, and Mitride®).	IV	IV

[5] Sample Selected Controlled Medication List (II-V), American Society of Consultant Pharmacists, http://www.med-pass.com/Docs/Products/samples/A96975RCK_sp.pdf (last accessed on March 11, 2011).

CHEMICAL	DESCRIPTION	FEDERAL SCHEDULE	PROPOSED FLORIDA SCHEDULE
Pregabalin	Anticonvulsant that is used for neuropathic pain, partial seizures (adjunct therapy), and generalized anxiety disorder (Lyrica®).	V	V
Not more than 0.5 milligrams of Difenoxin and not less than 25 micrograms of Atropine sulfate per dosage unit	Difenoxin is a 4-phenylpiperidine derivative that is chemically related to the narcotic meperidine. It is used in combination with atropine to treat diarrhea (Motofen®). Atropine discourages deliberate overdosage.	V	V

Federal law provides that Schedule III listed stimulants and depressants also include their salts, isomers, and salts of isomers whenever the existence of such salts, isomers is possible within the specific chemical designation.[6] Florida's Schedule III does not currently contain similar language.[7]

Health care practitioners in Florida who are authorized to prescribe include medical physicians, physician assistants, osteopathic physicians, advanced registered nurse practitioners, podiatrists, naturopathic physicians, dentists, optometrists, and veterinarians. However, s. 893.02, F.S., defines which practitioners may prescribe a controlled substance under Florida law. A "practitioner" is defined to mean a licensed medical physician, dentist, veterinarian, osteopathic physician, naturopathic physician, or podiatrist, if such practitioner holds a valid federal controlled substance registry number. Accordingly, the prescribing of controlled substances is a privilege that is separate from the regulation of the practice of the prescribing practitioner.

III. Effect of Proposed Changes:

The bill amends s. 893.03, F.S., to schedule a number of chemicals as controlled substances. The proposed scheduling of these chemicals is consistent with federal scheduling of these chemicals.

The bill schedules the following synthetic cannabinoids in Schedule I:

- 2-[(1R,3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-195 yl)phenol (also known as CP 47,497 and its dimethyl octyl (C8) 196 homologue).
- (6aR,10aR)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-198 methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c] chromen-1-ol 199 (also known as HU-210).
- 1-Pentyl-3-(1-naphthoyl)indole (also known as JWH-018).
- 1-Butyl-3-(1-naphthoyl)indole (also known as JWH-073).

The bill schedules some of the synthetic cannabinoids that the DEA has temporarily scheduled as Schedule I controlled substances. (See "Present Situation" section of this bill analysis.)

[6] 21 CFR § 1308.13
[7] *See* s. 893.03(3), F.S.

The bill schedules mephedrone in Schedule I. Although not specifically scheduled in federal law, the DEA considers mephedrone to be an analogue of methcathinone, a Schedule I controlled substance. Further, the Florida Office of the Attorney General, through emergency rulemaking, has temporarily scheduled this substance as a Schedule I controlled substance. (See "Present Situation" section of this bill analysis.)

Consistent with federal scheduling (see "Present Situation" section of this bill analysis), the bill also schedules a number of other chemicals as follows:

Schedule I:
- Alpha-Methyltryptamine.
- 1- (1-Phenylcyclohexyl) pyrrolidine.
- 2, 5-Dimethoxy-4- (n) -Propylthiophenethylamine.
- 5-Methoxy-N, N-Diisopropyltryptamine.
- N-Benzylpiperazine.

Schedule II:
- Dihydroetorphine.
- Lisdexamfetamine.
- Remifentanil.

Schedule III:
Embutramide.

Schedule IV:
- Zopiclone.
- Zaleplon.
- Zolpidem.
- Modafinil.
- Petrichloral.
- Sibutramine.
- Dichloralphenazone.

Schedule V:
- Pregabalin.
- Not more than 0.5 milligrams of Difenoxin and not less than 25 micrograms of Atropine sulfate per dosage unit.

The bill also provides that Schedule III listed stimulants and depressants include their salts, isomers, and salts of isomers whenever the existence of such salts, isomers is possible within the specific chemical designation. This language, which is not currently included in Schedule III, appears in federal scheduling laws. (See "Present Situation" section of this bill analysis.)

The effective date of the bill is July 1, 2011.

Other Potential Implications:

The Florida Department of Law Enforcement (FDLE) has provided the following comments regarding proposed scheduling in the bill:

> Because all of the proposed chemical substances are currently scheduled federally (…with the exception of the synthetic cannabinoids which are currently under a notice of intent to be scheduled federally), there would be no impact on physicians, pharmacies, or patients who are prescribed any of these substances which are scheduled II-IV. The proposed substances that have been recommended as a Schedule I have no accepted medical use and have very limited legitimate use for the private citizen. There would be a potential impact on individuals in possession of the proposed additional substances, since currently they are not covered by state statute, however, persons in possession of the substances are already violating federal law and subject to federal prosecution.
>
> Aligning Florida law with the federal controlled substances list creates consistency for those entities and/or persons involved in the manufacturing, distribution, and dispensing of any controlled substance. It reduces the amount of confusion related to the handling of these substances, and helps close the "loophole" which allows diversion of legal substances for illicit purposes throughout the state without fear of local enforcement. It makes the training for law enforcement simpler, since there is only "one set of rules" instead of two sets to deal with. It also acknowledges and maximizes the use of the time and research devoted to the scheduling process at the federal level. The Food & Drug Administration (FDA), the Department of Health & Human Services (DH&HS), and the Drug Enforcement Agency (DEA) conduct extensive research on any product that is recommended for scheduling and provide the industry and public numerous opportunities throughout the process to produce independent research, legal remedy, and public opinion as an alternative to scheduling. The ability of these three federal agencies to monitor and detect substances of concern from a national level provides them with a unique opportunity to predict what substances may threaten the population long before a specific substance may reach the state of Florida and threaten health and public safety.[8]

According to the FDLE, providing that Schedule III listed stimulants and depressants include their salts, isomers, and salts of isomers whenever the existence of such salts, isomers is possible within the specific chemical designation, "would close current gaps in the statute that allow potential 'exemptions' of various forms of substances already controlled in Florida."[9]

CS/CS SB 204 addresses synthetic cannabinoid scheduling and includes a more comprehensive list of synthetic cannabinoids than SB 336. SB 1886 addresses mephedrone and includes a more comprehensive list of similar chemicals. SB 1886 also uses more specific chemical nomenclature for mephedrone than SB 336.[10]

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[8] Analysis of SB 336 (January 14, 2011), Florida Department of Law Enforcement (on file with the Senate Criminal Justice Committee). Cited in further references as the "FDLE analysis."

[9] FDLE analysis.

[10] Staff of the bill sponsor has indicated to Senate professional staff that the sponsor intends to remove reference to the synthetic cannabinoids and mephedrone.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The FDLE states: "SB 336 should have little or no impact of the private sector. All of the proposed substances have been federally scheduled (or are currently under notice of intent as being emergency federally scheduled) as being illegal."[11]

C. Government Sector Impact:

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of legislation, has determined that the bill has an insignificant prison bed impact (possibly a small number of additional prison beds).

The FDLE states: "Local agencies that fund and maintain their own crime lab with a chemistry section would potentially be facing a rise in submissions associated with the additions of the proposed chemical substances."[12]

The FDLE further states: "The passage of SB 336 would add chemical substances to Florida's controlled substances list. Any resulting increase in volume of evidence submissions to FDLE's Crime Laboratory System, as well as costs to acquire and maintain additional required chemical standards, will be assimilated as part of the laboratories' cost of doing business."[13]

VI. Technical Deficiencies:

None.

[11] FDLE analysis.
[12]. *Id.*
[13] *Id.*

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

217026

LEGISLATIVE ACTION

Senate . House

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The Committee on Criminal Justice (Evers) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Eligibility criteria for government-funded pretrial release.—

(1) It is the policy of this state that only defendants who are indigent and therefore qualify for representation by the public defender are eligible for government-funded pretrial release. Further, it is the policy of this state that, to the greatest extent possible, the resources of the private sector be

217026

used to assist in the pretrial release of defendants. It is the intent of the Legislature that this section not be interpreted to limit the discretion of courts with respect to ordering reasonable conditions for pretrial release for any defendant. However, it is the intent of the Legislature that government-funded pretrial release be ordered only as an alternative to release on a defendant's own recognizance or release by the posting of a surety bond.

(2) A pretrial release program established by an ordinance of the county commission, an administrative order of the court, or by any other means in order to assist in the release of defendants from pretrial custody is subject to the eligibility criteria set forth in this section. These eligibility criteria supersede and preempt all conflicting local ordinances, orders, or practices. Each pretrial release program shall certify annually, in writing, to the chief circuit court judge, that it has complied with the reporting requirements of s. 907.043(4), Florida Statutes.

(3) A defendant is eligible to receive government-funded pretrial release only by order of the court after the court finds in writing upon consideration of the defendant's affidavit of indigence that the defendant is indigent or partially indigent as set forth in Rule 3.111, Florida Rules of Criminal Procedure, and that the defendant has not previously failed to appear at any required court proceeding. A defendant may not receive a government-funded pretrial release if the defendant's income is above 300 percent of the then-current federal poverty guidelines prescribed for the size of the household of the defendant by the United States Department of Health and Human

Services, unless the defendant is receiving Temporary Assistance for Needy Families-Cash Assistance, poverty-related veterans' benefits, Supplemental Security Income (SSI), food stamps, or Medicaid.

(4) If a defendant seeks to post a surety bond pursuant to a bond schedule established by administrative order as an alternative to government-funded pretrial release, the defendant shall be permitted to do so without any interference or restriction by a pretrial release program.

(5) This section does not prohibit the court from:

(a) Releasing a defendant on the defendant's own recognizance.

(b) Imposing upon the defendant any additional reasonable condition of release as part of release on the defendant's own recognizance or the posting of a surety bond upon a finding of need in the interest of public safety, including, but not limited to, electronic monitoring, drug testing, substance abuse treatment, or attending a batterers' intervention program.

(6) In lieu of using a government-funded program to ensure the court appearance of any defendant, a county may reimburse a licensed surety agent for the premium costs of a surety bail bond that secures the appearance of an indigent defendant at all court proceedings if the court establishes a bail bond amount for the indigent defendant.

Section 2. This act shall take effect October 1, 2011.

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

And the title is amended as follows:

Delete everything before the enacting clause

217026

and insert:

A bill to be entitled

An act relating to pretrial programs; providing state policy and legislative intent; requiring each pretrial release program established by ordinance of a county commission, by administrative order of a court, or by any other means in order to assist in the release of a defendant from pretrial custody to conform to the eligibility criteria set forth in the act; preempting any conflicting local ordinances, orders, or practices; requiring that the defendant satisfy certain eligibility criteria in order to be assigned to a pretrial release program; providing that the act does not prohibit a court from releasing a defendant on the defendant's own recognizance or imposing any other reasonable condition of release on the defendant; authorizing a county to reimburse a licensed surety agent for the premium costs of a bail bond for the pretrial release of an indigent defendant under certain circumstances; providing an effective date.

650300

LEGISLATIVE ACTION

Senate . House

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The Committee on Criminal Justice (Evers) recommended the following:

Senate Amendment to Amendment (217026) (with title amendment)

Between lines 65 and 66
insert:

(7) The income eligibility limitations applicable to government-funded pretrial release programs apply only to those counties with a population equal to or greater than 350,000 persons.

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

650300

And the title is amended as follows:

Delete line 90

and insert:

under certain circumstances; providing that the income eligibility limitations applicable to government-funded pretrial release programs apply only to certain specified counties; providing an effective

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL:	SB 372
INTRODUCER:	Senator Bogdanoff
SUBJECT:	Pretrial Programs
DATE:	March 15, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Pre-meeting**
2.			JU	
3.			BC	
4.				
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I. Summary:

Senate Bill 372 creates an undesignated new section of Florida Statutes that would implement statutory eligibility criteria for defendants admitted to the county pretrial release programs.

The bill sets forth a state policy that only indigent defendants who qualify for the appointment of the public defender are eligible for participation in pretrial release programs.

The policy that private entities be used to assist defendants in pretrial release, to the greatest possible extent, is also set forth in the bill

The bill expresses the intent of the Legislature that the bill not be interpreted to restrict courts from placing reasonable conditions on a defendant who is being released from custody by the court.

The state requires locally-created pretrial release programs to adhere to the indigency eligibility requirement of the bill and preempts all conflicting local ordinances, practices, or (court) orders.

The court must find a defendant indigent, in writing, pursuant to the procedures set forth in Florida Rule of Criminal Procedure 3.111, and order that the defendant is eligible to participate in a pretrial release program.

The bill prohibits interference by a pretrial release program when a defendant seeks to post a surety bond set forth in a predetermined bond schedule.

The bill declares that a county may reimburse a licensed surety agent for the costs of a bail bond that secures the appearance of the defendant at all court proceedings in lieu of utilizing the services of a local pretrial release program.

The bill creates an undesignated section of the Florida Statutes.

II. Present Situation:

Article I, section 14 of the Florida Constitution provides that unless a person is charged with a capital offense or one punishable by life and "the proof of guilt is evident or the presumption great," every person *shall be entitled* to pretrial release on reasonable conditions. If, however, no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.[1]

Section 907.041(3), F.S., sets forth the Legislature's intention that there be a presumption in favor of nonmonetary release for any person who is granted release *unless* such person is charged with a dangerous crime. Subsection (4) of the same section of law defines the term "dangerous crime" for purposes of pretrial release.[2]

When a person is arrested and appears before the court at First Appearance, the court must determine whether the defendant should remain in custody or grant the defendant's release pending the outcome of the charges. The decision is, practically-speaking, based upon consideration of the nature of the charges (and whether the court finds probable cause for the arrest), the defendant's criminal history, his or her ties to the community, whether he or she presents a flight risk, and the safety of the victim and community at large.

The court has certain options available with regard to a person's release at first appearance. These are:

- Release on own Recognizance (ROR) allows defendants to be released from jail based on their promise to return for mandatory court appearances. Defendants released on recognizance are not required to post a bond and are not supervised.
- Posting bond is a monetary requirement to ensure that defendants appear in court when required. A defendant whom the court approves for this release must post a cash bond to the court or arrange for a surety bond through a private bondsman. Defendants typically pay a nonrefundable fee to the bondsman of 10 percent of the bond required by the court for release. If the defendant does not appear, the bondsman is responsible for paying the entire

[1] Art. I, section 14, Constitution of Florida.
[2] Section 907.041(4), F.S., defines the term "dangerous crime" to include arson; aggravated assault; aggravated battery; illegal use of explosives; child abuse or aggravated child abuse; abuse or aggravated abuse of an elderly person or disabled adult; aircraft piracy; kidnapping; homicide; manslaughter; sexual battery; robbery; carjacking; lewd, lascivious, or indecent assault or act upon or in presence of a child under 16 years; sexual activity with a child, who is 12 years of age or older but less than 18 years of age, by or at solicitation of person in familial or custodial authority; burglary of a dwelling; stalking or aggravated stalking; act of domestic violence; home invasion robbery; act of terrorism; manufacturing any substances in violation of ch. 893; and attempting or conspiring to commit any of the aforementioned crimes.

amount. As such, bondsmen have a vested interest in ensuring that their clients attend their court dates and do not abscond. Bondsmen are not required to supervise a defendant.

- Pretrial release programs[3] supervise approved defendants. The programs do so through phone contacts, visits, and/or electronic monitoring until the defendant's case is disposed or until the defendant's supervision is revoked. Defendants generally are released into a pretrial release program without paying a bond, although this is not always the case. According to the OPPAGA report, judges in 23 of the 28 counties that have pretrial release programs may require defendants to post a bond *and* participate in a pretrial release program[4], perhaps providing the defendants with an extra layer of accountability to the court. Defendants may be assigned to the program by a judge or selected for participation by the program. There are no pretrial release program eligibility criteria in the Florida Statutes – each county develops its own criteria for determining who is eligible for its pretrial release program.

Prior to a defendant being released to a pretrial release program, the program must certify to the court that it has investigated or otherwise verified:

- The circumstances of the accused's family, employment, financial resources, character, mental condition, and length of residence in the community;
- The accused's record of convictions, of appearances at court proceedings, of flight to avoid prosecution, or of failure to appear at court proceedings; and
- Other facts necessary to assist the court in its determination of the indigency of the accused and whether the accused should be released under the supervision of the program.[5]

Pretrial Release Programs in Florida

Currently there are 28 local pretrial release programs in Florida. Section 907.044, F.S., requires the Office of Program Policy Analysis and Governmental Accountability (OPPAGA) to conduct annual studies to evaluate the effectiveness and cost efficiency of pretrial release programs in the state. The county pretrial release programs are required to submit annual reports to OPPAGA by March 31 of every year which OPPAGA uses to gather the data for OPPAGA's annual evaluation of the programs. The OPPAGA report issued in December of 2010 analyzed the programs' performance for the 2009 calendar year. There are four primary questions OPPAGA must consider in conducting its annual study.

How are Florida's Pretrial Release Programs Funded? None of the programs receive state general revenue funding. The programs are initiated, administrated, and funded at the county government level. The counties that operate these programs determine their budgets, funding sources and the scope of the programs' services.[6]

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[3] Section 907.043(2)(b), F.S., defines the term "pretrial release program" as an entity, public or private, that conducts investigations of pretrial detainees, makes pretrial release recommendations to a court, and electronically monitors and supervises pretrial defendants.

[4] For example, 85-90% of Polk County defendants who participated in local pretrial release programs also paid a bond, while 42% did so in Broward County, 60% in Osceola County, and 24% of Palm Beach County defendants in the pretrial release program also paid a bond. *Pretrial Release Programs' Data Collection Methods and Requirements Could Improve;* OPPAGA Report No. 10-66, issued December 2010, including Appendices and Supplemental Materials and Exhibits on file with the Senate Criminal Justice Committee. See Exhibit 2, page 3.

[5] s. 907.041(3)(b), F.S.

[6] OPPAGA Report 10-66, December 2010.

Five of the 28 programs have sought and received grant funding. Twelve programs charge fees to defendants participating in the program. Two of those counties (Leon and Palm Beach) require payment of cost of supervision which is used to help pay for the pretrial release programs. Some counties collect fees for urinalysis, electronic monitoring, GPS monitoring or telephone monitoring. These fees and costs are paid to vendors such as laboratories or other service providers and some portion of the funds may be deposited as county general revenue.[7]

What is the nature of the criminal charges of defendants in pretrial release programs? Although OPPAGA is expected to report this data, it is not generally collected by the programs in either the content or the form that s. 907.044, F.S., requires OPPAGA to analyze.

Section 907.043, F.S., requires that data be gathered and reported on a *weekly* basis by the pretrial release programs in a register held in the office of the local clerk of the circuit court. Section 907.043(3)(b)6., F.S., requires weekly program reporting of "*the charges* filed against and the case numbers of defendants accepted into the pretrial release program."

Subsection (4) of the same statute, which contains the *annual* reporting requirements to OPPAGA by the programs, does not contain a component that is similar to either the weekly component nor the component OPPAGA must analyze.[8]

Due to the dissimilarity in reporting requirements, OPPAGA has only been able to report on seven county programs regarding this particular measure. Of those seven, one county reported that approximately 70 percent of its participants had prior violent felonies. The other six counties reported a much larger number of participants with no prior violent felonies.[9]

How many defendants served by pretrial release programs were issued warrants for failing to appear in court or were arrested while in the program? Two counties reported that no warrants were issued for defendants participating in their programs for failure to appear in court. At the other end of the spectrum, Miami-Dade reported that of 16,342 participants, 1,861 (11.4%) had warrants issued for their failure to appear.[10]

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[7] *Id. Appendix B.*

[8] Section 907.043(4)(b), F.S. requires the following:
1. The name, location, and funding sources of the pretrial release program, including the amount of public funds, if any, received by the pretrial release program. 2. The operating and capital budget of each pretrial release program receiving public funds. 3. The percentage of the pretrial release program's total budget representing receipt of public funds; the percentage of the total budget which is allocated to assisting defendants obtain release through a nonpublicly funded program; the amount of fees paid by defendants to the pretrial release program. 4. The number of persons employed by the pretrial release program. 5. The number of defendants assessed and interviewed for pretrial release. 6. The number of defendants recommended for pretrial release. 7. The number of defendants for whom the pretrial release program recommended against nonsecured release. 8. The number of defendants granted nonsecured release after the pretrial release program recommended nonsecured release. 9. The number of defendants assessed and interviewed for pretrial release who were declared indigent by the court. 10. The name and case number of each person granted nonsecured release who: failed to attend a scheduled court appearance; was issued a warrant for failing to appear; was arrested for any offense while on release through the pretrial release program; and any additional information deemed necessary by the governing body to assess the performance and cost efficiency of the pretrial release program.

[9] *Pretrial Release Programs' Data Collection Methods and Requirements Could Improve;* OPPAGA Report issued December 2010, page 3.

[10] *Id.* page 4. See also Appendix A.

It should be noted that because of the ambiguity in the statutory language, persons who were arrested for failure to appear might be counted in both of the two categories this question is meant to analyze: a warrant may have been issued for failure to appear *and* the person may have been *arrested* on that warrant for failure to appear.

Are pretrial release programs complying with statutory reporting requirements? Apparently because of the ambiguous and problematic statutory language (discussed above), OPPAGA has had challenges collecting the data that Office needs to complete a thorough analysis.

All of the data elements do not apply to all of the programs. There is variation among the county programs in areas such as whether the program selects its participants, whether the program makes release recommendations to the court, or even whether pretrial services personnel attend First Appearance. Therefore, data elements like 'the number of defendants recommended for pretrial release'[11] simply may not have a response.

Another problem encountered in the reporting process has been the restrictions by federal law on public access to national criminal history records and the Florida Department of Law Enforcement's determination that the statute cannot authorize the dissemination of that information. This restriction resulted in most programs not providing the criminal history information required by s. 907.043(3)(b)7., F.S.[12]

OPPAGA suggested several possibilities to assist the programs in reporting and allowing OPPAGA to compile a more complete report each year. The OPPAGA report suggests statutory revisions that should lead to better data reporting and analysis in the future if they are enacted. It should be remembered, however, that the county pretrial release programs cannot be directly compared to other pretrial release options (bond and ROR) without comparative data on those other release options.[13]

Determination of Indigency

In Florida, a person who is arrested and before the court at First Appearance is likely to have the public defender appointed to represent he or she, if only temporarily for the purposes of the First Appearance hearing, unless the arrest is on a minor misdemeanor offense which is unlikely to result in a loss of liberty.

With the defendant placed under oath, a court generally inquires about whether the defendant can afford to hire a lawyer, and may question the defendant regarding employment and property ownership. If the court is satisfied that the defendant is most likely indigent based upon the answers given, an application seeking appointment of the public defender is signed by the defendant at that time. Some jurisdictions may complete the application process in a different manner, but if the defendant is incarcerated it is the responsibility of the public defender to assist the defendant in the application process.[14]

[11] s. 907.043(4)(b)6., F.S.
[12] OPPAGA Report 10-66, page 4.
[13] *Id.* page 4-6 See also Appendix D.
[14] s. 27.52(1), F.S.

The application seeking appointment of the public defender is submitted to the clerk of the court, with a $50 application fee, for verification of the information required in the application.[15] The clerk also considers the following:

- A person is indigent if the applicant's income is equal to or below 200 percent of the then-current federal poverty guidelines prescribed for the size of the household of the applicant by the United States Department of Health and Human Services or if the person is receiving Temporary Assistance for Needy Families-Cash Assistance, poverty-related veterans' benefits, or Supplemental Security Income (SSI).
- There is a presumption that the applicant is not indigent if the applicant owns, or has equity in, any intangible or tangible personal property or real property or the expectancy of an interest in any such property having a net equity value of $2,500 or more, excluding the value of the person's homestead and one vehicle having a net value not exceeding $5,000.
- The clerk conducts a review of the property records for the county in which the applicant resides and the motor vehicle title records of the state to identify any property interests of the applicant.[16]

The clerk then determines whether the applicant is indigent or not indigent. The determination of indigent status is a ministerial act of the clerk and not a decision based on further investigation or the exercise of independent judgment by the clerk. The clerk may contract with third parties to perform functions assigned to the clerk by Florida Statute.[17]

As previously mentioned, if the clerk of the court has not made a determination of indigent status at the time a person requests appointment of a public defender, most likely at First Appearance or possibly Arraignment, the court shall make a preliminary determination of indigent status, pending further review by the clerk, and may, by court order, appoint a public defender, the office of criminal conflict and civil regional counsel, or private counsel on an interim basis.[18]

The Florida Rules of Criminal Procedure define indigency and set forth the procedures the court must follow in appointing counsel to represent the indigent.

> "Indigent" shall mean a person who is unable to pay for the services of an attorney, including costs of investigation, without substantial hardship to the person or the person's family; "partially indigent" shall mean a person unable to pay more than a portion of the fee charged by an attorney, including costs of investigation, without substantial hardship to the person or the person's family.
>
> Before appointing a public defender, the court shall: (A) inform the accused that, if the public defender or other counsel is appointed, a lien for the services rendered by counsel may be imposed as provided by law; (B) make inquiry into the financial status of the accused in a manner not inconsistent with the guidelines established by section 27.52, Florida Statutes. The accused shall respond to the inquiry under oath; (C) require the

[15] s. 27.52(1)(a), F.S.
[16] s. 27.52(2)(a), F.S.
[17] s. 27.52(2)(d), F.S.
[18] s. 27.52(3), F.S.

accused to execute an affidavit of insolvency as required by section 27.52, Florida Statutes.[19]

Indigency is not a requirement for participation in Florida's pretrial release programs.

III. Effect of Proposed Changes:

Senate Bill 372 creates an undesignated new section of Florida Statutes that would implement statutory eligibility criteria for defendants admitted to the county pretrial release programs.

The bill sets forth a state policy that only indigent defendants who qualify for the appointment of the public defender are eligible for participation in pretrial release programs.

The policy that private entities be used to assist defendants in pretrial release, to the greatest possible extent, is also set forth in the bill.

The bill expresses the intent of the Legislature that the bill not be interpreted to restrict courts from placing reasonable conditions on a defendant who is being released from custody by the court.

The state requires locally-created pretrial release programs to adhere to the indigency eligibility requirement of the bill and preempts all conflicting local ordinances, practices, or (court) orders.

The court must find a defendant indigent, in writing, pursuant to the procedures set forth in Florida Rule of Criminal Procedure 3.111, and order that the defendant is eligible to participate in a pretrial release program.

The bill prohibits interference by a pretrial release program when a defendant seeks to post a surety bond set forth in a predetermined bond schedule. This is generally an option at the jail prior to First Appearance, in limited cases. Some pretrial release programs have personnel at local jails during the night performing intake and interviews of people who are arrested.

The bill clarifies that the court is not prohibited from releasing a defendant from custody with or without any reasonable conditions of release.

The bill declares that a county may reimburse a licensed surety agent for the costs of a bail bond that secures the appearance of the defendant at all court proceedings - if the court establishes a bond amount for an indigent defendant – in lieu of using a "governmental program" to ensure the defendant's appearance.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

[19] Rule 3.111(b)(4)-(5), Fl.R.Crim.P.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The Demand For Private Surety Bond Services Will Likely Increase
Since current local pretrial release programs in this state are available to defendants regardless of their financial status, this bill will likely increase the number of pretrial detainees who pay for a commercial bond in order to be released from jail. Consequently, bail bondsmen are likely to see an increase in revenue if the bill becomes law.

More Non-Indigent Defendants Will Pay the Private Sector Rather Than the Public Sector For Release from Jail
Non-indigent defendants who were previously eligible for a local pretrial release program will not be eligible under the bill and must post a commercial bond to be released from jail. If these non-indigent defendants are unable to post a bond, then they will remain incarcerated until the disposition of their criminal charges. For those defendants who do post a bond, insufficient information on the cost of bonds, participant fees, and program costs makes it difficult to ascertain whether the total costs to the affected defendants will be higher or lower as a result of this bill.

Vendors Who Provide Supervision Services to Pretrial Release Participants Will Lose Revenue
Six of the 28 pretrial release programs contract with vendors for GPS and electronic monitoring, drug and alcohol testing, kiosk reporting, and other services rendered to defendants.[20] These services are fully or partially supported by program participant fees. If this bill passes and the eligibility criteria for the pretrial release program is narrowed to only indigents, these contractual services will likely decline because the sheer number of participants will be less and because indigent defendants will be less likely to afford these types of supervision and support services.

It should be noted that bondsmen are not required to supervise defendants but have a vested interest in making sure their clients keep their court dates and do not abscond. Judges in many circuits require defendants who post bond to also be supervised by a

[20] Program Survey Responses from 2010 OPPAGA Annual Report. Counties include: Alachua, Broward, Charlotte, Escambia, Orange, and Osceola.

pretrial release program and receive these contractual services as an added layer of accountability. Effective pretrial release programs supervise the defendants and decrease the likelihood of reoffending and enhance public safety. If this bill passes and the eligibility criteria for the pretrial release program is narrowed to indigents, this additional layer of accountability and public safety will not be available to the judge for those non-indigent defendants.

C. Government Sector Impact:

All of the state's pretrial release programs are funded from county funds, grants, and participant fees. According to OPPAGA, the pretrial release program budgets vary greatly, ranging from $60,000 in Bay County to $5.3 million in Broward County. None of the 28 programs in Florida receive state general revenue. Consequently, there is no direct fiscal impact from the state's perspective. However, county governments anticipate an indeterminant but significant negative fiscal impact if this bill becomes law.

Jail Population May Be Impacted
According to OPPAGA, jail population and occupancy rates vary widely throughout the state and there appears to be no correlation between a counties' occupancy rate and whether or not they have a local pretrial release program. The potential impact of this bill on the states' local jail population is difficult to predict in any scientific way or with any measure of certainty because of a multitude of factors. As a result of this bill, some defendants who are ineligible to participate in pretrial release programs will instead have to post a bond to gain pretrial release. Some defendants will have the ability to immediately post a bond. Others may ultimately post a bond, but may spend additional time in jail while accumulating the funds to do so. For these reasons, counties may see an increase in their jail population and need for jail beds. The potential jail impact is indeterminant and highly dependent upon what portion of the non-indigent defendants have the resources to post bond and how long they stay in jail until they are able to make the financial arrangements for their release.

On April 15, 2010, the Criminal Justice Impact Conference (CJIC) determined that Senate Bill 782 from the 2010 Session, which is similar to this bill, would have an indeterminate prison bed impact on the Department of Corrections. CJIC commented that the state prison bed impact was based on an anticipated increase in the county jail population, which they found was also indeterminate. This bill, SB 372, has yet to be scheduled for a CJIC.

According to the Association of Counties, all of the 28 pretrial release programs in the state serve non-indigent defendants.[21] It can be expected that the greatest impact from this bill may be experienced in the counties that have pretrial programs who admit a large percentage of non-indigents like Okaloosa, Broward and Sarasota.

[21] The percentage of pretrial release participants who are non-indigent varies from program to program, with a high of 56% in Sarasota to a low of 10% in Escambia.

It is important to note that the Pasco County jail population did not increase after it abolished its pretrial program in February of 2009.[22] Advocates of this bill point to the Pasco County experience as an indicator that this bill will not cause an increase in the county jail population. Despite the Pasco County experience, the counties and some representatives from law enforcement predict that this bill could potentially lead to an indeterminant but significant number of more pretrial detainees remaining incarcerated for longer periods of time in the local jail.

Collection of Participant Fees That Support Pretrial Program Budgets and Provide Support and Surveillance Services Will Decline

Of the 28 local pretrial release programs in Florida, twelve[23] charge fees to program participants to support program budgets and to pay vendors for services to defendants, primarily electronic monitoring. If this bill becomes law, it is estimated that the number of participants in the pretrial release program will decline and the collection of fees associated with their participation will be substantially reduced since the remaining indigent defendants will be less likely to be able to pay such fees.

D. Other Constitutional Issues:

There is a delicate balance between the power of the courts and the power of the Legislature in matters such as pretrial detention and release, as evidenced by the 2000 Legislature's amendments to s. 907.041, F.S., and the events that followed.

In 2000, the Legislature amended s. 907.041, F.S., to insert the following pertinent paragraphs, and also repealed certain inconsistent Rules of Procedure:

> (3)(b) No person shall be released on nonmonetary conditions under the supervision of a pretrial release service, unless the service certifies to the court that it has investigated or otherwise verified:
> 1. The circumstances of the accused's family, employment, financial resources, character, mental condition, and length of residence in the community;
> 2. The accused's record of convictions, of appearances at court proceedings, of flight to avoid prosecution, or of failure to appear at court proceedings; and
> 3. Other facts necessary to assist the court in its determination of the indigency of the accused and whether she or he should be released under the supervision of the service. …
>
> (4)(b) No person charged with a dangerous crime shall be granted nonmonetary pretrial release at a first appearance hearing; however, the court shall retain the discretion to release an accused on electronic monitoring or on recognizance bond if the findings on the record of facts and circumstances warrant such a release.

In *State v. Raymond*, the defendant qualified for nonmonetary release to pretrial services because she had no prior offenses, but because she was charged with domestic violence

[22] OPPAGA Report, Pretrial Release Programs, Pasco County's Jail Population
[23] OPPAGA Program Survey Responses from 2010 Annual Report. Twelve counties include: Alachua, Broward, Charlotte, Citrus, Escambia, Leon, Okaloosa, Orange, Osceola, Palm Beach , Santa Rosa, and St. Lucie.

the court could not release her under s. 907.041(4)(b), F.S., (2000) *at first appearance*. The Supreme Court found that by enacting s. 907.041(4)(b), F.S., "which is *a rule of procedure* affecting the *timing* of a defendant's eligibility for pretrial release," the Legislature had encroached upon the court's power, by "imposing a new procedural rule."[24] The Court then temporarily readopted the Rules and then stated: "We are particularly concerned that we be fully informed as to the policy concerns of the Florida Legislature before we take any final action on these rules. For that reason, we expressly invite the Legislature to file comments particularly addressing the policy concerns that the Legislature was attempting to address by enacting section 907.041(4)(b)."[25]

Subsequently, during the Court's rulemaking process to fill the void left by the rules that had been repealed, the House of Representatives issued an official comment indicating the reasoning behind the Legislature's passage of 2000-178, Laws of Florida. The stated purpose was to *delay the release* of persons (on nonmonetary conditions) to pretrial release programs until the certification process required in s. 907.041(3)(b), F.S., could be completed.[26]

The court took the House's comment and the plain language of the statute, and amended the Rule regarding pretrial release to read:

> No person charged with a dangerous crime as defined in section 907.041(4)(a), Florida Statutes, shall be released on nonmonetary conditions under the supervision of a pretrial release service, unless the service certifies to the court that it has investigated or otherwise verified the conditions set forth in section 907.041(3)(b), Florida Statutes.[27]

Although it does not appear that Senate Bill 372 encroaches upon the rulemaking authority of the court, as was the case in the 2000 amendments to this section of law, it is not that clear that requiring a person to be indigent in order to qualify for a local pretrial release program will necessarily escape constitutional scrutiny. A person who is unable to be released from jail to a pretrial release program because he is not indigent (although otherwise qualifying under the statute) may raise an Equal Protection challenge.

VI. Technical Deficiencies:

The bill is unclear as to the role of the clerk of the court in the declaration of indigency procedures going forward. It appears that the intent of the bill is that the onus be on the court to find a person indigent pursuant to the applicable court rule, for purposes of pretrial release determinations. If it is the intent that the court's (First Appearance) determination be the final order on the matter, that needs to be clarified. If it is the bill's intent that a preliminary or temporary finding of indigency by the court at First Appearance will suffice for the "court order" as required for pretrial release program participation, that, too, needs clarification.

[24] *State v. Raymond*, 906 So.2d 1045 (Fla. 2005).
[25] *Id.* at 1051.
[26] *In re Florida Rules of Criminal Procedure 3.131 and 3.132*, 948 So.2d 731, 733 (Fla. 2007).
[27] *Id.* and Florida Rule of Criminal Procedure 3.131(b)(4).

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate	.	House
Comm: WD	.	
03/21/2011	.	
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The Committee on Criminal Justice (Dockery) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Section 414.145, Florida Statutes, is created to read:

414.145 Drug-screening program.—

(1) The Department of Children and Family Services, shall require a drug test consistent with s. 112.0455 to screen each individual that applies for Temporary Assistance to Needy Families (TANF) or Supplemental Nutrition Assistance Program (SNAP). The cost of drug testing shall be the responsibility of

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the individual.

(a) Individuals subject to the requirements of this section include any parent or caretaker relative who is included in the cash assistance group, including individuals who may be exempt from work activity requirements due to the age of the youngest child or who may be excepted from work activity requirements under s. 414.065(4).

(b) Individuals who test positive for controlled substances as a result of a drug test required under this law will be ineligible to receive TANF or SNAP benefits for one year.

(2) Procedures for the Department of Children and Family Services shall:

(a) Provide notice of drug testing to each individual at the time of application. The notice must advise the individual that drug testing will be conducted as a condition for receiving TANF or SNAP benefits, and that the individual must bear the cost of testing. The individual shall be advised that the required drug testing may be avoided if the individual does not apply for TANF or SNAP benefits. Children under the age of 18 shall be exempt from the drug-testing requirement.

(b) Require that for two-parent families, both parents must comply with the drug testing requirement.

(c) Advise each person to be tested, before the test is conducted, that he or she may, but is not required to, advise the agent administering the test of any prescription or over-the-counter medication he or she is taking.

(d) Require each person to be tested to sign a written acknowledgment that he or she has received and understood the notice and advice provided under paragraphs (a) and (c).

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(e) Assure each person being tested a reasonable degree of dignity while producing and submitting a sample for drug testing, consistent with the state's need to ensure the reliability of the sample.

(f) Specify circumstances under which a person who fails a drug test has the right to take one or more additional tests.

(g) Individuals who test positive for controlled substances and are deemed ineligible for TANF or SNAP benefits may re-apply for those benefits one year after the date of the positive drug test. If the individual tests positive again, he or she shall be ineligible to receive TANF or SNAP benefits for three years from the date of the second positive drug test.

(h) Provide any individual who tests positive with information concerning substance abuse treatment programs that may be available in the area in which he or she resides. Neither the department nor the state is responsible for providing or paying for substance abuse treatment as part of the screening conducted under this section.

(3) Benefits relating to children:

(a) If a parent is deemed ineligible for TANF or SNAP benefits due to the failure of a drug test under this act, his or her dependent child's eligibility for TANF or SNAP benefits is not affected.

(b) If a parent is deemed ineligible for TANF or SNAP benefits due to the failure of a drug test, an appropriate protective payee will be established for the benefit of the child.

(c) The parent may choose to designate another individual to receive benefits for the parent's minor child. The designated

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individual must be an immediate family member or, if an immediate family member is not available or the family member declines the option, another individual, approved by the department, may be designated. The designated individual must also undergo drug testing before being approved to receive benefits on behalf of the child. If the designated individual tests positive for controlled substances, he or she will be deemed ineligible to receive benefits on behalf of the child.

(4) The Department of Children and Families shall adopt rules as necessary to implement this law.

Section 2. This act shall take effect on July 1, 2011.

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

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating Temporary Assistance to Needy Families; creates s. 414.145 F.S.; requiring the Department of Children and Families to perform a drug test on individuals who apply for Temporary Assistance for Needy Families or Supplemental Nutrition Assistance Program benefits; makes individuals responsible for bearing the cost of drug testing; requiring certain notice; providing procedures for testing, and retesting; providing for notice of local substance abuse programs; providing that, if a parent is deemed ineligible due to a failure of a drug test,

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the eligibility of the children will not be affected;
providing an effective date.

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LEGISLATIVE ACTION

Senate . House

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Section 1. Section 414.145, Florida Statutes, is created to read:

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(a) Individuals subject to the requirements of this section include any parent or caretaker relative who is included in the cash assistance group, including individuals who may be exempt from work activity requirements due to the age of the youngest child or who may be excepted from work activity requirements under s. 414.065(4).

(b) Individuals who test positive for controlled substances as a result of a drug test required under this law will be ineligible to receive TANF benefits for one year.

(2) The Department of Children and Family Services shall:

(a) Provide notice of drug testing to each individual at the time of application. The notice must advise the individual that drug testing will be conducted as a condition for receiving TANF benefits, and that the individual must bear the cost of testing. The individual shall be advised that the required drug testing may be avoided if the individual does not apply for TANF benefits. Children under the age of 18 shall be exempt from the drug-testing requirement.

(b) Require that for two-parent families, both parents must comply with the drug testing requirement.

(c) Advise each person to be tested, before the test is conducted, that he or she may, but is not required to, advise the agent administering the test of any prescription or over-the-counter medication he or she is taking.

(d) Require each person to be tested to sign a written acknowledgment that he or she has received and understood the notice and advice provided under paragraphs (a) and (c).

(e) Assure each person being tested a reasonable degree of dignity while producing and submitting a sample for drug

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testing, consistent with the state's need to ensure the reliability of the sample.

(f) Specify circumstances under which a person who fails a drug test has the right to take one or more additional tests.

(g) Inform individuals who test positive for controlled substances and are deemed ineligible for TANF benefits that they may re-apply for those benefits one year after the date of the positive drug test. If the individual tests positive again, he or she shall be ineligible to receive TANF benefits for three years from the date of the second positive drug test.

(h) Provide any individual who tests positive with information concerning substance abuse treatment programs that may be available in the area in which he or she resides. Neither the department nor the state is responsible for providing or paying for substance abuse treatment as part of the screening conducted under this section.

(3) Benefits relating to children:

(a) If a parent is deemed ineligible for TANF benefits due to the failure of a drug test under this act, his or her dependent child's eligibility for TANF benefits is not affected.

(b) If a parent is deemed ineligible for TANF benefits due to the failure of a drug test, an appropriate protective payee will be established for the benefit of the child.

(c) The parent may choose to designate another individual to receive benefits for the parent's minor child. The designated individual must be an immediate family member or, if an immediate family member is not available or the family member declines the option, another individual, approved by the department, may be designated. The designated individual must

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also undergo drug testing before being approved to receive benefits on behalf of the child. If the designated individual tests positive for controlled substances, he or she will be deemed ineligible to receive benefits on behalf of the child.

(4) The Department of Children and Families shall adopt rules as necessary to implement this law.

Section 2. This act shall take effect on July 1, 2011.

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

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating Temporary Assistance to Needy Families; creates s. 414.145 F.S.; requiring the Department of Children and Families to perform a drug test on individuals who apply for Temporary Assistance for Needy Families benefits; makes individuals responsible for bearing the cost of drug testing; requiring certain notice; providing procedures for testing, and retesting; providing for notice of local substance abuse programs; providing that, if a parent is deemed ineligible due to a failure of a drug test, the eligibility of the children will not be affected; providing an effective date.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL:	SB 556
INTRODUCER:	Senators Oelrich, Dockery, and Garcia
SUBJECT:	Drug Screening/Beneficiaries/Temporary Assistance
DATE:	March 17, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Pre-meeting**
2.			BC	
3.				
4.				
5.				
6.				

I. Summary:

The bill creates s. 414.0652, F.S. establishing that the Department of Children and Families (DCF) shall create a drug screening program for temporary cash assistance applicants as a condition of eligibility. The program must be implemented no later than July 1, 2012. The bill provides the following:

- Applicants who have been convicted of a drug felony in the previous 3 years shall be drug screened and upon receiving cash assistance the individual will be screened for an additional 3 years.
- Applicants that fail the drug screen shall be disqualified from receiving temporary cash assistance for 3 years. However, the applicant or DCF may designate another individual to receive the cash assistance benefits on behalf of a minor child.
- The methods of drug screening and confirmatory testing, including policies and procedures for specimen collection, testing, storage and transportation are detailed in the bill. DCF shall solicit competitive bids for drug screening and confirmatory screening services to ensure the lowest costs. The cost of screening and confirmatory testing shall be paid by the individual applicant.
- DCF shall provide any individual who tests positive for drugs with information concerning drug abuse and treatment programs in the area in which he or she resides. The bill specifies that neither DCF nor the state is responsible for providing or paying for substance abuse treatment as part of screening under this section.
- The drug screening program shall be implemented no later than July 1, 2012.

- DCF is required to submit an annual report to the Speaker of the House of Representatives, the President of the Senate, and the Governor by January 1, 2013.

The bill provides an effective date of July 1, 2011.

This bill substantially amends section 414.095, F.S., and creates section 414.0652, F.S.

II. Present Situation:

Temporary Assistance for Needy Families (TANF)
Under the welfare reform legislation of 1996, the Personal Responsibility and Work Opportunity Reconciliation Act – PWRORA – Public Law 104-193, the Temporary Assistance for Needy Families (TANF) program replaced the welfare programs known as Aid to Families with Dependent Children (AFDC), the Job Opportunities and Basic Skills Training (JOBS) program and the Emergency Assistance (EA) program.

The law ended federal entitlement to assistance and instead created TANF as a block grant that provides States, territories and tribes federal funds each year. These funds cover benefits, administrative expenses, and services targeted to needy families.

TANF became effective July 1, 1997, and was reauthorized in February 2006 under the Deficit Reduction Act of 2005.[1] States receive block grants to operate their individual programs and to accomplish the goals of the TANF program. Those goals include:

- Assisting needy families so that children can be cared for in their homes;
- Reducing the dependency of needy parents by promoting job preparation, work, and marriage;
- Preventing out-of-wedlock pregnancies;
- Encouraging the formation and maintenance of two-parent families.[2]

Currently, DCF administers the TANF program in conjunction with the Agency for Workforce Innovation (AWI). Current law provides that families are eligible for cash assistance for a lifetime cumulative total of 48 months (4 years).[3] DCF reports that approximately 113,346 people are receiving temporary cash assistance.[4] The FY 2010-2011 appropriation of TANF funds to support temporary cash assistance was $211,115,965.

The TANF program expires on September 30, 2011, and must be reauthorized by Congress to continue.

[1] US Dept. of Health and Human Services, Administration on Children and Families http://www.acf.hhs.gov/programs/ofa/tanf/about.html (last visited on 2/15/11).
[2] *Id*
[3] s. 414.105, F.S.
[4] DCF Quick Facts, Access Program, January 1, 2011.

Food Assistance Program (Supplemental Nutrition Assistance Program -SNAP)
The Food Assistance Program is a 100 percent federally funded program to help low-income people buy food they need for good health. The U.S. Department of Agriculture (USDA) determines the amount of food assistance benefits an individual or family receives. Food assistance benefits are a supplement to a family's food budget. Households may need to spend some of their own cash, along with their food assistance benefits, to buy enough food for a month.[5] DCF reports that over 1.9 million Floridians received food assistance during fiscal year 2009-10.[6]

Pilot Project for Drug Testing TANF Applicants
From January 1999 to May 2001, DCF in consultation with Workforce Florida implemented a pilot project in Regions 3 and 8 to drug screen and drug test applicants for TANF.[7] A Florida State University researcher under contract to evaluate the pilot program did not recommend continuation or statewide expansion of the project. Overall research and findings concluded that there is very little difference in employment and earnings between those who test positive versus those who test negative. Researchers concluded that the cost of the pilot program was not warranted.

Sanctions to Welfare and Food Assistance Recipients Resulting from Felony Drug Convictions
Federal law provides that an individual convicted (under federal or state law) of any offense which is classified as a felony related to the possession, use or distribution of a controlled substance shall not be eligible for assistance under the TANF program or benefits under the food stamp program or any program carried out under the Food and Nutrition Act of 2008.[8]

The same section of Federal law provides that each state has the right to exempt individuals from having benefits withheld due to a felony drug charge.[9] Florida has opted to exempt individuals from this provision and does not deny benefits for a felony drug conviction, unless the conviction is for drug trafficking.[10]

Drug Testing Welfare and Food Assistance Recipients
Federal law regarding the use of TANF funds provides that states may test welfare recipients for use of controlled substances and sanction those recipients who test positive.[11] However, there is no provision in federal law allowing drug testing recipients of the food assistance program. Further the Federal code provides that states cannot, as a condition of eligibility, impose additional application or application processing requirements on recipients of the food assistance program.[12]

[5] Food Assistance Program Fact Sheet, DCF http://www.dcf.state.fl.us/programs/access/foodstamps.shtml (last visited 3/3/11).
[6] DCF Quick Facts, Access Program, January 1, 2011
[7] Evaluation Report, Robert E. Crew, Florida State University (on file with House committee staff).
[8] P.L. 104-193, Section 115, 42 U.S.C. 862(a)
[9] *Id*
[10] s. 414.095, F.S.
[11] P.L. 104-193, Section 902, 21 U.S.C. 862(b)
[12] 7 CFR Part 273.2

Protective Payees
The TANF program requires that people receiving cash assistance must satisfy work requirements established in federal law. Florida statutes provide that the Agency for Workforce Innovation develop specific activities that satisfy the work requirements.[13]

In the event that a TANF recipient is noncompliant with the work activity requirements, DCF has authority to terminate cash assistance to the family.[14] In the event that assistance is terminated, DCF will establish a protective payee that will receive TANF funds on behalf of any children in the home who are under the age of 16.[15] The protective payee shall be designated by DCF and may include:[16]

- A relative or other individual who is interested in or concerned with the welfare of the child or children and agrees in writing to utilize the assistance in the best interest of the child or children.
- A member of the community affiliated with a religious, community, neighborhood, or charitable organization who agrees in writing to utilize the assistance in the best interest of the child or children.
- A volunteer or member of an organization who agrees in writing to fulfill the role of protective payee and utilize the assistance in the best interest of the child or children.

Agency for Health Care Administration – Laboratory Certifications
The Agency for Health Care Administration (AHCA) regulates facilities that perform clinical, anatomic, or cytology lab services to provide information or materials for use in diagnosis, prevention or treatment of a disease or in the identification or assessment of a medical or physical condition in accordance with Chapter 408 and 483, F.S. These are considered clinical labs.

Additionally, AHCA regulates facilities for "Drug Free Workplaces." These types of labs perform chemical, biological or physical instrumental analyses to determine the presence or absence of specified drugs or their metabolites in job applicants of any agency in state government.[17] AHCA does not have the authority to drug screen temporary cash assistance benefits in either of these labs.

Department of Health and Human Services Division of Workplace Programs
The United States Department of Health and Human Services (HHS), Substance Abuse and Mental Health Services Administration (SAMHSA), Division of Workplace Programs (DWP) provide oversight for the Federal Drug Free Workplace Program. DWP certifies labs that conduct forensic drug testing for federal agencies and for some federally-regulated industries.[18]

[13] s. 445.024, F.S.
[14] s. 414.065, F.S.
[15] *Id*
[16] *Id*
[17] Chapter 408, F.S.
[18] *Id*

III. Effect of Proposed Changes:

The bill creates s. 414.0652, F.S., providing that DCF will create a drug screening program that requires individuals who have been convicted of a felony drug offense within the prior three years to consent to being drug screened as a condition of eligibility for temporary cash assistance.

The program shall be implemented by July 1, 2012. DCF must provide notice of the potential of drug screening to all applicants and shall require an applicant to sign an acknowledgement form that he or she has received notice of DCF's drug screen policy and that he or she can refuse to undergo the screen.

Drug Screening Process
Individuals will only be screened if they have been convicted of a drug felony within the prior 3 years, and will continue to be screened for 3 years after they begin to receive TANF funds.

The bill provides that an individual will be disqualified from receiving or continuing to receive TANF benefits if:

- They refuse to submit to a drug screen or confirmatory test under this section.
- They test positive for drugs as a result of a confirmation test.

In the event that an individual fails a confirmation test they will be ineligible for TANF benefits for 3 years. The bill establishes that in the event the individual has minor children, the individual can designate an immediate family member or another individual approved by DCF to receive funds on behalf of the children. The designated individual may not have been convicted of a drug felony within the past 3 years.

DCF shall provide an individual who tests positive for drugs information concerning substance abuse treatment programs that may be available in their area. Neither DCF nor the state is responsible for providing or paying for substance abuse treatment for these individuals as part of the screening conducted in this section of law.

Applicants for cash assistance shall be responsible for the cost of both the initial drug screen and the confirmatory test (if needed). DCF is required to solicit competitive bids for drug screening and confirmatory testing to ensure the lowest possible cost. DCF estimates the initial screening cost at $10 per person and the confirmatory test at $25 per person.[19]

The bill modifies language from s. 414.095, F.S., establishing that benefits shall not be denied to food assistance recipients unless they are convicted of drug trafficking pursuant to s. 893.135, F.S.

[19] Per DCF bill analysis, February 8, 2011 (on file with the Senate Criminal Justice Committee).

Definitions
The bill provides definitions for the following:

- Confirmation Test or Confirmatory Testing
- Drug
- Drug Screening or Screen
- Initial Drug Screening or Initial Screen
- Nonprescription Medication
- Prescription Medication
- Specimen
- Applicants and Recipients

Specimen Collection
The bill details the use of results from specimen collection, requiring:

- That the individual to be screened or tested must provide written consent to be screened or tested on a form developed by DCF.
- A specimen shall be collected with due regard to the privacy of the individual providing the specimen and in a manner to prevent substitution or contamination of the specimen.

Specimen collection must be documented and should adhere to the following procedures:

- Labeling of specimen containers to preclude erroneous identification of drug screen or confirmation results.
- A form on which the individual being tested can provide any information that he/she feels is relevant to the screen, including prescription or non-prescription medications that are currently or were recently used. The form must provide notice of the most common medications by brand name or common name and by chemical name which may alter or affect a drug screen or confirmation test.

Specimen collection, storage, and transportation to the testing site must be performed in a manner that reasonably precludes contamination of the specimen as specified in DCF policies and procedures for this section. Additionally, the specimen that produces a positive screen or positive test result must be preserved for a certain period of time as established by the department's policies and procedures.

Mandated Report
The bill requires DCF to submit a report detailing statistics from the program to the Governor, President of the Senate, and Speaker of the House by January 1, 2013.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

In a Michigan case welfare recipients sought an injunction to stop enforcement of a state statute authorizing suspicionless drug testing of applicants for and recipients of benefits. The U.S. District Court issued the temporary injunction and the State of Michigan appealed. The Circuit Court of Appeal overturned the District Court's ruling in 2003.[20] In doing so the court thoroughly analyzed the evidence presented by the state to show the state's "special need" for the suspicionless drug testing. The Court relied, in part, on the 2002 U.S. Supreme Court decision in *Board of Education v. Earls* that approved of drug testing of students who participate in extracurricular activities.[21]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill will have an impact on applicants who are required to undergo a drug screen or confirmation test as a condition of eligibility for temporary cash assistance funds. DCF estimates that the initial drug screen costs will be $10.00 per person and the confirmatory test will be $25.00 per person.[22] However, exact costs will not be known until DCF solicits competitive bids from private laboratories.

C. Government Sector Impact:

It is unknown whether the fiscal effect of this bill will be positive or negative for the state. Because of the bill's provision that a TANF applicant or recipient, who is a parent with a minor child, and who fails the drug screen, may designate another recipient on the child's behalf, it is less likely TANF funds would be "saved" in every case of a positive drug screen.

Currently, DCF does not drug screen any individual as a condition of eligibility for cash assistance. DCF estimates that between 170-340 people (based on current caseloads)

[20] *Marchwinski v. Howard*, 309 F.3d 330 (6th Cir. 2002).
[21] *Earls*, 122 S.Ct. 2559 (2002).
[22] DCF Bill Analysis on HB 353 (2/8/2011)

would test positive as a result of a drug screen, and that about 1.7 percent of current recipients would have a prior drug felony conviction.[23] These estimates may be low.

The Substance Abuse and Mental Health Administration, which is part of the U.S. Department of Health and Human Services found that 9.6 percent of people living in households that receive government assistance used illicit drugs (in the previous month) compared with a 6.8 percent rate among families who receive no assistance.[24]

As mentioned in the Present Situation section of the analysis, a drug-screening pilot project was conducted in the Jacksonville area and parts of Putnam County between 1999 and 2001. During the project, 8,797 applicants or recipients were tested. Of those 8,797 applicants who were tested, 335 applicants tested positive for a controlled substance. The Orlando Sentinel reported that the cost of the pilot project was $2.7 million.[25]

The bill states that neither the department nor the state is responsible for paying for substance abuse treatment for individuals as part of the screening conducted in this section. This could create problems for DCF when individuals who failed TANF drug screening seek help at a DCF-licensed substance abuse treatment facility or provider. It appears that DCF would need to establish a system to cross-reference those denied temporary cash assistance due to drug screening with those who are seeking substance abuse treatment. It is unknown at this time what the cost of developing such a cross-referencing system would be.

It is also suggested by the Department of Children and Families that certain changes would be necessary within its ACCESS database as a result of this bill.

VI. Technical Deficiencies:

Rule making authority is needed for DCF to implement the drug screening program.

Additionally, the definition of "drug" in the bill may be somewhat limiting to the intent of the bill being carried out. It is suggested that the term "controlled substance" be used and that the limiting list of drug types be deleted from the bill.

The term "drug felony" also needs to be revised. It is suggested that the term "felony violation of the provisions of Chapter 893" be used instead.

There has been a concern raised by the Department of Children and Families that the amendment made to s. 414.095, F.S., may create unintended consequences for the participants in the food assistance program known as SNAP.

[23] Email from Jennifer Lange on TANF (on file with House committee staff). Numbers and Statistics based on data from North Carolina, DCF has been in exchanges with the state as it relates to the bill and numbers of people who might be affected.
[24] *Should Welfare Recipients Get Drug Testing?*, Alan Greenblatt, www.npr.org, March 31, 2010.
[25] Orlando Sentinel editorial, *Our take on: Welfare drug tests*, October 30, 2010.

The Department of Children and Families has suggested some technical changes need to be made in order to conform terminology used in the bill with consistent terms used throughout Chapter 415.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL:	SB 608
INTRODUCER:	Senator Evers
SUBJECT:	Traffic Offenses
DATE:	March 14, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Spalla	TR	**Favorable**
2.	Dugger	Cannon	CJ	**Pre-Meeting**
3.			BC	
4.				
5.				
6.				

I. Summary:

The bill creates criminal penalties for operators of motor vehicles who commit moving traffic violations that cause serious bodily injury or death to a person riding in or on a motor vehicle or motorcycle.

A person who commits a moving violation that results in the serious bodily injury of a person riding in or on a motor vehicle or motorcycle is guilty of a second degree misdemeanor. In such cases, the bill requires the offender to pay a minimum of $500, serve a minimum of 30 days in jail, attend a driver improvement course, and have his or her driver's license suspended for a minimum of 30 days.

A person who commits a moving violation that results in the death of a person riding in or on a motor vehicle or motorcycle is guilty of a first degree misdemeanor. The bill requires these offenders to pay a minimum of $1,000, serve a minimum of 90 days in jail, attend an advanced driver improvement course, and have his or her driver's license suspended for a minimum of 1 year.

This bill creates section 318.195 of the Florida Statutes.

II. Present Situation:

Moving Violations, Generally

Under chapters 316 and 318, F.S., all moving violations are considered non-criminal infractions and are generally punishable by a fine as provided by s. 318.18, F.S. Moving violations include

such offenses as speeding, failure to stop at a stop sign or traffic control device, and improper lane change.[1] This section provides a baseline fine of $60 for all moving violations,[2] although county-by-county fees and surcharges raise the total amount paid. The section also provides tiered fines from $25 to $250 for moving violations involving excessive speed.[3]

Moving violations also typically result in points assessed against an operator's driver's license pursuant to s. 322.27(3)(d), F.S.

Penalties for Causing Death or Injury

Non-Criminal Violations
A mandatory hearing before the court is required for any infraction or criminal violation of chapter 316, F.S., which caused serious bodily injury or death.[4] Any person committing a traffic infraction causing death may be directed by a judge to perform 120 community service hours in a trauma center, pursuant to s. 316.027(4), F.S.[5]

For any traffic infraction or criminal offense causing death, injury, or property damage, the Department of Highway Safety and Motor Vehicles (DHSMV) may require re-examination of the offender's ability to drive. DHSMV may subsequently suspend the offender's license.[6] DHSMV may suspend an offender's license if the person refuses to submit to a re-examination. Refusal to submit to retesting is grounds to suspend the offender's license.[7] The court may suspend the driver's license for any criminal violation.[8]

Criminal Violations
For any criminal traffic offense causing death or an injury sufficient to require medical transport, the department shall mandate a driver-improvement course (in addition to any other applicable penalties). Failure to attend a driver improvement course results in cancellation of the offender's license until the course is completed.[9] If the criminal offense is murder, manslaughter, or a second DUI manslaughter conviction, the DHSMV shall revoke the offender's license.[10] License suspension for a manslaughter conviction may not be lifted unless the offender has completed a driver improvement or substance abuse program.[11]

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[1] *See generally* ch. 316, F.S.
[2] s. 318.18(3)(a), F.S.
[3] s. 318.18(3)(b), F.S.
[4] s. 318.19(1)-(2), F.S.
[5] The permissive 120 hours of community service are referenced twice in chapter 318, F.S.:
> **318.14(1), F.S.:** "If another person dies as a result of the noncriminal infraction, the person cited may be required to perform 120 community service hours under s. 316.027(4), in addition to any other penalties."
> **318.18(8)(c), F.S.:** "If the noncriminal infraction has caused or resulted in the death of another, the person who committed the infraction may perform 120 community service hours under s. 316.027(4), in addition to any other penalties."

[6] s. 322.221(2)(a), F.S.
[7] s. 322.221(3), F.S.
[8] s. 316.655(2), F.S.
[9] s. 322.0261(2), F.S.
[10] s. 322.26, F.S.(1)(a)-(b), F.S.
[11] s. 322.291(1)(a)3., F.S.

A person who commits the offense of reckless driving causing injury or death commits a third-degree felony, punishable separately from fines related to reckless driving.[12] If the court reasonably believes alcohol was involved, the court shall order the offender to attend a substance abuse program.[13]

An impaired driver who causes an accident involving injury or death commits a third-degree felony, punishable separately from the potential fine and/or incarceration related to the DUI.[14]

A person driving without a valid license who negligently causes an accident involving death or serious bodily injury is guilty of a third-degree felony.[15]

III. Effect of Proposed Changes:

The bill creates s. 318.195, F.S., providing enhanced penalties for committing certain moving traffic violations.

A person who commits a moving violation resulting in the serious bodily injury of a person riding in or on a motor vehicle or motorcycle is guilty of a second degree misdemeanor. In such cases, the bill requires the offender to pay a minimum of $500, serve a minimum of 30 days in jail, attend a driver improvement course, and have his or her driver's license suspended for a minimum of 30 days.

A person who commits a moving violation resulting in the death of a person riding in or on a motor vehicle or motorcycle is guilty of a first degree misdemeanor. The bill requires these offenders to pay a minimum of $1000, serve a mandatory minimum of 90 days in jail, attend an advanced driver improvement course, and have his or her driver's license suspended for a minimum of 1 year.

The bill states s. 318.195, F.S., does not prohibit a person from being charged with, convicted of, or punished for any other violation of the law.

The bill shall take effect July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

[12] s. 316.192(3)(c)2., F.S.
[13] s. 316.192(5), F.S.
[14] s. 316.193(3)(c)2., F.S.
[15] s. 322.34(6)(a)-(b), F.S. In a related offense, if a person knowingly loans a vehicle to a person whose license is suspended, and the borrower causes death or injury, the owner's license is suspended for one year (s. 322.36, F.S.).

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Drivers who commit a moving traffic violation resulting in the serious bodily injury or death of a person riding in or on a motor vehicle or motorcycle will be subject to the sanctions outlined in s. 318.195, F.S.

Criminalizing previously non criminal conduct would likely invoke application of criminal protections afforded citizens, including the right to counsel, formal arraignment, sentencing by a judge as opposed to a magistrate, and increased involvement of state prosecutors. The fiscal impact of these factors is unknown.

C. Government Sector Impact:

The bill may generate an indeterminate amount of revenue from fines for the behaviors criminalized by the bill.

Criminalizing previously non criminal conduct would likely invoke application of criminal protections afforded citizens, including the right to counsel, formal arraignment, sentencing by a judge as opposed to a magistrate, and increased involvement of state prosecutors. The fiscal impact of these factors is unknown.

The bill also may have an impact on local jail populations.

According to DHSMV, programming modifications of approximately 150 hours will be required in order to implement the provisions of this bill; however, this cost will be absorbed within existing resources.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill criminalizes moving violations that result in an injury or death to persons in or on other motor vehicles and motorcycles, but does not criminalize identical behavior resulting in the injury or death of pedestrians, bicyclists, or persons on other means of conveyance. Punishment is based upon the particular classification of the victim as opposed to the conduct or intent of the violator. This lack of uniformity could result in challenges to the validity of the bill.

Regardless of potential mitigating circumstances, absence of the violator's culpability or contributory actions on the part of the victim, the bill does not allow any discretion in the judiciary by its imposition of a mandatory jail sentence on the violator.

The bill also deviates from the normal practice of not imposing criminal penalties for non criminal civil moving violations alone without additional showing of willful or wanton recklessness or intent to violate the law. (Such as driving under the influence, reckless driving, and fleeing law enforcement.)

The DHSMV has expressed concerns about the effective date of the bill allowing sufficient time for implementation to make necessary programming modifications. The DHSMV suggests an effective date of October 1, 2011.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

149122

LEGISLATIVE ACTION

Senate . House

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The Committee on Criminal Justice (Dockery) recommended the following:

Senate Amendment (with title amendment)

Delete lines 783 - 812

and insert:

(3)(a) A licensed pharmacist or other person employed by or at a pharmacy may not knowingly fail to timely report to the local county sheriff's office the name of any person who obtains or attempts to obtain a substance controlled by s. 893.03 which the licensed pharmacist or other person employed by or at the pharmacy knows or reasonably should have known was obtained or attempted to be obtained from the pharmacy through any fraudulent method or representation. A licensed pharmacist or

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other person employed by or at a pharmacy who fails to make such a report within 24 hours after learning of the fraud or attempted fraud commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(b) A sufficient report of the fraudulent obtaining of or attempt to obtain a controlled substance under this subsection must contain, at a minimum, a copy of the prescription used or presented and a narrative, including all information available to the pharmacy regarding:

1. The transaction, such as the name and telephone number of the prescribing physician;

2. The name, description, and any personal identification information pertaining to the person presenting the prescription; and

3. All other material information, such as photographic or video surveillance of the transaction.

A licensed pharmacist or other person employed by or at a pharmacy is not subject to disciplinary action for reporting under this subsection.

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

And the title is amended as follows:

Delete lines 98 - 100

and insert:

subterfuge; providing that a licensed pharmacist or other person employed by or at a pharmacy is not subject to disciplinary action for reporting;

439008

LEGISLATIVE ACTION

Senate . House

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The Committee on Criminal Justice (Dockery) recommended the following:

Senate Amendment

Delete lines 1629 - 1630
and insert:
(17) After the prescription drug monitoring program's database has been operational for 12 months, the State Surgeon General shall

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LEGISLATIVE ACTION

Senate . House

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The Committee on Criminal Justice (Dockery) recommended the following:

Senate Amendment (with title amendment)

Delete lines 1665 - 1670

and insert:

Section 22. Paragraph (a) of subsection (3) of section 893.0551, Florida Statutes, is amended, present subsections (4), (5), (6), and (7) of that section are redesignated as subsections (5), (6), (7), and (8), respectively, and a new subsection (4) is added to that section, to read:

893.0551 Public records exemption for the prescription drug monitoring program.—

(3) The department shall disclose such confidential and

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exempt information to the following entities after using a verification process to ensure the legitimacy of that person's or entity's request for the information:

(a) The Attorney General and his or her designee when working on Medicaid fraud cases and Medicaid investigations involving prescribed controlled substances ~~prescription drugs~~ or when the Attorney General has initiated a review of specific identifiers of Medicaid fraud or specific identifiers that warrant a Medicaid investigation regarding prescribed controlled substances ~~prescription drugs~~. The Attorney General or his or her designee may disclose the confidential and exempt information received from the department to a criminal justice agency as defined in s. 119.011 as part of an active investigation that is specific to a violation of prescription drug abuse or prescription drug diversion law as it relates to controlled substances. The Attorney General's Medicaid fraud investigators and Medicaid investigators may not have direct access to the department's database.

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

And the title is amended as follows:

Delete line 173

and insert:

893.0551, F.S.; requiring the Department of Health to disclose confidential and exempt information pertaining to the prescription drug monitoring program to the Attorney General and designee when working on Medicaid fraud cases and Medicaid investigations involving prescribed controlled substances or when the


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Attorney General has initiated a review of specific identifiers that warrant a Medicaid investigation regarding prescribed controlled substances; prohibiting the Attorney General's Medicaid investigators from direct access to the prescription drug monitoring program's database; authorizing the Department of Health

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LEGISLATIVE ACTION

Senate . House

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The Committee on Criminal Justice (Smith) recommended the following:

Senate Amendment (with title amendment)

Delete lines 2011 - 2022.

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

And the title is amended as follows:

Delete lines 215 - 219

and insert:

providing an effective date.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL:	CS/SB 818
INTRODUCER:	Health Regulation Committee and Senator Fasano
SUBJECT:	Controlled Substances
DATE:	March 16, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stovall	Stovall	HR	**Fav/CS**
2.	Erickson	Cannon	CJ	**Pre-Meeting**
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill further refines the regulation of controlled substances by doing all of the following:

- Authorizing a 1-hour continuing education course relating to the Prescription Drug Monitoring Program (PDMP) to count toward requirements for the initial and renewal licensure of a practitioner whose lawful scope of practice authorizes the practitioner to prescribe, administer, or dispense controlled substances.
- Establishing criminal penalties for certain persons advertising that the individual or business is engaged in the dispensing of controlled substances.
- Revising the physician survey instrument to collect data concerning the use of the PDMP and requiring the aggregated reporting of this data.
- Adding an exception to the requirement to register as a pain-management clinic in the allopathic medicine and osteopathic medicine practice acts when a majority of the physicians who provide services in the clinic primarily provide interventional pain procedures of the type routinely billed using surgical codes.
- Removing the requirement that effective July 1, 2012, allopathic physicians working in a pain-management clinic must have completed a pain medicine fellowship or a pain-medicine residency.

- Requiring, under the two practice acts, a physician, an advanced registered nurse practitioner, or a physician assistant to perform an appropriate medical examination prior to and on the same day that the physician dispenses or prescribes controlled substances in a pain-management clinic.
- Establishing additional criminal penalties for fraudulently registering or attempting to register a pain-management clinic, failing to perform a physical examination of a patient at a pain-management clinic on the day in which a controlled substance is dispensed or prescribed to a patient, and prescribing or dispensing controlled substances in excess of a 72-hour dose without documenting that the dosage is within the standard of care as set forth in a specified rule.
- Requiring the Board of Medicine or the Board of Osteopathic Medicine to suspend a physician's license for at least 6 months and impose a fine of at least $10,000 per count when a physician in a pain-management clinic violates the standard of practice as set forth in law or rule.
- Requiring a pharmacist or any person working under the direction of a pharmacist to report to the local county sheriff's office identifying information concerning a person obtaining or attempting to obtain a controlled substance from the pharmacy through a fraudulent method or representation within 24 hours of learning of the fraud or attempted fraud, to avoid committing a misdemeanor of the first degree.
- Requiring a dispensing practitioner to register with the Board of Pharmacy as a dispensing practitioner who dispenses controlled substances, upon payment of a fee not to exceed $100, prior to dispensing controlled substances and to renew the registration every 4 years.
- Amending the elements of the crimes of burglary and grand theft to include certain activities relating to controlled substances.
- Prohibiting a person from adulterating a controlled substance by altering its manufactured form or changing its integrity or composition without the prescribing physician's direction to do so based on the patient's medical need for such alteration. Requiring the prescription to specify this adulteration of the dispensed form and the medical necessity for it. If a person unlawfully adulterates a controlled substance in this manner, the issuance of the entire prescription for the controlled substance becomes invalid. A law enforcement officer is authorized to seize the controlled substance as evidence and the bill provides for the return of the controlled substance under certain circumstances. The bill also prohibits a prescribing practitioner from writing a prescription for a controlled substance for a patient, another person, or an animal and authorizing or directing the adulteration of the dispensed form when it is not medically necessary for the treatment of the patient.
- Enhancing provisions pertaining to the PDMP and the monitoring database to:
  - Require the database comply with the National All Schedules Prescription Electronic Reporting (NASPER) Act's minimum requirements for authentication of a practitioner who requests information in the database.
  - Allow corrections to the database when notified by a health care practitioner or pharmacist.
  - Collect additional information in the database concerning refills.
  - Reduce the timeframe for reporting to 7 days.
  - Modify who must report data.
  - Require a pharmacy, prescriber, practitioner, or dispenser to register with the Department of Health (Department) before being authorized to access information in the database.

  - Require persons supporting the PDMP who may have access to the information in the database to undergo fingerprinting for state and federal background screening.
  - Authorize the Attorney General to access the database under certain conditions for Medicaid investigations as well as the Agency for Health Care Administration (Agency) for Medicaid fraud cases or Medicaid investigations involving prescribed controlled substances.
  - Require a government-issued photo identification to be provided in person by a person requesting access to verify the accuracy of the database information.
  - Delete the provision that all costs for administering the PDMP must be funded through federal grants or private funding.
  - Authorize the State Surgeon General to enter into a reciprocal agreement for the sharing of PDMP information with another state that has a compatible PDMP, within certain parameters, and provide for the related exceptions for the public records exemption.
- Requiring certain persons who are required to maintain records and inventory controlled substances to report the theft or loss of a controlled substance to a local county sheriff's office within 48 hours after the discovery of the theft or loss, or face criminal penalties.
- Codifying into law certain judicial opinions that construe the Legislature's intent concerning inspection powers previously conferred upon law enforcement officers which allows them to access, review, examine, and copy pharmacy records concerning controlled substances without a subpoena or search warrant and without giving prior notice of the records' examination and copying to the person to whom the particular pharmacy records refer.
- Prohibiting and clarifying prohibited acts relating to a person obtaining or attempting to obtain from a practitioner, controlled substances or a prescription for controlled substances that are not medically necessary, and relating to a health care practitioner providing such controlled substance by misrepresentation, fraud, forgery, deception, subterfuge, or concealment of a material fact. A material fact includes whether the person has an existing prescription for a controlled substance issued for the same time period by another practitioner or has received a controlled substance or a prescription for a controlled substance of like therapeutic use within the previous 30 days.
- Authorizing local administrative action to abate activity at a pain-management clinic upon the declaration of a public nuisance based on the occurrence of certain criminal activity.
- Prohibiting a pharmacist from interchanging or substituting an opioid analgesic drug for an opioid analgesic drug incorporating a tamper-resistance technology in certain situations.

This bill substantially amends the following sections of the Florida Statutes: 400.9905; 456.013; 458.305; 458.3191; 458.3192; 458.3265; 458.327; 458.331; 459.003; 459.013; 459.0137; 459.015; 465.015; 465.0276; 766.101; 810.02; 812.014; 893.04; 893.055; 893.0551; 893.07; 893.13; and 893.138.

The bill creates s. 893.021 and two unnumbered sections of law.

The effective date of the bill is October 1, 2011.

II. Present Situation:

Prescription drug abuse is the most threatening substance abuse issue in the State of Florida.[1] The number of deaths caused by at least one prescription drug increased from 1,234 in 2003 to 2,488 in 2009 (a 102 percent increase). This translates to seven Floridians dying per day. The drugs that caused the most deaths were oxycodone; all benzodiazepines, including alprazolam; methadone; ethyl alcohol; cocaine; morphine; and hydrocodone.

Controlled Substances

Chapter 893, F.S., sets forth the Florida Comprehensive Drug Abuse Prevention and Control Act. This chapter classifies controlled substances into five schedules in order to regulate the manufacture, distribution, preparation, and dispensing of the substances.

- A Schedule I substance has a high potential for abuse and no currently accepted medical use in treatment in the United States and its use under medical supervision does not meet accepted safety standards. Examples: heroin and methaqualone.
- A Schedule II substance has a high potential for abuse, a currently accepted but severely restricted medical use in treatment in the United States, and abuse may lead to severe psychological or physical dependence. Examples: cocaine and morphine.
- A Schedule III substance has a potential for abuse less than the substances contained in Schedules I and II, a currently accepted medical use in treatment in the United States, and abuse may lead to moderate or low physical dependence or high psychological dependence or, in the case of anabolic steroids, may lead to physical damage. Examples: lysergic acid; ketamine; and some anabolic steroids.
- A Schedule IV substance has a low potential for abuse relative to the substances in Schedule III, a currently accepted medical use in treatment in the United States, and abuse may lead to limited physical or psychological dependence relative to the substances in Schedule III. Examples: alprazolam; diazepam; and phenobarbital.
- A Schedule V substance has a low potential for abuse relative to the substances in Schedule IV, a currently accepted medical use in treatment in the United States, and abuse may lead to limited physical or psychological dependence relative to the substances in Schedule IV. Examples: low dosage levels of codeine; certain stimulants; and certain narcotic compounds.

A prescription for a controlled substance listed in Schedule II may be dispensed only upon a written prescription of a practitioner, except that in an emergency situation, as defined by Department rule, it may be dispensed upon oral prescription but is limited to a 72-hour supply. A prescription for a controlled substance listed in Schedule II may not be refilled.[2] A pharmacist may not dispense more than a 30-day supply of a controlled substance listed in Schedule III upon an oral prescription issued in this state.[3]

[1] *Florida Office of Drug Control 2010 Annual Report*, prepared by the Executive Office of the Governor.
[2] Section 893.04(1)(f), F.S.
[3] Section 893.04(2)(e), F.S.

Dispensing, Prescribing, and Administering

"Dispense" means the transfer of possession of one or more doses of a medicinal drug by a pharmacist or other licensed practitioner to the ultimate consumer thereof or to one who represents that it is his or her intention not to consume or use the same but to transfer the same to the ultimate consumer or user for consumption by the ultimate consumer or user.[4]

"Prescribing" is issuing a prescription. For purposes of the bill, a "prescription" includes an order for drugs that is written, signed, or transmitted by word of mouth, telephone, telegram, or other means of communication by a practitioner licensed by the laws of the state to prescribe such drugs, issued in good faith and in the course of professional practice, intended to be filled or dispensed by another person licensed to do so.[5]

"Administer," for purposes of the bill, means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a person.[6]

Dispensing Practitioner

Chapter 465, F.S., relating to the practice of pharmacy, contains the provisions for a dispensing practitioner.[7] Under this chapter, a practitioner authorized by law to prescribe drugs may dispense those drugs to his or her patients in the regular course of his or her practice. If a practitioner intends to dispense drugs for human consumption for a fee or remuneration of any kind, the practitioner must register with his or her professional licensing board as a dispensing practitioner, comply with and be subject to all laws and rules applicable to pharmacists and pharmacies, and give the patient a written prescription and advise the patient that the prescription may be filled in the practitioner's office or at any pharmacy.

A dispensing practitioner is prohibited from dispensing more than a 72-hour supply of a controlled substance for any patient in a pain-management clinic who pays for the medication by cash, check, or credit card, except if the controlled substance is dispensed to a workers' compensation patient; an insured patient who pays a copayment or deductible with cash, check, or credit card; or as a complimentary package to the practitioner's own patient without remuneration of any kind, whether direct or indirect.[8]

Practitioners in Florida who are authorized to prescribe prescription drugs include medical physicians, physician assistants, osteopathic physicians, advanced registered nurse practitioners, podiatrists, naturopathic physicians, dentists, and veterinarians.

However, s. 893.02, F.S., of the Florida controlled substances act defines which practitioners may prescribe a controlled substance under Florida law. A "practitioner" is defined to mean a licensed medical physician, dentist, veterinarian, osteopathic physician, naturopathic physician, or podiatrist, if such practitioner holds a valid federal controlled substance registry number.

[4] Section 893.02(7), F.S.
[5] Section 893.02(20), F.S.
[6] Section 893.02(1), F.S.
[7] Section 465.0276, F.S.
[8] Section 465.0276(1)(b), F.S., enacted by ch. 2010-211, L.O.F.

Accordingly, the prescribing of controlled substances is a privilege that is separate from the regulation of the practice of the prescribing practitioner.

Regulation of Pain-Management Clinics

Chapter 2010-211, Laws of Florida, (the "pill mill bill") was enacted to more aggressively regulate pain-management clinics. The requirement to register pain-management clinics and initial regulation was enacted by the 2009 Legislature.[9]

The pill mill bill requires businesses that meet the definition of a pain-management clinic to register with the Department, unless exempted from registration. Ownership of pain-management clinics is limited to allopathic physicians, osteopathic physicians, or groups of allopathic physicians and osteopathic physicians, and health care clinics that are licensed under part X of ch. 400, F.S.

Each pain-management clinic must designate a physician who is responsible for complying with all requirements relating to registration and operation of the clinic in compliance with the law. Only a physician licensed under ch. 458, F.S., relating to the practice of medicine (The Medical Practice Act), or ch. 459, F.S., relating to the practice of osteopathic medicine, may dispense a controlled substance on the premises of a registered pain-management clinic.

The pill mill bill requires allopathic physicians and osteopathic physicians practicing in a pain-management clinic to comply with specific provisions, including but not limited to:

- Performing a physical examination of a patient on the same day that he or she dispenses or prescribes a controlled substance.
- Documenting in a patient's record the reason for prescribing or dispensing more than a 72-hour does of controlled substances for the treatment of chronic nonmalignant pain,[10] if he or she prescribes or dispenses in excess of that quantity.
- Maintaining control and security of his or her prescription blanks and any other method used for prescribing controlled substances, and notifying the Department within 24 hours following a theft, loss, or breach of these instruments.

The pill mill bill provides for various forms of enforcement against a pain-management clinic or practitioner through administrative means including fines and suspension or revocation of a license and through the imposition of criminal penalties. The additional criminal violations created include: a third degree felony to knowingly operate, own, or manage a non-registered pain-management clinic that is required to be registered; a first degree misdemeanor to knowingly prescribe or dispense, or cause to be prescribed or dispensed, controlled substances in an unregistered pain-management clinic that is required to be registered; and a third degree felony to dispense more than a 72-hour supply of controlled substances to a patient in a pain-management clinic who pays for the medication by cash, check, or credit card.

[9] *See* sections 3 and 4 of ch. 2009-198, L.O.F.

[10] Chronic nonmalignant pain is defined as pain unrelated to cancer which persists beyond the usual course of the disease or the injury that is the cause of the pain or more than 90 days after surgery. *See* s. 458.3265(4), F.S., and s. 459.0137(4), F.S.

Prescription Drug Monitoring Program (PDMP)

Chapter 2009-197, L.O.F, established the PDMP in s. 893.055, F.S. This law requires the Department, by December 1, 2010, to design and establish a comprehensive electronic system to monitor the prescribing and dispensing of certain controlled substances. Prescribers and dispensers of certain controlled substances must report specified information to the Department for inclusion in the system. Vendor protests to the procurement process for a contractor to develop the PDMP have delayed implementation of the PDMP database.

Data regarding the dispensing of each controlled substance must be submitted to the Department no more than 15 days after the date the drug was dispensed by a procedure and in a format established by the Department, and must include minimum information specified in s. 893.005, F.S. Any person who knowingly fails to report the dispensing of a controlled substance commits a first degree misdemeanor. This law provides exemptions from the data reporting requirements for controlled substances when specified acts of dispensing or administering occur.

Section 893.0551, F.S., enacted at the same time, provides for a public records exemption for certain personal information of a patient and certain information concerning health care professionals. This section sets forth enumerated exceptions for disclosure of this information after the Department ensures the legitimacy of the person's request for the information.

The National Alliance for Model State Drug Laws identifies the benefits of a PDMP: as a tool used by states to address prescription drug abuse, addiction, and diversion. It may serve several purposes such as:

- Support access to legitimate medical use of controlled substances.
- Identify and deter or prevent drug abuse and diversion.
- Facilitate and encourage the identification, intervention with and treatment of persons addicted to prescription drugs.
- Provide data on use and abuse trends for public health initiatives.
- Educate individuals about PDMPs and the use, abuse, diversion of, and addiction to prescription drugs.[11]

As of July 2010, 34 states have operational PDMPs that have the capacity to receive and distribute controlled substance prescription information to authorized users. States with operational programs include: Alabama; Arizona; California; Colorado; Connecticut; Hawaii; Idaho; Illinois; Indiana; Iowa; Kentucky; Louisiana; Maine; Massachusetts; Michigan; Minnesota; Mississippi; Nevada; New Mexico; New York; North Carolina; North Dakota; Ohio; Oklahoma; Pennsylvania; Rhode Island; South Carolina; Tennessee; Texas; Utah; Vermont; Virginia; West Virginia; and Wyoming. Washington State's PDMP was operational but has been suspended due to fiscal constraints.[12]

[11] *See* The United State Department of Justice, Drug Enforcement Administration, Office of Diversion Control, Q & A, found at: < http://www.deadiversion.usdoj.gov/faq/rx_monitor.htm,>, (Last visited on March 17, 2011). The fourth purpose as reported in the Q & A reads: "inform public health initiatives through outlining of use and abuse trends."
[12] *Id.*

Seven states (Alaska, Florida, Kansas, New Jersey, Oregon, South Dakota, and Wisconsin) and one U.S. territory (Guam) have enacted legislation to establish a PDMP, but are not fully operational. Delaware has legislation pending to establish a PDMP.

Program Implementation and Oversight Task Force

The Program Implementation and Oversight Task Force[13] is created within the Executive Office of the Governor. The purpose of the Implementation and Oversight Task Force is to monitor the implementation and safeguarding of the PDMP monitoring database, and to ensure privacy, protection of individual medication history, and the electronic system's appropriate use by physicians, dispensers, pharmacies, law enforcement agencies, and those authorized to request information from the electronic system.

National All Schedules Prescription Electronic Reporting (NASPER) Act

NASPER was signed into law on August 11, 2005, making it the only statutorily authorized program to assist states in combating prescription drug abuse of controlled substances through a prescription monitoring program (PDMP). NASPER fosters interstate communication by providing grants to set up or improve state systems that meet basic standards of information collection and privacy protections that will make it easier for states to share information. This will enable authorities to identify prescription drug abusers as well as the "problem doctors" who betray the high ethical standards of their profession by over or incorrectly prescribing prescription drugs.[14]

Health Care Clinics

Currently, cash-only health care clinics are not licensed by the Agency. A "clinic" as defined in s. 400.9905(4), F.S., means an entity at which health care services are provided to individuals and which tenders charges for reimbursement for such services. This definition applies only to clinics that seek reimbursement from third-party payers, such as insurance, Medicaid, Medicare, etc. Cash-only or point-of-sale clinics are not covered by this definition.

The Agency indicates it has licensed approximately 200 health care clinics that are pain-management clinics which are not fully owned by medical or osteopathic physicians.[15]

Tamper-Resistant Technology

Due to the growing abuse associated with certain painkillers, in February 2009, the FDA announced that it plans to implement a Risk Evaluation and Mitigation Strategy (REMS) requirement for all extended-release opioid analgesics. The REMS plan is driving current research and development efforts and may ultimately drive prescribing of newer tamper-resistant extended-release opioids.

[13] *See* section 2, ch. 2009-198, L.O.F.
[14] *See:* <http://www.nasper.org/database.htm>, (Last visited on March 17, 2011).
[15] Agency 2011 Bill Analysis & Economic Impact Statement for SB 818, on file with the Senate Health Regulation Committee.

At least three versions have been through or are making their way through the FDA approval process. One, which was developed by Pain Therapeutics/King Pharmaceuticals, is called Remoxy. Another, developed by Alpharma which is now owned by King Pharmaceuticals, is called Embeda. The third is a product developed by Purdue Pharma. The principle is the same for each though the methods of deterring abuse/misuse of the medicine are different. The principle is that efforts to tamper with the medicine in order to get high will result in negating the properties of the medicine that cause the high. For example, Embeda uses a technology that sequesters a substance called naltrexone, which is only released when the pill is tampered with - crushed, chewed, or dissolved. Naltrexone basically prevents the morphine, the opioid analgesic, from producing any semblance of a high.[16]

The U.S. Food and Drug Administration has approved a new formulation of the controlled-release drug OxyContin. Rexista™ (oxycodone) is a unique dosage form, designed to be resistant to well-documented abuse that is experienced with current oxycodone products. This new formulation is designed to decrease the likelihood that this medication will be misused or abused, and result in overdose. The new formulation adds in new tamper-resistant features aimed at preserving the controlled release of the active ingredient, oxycodone. This includes abuse by injection when combined with solvents and by nasal inhalation when crushed or powdered. Rexista™ is also designed to resist release of the entire dose when consumed with alcohol, a significant problem with some opioid drugs, such as hydromorphone.[17]

III. Effect of Proposed Changes:

Section 1 amends s. 400.9905, F.S., to revise the definition of "clinic" and "portable equipment provider" for purposes of the licensure of health care clinics by the agency. "Clinic" is defined to mean an entity at which health care services are provided to individuals and which tenders charges for *payment*[18] for such services, including a mobile clinic and a portable equipment provider. The definition of "portable medical equipment provider" deletes the modifier that a portable equipment provider bills third-party payors for providing portable equipment to multiple locations performing treatment or diagnostic testing of individuals.

Section 2 amends s. 456.013, F.S., relating to general licensing provisions for the professions licensed by the Department or a board. The bill provides that, as a condition of initial licensure and each subsequent license renewal, the boards or the Department, if there is no board, must allow each allopathic physician, osteopathic physician, podiatrist, pharmacist, and dentist who lawful scope of practice authorizes the practitioner to prescribe, administer, or dispense controlled substances to complete a 1-hour continuing education course relating to the PDMP. The course requirements apply to each licensee renewing his or her license on or after July 1,

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[16] *See* HealthCentral Chronic Pain Connection.com: Tamper Resistant Opioid Medicines by Will Rowe, May 4, 2009, available at:<http://www.healthcentral.com/chronic-pain/c/3025/69656/medicines/>, (Last visited on March 17, 2011).
[17] *See* Intellipharmaceutics, The Future of Drug Delivery, Rexista™ (oxycodone), available at: <http://www.intellipharmaceutics.com/oxycodone.cfm>, and Federal Food and Drug Administration, OxyContin - Questions and Answers, available at: <http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm207196.htm> (Last visited on March 17, 2010).
[18] Current law only specifies reimbursement. The bill specifies reimbursement or payment.

2012, and to each applicant approved for licensure on or after January 1, 2013. The court must include, but need not be limited to:

- The purpose of the PDMP.
- The practitioners' capabilities for improving the standard of care for patients by using the PDMP.
- How the PDMP can help practitioners detect doctor shopping.
- The involvement of law enforcement personnel, the Attorney General's Medicaid Fraud Control Unit, and medical regulatory investigators with the PDMP.
- The procedures for registering for access to the PDMP.

The course hours may be included in the total number of hours of required continuing education and must be approved by the board or by the Department if there is no board. The boards or the Department must approve a course offered through a Florida-licensed hospital, ambulatory surgical center, or mobile surgical facility. The boards or the Department must also adopt rules as necessary to administer these provisions by October 1, 2011.

Sections 3 and 10 amend s. 458.305, F.S., and s. 459.003, respectively, to add a definition for "dispensing physician" to the terms used under the practice act for the respective professions. "Dispensing physician" is defined to mean a physician who is registered as a dispensing practitioner under the Pharmacy Practice Act in s. 465.0276, F.S.

Section 4 creates an unnumbered section of law relating to advertising controlled substances by a dispensing physician. This section prohibits a person, other than a dispensing physician, from using the title "dispensing physician" or "dispenser" or otherwise leading the public to believe that he or she is engaged in the dispensing of controlled substances. A person, other than the owner of a registered pain-management clinic or health clinic licensed under ch. 400, F.S., may not display any sign or take any other action that would lead the public to believe that the person is engaged in the business of dispensing a controlled substance. This could be construed as authorizing a registered pain-management clinic or any other health clinic licensed under ch. 400, F.S., to display a sign or otherwise communicate that the entity is in the business of dispensing a controlled substance, and authorizing them to advertise that the entity dispenses onsite. The bill provides that any advertisement that states "dispensing onsite" or "onsite pharmacy" violates the prohibition. A person who violates any of these provisions commits a first degree misdemeanor.[19]

A person, firm, or corporation that is not licensed as a pharmacy may not use in a trade name, sign, letter, or advertisement any term, including "drug," "pharmacy," "onsite pharmacy," "dispensing," "dispensing onsite," "prescription drugs," "Rx," or "apothecary," which implies that the person, firm, or corporation is licensed or registered to dispense prescription drugs in this state. A person who violates this provision commits a third degree felony.[20]

[19] A first degree misdemeanor is punishable by up to one year in a county jail and a fine of up to $1,000 may also be imposed. Sections 775.082 and 775.083, F.S.
[20] A third degree felony is punishable by up to 5 years in states prison and a fine of up to $5,000 may also be imposed. Sections 775.082 and 775.083, F.S.

The bill provides that in any warrant, information, or indictment, it is not necessary to negate any exceptions, and the burden of any exception is upon the defendant.

Section 5 amends s. 458.3191, F.S., to add to the information collected by the Department in the physician survey that is completed upon licensure renewal. The additional information includes whether the Department has ever approved or denied the physician's registration for access to a patient's information in the PDMP database, and whether the physician uses the PDMP with patients in his or her medical practice.

Section 6 amends s. 458.3192, F.S., to require the Department, by November 1 of each year, to provide non-identifying information to the PDMP's Implementation and Oversight Task Force regarding the number of physicians who are registered with the PDMP and who also use the database from the PDMP for their patients in their medical practice.

Sections 7 and 12 amend s. 458.3265, F.S., and s. 459.0137, F.S., respectively, to add to the list of clinics that are exempt from registration as a pain-management clinic, a clinic where the majority of the physicians who provide services in the clinic primarily provide interventional pain procedures of the type routinely billed using surgical codes.

The bill removes the requirement that effective July 1, 2012, unless grandfathered in, a physician practicing in a pain-management clinic must have completed a pain-management fellowship or residency.

A physician,[21] advanced registered nurse practitioner, or physician assistant must perform an appropriate medical examination prior to or on the same day that the physician dispenses or prescribes a controlled substance in a pain management clinic.

Additionally, the bill clarifies the physician's responsibilities with respect to prescribing or dispensing more than a 72-hour dose of controlled substance for the treatment of chronic nonmalignant pain when practicing in a pain-management clinic that is required to be registered. The bill requires a physician to document in the patient's record the reason that dosage is within the standard of care as set forth in Rule 64B8-9.013(3), Florida Administrative Code. Current law requires the physician to document in the patient's record the reason for prescribing or dispensing that quantity.

This section also creates a new crime for a licensee or other person who serves as the designated physician of a pain-management clinic to register a pain-management clinic through misrepresentation or fraud or procure or attempt to procure the registration of a pain-management clinic for any other person by making or causing to be made any false or fraudulent representation. This offense is a third degree felony.

Sections 8 and 11 amend s. 458.327, F.S., and s. 459.013, F.S., respectively, to designate the commission of certain acts criminal acts. All of the following acts are third degree felonies:

[21] In the amendment of s. 459.0137, F.S., the physician referenced is an osteopathic physician.

- Failing to perform a physical examination of a patient by a physician or a licensed designee acting under the physician's supervision[22] on the same day that the treating physician dispenses or prescribes a controlled substance to the patient at a pain-management clinic occurring three or more times within a 6-month period.
- Failing to perform a physical examination on three or more different patients on the same day that the treating physician dispenses or prescribes a controlled substance to each patient at a pain-management clinic within a 6-month period.
- Prescribing or dispensing in excess of a 72-hour dose of controlled substances at a pain-management clinic for the treatment of chronic nonmalignant pain of a patient occurring three or more times within a 6-month period without documenting in the patient's record the reason that such dosage is within the standard of care.[23]

All of the following acts are first degree misdemeanors:

- Failing to perform a physical examination of a patient on the same day that the treating physician dispenses or prescribes a controlled substance to the patient at a pain-management clinic occurring two times within a 6-month period.
- Failing to perform a physical examination on two different patients on the same day that the treating physician dispenses or prescribes a controlled substance to each patient at a pain-management clinic within a 6-month period.
- Prescribing or dispensing in excess of a 72-hour dose of controlled substances for the treatment of chronic nonmalignant pain of a patient occurring two times within a 6-month period without documenting in the patient's record the reason that such dosage is within the standard of care.

All of the following acts are second degree misdemeanors[24]:

- A first offense of failing to perform a physical examination of a patient on the same day that the treating physician dispenses or prescribes a controlled substance to the patient at a pain-management clinic.
- A first offense of failing to document in a patient's record the reason that such dosage is within the standard of care for prescribing or dispensing in excess of a 72-hour dose of controlled substances at a pain-management clinic for the treatment of chronic nonmalignant pain.

The use of the term "first offense" and the language that follows describing the "first offense" in the provisions relevant to second degree misdemeanor penalties do not appear to be indicating the creation of separate and distinct second degree misdemeanor offenses but rather indicating that a first violation ("first offense") involving a higher-penalty offense created by the bill is a second degree misdemeanor. The descriptive language in the second degree misdemeanor penalty provision neither tracks the elements of any higher penalty offense in its entirety, nor is

[22] In the amendment of s. 459.013, F.S., the reference is to an osteopathic physician and there is no reference to a licensed designee.
[23] See the discussion of sections 7 and 12 of the bill for an explanation of the standard of care.
[24] A second degree misdemeanor is punishable by up to 60 days in a county jail and a fine of up to $500 may also be imposed. Sections 775.082 and 775.083, F.S.

sufficiently descriptive to indicate that it applies to one higher-penalty offense to the exclusion of another one. Therefore, for example, it appears that "[a] first offense of failing to perform a physical examination of a patient on the same day that the treating physician dispenses or prescribes a controlled substance to the patient at a pain-management clinic" is intended to indicate that a first violation of the third degree felony offense of failure to perform such examination and a first violation of the first degree misdemeanor offense of failure to perform such examination are second degree misdemeanors.

Sections 9 and 13 amend s. 458.331, F.S., and s. 459.015, F.S., respectively, to provide for additional disciplinary action when the board finds that a physician[25] has prescribed or dispensed, or caused to be prescribed or dispensed, a controlled substance in a pain-management clinic in a manner that violates the standard of practice as set forth in the practice act or rules. Disciplinary action includes, at a minimum, suspending the physician's license for at least 6 months and imposing a fine of at least $10,000 per count. Increased penalties (not specified) are required for repeated violations.

Section 14 amends s. 465.015, F.S., to prohibit a licensed pharmacist, pharmacy technician, or any person working under the direction or supervision of a pharmacist or pharmacy technician, from knowingly failing to timely report to the local county sheriff's office the name of any person who obtains or attempts to obtain a controlled substance which the person knows or reasonably should have known was obtained or attempted to be obtained from the pharmacy through a fraudulent method or representation. A pharmacist, pharmacy intern, or other person employed by or at a pharmacy who fails to make such a report within 24 hours after learning of the fraud or attempted fraud commits a first degree misdemeanor.

The report must contain, at a minimum, a copy of the prescription used or presented and a narrative, including the following information if available to the pharmacy:

- The transaction, such as the name and telephone number of the prescribing physician.
- The name, description, and any personal identification information pertaining to the person presenting the prescription.
- All other material information, such as photographic or video surveillance of the transaction.

A pharmacist, pharmacy intern, or other person employed by or at a pharmacy is not subject to disciplinary action for this required reporting.

Section 15 amends s. 465.0276, F.S., relating to dispensing practitioners under the Pharmacy Practice Act. The bill requires a practitioner to register with the Board of Pharmacy as a dispensing practitioner who dispenses controlled substances in order to dispense controlled substances that are listed in Schedules II – IV and pay a fee that is not to exceed $100. The Department is required to adopt rules for renewal of the registration every 4 years.

Section 16 amends s. 766.101, F.S., relating to medical review committees, to conform a cross-reference.

[25] In the amendment of s. 459.015, F.S., the physician referenced is an osteopathic physician

Section 17 amends s. 810.02, F.S., to modify the elements of a burglary offense that is a second degree felony[26] so that this offense can be committed when a person, in the course of committing the burglary offense, does not make an assault or battery and is not and does not become armed with a dangerous weapon or explosive, and enters or remains in a structure or conveyance when the offense intended to be committed is theft of a substance controlled by s. 893.03, F.S. Substances controlled by s. 893.03, F.S., include pharmaceutical substances that are controlled substances but also include non-pharmaceutical controlled substances.

Further, the bill provides that, notwithstanding any contrary provisions of law, separate judgments and sentences for this burglary with the intent to commit theft of a controlled substance and for any applicable offense for possession of a controlled substance under s. 893.13, F.S., or an offense for trafficking in a controlled substance under s. 893.135, F.S., may be imposed if all such offenses involve the same amount or amounts of a controlled substance.

Section 18 amends s. 812.014, F.S., to modify the elements of grand theft of the third degree, which is a third degree felony, to provide that this theft offense can be committed when the property stolen is any amount of a substance controlled by s. 893.03, F.S. As previously noted, substances controlled by s. 893.03, F.S., include pharmaceutical substances that are controlled substances but also include non-pharmaceutical controlled substances.

Further, the bill provides that notwithstanding any contrary provisions of law, separate judgments and sentences for this theft and for any applicable offense for possession of a controlled substance under s. 893.13, F.S., or an offense for trafficking in a controlled substance under s. 893.135, F.S., may be imposed if all such offenses involve the same amount or amounts of a controlled substance.

Section 19 creates s. 893.021, F.S., to define an adulterated drug for purposes of ch. 893, F.S., relating to drug abuse prevention and control. An adulterated drug includes a controlled substance that meets the following criteria:

- The controlled substance has been produced, prepared, packed, and marketed for oral consumption by the manufacturer.
- The controlled substance has had any change to its integrity or composition for off-label use by means of inhalation, injection, or any other form of ingestion not in accordance with the manufacturer's recommended use, and such off-label use has not been previously directed and approved by the prescribing physician.

The bill provides that a physician is not prevented from directing or prescribing a change to the recognized manufactured recommendations for use in a patient who presents a medical need for such a requirement change of any controlled substance. The prescribing physician is required to clearly indicate any deviation of the recognized manufacturer's recommended use of a controlled substance on the original prescription, and the licensed pharmacist is required to clearly indicate the deviation on the label of the prescription upon dispensing the controlled substance.

[26] A second degree felony is punishable by up to 15 years in state prison and a fine of up to $10,000 may also be imposed. Sections 775.082 and 775.083, F.S.

Section 20 amends s. 893.04, F.S., to require that, in addition to existing required elements for a prescription for a controlled substance, the directions for use must specify the authorization by the physician, any instructions requiring the adulteration of the dispensed form of the medication, and the medical necessity for the adulteration as provided in s. 893.021, F.S., which is created in this bill.

Section 21 amends s. 893.055, F.S., relating to the PDMP, to require:

- The electronic system (database) comply with the National All Schedules Prescription Electronic Reporting (NASPER) Act's minimum requirements for authentication of a practitioner who requests information in the PDMP database and certification of the purpose for which information is requested.
- The Department to establish a method to allow corrections to the database when notified by a health care practitioner or pharmacist.
- Information that is reported by the dispenser to include the number of refills ordered and whether the drug was dispensed as a refill of a prescription or was a first-time request.
- The reporting of a dispensed controlled substance within 7 days as opposed to 15 days.

This section also modifies the exemptions from reporting to the PDMP to:

- Delete the exemption for a practitioner when administering or dispensing a controlled substance in the health care system of the Department of Corrections, so that if this provision is enacted, this event must be reported.
- Exempt reporting by a health care practitioner when administering or dispensing a controlled substance to a person under the age of 16, but only if the amount of the controlled substance is adequate to treat the patient during that particular treatment session.
- Reduce the timeframe for a pharmacist or a dispensing practitioner when dispensing a one-time emergency resupply of a controlled substance to a patient from a 72-hour emergency resupply to a 48-hour emergency resupply.

The bill requires a pharmacy, prescriber, practitioner, or dispenser to register with the Department in order to access the information in the PDMP database relating to his or her patient. The Department must approve the documentation submitted for registration prior to granting the person access to the appropriate information in the PDMP database. Upon approval, the Department must grant the registrant access to the appropriate information in the PDMP.

The PDMP program manager, designated program and support staff who act at the direction or in the absence of the program manager, and any individual who has similar access regarding the management of the database from the PDMP must submit fingerprints to the Department of Law Enforcement for a statewide and federal criminal background screening.

The bill expands the authority of the Attorney General to access the database through the program manager to include Medicaid investigations involving prescribed controlled

substances.[27] It also authorizes the Agency similar access for Medicaid fraud cases or Medicaid investigations involving prescribed controlled substances.[28]

The bill requires additional identifying information relating to a patient or the patient's legal guardian or health care surrogate to access the database to verify the accuracy of the information in the database. The additional information includes the patient's phone number, current address, and a copy of a government-issued photo identification which must be provided in person to the program manager along with the notarized request.

The bill eliminates the requirement that all costs incurred by the Department in administering the PDMP be funded through federal grants or private funding.

After the PDMP has been operational for 12 months, the State Surgeon General is required to enter into reciprocal agreements for the sharing of prescription drug monitoring information with other states that have a compatible program. The following factors are to be considered when determining compatibility:

- The essential purposes of the program and the success of the program in fulfilling those purposes.
- The safeguards for privacy of patient records and the success of the program in protecting patient privacy.
- The persons authorized to view the data. The bill lists those who are authorized access upon approval by the State Surgeon General.[29]
- The schedules of controlled substances that are monitored.
- The data required to be submitted for each prescription.
- Any implementing criteria deemed essential for a thorough comparison.

If the State Surgeon General evaluates the PDMP of another state, priority must be given to a state that is contiguous with the borders of this state. The State Surgeon General is required to annually review any reciprocal agreement to determine continued compatibility with Florida's PDMP. Any reciprocal agreement must prohibit the sharing of information concerning a Florida resident or a practitioner, pharmacist, or other prescriber for any purpose that is not otherwise authorized by s. 893.055, F.S., or s. 893.0551, F.S. (public records exemption for the PDMP).

Section 22 amends s. 893.0551, F.S., to authorize the Department to disclose confidential and exempt information contained in records held by the Department under s. 893.055, F.S., if the State Surgeon General has entered into a reciprocal agreement for the sharing of prescription drug monitoring information with any other state that has a compatible PDMP. The agreement may authorize the following persons to receive information from the PDMP if approved by the State Surgeon General:

[27] Currently that access is limited to Medicaid fraud cases involving prescribed controlled substances.
[28] The Agency doesn't currently have access.
[29] Authorized persons: comparable organizations and professions for practitioners in other states; law enforcement agencies; the Attorney General's Medicaid Fraud Unit; medical regulatory boards; and, as needed, management staff who have similar duties to the management staff authorized to work with the PDMP.

- A designated representative of a state professional licensing, certification, or regulatory agency charged with oversight of those persons authorized to prescribe or dispense controlled substances for a bona fide, specific investigation of a controlled substance prescription involving a designated person.
- A health care practitioner or pharmacist licensed in the state from which the request originates, provided the practitioner or pharmacist certifies that the requested information is for providing medical or pharmaceutical treatment to a bona fide, current patient and follows all procedures required under s. 893.055, F.S., and Department rules applicable to a request for database information.
- A law enforcement officer from another state who meets the following criteria:
  - The officer is a member of a sheriff's department or a police department.
  - The officer is authorized by law to conduct criminal investigations and make arrests.
  - The officer's duty is to enforce the laws of his or her state relating to controlled substances.
  - The officer is engaged in a bona fide specific, active investigation involving a designated person regarding prescriptions for controlled substances.

The program manager may review the request for information and validate it.

Section 23 amends s. 893.07, F.S., to require a person who engages in the manufacture, compounding, mixing, cultivating, growing, or by other means producing or preparing, or in the dispensing, importation, or as a wholesaler or distributor of controlled substance to report a theft or loss of a controlled substance to a local county sheriff's office within 48 hours after the discovery of the theft or loss. A person who fails to report the loss or theft as required commits a first degree misdemeanor.

The bill provides legislative findings that two judicial opinions[30] correctly construe legislative intent that the inspection powers previously conferred upon law enforcement officers which allow such officers to access and review pharmacy records concerning controlled substances are to be exercised properly by such officers without the requirement of a subpoena or search warrant being sought or issued to examine and copy such records, and without the requirement that those persons to whom particular pharmacy records refer be given notice of the records' examination and copying under s. 893.07, F.S. The bill further provides that provisions of this section relating to maintenance of records of controlled substances do not require that a law enforcement officer obtain a subpoena, court order, or search warrant in order to obtain access to or copies of such records.

Section 24 amends s. 893.13, F.S., to add the following prohibited acts:

- A person may not, with the intent to obtain a controlled substance, combination of controlled substances, or an amount of a controlled substances or substances that are not medically necessary for the person, obtain or attempt to obtain from a practitioner a controlled substance or prescription for a controlled substance by misrepresentation, fraud, forgery, deception, subterfuge, or concealment of a material fact. A material fact includes whether the

[30] *State v. Carter*, 23 So.3d 798 (Fla.1st DCA 2009) and *State v. Tamulonis*, 39 So.3d 524 (Fla. 2nd DCA 2010), *review denied*, 52 So.3d 662 (Fla.2011).

person has an existing prescription for a controlled substance issued for the same period of time by another practitioner or has withheld the following information from a practitioner with whom the person seeks to obtain a controlled substance or a prescription for a controlled substance: the person has received a controlled substance or a prescription for a controlled substance of like therapeutic use from another practitioner within the previous 30 days.

- A health care practitioner, with the intent to provide a controlled substance, combination of controlled substances, or an amount of a controlled substances or substances that are not medically necessary to his or her patient, may not provide a controlled substance or a prescription for a controlled substance by misrepresentation, fraud, forgery, deception, subterfuge, or concealment of a material fact (see previous description of this term).
- Any person who adulterates a controlled substance for directed off-label use without authorization by a prescribing physician, violates existing provisions of law and causes the issuance of the entire prescription for the controlled substance to become invalid. A law enforcement officer in the performance of his or her duties may seize the adulterated or off-label prescribed controlled substance as evidence. The controlled substance may be returned to the owner only with a notarized affidavit from the original prescribing practitioner who gave authorization and explicit directions for the adulteration or off-label use of the controlled substance.

A violation of any of these new prohibited acts is a third degree felony if any controlled substance that is the subject of the offense is listed in Schedule II, Schedule III, or Schedule IV.

A prescribing practitioner may not write a prescription for a controlled substance for a patient, other person, or an animal and authorize or direct the adulteration of the dispensed form of the controlled substance for the purpose of ingestion by means of inhalation, injection, or any other means that is not medically necessary for the treatment of that patient. A violation of this prohibition is a third degree felony.

Section 25 amends s. 893.138, F.S., to authorize any pain-management clinic which has been used on more than two occasions within a 6-month period as the site of a violation of state laws relating to assault and battery, burglary, dealing in theft, robbery by sudden snatching, or unlawful distribution of controlled substance to be declared a public nuisance. As such it may be abated pursuant to the procedures provided in s. 893.138, F.S. Under that statute, a county or municipality may create an administrative board to hear complaints regarding nuisances as defined in that statute and take action such as ordering the closure of the business or activity on the premises. Such an order expires after one year or at an earlier time if so stated in the order. The board may also bring a complaint to seek temporary or permanent injunctive relief from the nuisance.

Section 26 creates a new unnumbered section of law that defines the term "interchange or substitution of an opioid analgesic drug" to mean the substitution of any opioid analgesic drug, brand or generic, for the opioid analgesic drug incorporating a tamper-resistance technology originally prescribed, irrespective of whether the substituted drug is rated as pharmaceutically and therapeutically equivalent by the FDA or Board of Pharmacy or whether the opioid analgesic drug with tamper-resistance technology bears a labeling claim with respect to reduction of tampering, abuse, or abuse potential.

The bill defines an "opioid analgesic drug," "opioid analgesic drug incorporating a tamper-resistance technology," and "pharmacist."

The Board of Pharmacy is required to create a list of opioid analgesic drugs incorporating a tamper-resistance technology, along with the identification of those drugs that provide substantially similar tamper-resistance properties. Inclusion of a drug on this list does not require that the drug bear a labeling claim with respect to reduction of tampering, abuse, or abuse potential at the time of listing. The list must also include a determination by the Board of Pharmacy as to which listed opioid analgesic drugs incorporating tamper-resistance technologies provide substantially similar tamper-resistance properties, based solely on studies submitted by the drug manufacturer consistent with requirements of s. 893.138, F.S.

A pharmacist is prohibited from interchanging or substituting an opioid analgesic drug for an opioid analgesic drug incorporating a tamper-resistance technology which is listed by the Board of Pharmacy unless the pharmacist verifies that the opioid analgesic drug has been identified on the list as one that provides substantially similar tamper-resistance properties or obtains written, signed consent from the prescribing physician for the interchange or substitution.

Section 27 provides an effective date of October 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of the bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

It is possible that the advertising restriction in lines 403 through 427 may be challenged on grounds that the restriction violates the First Amendment to the United States Constitution and Article I, Section 4 of the Florida Constitution.

The Central Hudson Test is the standard used for determining the constitutionality of a restriction on commercial speech.[31] The four prongs of the *Central Hudson* test, as modified by *Board of Trustees of State Univ. of New York v. Fox,* 492 U.S. 469, 109 S.Ct.

[31] *See: Central Hudson Gas & Elec. Corp. v. Public Service Com'n,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

3028, 106 L.Ed.2d 388 (1989), are: (1) whether the speech at issue is not misleading and concerns lawful activity; (2) whether the government has a substantial interest in restricting that speech; (3) whether the regulation directly advances the asserted governmental interest; and (4) whether the regulation is narrowly tailored, but not necessarily the least restrictive means available, to serve the asserted governmental interest.

Article I, Section 4 of the Florida Constitution, relating to freedom of speech and press states:

> Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the trust may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

While the bill provides legislative findings that the First District Court of Appeal (First District) and the Second District Court of Appeal (Second District)[32] correctly construed legislative intent regarding law enforcement officers' access to and review of pharmacy records concerning controlled substances, these findings do not necessarily preclude a challenge in other appellate circuits that such inspections violate the federal Health Insurance Portability Act (HIPAA) of 1996, 42 U.S.C. section 1320d (challenge rejected by the First District) or the right to privacy under Article I, Section 23 of the Florida Constitution (challenge rejected by the First District and the Second District).

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The bill requires a $100 fee to register as a dispensing practitioner who dispenses controlled substances. This registration must be renewed every 4 years. The Department estimates that there will be 6,327 applicants for registration in year 1 and 301 applicants in year 2. The application fees collected will be subject to the 8 percent general revenue surcharge and deducted from the amounts collected. The Department currently collects revenues equal to the cost of FDLE and FBI background checks.[33]

B. Private Sector Impact:

All practitioners who are authorized under their practice act to dispense controlled substances and who choose to do so will be required to register with the Board of Pharmacy and pay a $100 registration fee initially and every 4 years thereafter to renew the registration. The Department states that all individuals with "management access" to the database are required to submit a state and federal background check.[34]

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[32] *See* "Effect of Proposed Changes" section of this analysis for case citations.
[33] Department of Health Bill Analysis, Economic Statement and Fiscal Note, February 26, 2011, on file with the Senate Criminal Justice Committee.
[34] *Id.*

C. Government Sector Impact:

The Department provided the following comments regarding fiscal impact on the Department:

> DOH is required to submit fingerprints to FDLE and FBI for completion of a state and federal criminal history as a requirement for all individuals that have, "management access," to the database. The cost per FDLE background check is $24. The cost per FBI background check (if submitted electronically by DOH) is $19.25. It is estimated that 5 DOH employees and 10 employees of a contracted vendor will be required to submit fingerprints for completion of a state and federal criminal history check. It is estimated that one additional DOH employee will be required to submit fingerprints for a background check during the second year.
>
> DOH will experience an increase in cost associated with the receipt and processing of registration applications. It is estimated initially that 6,327 first-time applicants for registration will be submitted for processing and 301 first-time applications each year thereafter. The processing cost per application is $7.69.
>
> DOH will experience an increase in workload associated with receipt and review of the registration applications.[35]

The Department and the boards will be required to adopt rules to implement provisions in the bill. The PDMP database may require modification, if completed before this law is enacted, to capture the additional information required to be reported. It is unknown at this time if adoption of rules and database modifications, if any, will have a potential fiscal impact.

The bill creates a number of third degree felonies and misdemeanors. It also amends the elements of a burglary offense that is a second degree felony and the elements of a grand theft offense that is a third degree felony. The impact, if any, of the amended offenses on county jails is indeterminate.

The Criminal Justice Impact Conference, which provides the final, official estimate of the state prison bed impact, if any, of legislation, has not yet met to provide an estimate regarding CS/SB 818.[36] However, insofar as the third degree felonies created by the bill, these felonies are unranked,[37] so it is probable that a first-time violation would be punished by a nonprison sanction, such as probation, rather than state prison.

[35] *Id.*

[36] Senate professional staff have requested that the bill be placed on a future agenda for review.

[37] "Unranked" is a descriptive term for a noncapital felony that is not specifically ranked in the offense severity ranking chart in s. 921.0022, F.S. If the felony is not ranked in the chart, it is ranked pursuant to s. 921.0023, F.S., based on its felony degree. An unranked third degree felony is a Level 1 offense. *Id.* A first-time offender convicted of only the unranked third degree felony would score a nonprison sanction as the lowest permissible sentence. Section 921.0024, F.S. Further, in this

VI. Technical Deficiencies:

Line 1629 provides for certain action after the PDMP has been operational for 12 months. It probably should require the action after the PDMP *database* has been operational for 12 months.

Section 14 of the bill refers to a pharmacy technician in one place and a pharmacy intern in others. Since this section relates to criminal violations, the person to which the provision applies should be consistent and clarified.

Section 21 of the bill expands the purposes for which the Attorney General may access information in the PDMP database (see lines 1325-1327) and authorizes the Agency to access information in the PDMP for certain purposes (see lines 1347 – 1349). However, a corresponding exception is not provided in s. 893.0551, F.S., relating to the confidentiality of information in the PDMP database.

VII. Related Issues:

The Department advises that it is authorized to comply with all requirements of the NASPER Act. However, the bill fails to authorize the PDMP program manager to provide health care practitioners with unsolicited reports. This authority is necessary for the Department / PDMP to be eligible to receive federal grant funding under the NASPER Act.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Health Regulation o March 14, 2011:

- Reduces the continuing education hours from 3 hours to 1 hour.
- Includes an exception from registration as a pain-management clinic in both ch. 458, F.S., and ch. 459, F.S., when a majority of the physicians who provide services in the clinic primarily provide interventional pain procedures of the type routinely billed using surgical codes.
- Strikes the requirement in existing law that allopathic physicians working in a pain-management clinic effective July 1, 2012 must have completed a pain medicine fellowship or a pain-medicine residency.
- Authorizes an ARNP or a PA, to perform an appropriate medical examination of a patient, in lieu of the allopathic physician or osteopathic physician on the same day that the physician dispenses or prescribes a controlled substance to a patient at a pain-management clinic and changes the terminology for the examination performed by a physician that is in current law to an appropriate medical examination rather than a physician examination.
- Specifies the standard of care that must be met is set forth in a specific rule when a physician prescribing or dispensing more than a 72-hour dose of controlled

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first-time offender scenario, a non prison sanction would be required unless the sentencing court made written findings that this sanction could present a danger to the public. Section 775.082(10), F.S.

substances for the treatment of chronic nonmalignant pain at a pain-management clinic documents in the patient record that the dosage is within the standard of care.

- Removes the Department of Law Enforcement as a report recipient when an employee in a pharmacy reports identifying information concerning a person obtaining or attempting to obtain a controlled substance through fraud or misrepresentation or when a person who is required to maintain records and inventories of controlled substances under ch. 893, F.S., discovers a loss or theft of controlled substances.
- Removes a dwelling as a location in which the new element for the crime of burglary may occur.
- Deletes one of the conditions that defines an adulterated controlled substance;
- Removes the new misdemeanor offense created in the bill as filed for a person or health care practitioner who performs a prohibited act with an adulterated controlled substance that is listed in Schedule V.
- Clarifies and exempts a law enforcement officer from securing a subpoena, court order, or search warrant in order to obtain access to or copies of records required to be maintained under ch. 893, F.S., relating to controlled substances.
- Prohibits the substitution of an opioid analgesic drug with tamper-resistance technology under certain circumstances.

B. Amendments:

None.

722356

LEGISLATIVE ACTION

Senate . House

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The Committee on Criminal Justice (Dean) recommended the following:

Senate Amendment (with title amendment)

Delete lines 70 - 71
and insert:
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========== T I T L E A M E N D M E N T ==========
And the title is amended as follows:
Delete line 9
and insert:
probationer or offender of the violation; authorizing the court to

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL:	SB 844
INTRODUCER:	Senator Benacquisto
SUBJECT:	Violations/Probation/Community Control/Widman Act
DATE:	March 14, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Pre-meeting**
2.			JU	
3.			BC	
4.				
5.				
6.				

I. Summary:

Senate Bill 844 provides that when the person before a circuit court for First Appearance on a new law violation is under community supervision, the court may issue an arrest warrant for the violation if the court finds reasonable grounds to believe that a community supervision violation has occurred.

At a First Appearance hearing on a violation of community supervision, if the offender admits the violation, the court may order that the offender be taken before the court that granted the probation or community control.

If the offender does not admit the violation, the First Appearance court may commit the offender or may release the offender with or without bail to await further hearing. In deciding whether or not to set bail, the court may consider the likelihood of a prison sanction on the violation of community supervision based on the new law violation arrest. The bill also provides that the court may order the return of the person under community supervision to the court that originally granted the community supervision for further proceedings.

The bill does not apply in cases where the offender is subject to the special requirements for hearings as to his or her dangerousness to the community under s. 948.06(4) and (8)(e), F.S.

The bill is named in honor of Officer Andrew Widman, a Fort Myers police officer who was killed during the exchange of gunfire with an offender who had not yet been arrested on a violation of community supervision warrant issued after his First Appearance on a new law violation in Lee County.

The bill would become effective October 1, 2011.

This bill substantially amends the following section of the Florida Statutes: 948.06.

II. Present Situation:

Section 948.01, F.S., provides the circumstances under which the trial court can place a person on probation[1] or community control[2] (community supervision). Any person who is found guilty by a jury, the court sitting without a jury, or enters a plea of guilty or nolo contendere may be placed on probation or community control regardless of whether adjudication is withheld.[3]

The Department of Corrections supervises all probationers sentenced in circuit court.[4] Section 948.03, F.S., provides a list of standard conditions of probation. In addition to the standard conditions of probation, the court may add additional conditions to the probation that it deems proper.[5] The condition requiring the probationer to not commit any new criminal offenses is a standard condition.[6]

If a person who has been sentenced to probation commits a new criminal offense, that person thereby commits a violation of the terms of probation. In such instances, upon being informed of the new law violation, generally the probation officer files an affidavit with the sentencing court alleging a violation of probation based upon the existence of the new law violation.[7] The court evaluates the facts as alleged in the affidavit to determine if sufficient probable cause of a violation exists and may then issue a warrant for the probationer's arrest.[8]

It is not uncommon for the sentencing court to set a condition of "no bond" in the case until the probationer has appeared before that particular judge who has jurisdiction over the probationer's case. If a different judge sees the probationer at First Appearance on the violation case, he or she generally honors the trial court judge's "no bond" requirement. This is the common course of local practice.

Under limited circumstances listed in s. 903.0351, F.S., the First Appearance judge *must* order pretrial detention without bail until the resolution of the probation violation or community control violation hearing. These violators fall into certain categories:

- Violent felony offenders of special concern as defined in s. 948.06, F.S.

[1] "Probation" is defined as a form of community supervision requiring specified contacts with parole and probation officers and other terms and conditions as provided in s. 948.03, F.S. Section 948.001(5), F.S.

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

[3] Section 948.01(1), F.S.

[4] *Id*.

[5] Section 948.03(2), F.S.

[6] Fl. R. Crim. Pro. 3.790 (2010).

[7] Section 948.06(1)(b), F.S.

[8] *Id*.

- A violator arrested for committing a qualifying offense set forth in s. 948.06(8)(c), F.S.
- A violator who has previously been found to be a habitual violent felony offender, a three-time violent felony offender, or a sexual predator, and who has been arrested for committing one of the qualifying offenses set forth in s. 948.06(8)(c), F.S.

In addition to the "normal" channels through which an alleged violation progresses, s. 948.06(1)(b), F.S., provides for the warrantless arrest of an offender reasonably believed by a law enforcement officer to have violated his or her community supervision in a material respect. It states:

> Whenever within the period of probation or community control there are reasonable grounds to believe that a probationer or offender in community control has violated his or her probation or community control in a material respect, any law enforcement officer who is aware of the probationary or community control status of the probationer or offender in community control or any parole or probation supervisor may arrest or request any county or municipal law enforcement officer to arrest such probationer or offender without warrant wherever found and return him or her to the court granting such probation or community control.[9]

Section 903.046, F.S., provides that the court may consider the defendant's past or present conduct and record of convictions in determining the bail amount for a new criminal offense. A defendant before the court for First Appearance on a new criminal law violation whose criminal history reflects his or her community supervision status should have that current status weighed as a bond-related factor by the First Appearance judge according to s. 903.046, F.S., and Rule 3.131(3)(b), Florida Rules of Criminal Procedure, even though a violation may not yet have been filed, warrant issued, or warrantless arrest made.

The Case of Abel Arango and the Death of Officer Andrew Widman[10]

In 1999, Abel Arango (A/K/A Abel Arrango) was sentenced on a split-sentence to 5 years in prison with 15 years of probation following his release for convictions of grand theft, burglary of an unoccupied structure or conveyance, carrying a concealed firearm, and armed robbery. The offenses occurred in Collier County, he was sentenced by the Circuit Court in and for Collier County, therefore the Collier court had continuing jurisdiction over the case (the successful completion of 15 years probation) upon Arango's release from prison in 2004.[11]

Arango reported to the probation office as required by the sentencing court until his arrest on Friday, May 16, 2008, in Lee County. On that day he was arrested on five felony cocaine-related

[9] Section 948.06(1)(a), F.S.

[10] The facts relayed in this Staff Analysis have been gathered from a Memo prepared by FDLE Commissioner Gerald Bailey at the request of the Governor's office, telephone conversations with FDLE personnel, Arango's Department of Corrections Release Information posted on the Department's website, a telephone conversation with a gentleman with the South Florida Detention and Removal Office of U.S. Immigration and Customs Enforcement, as well as newspaper accounts of the death of Officer Widman. The referenced information is on file with the Senate Committee on Criminal Justice.

[11] Although there was a federal detainer for Arrango and he spent several months after his prison release at the Krome's Detention Center, ICE was unable to deport him to Cuba because the U.S. has no formal diplomatic ties or agreement for repatriation with Cuba, so Arrango was released in July, 2008.

charges: two possession charges, two sale charges, and one trafficking of more than 28 grams but less than 150 kilograms.

By the time Arango appeared at First Appearance in Lee County the next day his criminal history, probationary status, and wants and warrants (of which there were none) were made available to the court by court services personnel. The First Appearance judge set a total of $100,000 bond in the Lee County (new law violation) cases which Arango was able to make, therefore he was released from the Lee County jail.

It should be noted that in setting the bond at $100,000, the First Appearance judge set the bond at more than double the amount on the standard bond schedule, therefore although there was no active warrant for a violation of probation, it appears that Arango's probation status was taken into account by the judge.[12]

In the meantime, Arango's probation officer received a message on Monday, May 19, sent by FDLE on Friday night. This "Florida Administrative Message" informed the probation officer that law enforcement had arrested Arango on Friday. She attempted to contact Arango by telephone and when he did not answer the probation officer left a message for him to call her immediately. The call was not returned.

On Friday, May 23, the probation officer delivered a sworn affidavit to the Collier County Circuit Court (the sentencing court in the probation cases) alleging the violation of probation in the Collier County cases, based upon the new arrest, and requesting a warrant be issued for Arango's arrest. The warrant was issued with a "no bond" provision and was entered into the Florida Crime Information Center (FCIC) on Monday, June 2, 2008.

Arango appeared at the Lee County Circuit Court for arraignment on the cocaine charges on Monday, June 16. Although the violation of probation warrant was active and in the FCIC system, no system queries were made on Arango prior to or during the time of his arraignment.

It is unknown whether court personnel or the bailiffs had knowledge of the warrant at that time. Presumably they did not as it is unlikely that an updated criminal history would be run on a defendant between First Appearance and the arraignment a month later. Arango came to and left arraignments without being arrested on the active violation of probation warrant.

On June 23, Arango's probation officer again attempted to contact him by going to his house but was unable to locate anyone at the residence. The Collier County Sheriff's Office ran warrant queries in the FCIC system twice in July, both of which showed the active warrant. It is unknown why this was done.

On Friday, July 18, 2008, Fort Myers Police officers responded to a reported domestic dispute between Arango and his girlfriend. Gunshots were exchanged between Arango and the officers. Officer Andrew Widman and Arango were killed during the gunfire.

[12] See the Presentment by the Fall Term 2008 Lee County Grand Jury, In re: Death of Fort Myers Police Officer Andrew Widman on July 18, 2008, filed with the Circuit Court of the Twentieth Judicial Circuit on September 11, 2008.

Section 1 of the bill names the bill "The Officer Andrew Widman Act" in his honor.

III. Effect of Proposed Changes:

The bill provides that a First Appearance court may reach beyond the matter of pretrial release or detention on a new law violation arrest under certain circumstances.

If the court has reasonable grounds to believe that the offender appearing before the court at First Appearance on the new law violation is under community supervision and has violated the terms of supervision in a material respect by committing the new law violation, the court may order the arrest of the offender for the violation at that time.

The bill, therefore, should allow the court to expedite the arrest of an offender whose terms of community supervision have been violated due to the alleged new law violation, if he or she has not already been arrested on the violation by law enforcement under the provisions of s. 948.06(1)(a), F.S.

The court must inform the offender of the violation of community supervision. If he or she admits the violation, the court may order that the offender be brought before the court that granted the community supervision.

If the offender does not admit the violation of community supervision, the court may either commit the offender or release him or her with or without bail to await further hearing on the matter, or simply order that the offender be brought before the court that granted the community supervision.

Should the court reach the question of releasing the offender on the violation of community supervision, the court may consider, specifically, whether it is more likely than not that a prison sanction would be handed down by the original sentencing court for a violation of community supervision based upon the new arrest.

The bill does not apply to those offenders who are subject to the "danger to the community" hearings required by s. 948.06(4), F.S., or the "violent felony offender of special concern" hearings required by s. 948.06(8)(e), F.S.

As previously stated, the bill is named in honor of Officer Andrew Widman.

The bill would become effective October 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

In the early 1980s, ss. 949.10 and 949.11, F.S., contained language that is similar to that of the bill. One clear difference between the bill and those sections of law, however, is that the statutes applied to offenders who were the subject of an active violation warrant and subsequent arrest for which they could not be released until after a violation hearing.

These sections provided that the arrest of any person who was on probation (for committing a new crime) was prima facie evidence of a violation of the terms and conditions of such probation. Upon such arrest, probation was immediately temporarily revoked, and such *person had to remain in custody until a hearing* by the Parole and Probation Commission or the court. The statutes required the hearing to be held within 10 days from the date of the arrest and provided that the failure of the commission or the court to hold the hearing within 10 days from the date of arrest resulted in the immediate release of such person from incarceration on the temporary revocation.

Although these sections of statute were repealed in 1982, they were analyzed by various courts. In *Miller v. Toles*, 442 So.2d 177 (Fla. 1983), an offender alleged that his due process rights were violated because he was not given a hearing until the eleventh day after being placed in custody. The Florida Supreme Court agreed and stated that:

> Without provision for expedited final hearings for a parolee or a probationer arrested for alleged commission of a felony, statutes governing subsequent felony arrest of felony parolee or probationer which deny the parolee or probationer arrested a preliminary probable cause hearing would be subject to constitutional attack as imposing an automatic forfeit of liberty interests upon arrest, not conviction, for a felony.

The Court acknowledged that probationers could be afforded lesser due process rights but stated that the quid pro quo for doing so was the expedited final hearing. The Court stated that without that provision, the statute would be subject to constitutional attack as imposing an automatic forfeit of liberty interests upon arrest, rather than conviction, for a felony.

The bill requires an arrest on a violation of community supervision before the offender's liberty is subject to being taken and it provides a prompt mechanism by which the offender can be released from custody or from any conditions of release.

There may be an issue of separation of powers to the extent that it could be said that the court is assuming the role of the executive branch (Department of Corrections) by initiating the violation of probation process. However, Florida Statutes provide that the community supervision process may be initiated by other means, specifically the warrantless arrest authorized in s. 948.06(1)(a), F.S. Also, the issue of separation of

powers may arise to the extent that the provisions of the bill may be viewed as procedural (the courts' power) rather than substantive (within the prerogative of the Legislature).

It should be noted that in the case of Abel Arango, this was not a person who met the statutory criteria for special scrutiny at First Appearance in existence at the time. He did not qualify as a "violent felony offender of special concern" nor as an offender who required a special hearing as to his potential danger to the community (*see s. 948.06(4) and (8)(e), F.S.).*

However, Arango was not a typical community supervision offender either, due to the fact that *he was on probation following a prison sentence* and therefore was *more likely* than a typical offender *to be sentenced to prison on a violation* of his probation. The fact of the likely prison sentence on the violation is easily discernable by a prosecutor at First Appearance, by the court, or by pretrial services personnel, any of whom have the ability to review an offender's prior criminal history and sentencing scoresheet.

Although human behavior cannot always be predicted, it could be argued that an offender such as Arango who is surely facing a return to prison if found to be in material violation of his probation, could pose an increased danger to society if he is released from custody at First Appearance on a new crime, regardless of whether the violation affidavit had been filed or a warrant secured under the "normal" procedure. Just as in the Arango case, an offender who is facing a return to prison may feel he or she has "nothing to lose" as it relates to future unlawful behavior pending resolution of the violation he or she must know is coming.

Perhaps due process and separation of powers concerns will be eliminated, or at least diminished, if a reviewing court gives great weight to the public safety issue brought to the attention of the Legislature by the Arango case and addressed by this bill.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

In the Arango case, subsequent to his arrest on the new law violation (drug charges in Lee County), the Lee County Sheriff's Office ran a warrants check for Arango. Later that night the Lee County Jail ran a second warrants check. Neither query provided probation information on Arango due to inaccurate identifiers having been entered during the queries, such as incorrect spelling of the last name, incorrect race, and the incorrect date of birth.[13]

Had the correct information been entered into the database, it is possible that the Lee County Sheriff's Office could have arrested Arango at that time, prior to First Appearance, for a violation of probation based upon the new law violation. Statutory authority for such an action is found in s. 948.06(1)(a), F.S. (set forth above in the *Present Situation* section).

The correct probation status report was supplied to the First Appearance court the next morning by the Lee County Pretrial Service in Arango's case. Therefore, it appears that an arrest on the violation could have been made by Lee County law enforcement just prior to or soon after the First Appearance proceedings on the drug arrest.

It is equally possible that, if Department of Corrections or law enforcement personnel were assigned specifically to arrest defendants with active warrants at arraignments or other court appearances, Arango may have been arrested on the active violation warrant (at arraignments in Lee County on the drug cases) a full month before Officer Widman's death.

Technology is now available through FDLE to provide rapid identification of persons who come into contact with the criminal justice system. The devices connect through a personal computer to the Florida Criminal Justice Network. The individual places two fingers on a platen and within 35-45 seconds critical information about the individual is transmitted. If the Network indicates a "hit," the database can be queried regarding identification, active warrants, criminal history and whether the individual has previously provided a DNA sample for the DNA database.

The rapid identification devices were in limited use at the time of the Arango case. Currently, however, all probation offices throughout the state utilize this technology to confirm the identity and current status of reporting probationers, some Sheriff's offices use the device, the Pinellas County jail uses it at intake, there are approximately 150 mobile units in patrol cars, and the Collier County Courthouse has a device available in an anteroom should identification become an issue in one of the courtrooms. Lee County has been routinely checking local, state and federal databases for active warrants on every person who has a court appearance since November 2008.[14]

[13] Commissioner Bailey, FDLE, August 11, 2008 Memo to the Governor's Office regarding the events leading up to Officer Widman's death. Memo on file with Senate Criminal Justice Committee.

[14] Warrants Checks Get Results in Lee County, story published February 8, 2010, http//www.news-press.com.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

293842

LEGISLATIVE ACTION

Senate	.	House
Comm: WD	.	
03/21/2011	.	
	.	
	.	
	.	

The Committee on Criminal Justice (Margolis) recommended the following:

Senate Amendment (with title amendment)

Delete lines 28 - 35
and insert:
forth in s. 817.67(2).

========== T I T L E A M E N D M E N T ==========
And the title is amended as follows:
Delete lines 6 - 13
and insert:
providing an effective date.


423390

LEGISLATIVE ACTION

Senate . House

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The Committee on Criminal Justice (Margolis) recommended the following:

Senate Amendment

Delete lines 28 - 35
and insert:
forth in s. 817.67(2). It is not a violation of this subsection for a retailer or retail employee, in the ordinary course of business, to: possess, receive, or return a credit card or debit card that the retailer or retail employee does not know was stolen; or possess, receive, or retain a credit card or debit card that the retailer or retail employee knows is stolen for the purpose of an investigation into the circumstances regarding the theft of the card or its possible unlawful use.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL:	SB 920
INTRODUCER:	Senator Ring
SUBJECT:	Possession of Stolen Credit or Debit Cards
DATE:	March 11, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	**Pre-meeting**
2.			CM	
3.			AG	
4.				
5.				
6.				

I. Summary:

The bill makes it a third degree felony to knowingly possess, receive, or retain custody of a credit or debit card that has been taken from the possession, custody, or control of another person without the cardholder's consent and with the intent to impede recovery of the card by the cardholder.

The bill also specifies that this offense does not apply to a retailer that takes, accepts, retains, possesses, or processes a stolen credit or debit card if the retailer does so in the ordinary course of business and does not have actual knowledge that the card is stolen. The exception does not apply to a retail employee who has actual knowledge that the card is stolen.

This bill substantially amends section 817.60 of the Florida Statutes.

II. Present Situation:

Section 817.60, F.S., is part of Part II of ch. 817, F.S., which is the 1967 "State Credit Card Crime Act."[1] This statute provides criminal penalties[2] for various crimes relating to credit cards.[3] The specific offenses are as follows:

[1] Section 817.57, F.S.

[2] The statute specifies that offenses are subject to the penalties set forth in s. 817.67(1), F.S. or s. 817.67(2), F.S., as applicable. Section 817.67(1), F.S., provides that a person who is subject to the penalties of this subsection is guilty of a first degree misdemeanor. A first degree misdemeanor is punishable by up to one year in county jail and a fine of up to $1,000 may also be imposed. Sections 775.082 and 775.083, F.S. Section 817.67(2), F.S., provides that a person who is subject to the penalties of this subsection is guilty of a third degree felony. A third degree felony is punishable by up to five years in state prison and a fine of up to $5,000 may also be imposed. Sections 775.082 and 775.083, F.S.

- *Taking or retaining possession of a credit card taken*: First degree misdemeanor: Person takes a credit card from the possession, custody, or control of another person without the cardholder's consent or, with knowledge the credit card has been so taken, receives the credit card with the intent to use it, to sell it, or to transfer it to another person other than the issuer or the cardholder.[4]
- *Theft of a credit card lost, mislaid, or delivered by mistake*: First degree misdemeanor: Person receives a credit card that he or she knows to have been lost, mislaid, or delivered by mistake as to the identity or address of the cardholder, and retains the credit card with the intent to use, sell, or transfer the credit card to another person other than the issuer or the cardholder.[5]
- *Purchase or sale of another person's credit card*: First degree misdemeanor: Person other than the credit card issuer sells a credit card or buys a credit card from a person other than the issuer.[6]
- *Obtaining control of a credit card as security for a debt*: First degree misdemeanor: Person, with intent to defraud the credit card issuer, a person or organization providing money, goods, services, or anything else of value, or any other person, obtains control over a credit card as security for a debt.[7]
- *Dealing in another person's credit card*: Third degree felony: Person other than the credit card issuer, during any 12-month period, receives two or more credit cards issued in the name or names of different cardholders, which cards he or she has reason to know were taken or retained under circumstances which constitute credit card theft or a violation of this part.[8]
- *Forgery of another person's credit card*: Third degree felony: Person, with intent to defraud a purported credit card issuer or a person or organization providing money, goods, services, or anything else of value or any other person, falsely makes, falsely embosses, or falsely alters in any manner a credit card or utters such a credit card or, with intent to defraud, has a counterfeit credit card or any invoice, voucher, sales draft, or other representation or manifestation of a counterfeit credit card in his or her possession, custody, or control.[9]
- *Signing another person's card*: First degree misdemeanor: Person other than the holder of a credit card or a person authorized by the cardholder, signs the credit card with the intent to

[3] "Credit card" is defined to mean "any instrument or device, whether known as a credit card, credit plate, bank service card, banking card, check guarantee card, electronic benefits transfer (EBT) card, or debit card, or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining money, goods, services, or anything else of value on credit or for use in an automated banking device to obtain any of the services offered through the device." Section 817.58(4), F.S.

[4] Section 817.60(1), F.S. Taking a credit card without consent includes obtaining it by conduct defined or known as statutory larceny, common-law larceny by trespassory taking, common-law larceny by trick or embezzlement or obtaining property by false pretense, false promise or extortion. *Id.*

[5] Section 817.60(2), F.S.

[6] Section 817.60(3), F.S.

[7] Section 817.60(4), F.S.

[8] Section 817.60(5), F.S.

[9] Section 817.60(6), F.S. A person other than an authorized credit card manufacturer or issuer who possesses two or more counterfeit credit cards is presumed to have violated this subsection. *Id.* A person falsely makes a credit card when he or she makes or draws in whole or in part a device or instrument which purports to be the credit card of a named issuer but which is not such a credit card because the issuer did not authorize the making or drawing or when he or she alters a credit card which was validly issued. *Id.* A person falsely embosses a credit card when, without the authorization of the named issuer, he or she completes a credit card by adding any of the matter, other than the signature of the cardholder, which an issuer requires to appear on the credit card before it can be used by a cardholder. *Id.*

defraud the credit card issuer or a person or organization providing money, goods, services, or anything else of value or any other person.[10]

III. Effect of Proposed Changes:

The bill amends s. 817.60, F.S., to create a new subsection (8) which provides that a person who knowingly possesses, receives, or retains custody of a credit or debit card[11] that has been taken from the possession, custody, or control of another person without the cardholder's consent and with the intent to impede recovery of the card by the cardholder commits unlawful possession of a stolen credit or debit card and is subject to the penalties set forth in s. 817.67(2), F.S., which are third degree felony penalties: up to five years in state prison and a fine of up to $5,000 may also be imposed.[12]

The bill also specifies that this offense does not apply to a retailer that takes, accepts, retains, possesses, or processes a stolen credit or debit card if the retailer does so in the ordinary course of business and does not have actual knowledge that the card is stolen. The exception does not apply to a retail employee who has actual knowledge that the card is stolen.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

[10] Section 817.60(7), F.S.

[11] "Debit card" is not a term defined in the bill, in s. 817.60, F.S., or in ch. 817, F.S. However, courts may look "to case law or related statutory provisions which define the term, and where a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense." *State v. Hagan*, 387 So.2d 943, 945 (Fla.1980). Staff's review of the Florida Statutes found many references to the term "debit card" without a definition of the term.

[12] Sections 775.082 and 775.083, F.S.

C. Government Sector Impact:

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of legislation, estimates that the bill has an insignificant prison bed impact because it creates an unranked third degree felony.[13]

VI. Technical Deficiencies:

The retailer exception at lines 28-35 of the bill does not track the elements of the act prohibited, and therefore could raise questions as to whether the retailer's actions are truly an exception from the act prohibited.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[13] "Unranked" is a descriptive term for a noncapital felony that is not specifically ranked in the offense severity ranking chart in s. 921.0022, F.S. If the felony is not ranked in the chart, it is ranked pursuant to s. 921.0023, F.S., based on its felony degree. An unranked third degree felony is a Level 1 offense. *Id.* A first-time offender convicted of only the unranked third degree felony would score a nonprison sanction as the lowest permissible sentence. Section 921.0024, F.S. Further, in this first-time offender scenario, a non prison sanction would be required unless the sentencing court made written findings that this sanction could present a danger to the public. Section 775.082(10), F.S.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL:	SB 1060
INTRODUCER:	Senator Lynn
SUBJECT:	Programs for Misdemeanor Offenders
DATE:	March 17, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Pre-Meeting**
2.			BC	
3.				
4.				
5.				
6.				

I. Summary:

Senate Bill 1060 requires a county court to sentence a defendant found guilty of misdemeanor possession of a controlled substance or drug paraphernalia to a licensed substance abuse education and treatment intervention program.

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

This bill substantially amends sections 948.15 and 948.16 of the Florida Statutes.

II. Present Situation:

Misdemeanor Probation

Section 948.15, F.S., provides for misdemeanor probation services. It specifies that a private entity or public entity under the supervision of the board of county commissioners or the court may provide probation services for offenders sentenced by the county court. Any private entity providing services for the supervision of misdemeanor probationers must contract with the county in which the services are to be rendered.

A private entity that provides court-ordered services to offenders and that charges a fee for such services must register with the board of county commissioners in the county in which the services are offered. The entity is required to provide the following information for each program it operates:

- The length of time the program has been operating in the county.
- A list of the staff and a summary of their qualifications.
- A summary of the types of services that are offered under the program.
- The fees the entity charges for court-ordered services and its procedures, if any, for handling indigent offenders.

The term of misdemeanor probation may be for up to one year.

Misdemeanor Pretrial Intervention Program
Section 948.16, F.S., specifies that a person who is charged with a misdemeanor for possession of a controlled substance or drug paraphernalia under ch. 893, F.S., and who has not previously been convicted of a felony nor been admitted to a pretrial program, is eligible for voluntary admission into a misdemeanor pretrial substance abuse education and treatment intervention program, including a treatment-based drug court program, for a period based on the program requirements and the treatment plan for the offender.

Admission may be based upon motion of either party or the court except, if the state attorney believes the facts and circumstances of the case suggest the defendant is involved in dealing and selling controlled substances, the court shall hold a preadmission hearing. If the state attorney establishes, by a preponderance of the evidence at such hearing, that the defendant was involved in dealing or selling controlled substances, the court shall deny the defendant's admission into the pretrial intervention program.

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

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

- Consider the recommendation of the treatment program;
- Consider the recommendation of the state attorney as to disposition of the pending charges; and
- Determine, by written finding, whether the defendant 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 or return the charges to the criminal docket for prosecution. The court must dismiss the charges upon finding that the defendant has successfully completed the pretrial intervention program.

III. Effect of Proposed Changes:

Senate Bill 1060 provides that defendants found guilty of a misdemeanor drug or paraphernalia possession charge under chapter 893, F.S., must be placed by the court in a licensed substance abuse education and treatment intervention program.

The local boards of county commissioners are authorized to contract with and supervise misdemeanor probation service organizations. The courts are also authorized under s. 948.15, F.S., to provide misdemeanor probation services.

The bill specifically includes licensed substance abuse education and treatment intervention programs among the programs that may provide misdemeanor supervision for defendants in county court on charges other than possession of drugs or paraphernalia under chapter 893, F.S.

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

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

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill is likely to have a fiscal impact on counties that will be required to provide licensed substance abuse education and treatment intervention programs for misdemeanor defendants placed on county probation as required by the bill.

The bill as written could also expand the number of potential participants in county-funded misdemeanor pretrial substance abuse education and treatment intervention programs. Although no potential fiscal impact has been brought to our attention, it is conceivable that the counties may decide to increase program capacity which would result in increased expenditures.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL:	SB 1114
INTRODUCER:	Senator Detert
SUBJECT:	Verification of a Prisoner's Immigration Status
DATE:	March 17, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	**Pre-meeting**
2.			MS	
3.			CA	
4.			BC	
5.				
6.				

I. Summary:

This bill requires the staff of any jail or other detention facility to make reasonable efforts to determine the citizenship of any person confined in the facility who is charged with either a felony, driving under the influence, or boating under the influence. If the person is a foreign national, staff is to make reasonable efforts to determine whether the person is lawfully in the United States. If citizenship cannot be determined by documents in the person's possession, a request for verification of immigration status must be requested from the Department of Homeland Security (DHS) within 48 hours of confinement. If DHS verifies that the person is not lawfully present in the United States, staff must notify DHS of the person's confinement and confirm whether a federal immigration detainer has or will be issued.

For purposes of bond consideration, the bill creates a rebuttal presumption that a person who is not lawfully present in the United States is a flight risk.

This bill creates section 907.06 of the Florida Statutes.

II. Present Situation:

An alien is a person in the United States who is not a US citizen. Aliens can be removed for reasons of health, criminal status, economic well-being, national security risks and other reasons of public concern that are specifically defined in the federal Immigration and Nationality Act (INA). The INA grants most aliens the right to a removal proceeding before an immigration judge. In a removal hearing, an immigration judge considers evidence presented by both the alien and the United States Immigration and Customs Enforcement (ICE) and renders a decision that can be appealed to the Board of Immigration Appeals. If the immigration judge issues a decision

ordering the alien removed from the United States, a DHS agency, ICE is responsible for enforcing the removal order. In federal Fiscal Year 2007, ICE removed 276,912 illegal aliens, including voluntary removals, from the United States.[1]

ICE ACCESS

ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS) encompass a number of services and programs that ICE makes available to local law enforcement agencies. Several of these programs specifically address or are related to the need to identify and remove criminal aliens who are jailed or incarcerated by local and state authorities.

Secure Communities

Secure Communities is an ICE ACCESS initiative that focuses federal resources on assisting local communities to identify and remove high-risk criminal aliens who are held in state and local prisons. The focus of the program is sharing of biometric data (such as fingerprint records) between federal, state, and local law enforcement agencies to screen all foreign-born detainees and identify criminal aliens. Fingerprints that are taken during the booking process for any person (not just those suspected of being foreign nationals) are automatically checked against both FBI criminal history records and DHS records. ICE is automatically notified when fingerprint data establishes that a person is an unauthorized alien and ICE officers conduct follow-up interviews and take appropriate action. ICE focuses its follow-up efforts on foreign nationals with charged or convicted offenses such as violent crimes, major drug offenses, and threats to national security.[2]

In January 2009, Duval County became the first Florida county to participate in Secure Communities. All 67 Florida counties are now activated Secure Communities jurisdictions.

Law Enforcement Support Center

ICE's Law Enforcement Support Center (LESC) answers queries from state and local law enforcement agencies regarding information status. The LESC is available 24 hours a day, 7 days a week. In FY 2010, LESC received 1,133,130 requests for information.[3]

Florida law enforcement agencies have a reduced need to utilize LESC services since activating Secure Communities with its automatic check of immigration status through fingerprints taken during the booking process. However, the LESC is still available for situations that do not fit into the Secure Communities framework.

Criminal Alien Program

ICE's Criminal Alien Program (CAP) was created to prevent criminal aliens from being released into the general public. CAP teams respond to local law enforcement agency requests as resources permit. Whenever possible, the program secures a final removal order prior to the termination of criminal aliens' sentences. CAP focuses on aliens who have been convicted of

1 All information concerning ICE is derived from information on the ICE website, www.ice.gov, last viewed on March 17, 2011.

[2] ICE "Secure Communities: A Modernized Approach to Identifying and Removing Criminal Aliens," http://www.ice.gov/doclib/secure-communities/pdf/sc-brochure.pdf (last viewed at on March 17, 2011).

[3] Description of Law Enforcement Support Center on ICE website at http://www.ice.gov/lesc (last viewed on March 17, 2011).

drug trafficking, sex offenses, and other violent crimes, including both offenders who are in custody and those who are at large.[4]

287(g) Immigration Cross-Designation

ICE may enter into written agreements with a state or any political subdivision of a state so that qualified personnel can perform certain functions of an immigration officer.[5] ICE trains and cross-designates state and local officers to enforce immigration laws as authorized through section 287(g) of the INA. An officer who is trained and cross-designated through the 287(g) program can interview and initiate removal proceedings of aliens processed through the officer's detention facility. If the local law enforcement agency does not have a 287(g) officer, an ICE officer must interview a foreign national and initiate removal proceedings, if appropriate. Since January 2006, the 287(g) program has been credited with identifying more than 185,000 individuals, mostly in jails, who are suspected of being in the country illegally.

ICE has 287(g) agreements with 71 law enforcement agencies in 25 states. Florida currently has four law enforcement agencies that participate in the program: the Florida Department of Law Enforcement (FDLE), and the sheriff's offices of Bay, Collier, and Duval counties.[6]

ALIENS IN FLORIDA JAILS

There is no nationwide reporting system that can be used to determine the total number of criminal aliens who are in jails and prisons in the United States. However, ICE estimates that 300,000 to 450,000 criminal aliens who are potentially removable are detained each year at federal, state, and local prisons and jails. These include illegal aliens in the United States who are convicted of any crime and lawful permanent residents who are convicted of a removable offense.

Florida Model Jail Standard 4.01 provides in part "[w]hen a foreign citizen is received/admitted to a detention facility for any reason, the detention facility shall make notification using the guidelines as set forth by the U.S. Department of State."[7] Prior to implementation of Secure Communities, when a person was booked into a local jail, jail officials used the information given by the detainee to help determine the person's citizenship status. If a detainee admitted that he or she was not a U.S. citizen, or if there was reason to believe a detainee was not a U.S. citizen, jail officials attempted to determine the detainee's citizenship status by submitting the detainee's identification information through LESC. This process is greatly simplified with Secure Communities because the booking fingerprints are automatically checked against the DHS database.

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[4] Description of Criminal Alien Program on ICE website at http://www.ice.gov/criminal-alien-program/, last viewed on March 17, 2011.

[5] Section 287(g) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1357(g) (1996), as amended by the Homeland Security Act of 2002, Public Law 107-296.

[6] "Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act," , http://www.ice.gov/news/library/factsheets/287g.htm (last visited March 17, 2011).

[7] http://www.flsheriffs.org/our_program/florida-model-jail-standards/?index.cfm/referer/content.contentList/ID/408/ (last visited March 8, 2011).

III. Effect of Proposed Changes:

The bill basically codifies the current participation by FDLE and all 67 county sheriffs in ICE's Secure Communities Program. However, there are differences between Secure Communities and the requirements of the bill.

This bill requires a number of actions to be taken by the staff of any jail or detention facility concerning a person who is confined for any period of time and is charged with either a felony, misdemeanor driving under the influence (DUI) (s. 316.193, F.S.), or misdemeanor boating under the influence (BUI) (s. 327.35, F.S.). The staff must:

- Make reasonable efforts to determine the citizenship of the person.
- If the person is a foreign national, make reasonable efforts to determine whether the person is lawfully in the United States.
- If the person's citizenship cannot be determined by documents in his or her possession, request verification of the person's immigration status from the Department of Homeland Security (DHS) within 48 hours of confinement.
- If DHS verifies that the person is not lawfully present in the United States, notify DHS of the person's confinement and confirm whether a federal immigration detainer has or will be issued.

The bill provides that it must be construed consistent with federal law. It appears that a state or local law enforcement agency could responsibly meet the bill's requirements by participating in Secure Communities. However, the bill is more restrictive than Secure Communities because it only requires determination of the immigration status of persons who are charged with a felony or with misdemeanor DUI or BUI.

The bill establishes a rebuttable presumption that the person is a flight risk if DHS verifies that he or she is a foreign national who is not lawfully present in the United States. This presumption would be considered in any decision establishing conditions of bond. Because the presumption is rebuttable, it could be overcome by evidence that the person is not a flight risk, such as having ties to the local community.

There is nothing in the bill authorizing detention of a person for the purpose of determining his or her immigration status. In the absence of a legal detainer from ICE, a person cannot be held longer than is required due to state criminal charges or another lawful reason such as a detainer from another jurisdiction. For example, a first appearance before a judge is required within 24 hours of arrest, and it would be unlawful to delay the first appearance in order to receive confirmation of alien or immigrant status from ICE.

The bill requires affected state or local agencies to adopt written procedures in compliance with federal immigration law to administer its provisions.

Other Potential Implications:

Specifically requiring determination of the immigration status of persons charged with a felony or misdemeanor DUI or BUI may lead to challenges in the use of the Secure Communities

technology to automatically check the immigration status of every person who is fingerprinted during booking.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate . House

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. .

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The Committee on Criminal Justice (Dean) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Section 985.12, Florida Statutes, is amended to read:

985.12 Civil citation.—

(1) There is established a juvenile civil citation process for the purpose of providing an efficient and innovative alternative to custody by the Department of Juvenile Justice for ~~of~~ children who commit nonserious delinquent acts and to ensure

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swift and appropriate consequences. The department shall encourage and assist in the implementation and improvement of civil citation programs or other similar diversion programs around the state. The civil citation or similar program shall ~~may~~ be established at the local level with the concurrence of the chief judge of the circuit, state attorney, public defender, and the head of each local law enforcement agency involved. The program may be operated by an entity such as a law enforcement agency, the department, a juvenile assessment center, the county or municipality, or some other entity selected by the county or municipality. Whichever entity is selected to operate the civil citation or similar diversion program shall be done so in consultation and agreement with the state attorney and local law enforcement agencies. Under such a juvenile civil citation program or similar diversion program, any law enforcement officer, upon making contact with a juvenile who admits having committed a misdemeanor, may issue a civil citation and assess ~~assessing~~ not more than 50 community service hours, and ~~may~~ require participation in intervention services as indicated by an assessment of the ~~appropriate to identified~~ needs of the juvenile, including family counseling, urinalysis monitoring, and substance abuse and mental health treatment services. A copy of each citation issued under this section shall be provided to the department, and the department shall enter appropriate information into the juvenile offender information system. Only first-time misdemeanor offenders are eligible for the civil citation program or similar diversion program. At the conclusion of a juvenile's civil citation program or similar diversion program, the agency operating the program shall report the

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outcome to the department. The issuance of a civil citation is not considered a referral to the department.

(2) The department shall develop guidelines for the civil citation program which include intervention services that are based upon proven civil citation programs or similar diversion programs within the state.

(3) ~~(2)~~ Upon issuing such citation, the law enforcement officer shall send a copy to the ~~county sheriff,~~ state attorney, the appropriate intake office of the department, or the community service performance monitor designated by the department, and the parent or guardian of the child~~, and the victim~~.

(4) ~~(3)~~ The child shall report to the community service performance monitor within 7 working days after the date of issuance of the citation. The work assignment shall be accomplished at a rate of not less than 5 hours per week. The monitor shall advise the intake office immediately upon reporting by the child to the monitor, that the child has in fact reported and the expected date upon which completion of the work assignment will be accomplished.

(5) ~~(4)~~ If the child ~~juvenile~~ fails to report timely for a work assignment, complete a work assignment, or comply with assigned intervention services within the prescribed time, or if the juvenile commits a ~~third or~~ subsequent misdemeanor, the law enforcement officer shall issue a report alleging the child has committed a delinquent act, at which point a juvenile probation officer shall process the original delinquent act as a referral to the department and refer the report to the state attorney for review ~~perform a preliminary determination as provided under s.~~

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~~985.145~~.

(6) ~~(5)~~ At the time of issuance of the citation by the law enforcement officer, such officer shall advise the child that the child has the option to refuse the citation and to be referred to the intake office of the department. That option may be exercised at any time before ~~prior to~~ completion of the work assignment.

Section 2. This act shall take effect July 1, 2011.

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

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to juvenile civil citations; amending s. 985.12, F.S.; requiring the Department of Juvenile Justice to encourage and assist in the implementation and improvement of civil citation and similar diversionary programs; requiring that a juvenile civil citation and similar diversion program be established at the local level with the concurrence of the chief judge of the circuit and other designated persons; authorizing a law enforcement agency, the Department of Juvenile Justice, a juvenile assessment center, the county or municipality, or an entity selected by the county or municipality to operate the civil citation or similar diversion program; requiring the entity operating the program to do so in consultation with

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and agreement by the state attorney and the local law enforcement agencies; authorizing a law enforcement officer, upon making contact with a juvenile who admits to having committed a misdemeanor, to require participation in intervention services based upon an assessment of the needs of the juvenile; restricting eligibility of participants for the civil citation program to first-time misdemeanor offenders unless the participation is approved by the state attorney or assistant state attorney; requiring the agency operating the program to report on the outcome to the Department of Juvenile Justice at the conclusion of a youth's civil citation or similar diversion program; providing that the issuance of a civil citation is not considered a referral to the department; requiring the department to develop guidelines for the civil citation program which include intervention services that are based upon proven civil citation and similar diversionary programs within the state; deleting a provision requiring that a law enforcement officer send a copy of a civil citation to the victim of the offense; requiring a juvenile probation officer to process the original delinquent act as a referral to the department in specified circumstances and to refer certain reports to the state attorney for review; providing an effective date.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL:	SB 1300
INTRODUCER:	Senator Storms
SUBJECT:	Juvenile Civil Citation Programs
DATE:	March 17, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon	CJ	**Pre-meeting**
2.			JU	
3.			BC	
4.				
5.				
6.				

I. Summary:

This bill requires juvenile civil citation programs to be established at the local level. (Currently these local diversion programs are discretionary.) The bill specifies that they may be operated by any number of entities, including law enforcement, the Department of Juvenile Justice (DJJ), a juvenile assessment center, the county or city, or an entity selected by the county or city. Unlike current law, only first-time juvenile misdemeanants will be eligible to participate in a civil citation program. (The statute currently allows second-time juvenile misdemeanants to participate.) The bill also provides that intervention services will be required during the civil citation program if a needs assessment determines such services are necessary.

Finally, the DJJ is required to develop a statewide civil citation model that includes intervention services and that is based on proven civil citation programs in Florida

This bill substantially amends section 985.12 of the Florida Statutes.

II. Present Situation:

Statutory Requirements for Civil Citation Programs:
Currently, juvenile civil citation programs provide an efficient and innovative alternative to the Department of Juvenile Justice's (DJJ) custody. They provide swift and appropriate consequences for youth who commit nonserious delinquent acts. A law enforcement officer is authorized to issue a civil citation to a youth who admits having committed a misdemeanor.[1]

[1] Section 985.12(1), F.S.

The programs are discretionary under the authorizing statute. They exist at the local level with the concurrence of the chief judge of the circuit, state attorney, public defender, and the head of each local law enforcement agency involved.[2] Civil citation programs require the youth to complete no more than 50 community service hours, and may require participation in intervention services appropriate to identified needs of the youth, including family counseling, urinalysis monitoring, and substance abuse and mental health treatment services.[3]

Upon issuance of a citation, the local law enforcement agencies are required to send a copy of the citation to the DJJ so that the department can enter the appropriate information into the Juvenile Justice Information System (JJIS).[4] A copy must also be sent by law enforcement to the sheriff, state attorney, the DJJ's intake office, the community service performance monitor, the youth's parent, and the victim.[5] At the time a civil citation is issued, the law enforcement officer must advise the youth that he or she has the option of refusing the civil citation and of being referred to the DJJ. The youth may refuse the civil citation at any time before completion of the work assignment.[6]

The youth is required to report to a community service performance monitor within seven working days after the civil citation has been issued. The youth must also complete at least five community service hours per week. The monitor reports to the DJJ information regarding the youth's service hour completion and the expected completion date.[7] If the youth fails to timely report or complete a work assignment, fails to timely comply with assigned intervention services, or if the youth commits a third or subsequent misdemeanor, the law enforcement officer must issue a report to the DJJ alleging that the youth has committed a delinquent act, thereby initiating formal judicial processing.[8]

Input from Local Civil Citation Programs:
Last summer, 21 local civil citation programs around the state received a questionnaire about their civil citation expungement procedures.[9] Out of that number, 18 responses were received.[10] One of these programs ended on June 30, 2010 because of inadequate funding.[11] Similarly, one of the three program recipients that did not complete the questionnaire also indicated that its program ended then for the same reason.[12] (Nine of the 21 civil citation programs were funded through the DJJ until the end of June when the 3-year grant funding stopped.[13]) Another of the

[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] Section 985.12(2), F.S.
[6] Section 985.12(5), F.S.
[7] Section 985.12(3), F.S.
[8] Section 985.12(4), F.S.
[9] *Senate Criminal Justice Interim Report #2011-113* (October 2010).
[10] The following judicial circuits have (or had) at least one such program: judicial circuit 1 (program ended June 2010), judicial circuit 2 (2 of 3 programs responded), judicial circuits 4, 5, and 6 (program ended but started a similar diversion program), judicial circuit 7 (2 of 3 programs responded), judicial circuit 8 (program ended June 2010), and judicial circuits 9, 11, 13,16, 17, 18, 19, and 20.
[11] Judicial circuit 8.
[12] Judicial circuit 1.
[13] Judicial circuits 1, 4, 5, 8, 11, 13, 17, 19, and 20.

program respondents indicated that its civil citation program was discontinued last year by choice and instead, a local diversion program was developed in its place.[14]

About half of these programs are run through the local sheriff,[15] and the rest are through the local DJJ or a youth services organization,[16] the state attorney,[17] or the city or court administrator.[18] Program lengths range anywhere from one month to six months, with two or three months being typical.

Several programs specified the following misdemeanors as being "acceptable" for admission into their respective programs:[19]

- Petit theft,
- Criminal mischief,
- Trespassing,
- Simple assault/battery,
- Disruption of a school function,
- Disorderly conduct, and
- Breach of the peace.

Although program admission eligibility requirements varied from circuit to circuit, the majority of programs seemed fairly consistent with their general requirements, including:[20]

- Must not have a prior criminal history (some programs specify no prior felony arrests, but will allow one prior misdemeanor);
- Must be between 10 and 17 years of age (some programs do not specify a minimum age, but specify the maximum age to be 17 years);
- Must not have participated in a prior diversion program, including civil citation, or be on any form of court-ordered supervision;
- Must be a first-time misdemeanor offense (some programs require there be no restitution issues, or some specify that it must be a nonviolent misdemeanor);
- Must not have committed a domestic violence offense, traffic offense, sexual crime, hate crime, or malicious act of violence;
- Must be a resident of the applicable county; and
- Must have a written agreement among the youth, the victim, and the parents.

[14] Judicial circuit 6. The program is called "Juvenile Arrest Avoidance Program" and its purpose is to prevent first time juvenile misdemeanants in Pinellas County from having a juvenile record. Everything about the program is kept local, including the youth's record. (Palm Beach County also has a diversion program that is handled completely on the local level, according to the state attorney's office in the 15th judicial circuit.)
[15] Judicial circuits 2, 5, 7 (has several programs), 16, 17, and 20 (has a few programs).
[16] Judicial circuits 6, 9, 11 are DJJ operated and Circuits 1, 2, 13, and 18 are operated by a youth services organization.
[17] Judicial circuit 20.
[18] Judicial circuits 4 and 19.
[19] *Senate Criminal Justice Interim Report #2011-113* (October 2011).
[20] *Id.*

III. Effect of Proposed Changes:

This bill requires civil citation programs to be established at the local level. (Currently these local diversion programs are discretionary.) The bill specifies that they may be operated by any number of entities, including law enforcement, the DJJ, a juvenile assessment center, the county or city, or an entity selected by the county or city. The bill also provides that intervention services will be required during the civil citation program if a needs assessment determines such services are necessary.

Unlike current law, only first-time juvenile misdemeanants will be eligible to participate in a civil citation program. (The statute currently allows second-time juvenile misdemeanants to participate.) Upon program completion, the issuing agency must report the outcome to the DJJ. The bill also states that the issuance of a civil citation will not be considered a referral to the DJJ, or put another way, it will not initiate formal judicial processing.

Finally, the DJJ is required to develop a statewide civil citation model that includes intervention services and that is based on proven civil citation programs in Florida.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The expansion of juvenile civil citation programs in Florida may well result in more eligible youth benefiting from this diversion program, especially as it relates to future opportunities for employment since these youth will not have to deal with the obstacle of having an arrest record.

C. Government Sector Impact:

By requiring local civil citation programs, the bill may result in an indeterminate fiscal impact on local jurisdictions that do not have adequate diversionary resources in place.

On the other hand, to the extent that youth are increasingly diverted from the more costly juvenile justice system, the greater the potential cost savings will be to Florida.

VI. Technical Deficiencies:

None.

VII. Related Issues:

This bill is one of the criminal and juvenile justice cost saving proposals recommended by Florida Tax Watch.[21]

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[21] Florida Tax Watch, *Cost-Savings Recommendations for the Criminal and Juvenile Justice System*, presented to the Senate Justice Committee, January 11, 2011 (on file with the Senate Criminal Justice Committee in Tallahassee, Florida).

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL:	SB 1494
INTRODUCER:	Senator Evers
SUBJECT:	Interstate Compact for Juveniles
DATE:	March 15, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon	CJ	**Pre-meeting**
2.			BC	
3.				
4.				
5.				
6.				

I. Summary:

This bill reenacts the statutes relating to the Interstate Compact for Juveniles (compact) and the State Council for Interstate Juvenile Offender Supervision (council) that expired by operation of law on August 26, 2010. The compact governs interstate movement of juveniles on probation and parole as well as extradition across state lines of runaways, escapees, absconders and juveniles charged as delinquent. The compact became effective in August 2008. However, there was also a two year sunset provision that began running when the compact became effective and it caused the compact to expire in August 2010. In order to reinstate the compact, Florida must reenact the laws governing the compact. As such, the bill reenacts the compact to do the following:

- Create the Interstate Commission for Juveniles (Interstate Commission), which is an independent compact administrative agency with the authority to administer ongoing compact activity;
- Provide rule making authority for the Interstate Commission;
- Establish a mechanism for all states to collect standardized information and information systems;
- Provide for sanctions against states that do not follow compact rules and regulations;
- Provide for gubernatorial appointments of representatives from member states to the Interstate Commission;
- Provide a mandatory funding mechanism sufficient to support essential compact operations;
- Provide for coordination and cooperation with other interstate compacts; and
- Require the creation of a state council.

This bill reenacts sections 985.802 and 985.5025 of the Florida Statutes.

II. Present Situation:

In 2005, the Legislature passed legislation[1] that revised and updated provisions of the Interstate Compact on Juveniles (compact), which provided for cooperation among states in supervising and returning juveniles who have run away or escaped from detention across state boundaries.[2] The revised compact did the following:

- Created the Interstate Commission, which is an independent compact administrative agency with the authority to administer ongoing compact activity;
- Required the Interstate Commission to establish an executive committee to oversee the day-to-day activities of the administration of the compact and to act on behalf of the Interstate Commission when it is not in session;
- Mandated that the Interstate Commission meet at least annually to attend to general business, rule-making, and enforcement procedures and that each member-state must appoint one voting commissioner to represent that state's interests on the Interstate Commission;
- Delegated rule-making authority to the Interstate Commission and made provisions for sanctions to administer and enforce the operation of the compact;
- Provided a mandatory funding mechanism sufficient to support essential compact operations (staffing, data collection, and training/education);
- Provided for collection of standardized information and information sharing systems;
- Provided for the coordination and cooperation with other interstate compacts which have "overlapping" jurisdiction (for example, the Interstate Compact on the Placement of Children and the Interstate Compact for Adult Offender Supervision); and
- Mandated states create a State Council for Interstate Juvenile Offender Supervision (council) comprised of a compact administrator, a representative from each of the three branches of government, a victim's advocate, and a parent of a youth not in the juvenile justice system, to oversee state participation in the activities of the Interstate Commission.

Additionally, this legislation created the State Council for Interstate Juvenile Offender Supervision (council)[3] to comply with the requirements of Article IX of the compact as follows:

- Required that the council consist of seven members comprised of the Secretary of the Department of Juvenile Justice (DJJ), the compact administrator or his or her designee, the Executive Director of the Department of Law Enforcement (FDLE) or his or her designee, and four remaining members to be appointed by the Governor, who may delegate this appointment power to the Secretary of DJJ in writing on an individual basis;
- Provided that appointees may include one victim's advocate, employees of the Department of Children and Family Services (DCF), employees of the FDLE who work with missing or exploited children, and a parent;

[1] HB 577, ch. 2005-80, L.O.F., s. 985.502, F.S.
[2] In FY 2009-10, Florida provided cooperative supervision for 2,828 juveniles. It also returned 427 absconders, escapees, failed placements, and delinquent juveniles to other states, according to the DJJ's 2011 Agency Proposal re Interstate Compact for Juveniles (on file with the Senate Criminal Justice Committee in Tallahassee, Florida).
[3] Section 985.5025, F.S., HB 577, ch. 2005-80, L.O.F.

- Applied provisions of public records/open meetings requirements to the council's proceedings and records;
- Supplied terms of office, record storage, property transfer, and reimbursement for travel and per diem expenses; and
- Created additional duties and responsibilities for the compact administrator.

The legislation provided that the compact was to become effective on July 1, 2005, or upon ratification of the thirty-fifth state, whichever occurred later. The compact became effective in August 2008 after the thirty-fifth state joined.[4] However, there was also a two year sunset provision that began to run when the compact became effective and it caused the compact to expire in August 2010. In order to reinstate the compact, Florida must reenact the laws governing the compact.[5]

III. Effect of Proposed Changes:

The bill reenacts the statutes relating to the Interstate Compact for Juveniles (compact) and the State Council for Interstate Juvenile Offender Supervision (council) that expired by operation of law on August 26, 2010.[6] The compact governs interstate movement of juveniles on probation and parole as well as extradition across state lines of runaways, escapees, absconders and juveniles charged as delinquent. The bill reenacts the compact to do the following:

- Create the Interstate Commission, which is an independent compact administrative agency with the authority to administer ongoing compact activity;
- Provide rule making authority for the Interstate Commission;
- Establish a mechanism for all states to collect standardized information and information systems;
- Provide for sanctions against states that do not follow compact rules and regulations;
- Provide for gubernatorial appointments of representatives from member states to the Interstate Commission;
- Provide a mandatory funding mechanism sufficient to support essential compact operations;
- Provide for coordination and cooperation with other interstate compacts; and
- Require the creation of state councils.

The bill also reenacts the Interstate Juvenile Offender Supervision Council (council) to do the following:

- Require that the council consist of seven members comprised of the Secretary of the DJJ, the compact administrator or his or her designee, the Executive Director of the FDLE or his or her designee, and four remaining members to be appointed by the Governor, who may delegate this appointment power to the Secretary of DJJ in writing on an individual basis;
- Provide that appointees may include one victim's advocate, employees of the DCF, employees of the FDLE who work with missing or exploited children, and a parent;

[4] The DJJ 2011 Agency Proposal re Interstate Compact for Juveniles (on file with the Senate Criminal Justice Committee in Tallahassee, Florida).
[5] *Id.*
[6] *Id.*

- Apply provisions of public records/open meetings requirements to the council's proceedings and records;
- Supply terms of office, record storage, property transfer, and reimbursement for travel and per diem expenses; and
- Create additional duties and responsibilities for the compact administrator.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Florida's annual dues for participation in the State Council for Interstate Juvenile Offender Supervision is $37,000. The aggregated annual assessment is allocated based on a formula determined by the commission. Florida, along with California and Texas, is one of the top three states by size.[7]

VI. Technical Deficiencies:

None.

VII. Related Issues:

According to the DJJ, this bill is necessary because it reenacts a crucial tool ensuring public safety and preserving child welfare within the State. With the compact currently repealed, the

[7] *Id.*

mechanism by which Florida manages the interstate movement of juvenile offenders and status offenders no longer exists.[8]

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[8] The DJJ 2011 Agency Proposal re Interstate Compact for Juveniles (on file with the Senate Criminal Justice Committee in Tallahassee, Florida).

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL:	SB 1932
INTRODUCER:	Senator Evers
SUBJECT:	Justice Reinvestment Commission
DATE:	March 17, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	**Pre-meeting**
2.			GO	
3.			BC	
4.				
5.				
6.				

I. Summary:

This bill creates the Justice Reinvestment Commission within the Executive Office of the Governor. The commission is charged with reviewing and analyzing criminal and juvenile justice laws and policies. It is expected to recommend changes to increase public safety, improve offender accountability, reduce recidivism, and control spending for correction facilities and programs. The bill includes both mandatory and suggested areas for the commission to address.

The commission is comprised of nine members from the adult and juvenile criminal justice community. It will be assisted in its work by an executive director and staff, and is authorized to call upon various state offices to complete its work. In addition, the commission can contract or partner with outside persons or entities. A specific requirement is development of a technical assistance agreement with an independent public policy research institution or an educational institution to assist with its review of the effectiveness of correctional policies.

The commission must issue an interim report of its findings and recommendations by December 31, 2011. A final report must be issued before the commission is abolished on December 31, 2012.

This bill creates a new section of the Florida Statutes.

II. Present Situation:

The Correctional Policy Advisory Council (CPAC) was created in 2008 as a result of Senate Bill 2000 (enacted as Chapter 2008-54, Laws of Florida). The purpose of the CPAC was to evaluate and make findings and recommendations to the Governor and Legislature about "correctional

policies, justice reinvestment initiatives, and laws affecting or applicable to corrections." It was anticipated that this would be a first-ever comprehensive review of sentencing and corrections laws and policies. Although members were appointed, the CPAC has never met and will be abolished on July 1, 2011 as required by the enabling legislation.

As it became clear that the CPAC was not moving forward, some private organizations took up the called for examination of Florida's justice policies with the goal of achieving better results at less cost. The two most prominent groups called for implementation of the CPAC or of a successor to look into justice reform issues.

The Coalition for Smart Justice and the Collins Center for Public Policy

In June 2009, the Coalition for Smart Justice issued "An Open Letter to the Governor, Legislature, and People of Florida."[1] The Coalition is a diverse group of business, religious, and social service leaders facilitated by the Collins Center for Public Policy.[2] The letter noted that public safety is paramount to the public's health and well being, but presented arguments for reform of the justice system. The letter noted specific concerns with: (1) excessive incarceration of non-violent persons; (2) the costliness of having to continue to build prisons; (3) ineffectiveness of the juvenile justice system; and (4) recidivism because of a lack of effective treatment and re-entry training in prison. It observed that the Department of Corrections' (DOC) budget continued to grow even during a time of serious recession and budget crisis. The crux of the letter seemed to be that:

> without reform, that budget will continue to grow at a pace that crowds out other mission-critical services such as education, human service needs, and environmental protection. Without reform, the criminal justice system will remain underfunded.

The "Open Letter" called for immediate initiation of a serious discussion about justice reform. It noted that many reform ideas should be considered, but specifically endorsed the following:

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[1] http://www.collinscenter.org/resource/resmgr/smart_justice/transmittal_letter_and_open.pdf , (last viewed on March 18, 2011)

[2] The letter was signed by Parker Thompson (Chairman, Collins Center for Public Policy), Barney T. Bishop III (President & CEO, Associated Industries of Florida), Dominic M. Calabro (President & CEO, Florida TaxWatch), Tony Carvajal (Executive Vice President, Florida Chamber Foundation), Chris Holley (Executive Director, Florida Association of Counties), James R. McDonough (Secretary, Florida Department of Corrections 2006-2008), S. Curtis Kiser (Leroy Collins Institute), Dr. Lori Parham (Florida State Director, AARP), Mark P. Fontaine (Executive Director, Florida Alcohol and Drug Abuse Association), D. Michael McCarron (Executive Director, Florida Catholic Conference), Gail D. Cordial (Executive Director, Florida Partners in Crisis, Inc.), Andrew J. Vissicchio, Jr. K.M. (The Sovereign Military Order of Malta, American Association), David Murrell (Executive Director, Florida Police Benevolent Association), Judith A. Evans, (Executive Director, National Alliance on Mental Illness, Inc. (NAMI Florida, Inc.), Rev. Dr. Allison DeFoor (Prison Chaplain), Richard Doran (Florida Attorney General, 2002-2003), Jim Smith (Florida Attorney General, 1979-1987), Robert Butterworth (Florida Attorney General, 1987-2002), Bernie DeCastro (CEO, Florida Ex-Offender Reentry Coalition), Tom Slade (Chairman, Republican Party of Florida, 1993-1999), Martha W. Barnett (Partner, Holland & Knight), Nathaniel P. Reed (Founder, 1000 Friends of Florida), Allan G. Bense (Speaker of the Florida House of Representatives, 2004-2006), John M. McKay (President of the Florida Senate, 2000-2002), Tom Lee (President of the Florida Senate, 2004-2006), Kenneth "Buddy" MacKay (Governor, State of Florida, 1998 and Lieutenant Governor, 1991-1998), and Vicki L. Lukis (Vice Chair, Florida Department of Corrections Reentry Advisory Council).

- Immediate implementation of Senate Bill 2000 to allow the Correctional Policy Advisory Council to provide legislative focus and analysis on "new policy pathways" to address corrections issues.
- Funding of effective programs to provide community-based treatment for offenders and assistance to help inmates with their re-entry into society.
- Acceptance of assistance from the Council on State Governments, or other credible national organizations, in reviewing policy alternatives used in other states that can be successful in Florida.

The Coalition sponsored "Justice Summit 2009" in Tampa on November 16-17, 2009. The Summit had nearly 300 participants and featured individual and panel presentations as well as discussions of justice reform issues. Agreement was reached on the following recommendations:

- Establish a council to analyze all of the criminal justice and corrections policies and make recommendations for reforms. Fully implement Senate Bill 2000, establishing the Correctional Policy Advisory Council.
- Focus on securely locking up the most dangerous criminals rather than nonviolent offenders who can be turned around with treatment and services.
- Beef up existing drug, alcohol and mental health services, both in and out of prisons, and create solid education and job training programs, especially for young offenders.
- Enact other reforms that slow prison growth. Find opportunities for concrete changes that can reduce the numbers we lock up and how often they return to prison.[3]

The Collins Center followed up Justice Summit 2009 with a comprehensive report entitled "Smart Justice: Findings and Recommendations for Florida Criminal Justice Reform" in February 2010. The report included eight specific findings and recommendations for justice reform. Once again, the first recommendation was that the Correctional Policy Advisory Council should be implemented and given necessary support. It was noted that the attendees at the Justice Summit unanimously supported this recommendation.[4]

Florida TaxWatch

In 2009, Florida TaxWatch organized the Government Cost Savings Task Force to identify ways to achieve immediate cost savings without cutting core services or raising taxes or fees. The result of the Task Force's efforts was publication in March 2010 of the "Report and Recommendation of the Florida TaxWatch Government Cost Savings Task Force to Save More than $3 Billion."[5] The Task Force was comprised of 34 business and government leaders.[6] Among the many recommendations for achieving efficiencies and cost-savings throughout government, the Task Force made eleven specific recommendations for justice reform "in the spirit of the not-yet seated Correctional Policy Advisory Council."[7]

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[3] Smart Justice: Findings and Recommendations for Florida Criminal Justice Reform (February 2010), p. 6, http://www.collinscenter.org/resource/resmgr/smart_justice/smart_justice_report.pdf , (last viewed on March 18, 2011).
[4] Ibid., p. 13.
[5] Report and Recommendation of the Florida TaxWatch Government Cost Savings Task Force to Save More than $3 Billion (March 2010), http://www.floridataxwatch.org/resources/pdf/03042010FullReport.pdf , (last viewed on March 18, 2011).
[6] Prominent government sector participants included Lieutenant Governor Jeff Kottkamp, Senator J.D. Alexander, Representative Will Weatherford, Attorney General Bill McCollum, and Chief Financial Officer Alex Sink.
[7] March 2010 Report of Recommendation, p. 40.

A significantly expanded Task Force report issued in December 2010 included 24 specific recommendations for Justice Reform, with additional subrecommendations.[8] The first of what were termed "Big Picture Recommendations" for justice reform was to "create a commission to do a top to bottom review of the criminal justice system and Corrections." The explanation of the recommendation noted the failure to implement Senate Bill 2000's Correctional Policy Advisory Council and observed that "such a body, but expanded in both scope and membership, is essential to the deliberative process necessary for meaningful, sustainable, cost-effective justice reforms." The full language of the recommendation is as follows:

> The Governor, with the bipartisan, bicameral cooperation of the legislature and judiciary, create a commission composed of members of the executive, legislative and judicial branches along with experts in criminology, sentencing, corrections, veterans affairs, mental health, substance abuse, reentry, and community supervision to do a top-to-bottom data-driven assessment of Florida's corrections and criminal justice system with a focus on cost-effective ways to improve public safety while slowing prison growth. This commission should be required to produce comprehensive, actionable reforms in time for consideration by the legislature in 2012.[9]

III. Effect of Proposed Changes:

The bill creates the Justice Reinvestment Commission within the Executive Office of the Governor. The stated purpose of the commission is to review and analyze criminal and juvenile justice laws and policies, and to recommend changes that will: (1) increase public safety; (2) improve offender accountability; (3) reduce recidivism; and (4) manage the growth of spending on correction facilities and programs. Any changes recommended by the commission must be consistent with the goals of protecting public safety and, when not inconsistent with protecting public safety, providing for cost-effective and efficient use of correctional resources.

The commission's responsibilities include examination of many of the general issues raised by the Coalition for Smart Justice and specific recommendations of the Florida TaxWatch Government Cost Savings Task Force.

Responsibilities of the Commission

The commission has three mandatory tasks to perform within available resources. It must: (1) conduct analytical research of criminal and juvenile justice data; (2) evaluate criminal and juvenile justice and current spending at the state level; and (3) from this analysis and evaluation, develop practical and data-driven policy options that will achieve the commission's four stated purposes.

In the analysis phase, the commission must consider the following information:

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[8] Report and Recommendation of the Florida TaxWatch Government Cost Savings Task Force for Fiscal Year 2011-12 (December 2010), http://www.floridataxwatch.org/resources/pdf/12082010GCTSF.pdf , (last viewed on March 18, 2011).
[9] Ibid., p. 45.

- Aggregate crime and arrest data. The purpose is to understand particular types of crime and any general or local spikes in crime.
- Felony conviction data. The intent is to understand the relative numbers of offenders who are incarcerated for particular offenses and the length of their sentences.
- 3 to 5 years of data concerning prison or jail admissions and lengths-of-stay. The purpose is to determine what groups of offenders contribute most to prison population growth.
- Probation and parole data to determine which offenders are being reincarcerated for violating conditions of supervision.
- The capacity and quality of risk-assessment processes and recidivism-reduction programs. The focus would be on risk-reduction programs that are intended to divert persons from incarceration and reduce recidivism of offenders on community supervision. Such programs typically address drug treatment, mental health issues, education, job training, housing, and other human services.

The evaluation phase of the commission's work must include the following:

- Analysis of criminal and juvenile justice policies, including: (1) the proportionality and cost-effectiveness of sentencing policies; (2) the effect of diversion programs on prison disposition rates; and (3) the relationship between the strength of probation systems and the likelihood of a probation versus prison sentence, as well as the likelihood of a decrease in violation behavior, new convictions, and revocations resulting in return to prison.
- Analysis of state corrections expenditures, including the cost-effectiveness of current spending on institutional and community corrections, to understand the responsiveness of the existing system to criminal justice trends.
- Development of a prison population simulation model to project the impact of policy changes.

The policy development phase depends upon the results of the analysis and evaluation phases. Policy options must:

- Address admissions and length of stay as determined by current sentencing policy and practice.
- Address probation and parole, earned time policies, and recidivism-reduction strategies focusing on the number of offenders who are released or diverted from prison.
- Provide policymakers with assistance to strengthen community supervision agencies through statutory and administrative policy change, increases or reallocations of resources, and enhanced data analysis.

In addition to its required tasks, the bill encourages the commission to address the following specific topics:

- The effectiveness of mental health and substance abuse diversion programs.
- Development of a risk and needs assessment and cost-analysis tool to be used in sentencing.
- Alternative sanctions for low-level drug and property offenders.
- Expansion of electronic monitoring as an alternative to state incarceration.

- Encouragement for counties to increase local alternatives to state incarceration, and the impact of jail overcrowding on local alternative programs and sanctions.
- Post-incarceration drug courts.
- The effectiveness of prison reentry practices.
- Increasing the maximum gain-time accrual for state inmates.
- Development of a sanctions program for probation violations that relies on immediate and proportionate punishment as an alternative to recommitment to prison.
- Development of a progressive sanctions program for probation violations.
- The effectiveness of community supervision strategies.
- The delivery of supervision and programs in neighborhoods that have a high proportion of supervised and incarcerated offenders.

Structure of the Commission

The commission will have nine members, with the chair selected by the members. Members will not be compensated, but are entitled to reimbursement by their appointing entity for per diem and travel expenses paid by the appointing entity. The members include:

- A member of each legislative chamber appointed by their respective leader.
- A representative of the victim advocacy profession appointed by the Attorney General.
- The Attorney General, the chair of the Florida Parole Commission, the Secretary of Corrections, the Secretary of Juvenile Justice, or their respective designees.
- A state attorney and a public defender appointed by the Governor from nominees submitted by the Florida Prosecuting Attorneys Association and the Florida Public Defenders Association, respectively.

The commission will have subcommittees to complete its tasks. Personnel from state or local agencies may be designated as ex officio members to give technical advice to the subcommittees. The commission may take public testimony and members can participate either in person or through telecommunications.

The commission's executive director will be appointed by the Governor and report directly to the commission. He or she will be responsible for appointing, directing, and controlling any employees and staff members of the commission.

The bill requires the commission to convene by August 1, 2011, and to meet at least quarterly. It will be abolished on December 31, 2012.

Outside Assistance to the Commission

In addition to receiving technical advice from personnel of state and local agencies, the bill specifies that the commission can receive further assistance as follows:

- If necessary to carry out the commission's responsibilities, the executive director can enter into contracts or partnerships with persons or entities. This includes contracts and partnerships with nonprofit organizations and educational institutions.
- If requested by the chair or the executive director, the Office of Program Policy Analysis and Government Accountability (OPPAGA), the Office of Economic and Demographic Research

(EDR), the Department of Corrections (DOC), the Department of Juvenile Justice (DJJ), and any other state agency or department must assist the commission with data collection, analysis, and research. The commission may also request assistance from the Office of the State Courts Administrator, but the judicial branch is not obligated to comply with the request.

- The chair must develop a technical assistance agreement with an independent public policy research institution or an educational institution to assist with the review of the effectiveness of correctional policies. The agreement must include procedures to access the data collection, analysis, and research capabilities of OPPAGA, EDR, DOC, and DJJ.

Reporting Requirements

The commission is required to submit an interim report and a final report of its findings and recommendations to the Governor, the President of the Senate, and the Speaker of the House of Representatives. The deadline for the interim report is December 31, 2011, and the deadline for the final report is December 31, 2012. The commission may also submit additional reports as it deems to be appropriate.

In addition to the scheduled reports, the Governor can direct the commission to report on its findings and recommendations concerning any issue pertinent to correctional policies, justice reinvestment initiatives, or laws affecting or applicable to corrections. The President of the Senate or the Speaker of the House of Representatives may request such a special purpose report.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None

C. Government Sector Impact:

There may be administrative costs for the commission, including payment of the executive director and staff. However, it is possible that some costs can be absorbed through existed resources (such as using current employees) and that outside funding may be available.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.