

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 165 Sexually Transmissible Diseases  
**SPONSOR(S):** Criminal Justice Subcommittee, McGhee  
**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	14 Y, 0 N, As CS	Hall	White
2) Justice Appropriations Subcommittee	11 Y, 0 N	Smith	Gusky
3) Judiciary Committee		Hall	Camechis

### SUMMARY ANALYSIS

Section 384.24, F.S., prohibits a person from having “sexual intercourse” if the person:

- Knows he or she is infected with one or more specified sexually transmissible diseases (STDs);
- Has been informed that the STD is transmissible to another person through sexual intercourse; and
- Has not first informed the other person of the presence of the STD and gained the person’s consent to the sexual intercourse.

The specified STDs are: (1) chancroid; (2) gonorrhea; (3) granuloma inguinale; (4) lymphogranuloma venereum; (5) genital herpes simplex; (6) chlamydia; (7) nongonococcal urethritis (NGU); (8) pelvic inflammatory disease (PID)/acute salpingitis; (9) syphilis; and (10) human immunodeficiency virus (HIV) infection.

A violation of the prohibition is punishable as a first degree misdemeanor for any specified STD except HIV infection. If HIV infection is present, a first-time violation is punishable as a third degree felony and a second or subsequent violation is punishable as a second degree felony.

Currently, the term “sexual intercourse” is not statutorily defined, and, as a result, criminal defendants have challenged the term’s meaning on appeal. The Third and Fifth District Courts of Appeals (DCAs) have held that the term includes sexual conduct between persons regardless of gender, while the Second DCA has held that the term only describes the placement of a male’s sex organ inside a female’s sex organ. In March 2017, the Florida Supreme Court released an opinion approving the decision by the Third DCA and disapproving the decision by the Second DCA.

The bill amends s. 384.24, F.S., to substitute the term “sexual conduct” for the term “sexual intercourse.” The bill defines “sexual conduct” to mean conduct between persons, regardless of gender, which is capable of transmitting a STD, including but not limited to contact between a: (a) penis and a vulva or an anus; or (b) mouth and a penis, a vulva, or an anus. Accordingly, under the bill, the scope of prohibited conduct for persons with specified STDs is expanded beyond the interpretation set forth by the Second DCA. Additionally, the bill adds human papillomavirus and hepatitis to the list of specified STDs for which certain sexual conduct is prohibited.

The Criminal Justice Impact Conference met on March 2, 2017 and determined the bill would increase the prison population by an insignificant amount. “Insignificant” means the impact would be less than 10 prison beds.

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

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Present Situation

Chapter 384, F.S., is entitled the, “Control of Sexually Transmissible Disease Act” (hereinafter referred to as “the Act”). Section 384.22, F.S., specifies that the intent of the Act is to “provide a program that is sufficiently flexible to meet emerging needs, [that] deals efficiently and effectively with reducing the incidence of sexually transmissible diseases, and [that] provides patients with a secure knowledge that information they provide will remain private and confidential.”

Under the Act, certain sexual behavior is prohibited for persons infected with specified sexually transmissible diseases (STDs). Specifically, s. 384.24, F.S., makes it unlawful for a person to have “sexual intercourse” if the person:

- Knows he or she is infected with one or more specified STDs;
- Has been informed that the STD is transmissible to another person through sexual intercourse; and
- Has not first informed the other person of the presence of the STD and gained the person’s consent to the sexual intercourse.

The specified STDs are: (1) chancroid; (2) gonorrhea; (3) granuloma inguinale; (4) lymphogranuloma venereum; (5) genital herpes simplex; (6) chlamydia; (7) nongonococcal urethritis (NGU); (8) pelvic inflammatory disease (PID)/acute salpingitis; (9) syphilis; and (10) human immunodeficiency virus (HIV) infection.<sup>1</sup> This list of STDs has not been statutorily updated since 1988.<sup>2</sup> Since that time, human papillomavirus (HPV)<sup>3</sup> and hepatitis types A through E<sup>4</sup> have been identified as sexually transmissible diseases.<sup>5</sup>

A violation of the prohibition is punishable as a first degree misdemeanor<sup>6</sup> for any specified STD, except HIV infection.<sup>7</sup> If HIV infection is present, a first-time violation is punishable as a third degree felony<sup>8</sup> and a second or subsequent violation is punishable as a second degree felony.<sup>9, 10</sup>

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<sup>1</sup> s. 384.24(1) and (2), F.S.

<sup>2</sup> See Ch. 88-80, s. 27 (1988).

<sup>3</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, *Human Papillomavirus (HPV)*,

<https://www.cdc.gov/hpv/parents/whatishpv.html> (last visited January 29, 2017)(stating “HPV is transmitted through intimate skin-to-skin contact. You can get HPV by having vaginal, anal, or oral sex with someone who has the virus. It is most commonly spread during vaginal or anal sex.”).

<sup>4</sup> NATIONAL INSTITUTE OF DIABETES AND DIGESTIVE AND KIDNEY DISEASES, *Hepatitis A through E (Viral Hepatitis)*,

<https://www.niddk.nih.gov/health-information/liver-disease/viral-hepatitis> (last visited January 29, 2017)(indicating that hepatitis A through E is transmissible through sexual conduct and other means).

<sup>5</sup> See also Rule 64D-3.028(23), F.A.C. (last amended November 24, 2008)(Florida Department of Health rule defining “Sexually Transmissible Disease” as “Acquired Immune Deficiency Syndrome (AIDS), Chancroid, Chlamydia trachomatis, Gonorrhea, Granuloma Inguinale, Hepatitis A through D, Herpes simplex virus (HSV), Human immunodeficiency virus Infection (HIV), Human papillomavirus (HPV), Lymphogranuloma Venereum (LGV), and Syphilis.”).

<sup>6</sup> A first degree misdemeanor is punishable by up to one year imprisonment and a \$1,000 fine. ss. 775.082 and 775.083, F.S.

<sup>7</sup> s. 384.34(1), F.S.

<sup>8</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. ss. 775.082, 775.083, and 775.084, F.S.

<sup>9</sup> A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. ss. 775.082, 775.083, and 775.084, F.S.

<sup>10</sup> Other Florida Statutes criminalize additional behavior that could result in the transmission of STDs. See, e.g., s. 381.0041, F.S. (makes it a third degree felony for a person who knows he or she is infected with HIV and who has been informed that they may communicate the disease by donating blood, plasma, organs, skin, or other human tissue, to donate blood, plasma, organs, skin, or other human tissue); s. 775.0877, F.S. (makes it a third degree felony for a person, who has previously undergone HIV testing pursuant to a court order and to whom positive test results have been disclosed, to commit a subsequent enumerated offense involving the transmission of bodily fluids from one person to another); and s. 796.08, F.S. (makes it a third degree felony for a person with

Currently, the term “sexual intercourse” is not statutorily defined for purposes of the aforementioned offenses. As a result, criminal defendants charged with the offenses have argued on appeal that the term’s meaning should be limited to heterosexual penetration of the female sex organ by the male sex organ. Two District Courts of Appeal (DCAs) have rejected this argument:

- The Third DCA has held that “sexual intercourse” describes “more than just penetration of the female sex organ by the male sex organ and includes ...fellatio and penile-anal penetration...” Further, the term embraces such conduct regardless of gender.<sup>11</sup>
- The Fifth DCA has held that, “sexual intercourse” includes “vaginal, anal, and oral intercourse between persons, regardless of their gender.”<sup>12</sup>

In contrast, the Second DCA has held that, "sexual intercourse" is an act where a male's penis is placed inside a female's vagina and, therefore, s. 384.24(2), F.S., did not apply to the conduct in the case, i.e., oral sex and digital penetration between two women.<sup>13</sup>

On March 16, 2017, the Florida Supreme Court released an opinion approving the decision by the Third DCA and disapproving the decision by the Second DCA, holding “sexual intercourse” encompasses conduct beyond heterosexual penile-vaginal intercourse.<sup>14</sup>

### **Effect of Bill**

The bill amends s. 384.24, F.S., to substitute the term “sexual conduct” for the term “sexual intercourse.” The bill defines “sexual conduct” to mean conduct between persons, regardless of gender, which is capable of transmitting a STD, including but not limited to contact between a:

- Penis and a vulva<sup>15</sup> or an anus; or
- Mouth and a penis, a vulva, or an anus.

Accordingly, under the bill, the scope of prohibited sexual conduct for persons with specified STDs is expanded. The new definition for “sexual conduct” is consistent with the Florida Supreme Court’s recent holding regarding the scope of sexual intercourse in s. 384.24, F.S.

The bill also updates the list of specified STDs to add human papillomavirus and hepatitis.

Finally, the bill reenacts s. 384.34(1) and (5), F.S., to incorporate amendments made by the bill to s. 384.24, F.S.

The bill takes effect on October 1, 2017.

### **B. SECTION DIRECTORY:**

Section 1. Amending s. 384.23, F.S., providing definitions.

Section 2. Amending s. 384.24, F.S., relating to unlawful acts.

Section 3. Reenacting s. 384.34(1) and (5), F.S., providing penalties.

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HIV and a first degree misdemeanor for a person with other STDs to commit or procure prostitution if the person knew he or she had a positive test result and that it was possible to communicate the disease through sexual activity).

<sup>11</sup> *State v. Debaun*, 129 So. 3d 1089, 1090, 1095 (Fla. 3d DCA 2013).

<sup>12</sup> *State v. D.C.*, 114 So. 3d 440, 442 (Fla. 5th DCA 2013).

<sup>13</sup> *L.A.P. v. State*, 62 So. 3d 693, 694 (Fla. 2d DCA 2011).

<sup>14</sup> *Debaun v State*, 2017 Fla. LEXIS 583, 10 (Fla. 2017).

<sup>15</sup> “Vulva” is defined as “the external parts of the female sex organs considered as a whole. Included are the labia majora, the labia minora, the clitoris, the entrance to the vagina, the opening of the urethra, the vestibule, and the mons pubis (mons veneris).”

ATTORNEY’S DICTIONARY OF MEDICINE (2016).

Section 4. Providing an effective date of October 1, 2017.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: The bill does not appear to have any impact on state revenues.
2. Expenditures: The Criminal Justice Impact Conference met on March 2, 2017, and determined the bill would increase the prison population by an insignificant amount. "Insignificant" means the impact would be less than 10 prison beds.

"Per DOC, in FY 15-16, there were 4 offenders sentenced under the unranked, 3rd degree felony, and 1 of these offenders was sentenced to prison. There was 1 offender sentenced under the unranked, 1st degree felony, and that offender was sentenced to prison. It is unknown how many additional offenders would be affected by this law."<sup>16</sup>

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: The bill does not appear to have any impact on local government revenues.
2. Expenditures: The bill may increase the need for jail beds due to its expansion of prohibited sexual conduct and the list of STDs which are subject to first degree misdemeanor penalties.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

### D. FISCAL COMMENTS: None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: This bill appears to be exempt from the requirements of article VII, section 18 of the Florida Constitution because it is a criminal law.
2. Other: None.

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

### C. DRAFTING ISSUES OR OTHER COMMENTS: None.

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<sup>16</sup> DEPARTMENT OF ECONOMIC AND DEMOGRAPHIC RESEARCH, *CS/HB 165 – Sexually Transmissible Diseases*, "Criminal Justice Impact Conference", March 2, 2017, <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/CSHB165.pdf>.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On February 8, 2017, the Criminal Justice Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute (CS). The CS differs from the bill as filed in that the CS:

- Broadened the definition of “sexual conduct” in s. 384.23, F.S., to include conduct between persons that is capable of transmitting a STD; and
- Expanded the list of STDs in s. 384.24, F.S., to include human papillomavirus and hepatitis.

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