Tab 1	**SB 18** by **Braynon**; (Similar to CS/H 06509) Relief of C.M.H. by the Department of Children and Families

Tab 2	**SB 42** by **Rodriguez**; (Similar to H 06505) Relief of Vonshelle Brothers by the Department of Health

Tab 3	**SB 44** by **Rodriguez**; (Similar to H 06501) Relief of Cristina Alvarez and George Patnode by the Department of Health

Tab 4	**SB 536** by **Passidomo**; (Compare to CS/H 00875) Limitations of Actions Other Than for the Recovery of Real Property

~~538518~~	A	S	WD	JU, Steube	Delete L.40 - 54:	01/25 05:51 PM
758426	A	S	RCS	JU, Steube	Delete L.40 - 54:	01/25 05:51 PM

Tab 5	**SB 1598** by **Passidomo**; (Similar to CS/H 01217) Deployed Parent Custody and Visitation

323296	A	S	RCS	JU, Passidomo	Before L.32:	01/25 05:51 PM

Tab 6	**SB 1048** by **Baxley (CO-INTRODUCERS) Stargel**; (Similar to H 01419) Firearms

160384	D	S	RCS	JU, Baxley	Delete everything after	01/25 05:51 PM

Tab 7	**CS/SB 970** by **CJ, Brandes**; (Similar to H 01261) Alcohol and Drug-related Overdoses

572144	A	S	RCS	JU, Brandes	Delete L.46 - 50:	01/25 05:51 PM

Tab 8	**SB 1120** by **Perry (CO-INTRODUCERS) Passidomo**; (Similar to H 01063) Expert Witnesses

Tab 9	**SB 1412** by **Simmons**; (Compare to H 00687) Office of the Judges of Compensation Claims

783328	A	S	RCS	JU, Simmons	Delete L.19 - 44.	01/25 05:51 PM

Tab 10	**SB 1424** by **Gainer**; Court-ordered Treatment Programs

Tab 11	**SB 14** by **Gibson**; (Identical to H 06519) Relief of Danielle Maudsley by the Department of Highway Safety and Motor Vehicles

Tab 12	**SB 36** by **Gibson**; (Similar to CS/CS/H 06525) Relief of Marcus Button by the Pasco County School Board

Tab 13	**SB 40** by **Thurston**; (Identical to H 06535) Relief of the Estate of Dr. Sherrill Lynn Aversa by the Department of Transportation

Tab 14	**CS/SB 298** by **CJ, Bracy**; (Compare to CS/H 01065) Criminal History Records

Tab 15	**SB 866** by **Bracy**; (Similar to H 00355) Sentencing

Tab 16	**CS/SB 928** by **CJ, Bracy (CO-INTRODUCERS) Rouson**; (Similar to H 00713) Theft

Tab 17	**SB 908** by **Steube**; (Similar to H 00723) Construction Bonds

880242	A	S	RCS	JU, Steube	Delete L.99 - 107:	01/25 03:07 PM
957880	A	S	RCS	JU, Steube	Delete L.219 - 227:	01/25 03:07 PM

Tab 18	**SB 1034** by **Steube**; (Similar to H 01043) Mediation					
738538	A	S		JU, Steube	Delete L.77 - 82:	01/09 06:07 PM

Tab 19	**SB 1396** by **Steube**; (Similar to H 05301) Judgeships					
262208	A	S	RCS	JU, Flores	Delete L.32.	01/25 05:49 PM

The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

JUDICIARY
Senator Steube, Chair
Senator Benacquisto, Vice Chair

MEETING DATE: Thursday, January 25, 2018
TIME: 10:00 a.m.—12:00 noon
PLACE: *Toni Jennings Committee Room,* 110 Senate Office Building

MEMBERS: Senator Steube, Chair; Senator Benacquisto, Vice Chair; Senators Bracy, Bradley, Flores, Garcia, Gibson, Mayfield, Powell, and Thurston

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	**SB 18** Braynon (Similar CS/H 6509)	Relief of C.M.H. by the Department of Children and Families; Providing for the relief of C.M.H.; providing an appropriation to compensate C.M.H. for injuries and damages sustained as a result of the negligence of the Department of Children and Families, formerly known as the Department of Children and Family Services; requiring certain funds to be placed into an irrevocable trust, etc. SM JU 01/25/2018 Favorable AHS AP	Favorable Yeas 10 Nays 0
2	**SB 42** Rodriguez (Similar H 6505)	Relief of Vonshelle Brothers by the Department of Health; Providing for the relief of Vonshelle Brothers on behalf of her daughter Iyonna Hughey; providing an appropriation to compensate Iyonna Hughey for injuries and damages sustained as a result of the alleged negligence of the Brevard County Health Department, an agency of the Department of Health, etc. SM JU 01/25/2018 Favorable AHS AP	Favorable Yeas 10 Nays 0
3	**SB 44** Rodriguez (Similar H 6501)	Relief of Cristina Alvarez and George Patnode by the Department of Health; Providing for the relief of Cristina Alvarez and George Patnode; providing appropriations to compensate them for the death of their son, Nicholas Patnode, a minor, due to the negligence of the Department of Health, etc. SM JU 01/25/2018 Favorable AHS AP	Favorable Yeas 10 Nays 0

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
4	**SB 536** Passidomo (Compare CS/H 875)	Limitations of Actions Other Than for the Recovery of Real Property; Authorizing the commencement, within a specified timeframe, of counterclaims, cross-claims, and third-party claims that arise out of the same transaction or occurrence and are the basis for an action previously brought, etc. JU 01/25/2018 Fav/CS CA RC	Fav/CS Yeas 9 Nays 0
5	**SB 1598** Passidomo (Similar CS/H 1217)	Deployed Parent Custody and Visitation; Creating provisions entitled “Uniform Deployed Parents Custody and Visitation Act”; providing requirements for proceeding for custodial responsibility of a child of a servicemember; authorizing a court to grant caretaking authority or limited contact to a nonparent under certain conditions; providing for the termination of a grant of authority; authorizing a court to modify or terminate a temporary grant of custodial responsibility, etc. JU 01/25/2018 Fav/CS MS RC	Fav/CS Yeas 9 Nays 0
6	**SB 1048** Baxley (Similar H 1419)	Firearms; Authorizing a church, a synagogue, or other religious institution to allow a concealed weapons or concealed firearms licensee to carry a firearm on the property of the church, synagogue, or religious institution for certain purposes, etc. JU 01/18/2018 Temporarily Postponed JU 01/25/2018 Fav/CS RC	Fav/CS Yeas 6 Nays 4
7	**CS/SB 970** Criminal Justice / Brandes (Similar H 1261)	Alcohol and Drug-related Overdoses; Prohibiting the arrest, charging, prosecution, or penalizing under specified provisions of a person acting in good faith who seeks medical assistance for an individual experiencing, or believed to be experiencing, an alcohol or a drug-related overdose; prohibiting a person from being penalized for a violation of a condition of certain programs if that person in good faith seeks medical assistance for an individual experiencing, or believed to be experiencing, an alcohol or a drug-related overdose, etc. CJ 01/09/2018 Fav/CS JU 01/25/2018 Fav/CS RC	Fav/CS Yeas 9 Nays 0

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
8	**SB 1120** Perry (Similar H 1063)	Expert Witnesses; Requiring a court to pay reasonable fees to members of an examining committee for their evaluation and testimony regarding persons with disabilities; authorizing, rather than requiring, a court to appoint up to two additional experts to evaluate a defendant suspected of having an intellectual disability or autism under certain circumstances; authorizing a court to take less restrictive action than commitment if an expert finds a child incompetent, etc. JU 01/18/2018 Temporarily Postponed JU 01/25/2018 Not Considered CJ AP	Not Considered
9	**SB 1412** Simmons (Compare H 687)	Office of the Judges of Compensation Claims; Revising the duration of the initial term of a judge of compensation claims; specifying the salaries of full-time judges of compensation claims and the Deputy Chief Judge, etc. JU 01/25/2018 Fav/CS AGG AP	Fav/CS Yeas 9 Nays 0
10	**SB 1424** Gainer	Court-ordered Treatment Programs; Providing that veterans who were discharged or released under any condition, individuals who are current or former United States Department of Defense contractors, and individuals who are current or former military members of a foreign allied country are eligible in a certain Military Veterans and Servicemembers Court Program, etc. JU 01/25/2018 Favorable ACJ AP	Favorable Yeas 9 Nays 0
11	**SB 14** Gibson (Identical H 6519)	Relief of Danielle Maudsley by the Department of Highway Safety and Motor Vehicles; Providing for the relief of the Estate of Danielle Maudsley; providing an appropriation to compensate the Estate of Danielle Maudsley for Ms. Maudsley's death, sustained as a result of the alleged negligence of Trooper Daniel Cole and the Florida Highway Patrol, a division of the Department of Highway Safety and Motor Vehicles, etc. SM JU 01/25/2018 Favorable ATD AP	Favorable Yeas 9 Nays 0

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
12	**SB 36** Gibson (Similar CS/H 6525)	Relief of Marcus Button by the Pasco County School Board; Providing for the relief of Marcus Button by the Pasco County School Board; providing an appropriation to compensate Marcus Button for injuries sustained as a result of the negligence of an employee of the Pasco County School Board; providing an appropriation to compensate Mark and Robin Button, as parents and natural guardians of Marcus Button, for injuries and damages sustained by Marcus Button, etc. SM JU 01/25/2018 Favorable GO RC	Favorable Yeas 9 Nays 0
13	**SB 40** Thurston (Identical H 6535)	Relief of the Estate of Dr. Sherrill Lynn Aversa by the Department of Transportation ; Providing for the relief of the Estate of Dr. Sherrill Lynn Aversa; providing an appropriation to compensate the Estate of Dr. Sherrill Lynn Aversa for Dr. Aversa's death as a result of the negligence of the Department of Transportation; requiring the Executive Office of the Governor to establish spending authority from unappropriated trust fund balances of the department for compensation to the Estate of Dr. Sherrill Lynn Aversa, etc. SM JU 01/25/2018 Favorable ATD AP	Favorable Yeas 9 Nays 0
14	**CS/SB 298** Criminal Justice / Bracy (Compare CS/H 1065, S 1142)	Criminal History Records; Revising the elements that must be attested to by a petitioner in a statement submitted in support of the expunction of a criminal history record; revising the elements that must be attested to by a petitioner in a statement submitted in support of the sealing of a criminal history record; revising the circumstances under which the Department of Law Enforcement must issue a certificate of eligibility for sealing of a criminal history record, etc. CJ 10/23/2017 Fav/CS JU 01/25/2018 Favorable RC	Favorable Yeas 10 Nays 0

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
15	**SB 866** Bracy (Similar H 355, S 570)	Sentencing; Revising the threshold of assessed sentence points below which a court must sentence nonviolent felony offenders who commit certain offenses on or after a specified date to a nonstate prison sanction, etc. CJ 01/09/2018 Favorable JU 01/25/2018 Favorable ACJ AP	Favorable Yeas 8 Nays 2
16	**CS/SB 928** Criminal Justice / Bracy (Similar H 713)	Theft; Revising threshold amounts and types of property which qualify for theft offenses; revising threshold amounts for retail theft, etc. CJ 01/09/2018 Fav/CS JU 01/25/2018 Favorable RC	Favorable Yeas 6 Nays 4
17	**SB 908** Steube (Similar H 723)	Construction Bonds; Requiring a notice of nonpayment to be verified; providing that a provision relating to attorney fees applies to certain suits brought by contractors; requiring a lienor to serve a verified notice of nonpayment to specified entities during a certain period of time; providing that a contractor may record a notice identifying a project bond as a conditional payment bond before project commencement to make the duty of a surety to pay lienors coextensive with the contractor's duty to pay, etc. JU 01/25/2018 Fav/CS CA RC	Fav/CS Yeas 9 Nays 0
18	**SB 1034** Steube (Similar H 1043)	Mediation; Requiring that insurance carrier representatives who attend circuit court mediation have specified settlement authority and the ability to immediately consult by specified means with persons having certain additional settlement authority; limiting the information that may be included in the mediator's report to the court, etc. JU 01/10/2018 Temporarily Postponed JU 01/25/2018 Temporarily Postponed BI	Temporarily Postponed
19	**SB 1396** Steube (Similar H 5301)	Judgeships; Adding judges to the Ninth Judicial Circuit Court; adding and removing judges from certain county courts, etc. JU 01/25/2018 Fav/CS ACJ AP	Fav/CS Yeas 9 Nays 0

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
	Other Related Meeting Documents		

THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
515 Knott Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5198

DATE	COMM	ACTION
1/22/18	SM	Favorable
01/23/18	JU	**Favorable**
	AHS	
	AP	

January 22, 2018

The Honorable Joe Negron
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 18** – Senator Oscar Braynon II
HB 6509 – Representative James Grant
Relief of C.M.H.

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNCONTESTED CLAIM FOR $5,000,000 PREDICATED ON THE ENTRY OF A JURY AWARD IN FAVOR OF CHRISTOPHER HANN AND THERESA HANN, INDIVIDUALLY, AND AS NAUTRAL GUARDIANS OF C.M.H., A MINOR CHILD, DUE TO THE NEGLIGENCE OF THE DEPARTMENT OF CHILDREN AND FAMILIES.

FINDINGS OF FACT:

The Department of Children and Families, placed J.W., a 10 year old foster child with a history of violence and sexual assaults against younger children, in the home of Christopher and Theresa Hann. The Hanns had young children of their own, and because the Hanns were not trained to handle a child with J.W.'s propensity for violence, the department should not have placed J.W. in the Hann's home. Making matters worse, the department concealed J.W.'s violent past from the Hanns when it had a duty to disclose it. Ultimately, the department's placement of J.W. in the Hann's home led to the emotional, physical, and sexual abuse of C.M.H., the Hann's 8 year old son, by J.W.

The Department of Children and Families knew of J.W.'s propensity for violence toward other children.

J.W. was born January 23, 1992, in Florida, to a teenage mother who had a history of mental illness and homelessness. She did not receive prenatal care and attempted suicide during the third month of her pregnancy by inhaling butane. J.W.'s mother was living in a shelter for homeless and runaway youth at his birth. J.W.'s biological father had a history of drug abuse and played no major role in his life.

J.W. lived with his mother until the age of 4. During this time, he was subjected to extreme neglect, cruelty, and physical and sexual abuse by his mother, her boyfriends, and her extended family members. J.W., at age 1, was subjected to sexual abuse for approximately 2-3 years by males visiting his mother. He was severely beaten at age 2 while in the care of his mother's boyfriend.

As a result of his repeated abuse and neglect, J.W. began to exhibit symptoms of post-traumatic stress disorder. Due to aggressive behaviors, he was dismissed from two daycare centers. At age 3, he attempted suicide. He was subsequently diagnosed as having attention deficit hyperactivity disorder with psychotic behavior and suicidal tendencies and treated with anti-psychotic medication.

J.W. was returned to his mother's care at age 5. He was severely psychotic and began setting fires. In June 1997, J.W. was admitted to the Columbia Hospital Inpatient Psychiatric Program for a week due to self-mutilation, violent behavior, homicidal ideation, auditory hallucinations, and multiple suicide attempts. J.W. would continue receiving intensive outpatient psychiatric treatment for 7 months following his initial hospitalization.

After receiving a report that J.W. was again sexually molested by another of his mother's male friends, the department placed J.W. back into foster care where he resided on and off for approximately 5 years. He was involuntarily hospitalized at least two more times by age 9. One hospitalization was due to aggressive behavior, an attempt to stab his uncle and his babysitter with a knife. Later he was hospitalized for planning to bring a gun and knife to school to kill a teacher and himself. In 2002, J.W. was living with his mother who had married several years earlier and had given birth to a daughter with

her new husband. The department and the family entered into a voluntary case plan to address continuing allegations of abuse, neglect, and domestic violence in the home. During this time, J.W. began to exhibit sexually aggressive behavior towards other children. Multiple reports indicated that J.W. performed anal penetration on a neighborhood girl. He also continued to display severe psychotic behavior. On one occasion he attempted to cut his stepfather's throat while he slept.

On June 14, 2002, DCF family services counselor, Suzy Parchment, referred J.W. to Camelot Community Care, a DCF provider of child welfare and behavioral health services, for intensive therapeutic in-home services. Realizing the severity of J.W.'s behavior, in a communication with Camelot on June 24, Ms. Parchment noted that J.W. needed to be in a residential treatment facility as soon as possible.

As an emergency, temporary solution and noting that J.W. was a danger in the home, Camelot accepted the referral to provide mental health services to J.W. in his natural home while the department sought residential placement. Camelot noted on its admission form that J.W. was a sexual predator and engaged in sexually inappropriate behavior. It was also noted that J.W. suffered from non-specified psychosis, major depression with psychotic features, adjustment disorder and attention deficit hyperactivity disorder. The in-home counselor assigned to J.W.'s case did not have experience with sexual trauma, and Camelot's initial treatment plan did not include any specific goals or specialized treatment for sexual abuse.

J.W.'s mother informed Camelot and the department that J.W. was giving his 3 year old sister hickies, bouncing her on his lap in a sexual manner, and having her fondle his genitals. Camelot performed a child safety determination and found that based on J.W.'s history, a sibling was likely to be in immediate danger of moderate to severe harm if J.W. was not supervised. Camelot recommended that J.W.'s parents separate him from his younger sister at night and closely watch him when he interacts with his sister.

On or about August 2002, the department removed J.W. and his younger sister from their mother's care after she abandoned them at a friend's house. J.W. was sheltered in the home of a family friend, Luz Cruz, a non-relative

placement while his younger half-sister was placed with family members.

J.W. underwent a Comprehensive Behavioral Health Assessment on August 30, 2002, at the request of DCF. The assessment concluded that J.W. "should not have unsupervised access to [his younger sister], or to any younger, or smaller children wherever he resides." The Assessment also states: "***J.W.'s caregiver must be informed about these issues and must be able to demonstrate that they can provide adequate levels of supervision in order to prevent further victimization. These issues should be strongly considered in terms of making decisions about both temporary and long term care and supervision of J.W.***"

Based upon the findings and recommendations in the Assessment, J.W. was referred to Father Flanagan's Boys' Home d/b/s Girls and Boys Town, a DCF service provider, for case management services.

The Department of Children and Families knew that J.W., should not have been placed in a home with younger children.

Ms. Parchment removed J.W. from the Cruz home on September 6, 2002, due to allegations of sexual abuse by a member of the Cruz family; however, she did not report the abuse allegation as required by Florida law. It was also on September 6, 2002, that J.W. was placed with the Hanns.

Mr. and Mrs. Hann were former neighbors of J.W. and his natural family. The Hanns lived with their two children, a daughter, age 16, and a son, C.M.H., age 8. They were not licensed or trained foster parents. In the past, J.W. had often sought shelter in the Hann home when left alone by his mother. Theresa Hann had offered to care for J.W. and his mother lobbied Camelot and the department to have J.W. placed with the Hann family instead of Luz Cruz.

Ms. Parchment recalled her first impressions of the Hann family were of nice people who maintained a very organized and clean home. She believed Theresa Hann's main purpose was to care for J.W. and that she had no ulterior motives. However, despite the willingness of the Hanns to care for

J.W., the removal of J.W. from the Cruz home and placement in the Hann home violated DCF rules.

Under the department's rules, it is required to obtain prior court approval for all non-relative placements. This requirement eliminates non-relative placements for use in lieu of emergency shelter care. Ms. Parchment did not obtain the required court approval prior to placing J.W. in the Hann home. She also failed to notify the department's legal team, who is responsible for court filings, of the allegation of sexual abuse of J.W. in the Cruz home or his subsequent placement in the Hann home for two months.

Additionally, the placement directly conflicted with previous recommendations by department providers regarding placement for J.W. due to his sexually aggressive behaviors. J.W. was placed in a home with an 8 year old child even though 2 months earlier Camelot had warned that a sibling would be in danger in a home with J.W. One week prior to the placement, St. Mary's Medical Center had recommended that J.W. not have unsupervised access to younger children. The Hanns were not provided any information about J.W.'s ongoing inappropriate behavior with younger children and the Hanns allowed J.W. to share a bedroom with their son, C.M.H. Department rules expressly prohibit placing a sexually aggressive child in a bedroom with another child. Ms. Parchment knew of the planned sleeping arrangements prior to placing J.W. in the Hann home but did not tell them that the arrangement was prohibited under the department's rules.

The Department of Children and Families failed to inform the Hanns of J.W.'s background.

Christopher Hann specifically requested information about J.W., but the department failed to provide any information regarding J.W.'s troubled history of child-on-child sexual abuse or on his background generally. Florida law requires DCF to share psychological, psychiatric and behavioral histories, comprehensive behavioral assessments and other social assessments found in the child's resource record with caregivers. The department acknowledged during litigation that no evidence of a child resource record for J.W. was found. Additionally, for the purpose of preventing the reoccurrence of child-on-child sexual abuse, the department must provide caregivers of sexual abuse victims and aggressors with written, complete, and detailed information and strategies

related to such children, including the date of the sexual abuse incident(s), type of abuse, type of treatment received, and outcome of the treatment in order to "provide a safe living environment for **all** the children living in the home."

Not only did the department fail to comply with its own requirements, Ms. Parchment told Mr. Hann that she was not allowed to give him such information about J.W. because the placement was temporary. Nevertheless, J.W. remained in the Hann home for approximately 3 years during which his behavioral problems continued and quickly escalated.

The Department of Children and Families knew it should have removed J.W. from the Hann home as his violent behaviors increased.

Within a few weeks after J.W.'s placement in the Hann home, Mrs. Hann reported to Camelot that J.W. was playing with matches in the presence of C.M.H.; exhibited extreme anger and hostility towards C.M.H., including yelling, screaming "shut up" at the smallest aggravation or noise, and kicking C.M.H. Among J.W.'s behavioral problems, he stabbed himself with a straightened paper clip after being grounded for leaving the neighborhood without permission; threatened to jump out of a window after it was discovered he stole a roll of felt from school; and attacked Ms. Hann, biting and scratching her when she grounded him for cursing.

Camelot recommended to Ms. Parchment that the Hanns place a one way monitor in the bedroom shared by J.W. and C.M.H. While Ms. Parchment agreed to pass the recommendation on to the Hanns, there is no evidence that the information was shared or that the Hanns ever obtained the monitor.

J.W.'s behavior further deteriorated and on October 24, 2002, after a physical altercation with C.M.H., he pulled a knife on the younger child but was stopped from further assaulting him by Mr. Hann. Camelot was immediately informed of the incident by Mr. Hann, and J.W. was again involuntarily committed into Columbia Hospital for a mental health assessment. Camelot's notes indicate Ms. Parchment was informed of J.W.'s escalating behavior in the Hann home. Ms. Parchment later acknowledged that at this point she should have considered removing J.W. from the Hann home due to the danger he posed to himself, the Hanns and their son.

A week after the mental health assessment was performed, J.W. sexually assaulted a 4 year old girl who was visiting the Hann home. The children were watching a movie when J.W. exposed his genitals and began "humping" the young girl. Ms. Hann reported the incident to DCF. During the course of the investigation, the department learned the children were not under the direct supervision of any adult at the time of the incident – a failure that DCF providers warned would lead to harm of other children when left alone with J.W. Again, DCF was required to give immediate consideration to the safety of C.M.H. Despite, the inability of the Hanns, who both worked outside the home, to adequately supervise J.W. and his continuing access to young children, DCF did not remove J.W. from the Hann home.

Camelot began pressuring Ms. Parchment to schedule a psychosexual evaluation of J.W. which she was required to do months earlier pursuant to DCF's operating procedures. The evaluation had in fact been requested by Camelot when J.W. was placed with the Hanns and again just 2 days before he sexually assaulted the 4 year old girl visiting the Hann home. Camelot's notes indicate that it told Ms. Parchment that "[J.W.] needed specific sexual counseling by a specialist in this area." Ms. Parchment took no action so Camelot advised Mr. Hann that a new safety plan would be implemented which prohibited J.W. and C.M.H. from sharing a bedroom and requiring J.W. to be under close adult supervision when other children were present. Such recommendations had already been a complete failure at preventing J.W. from perpetuating sexual abuse on other children. Further, still without knowledge of J.W.'s extensive history of sexual abuse as a victim and aggressor, Mr. Hann informed Camelot that the family disagreed with and would not follow the safety plan.

The Department of Children and Families ignored repeated warnings from its service providers.

Beginning in November 2002, Girls and Boys Town began providing services to J.W. in conjunction with Camelot. The assessment of J.W.'s case and his current behaviors, which was performed by Girls and Boys Town, found that despite his escalating violence and suicidal and sexually aggressive actions, no additional interventions or therapies had been put in place.

Camelot again requested a psychosexual evaluation of J.W. on November 6, 2002.

Additionally, in November 2002, C.M.H. began to exhibit behavioral problems which Camelot directly attributed to J.W. being in the home. C.M.H.'s grade dropped. In one school year he went from being an "A", "B", or "C" student to failing grades and was ultimately retained in the fourth grade.

In December 2002, the Hanns, overwhelmed with the number of providers involved in J.W.'s care and the disruption to their family, canceled the services of Camelot. Camelot recommended in its discharge form, signed by Ms. Parchment, that J.W. be placed in a residential treatment facility; however, DCF did not initiate a change in placement.

In June 2003, J.W. began expressing sexually inappropriate behavior towards C.M.H., asking him if he wanted to "see what sperm looks like" before masturbating to completion in front of him and attempting to hand him the semen. Due to this new escalation of J.W.'s behavior now directed at C.M.H., the department finally secured the psychosexual evaluation of J.W. but still did not remove him from the Hann home.

The department received the results of the psychosexual evaluation of J.W. performed by The Chrysalis Center on September 18, 2003. The Center found that J.W. "fit the profile of a sexually aggressive child due to the fact that he continues to engage in extensive sexual behaviors with children younger than himself." Further, it was found that J.W. "[presented] a risk of potentially becoming increasing more aggressive" and "continuing sexually inappropriate behaviors." The Center warned that J.W. "may seek out victims who are children and coerce them to engage in sexual activity." And again the Center recommended specific counseling for J.W. and appropriate training for his caregivers, the Hanns.

Finally, in October 2003, the Hanns requested J.W. be placed in a therapeutic treatment facility as they did not feel equipped to provide him with services and interventions he needed. Therapeutic placement was authorized for J.W. and he was referred to Alternate Family Care in Jupiter, Florida. The Hanns were told that if J.W. was removed from their home they would not be permitted visitation privileges with him at the facility. The Hanns did not want to be the next in a series

of parental figures that abandoned J.W. so they ultimately made the decision to maintain him in their home with a request for additional services to treat his ongoing issues. At this time the Hanns begin training to become therapeutic foster parents.

C.M.H.'s problems due to J.W.'s presence in the home continued at school. Beginning in late 2003 to early 2004, C.M.H. began to act out and have more conflicts in school. He received a student discipline referral for ongoing behavioral problems in the classroom. Additionally, in early 2004 he began gaining weight and would subsequently gain about 40 pounds over the next two years.

The Department of Children and Families failed to remove a dangerous child it had placed in the Hann home when requested by the Hanns.

Mrs. Hann was diagnosed with terminal cancer on March 3, 2004. As a result, Mr. Hann contacted DCF within 48 hours of the diagnosis and requested the process of having J.W.'s placement with them as "long-term non-relative care" be stopped and asked that J.W. be placed elsewhere. Ms. Parchment visited the Hann home within 24 hours after the request and advised the family that "we'll get on it."

Nothing was done and contrary to the express request and wishes of the Hanns and without their knowledge, DCF had the Hanns declared as "long term non-relative caregivers" of J.W. The department subsequently closed the dependency case, leaving J.W. in the care of the Hanns.

The Department of Children and Family Services withdrew support for the Hann family when it was needed most.

The Hanns were not part of the foster care system so when DCF closed its dependency case, the Hann family lost approximately 50 percent of their services and counseling. Father Flanagan's suspended services to J.W. and the Hann family in April 2004. The Hanns would later directly attribute the resurgence in J.W.'s inappropriate sexual behavior to the loss of counseling services.

With almost no support from DCF, the Hanns grew more desperate as they tried to deal with Mrs. Hann's illness and J.W.'s escalating behavior.

C.M.H.'s troubles also continued. An April 2005 treatment plan from St. Mary's Child Development Center's Children's Provider Network noted that he began to have nightmares and was easily frustrated. The report also noted that his mother's diagnosis of terminal cancer and intensive chemotherapy treatments were contributing to C.M.H.'s increasing separation anxiety and grief issues. He was diagnosed with post-traumatic stress disorder.

In April 2005, Mr. Hann wrote DCF and the juvenile judge requesting help in placing J.W. in a residential placement. There was no response to his request, and J.W. remained in the Hann home.

A report from Child & Family Connections, the lead agency for community-based care in Palm Beach County, dated June 16, 2005, provided a description of J.W.'s personality and behavior, the high risk of sexual behavior problems and increasing aggression, his excessive masturbation, seeking out younger children, lies, and refusal to take responsibility for his actions. The report stated that the Hanns "[had] been told that it is not a matter of will J.W. perpetrate on their son again, but a matter of when the perpetration would occur. [J.W. was] in need of a more restrictive setting with intensive services specializing in sexual specific treatment." The report also noted that J.W.'s previous therapist, current therapist, and a psychosexual evaluation all recommended a full-time group home facility specializing in sexual specific treatment. The report concluded that J.W.'s condition was "so severe and the situation so urgent that treatment [could not] be safely attempted in the community."

Predictably, the numerous failures of the Department and its Family Services resulted in the sexual assault of another child.

On June 29, 2005, after a physical altercation between J.W. and Mrs. Hann, C.M.H., then 10 years old, told his parents that 2 years prior, J.W. had forced him to engage in oral sex while the boys were at a sleepover at this cousin's house. Mr. Hann called Girls & Boys Town and demanded that J.W. be removed from the home immediately. Later that same day, the department finally removed J.W. from the Hann home, and he was taken to an emergency shelter until a placement could be determined.

The court entered an order on August 11, 2005, authorizing the placement of J.W. into a residential treatment center. The court found that although a previous court order authorized placement in a specialized therapeutic group home, due to another incident that occurred while in emergency shelter, J.W. required a higher level of care.

Theresa Hann passed away the next year shortly after initiating litigation against DCF and its providers.

CLAIMANT'S POSITION:

The lawsuit was filed against the department, Camelot Community Care, Inc., Elaine Beckwith, Chrysalis Center, and Father Flanagan's Boys' Home d/b/a Girls and Boys Town of South Florida. The suit alleged the defendants were negligent and directly liable for the injuries suffered by C.M.H. as a result of the sexual abuse due to:

1. The initial placement of J.W. in the Hann home;
2. The failure of DCF to follow its own rules and operating procedures to provide the necessary treatment and services for J.W.;
3. The failure of DCF to provide the required information to the Hanns regarding J.W.'s history of sexual abuse and sexual aggressiveness, including the failure to formulate a safety plan for J.W. and all the children residing in the Hann home;
4. The failure of DCF to maintain the safety of J.W. and any children residing in the placement;
5. The failure of the DCF employee to report the allegations of sexual abuse of J.W. as mandated by s. 39.201, F.S.; and
6. DCF moving forward with having the court declare the Hanns "long-term non-relative caregivers," closing the case file, and leaving J.W. in the custody of the Hanns without notice to them and despite their request to stop the process.

RESPONDENT'S POSITION:

The Department of Children and Families defended the lawsuit. On November 18, 2013, after a 4-week jury trial, a judgment was entered in the amount of $10,000,000. DCF was found to be 50 percent liable ($5,000,000) and Mr. and Mrs. Hann were found to be 50 percent liable ($5,000,000). The jury attributed no liability to the remaining defendants.

CONCLUSIONS OF LAW:

Every claim bill must be based on facts sufficient to meet the preponderance of evidence standard. With respect to this claim bill, which is based on a negligence claim, the claimant proved that the state had a duty to the claimant, the state breached that duty, and that the breach caused the claimant's damages.

Duty

The Department of Children and Families had a duty pursuant to exercise reasonable care when placing a child involved in child-on-child sexual abuse or sexual assault in substitute care; to provide caregivers of children with sexual aggression and sexual abuse with written, detailed and complete information of the child's history; to establish appropriate safeguards and strategies to protect all children living in the foster or temporary care; to ensure the foster family is properly trained and equipped to meet the serious needs of the foster child; and to exercise reasonable care under the circumstances.

Breach

A preponderance of the evidence establishes that DCF breached its duties by failing to follow its governing statutes, rules, and internal operating procedures by:

- Placing J.W., a known sexually aggressive, severely emotionally disturbed, and dangerous child in the Hann home without legal authority and in direct conflict with recommendations of DCF service providers that J.W. not have access to young children;
- Failing to ensure that Mr. and Mrs. Hann were duly licensed and trained as required by department rule, making them capable of safely caring for a child with J.W.'s extensive needs;
- Failing to fully and completely inform the Hanns of J.W.'s history, and the risk and danger he posed to C.M.H. as required by department rule; and
- Failing to remove J.W. from the Hann home when it became clear that the placement was inappropriate and dangerous to the Hanns and C.M.H. particularly.

Causation

The sexual, physical and emotional abuse suffered by C.M.H. was the direct and proximate result of DCF's failure to fulfill its duties regarding the foster placement of a known sexually aggressive child.

Damages

At the conclusion of a 2-week trial, the jury found DCF and Mr. and Mrs. Hann each 50 percent responsible for the negligence that resulted in the injuries suffered by C.M.H. The jury awarded C.M.H. $6 million for past pain and suffering, $3.5 million for future pain and suffering, $250,000.00 for future treatment and services and $250,000.00 for future loss of earning capacity for a total award of $10 million. The department and Mr. and Mrs. Hann were each responsible for $5 million. The jury did not assess any liability for negligence against the remaining 6 defendants.

C.M.H. was initially diagnosed with post-traumatic stress disorder in 2005. Thomas N. Dikel, Ph.D., reaffirmed the diagnosis in 2010, finding that C.M.H.'s severe PTSD was cause by his "experiences of child-on-child sexual abuse, exacerbated and magnified by his mother's diagnosis of stage 4, metastatic colon cancer."

He was re-evaluated by Dr. Stephen Alexander in October 2014. Dr. Alexander found C.M.H. to continue to suffer from PTSD and major depression, but had become even more dysfunctional since his initial evaluation due to lack of services. Dr. Alexander attributed the majority of C.M.H.'s psychological trauma to this mother's illness and death; however, he did note that due to J.W.'s presence in the home during her illness, the two events have become inextricably intertwined in this psyche.

Comprehensive Rehabilitation Consultants, Inc., created a life plan for C.M.H. to determine the funds necessary to provide the support needed by C.M.H. as a direct consequence of the sexual abuse he experienced. It was determined the cost for medical, psycho-therapies, educational and support services as well as ancillary services of transportation, housing and personal items would be $2.23 million over C.M.H.'s life.

As a result of the judgment entered by the court against DCF, the state paid $100,000 (the maximum allowed under the state's sovereign immunity waiver) with the remaining $4.9 million to be paid if this claim bill is passed by the Legislature and signed into law by the Governor.

COLLATERAL SOURCES OF RECOVERY:

Father Flanagan's Boys' Home d/b/a Girls and Boys Town of South Florida (Father Flanagan) was a named defendant in the lawsuit. Father Flanagan executed a settlement agreement with Claimants on July 30, 2013, in the amount of $340,000. However, in October 2013, the jury found that Father Flanagan was not negligent for any loss, injury or damage to C.M.H.

ATTORNEYS FEES:

Claimant's attorneys have acknowledged in writing that nothing in excess of 25 percent of the gross recovery will be withheld or paid as attorneys' fees.

RECOMMENDATIONS:

The negligence of the department and the Hanns were the legal proximate cause of the damages suffered by C.M.H. However, the jury award of $9.5 million for non-economic damages or pain and suffering is not supported by the weight of the evidence. According to Dr. Alexander's October 2014 report, C.M.H. continues to suffer from PTSD but attributes a majority of C.M.H.'s psychological trauma to the illness and death of his mother. The department should not be held financially liable for C.M.H.'s psychological trauma that occurred due to the illness and death of his mother.

Damages awarded by the jury in the amount of $500,000 for future treatment and services and lost wages due to the sexual abuse are reasonable under the circumstances and are fully supported by the weight of the evidence. C.M.H. requires intensive and long-term psychotherapy, psychiatric evaluation and treatment and possible psychotropic mediations to assist him in dealing with his PTSD.

It should be noted that since receiving the settlement from Father Flanagan's in 2013, C.M.H. has only sought psychiatric treatment one time.

Accordingly, I recommend that SB 18 be reported FAVORABLY, with the amount to be paid amended to $2.5 million. The jury awarded $9.5 million ($4.75 million assessed to DCF) for past and future pain and suffering. Based on a lack of objective evidence in the record, a 50 percent reduction of DCF's obligation or $2.375 million may be a more appropriate amount to be paid for the non-economic damages. A corresponding reduction of 50 percent of DCF's share of the economic damages ($125,000) would be appropriate.

I further recommend that the funds be paid into a trust established for C.M.H. in equal installments over 10 years to pay for expenses related to education, psycho-therapies and living expenses. Any funds remaining in the trust after 10 years should be distributed in full to C.M.H.

Respectfully submitted,

Barbara M. Crosier
Senate Special Master

cc: Secretary of the Senate

The Florida Senate

Committee Agenda Request

To: Senator Greg Steube, Chair
Committee on Judiciary

Subject: Committee Agenda Request

Date: January 19, 2018

I respectfully request that **Senate Bill #18**, relating to Relief of C.M.H. by the Department of Children and Families, be placed on the:

☒ committee agenda at your earliest possible convenience.

☐ next committee agenda.

Senator Oscar Braynon II
Florida Senate, District 35

File signed original with committee office

S-020 (03/2004)

THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
515 Knott Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5198

DATE	COMM	ACTION
1/22/18	SM	Unfavorable
1/23/18	JU	**Favorable**
	AHS	
	AP	

January 22, 2018

The Honorable Joe Negron
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 42** – Senator Jose Rodriguez
HB 6505 – Representative Jenne
Relief of Vonshelle Brothers, Individually, and as the Natural Parent and Guardian of Iyonna Hughey

SPECIAL MASTER'S FINAL REPORT

THIS IS A SETTLED EXCESS JUDGMENT CLAIM FOR $1 MILLION. THE CLAIM SEEKS COMPENSATION FROM THE GENERAL REVENUE FUND FOR THE ALLEGED MEDICAL MALPRACTICE COMMITTED BY THE BREVARD COUNTY HEALTH DEPARTMENT DURING THE PRENATAL CARE OF VONSHELLE BROTHERS AND THE RESULTING DAMAGES TO HER DAUGHTER, IYONNA HUGHEY.

CASE SUMMARY:

Iyonna Hughey is a 7-year-old child who developed meningoencephalitis[1] soon after birth. The disease was both an infection of the meninges, the tissue covering the brain, and an infection of the brain tissue itself. The disease was caused by herpes simplex virus type 2. As a result, Iyonna is severely brain damaged and has profound developmental delays.

Vonshelle Brothers, the Claimant, is Iyonna's mother. Vonshelle alleges that the infection and resulting damage were caused by the failure of the Brevard County Health

[1] Iyonna's condition is referred to throughout the depositions as being meningoencephalitis, herpetic encephalopathy, and alternatively, herpetic encephalitis.

Department to sufficiently test her, the mother, for herpes. Adequate testing, the Claimant argued, would have led to Vonshelle's treatment with an anti-viral drug that would have prevented her from passing the virus to Iyonna. However, the evidence submitted through deposition testimony and medical records demonstrated that Vonshelle Brothers did not have the herpes simplex virus type 2. As a result, Iyonna must have contracted the herpes virus by contact with another person who had the infection. Because the Department did not cause the injuries to Iyonna, I recommend this claim unfavorably.

BACKGROUND INFORMATION: As a foundational matter, it is helpful to understand how Iyonna may have contracted the herpes virus. The herpes simplex viruses exist in two forms: herpes simplex virus type 1, which is oral herpes and abbreviated as HSV-1, and herpes simplex virus type 2, which is genital herpes and abbreviated as HSV-2.

HSV-1 generally causes sores near the mouth and lips, which are referred to as cold sores or fever blisters. HSV-1 is usually transmitted by oral-to-oral contact through oral secretions or sores on the skin and can be spread through sharing eating utensils and toothbrushes or kissing. With HSV-2, sores generally occur around the genitals or rectum. Genital herpes may be caused by HSV-1 or HSV-2, but most cases are caused by HSV-2 and are spread during sexual contact with someone who has a genital herpes type 2 infection. HSV-2 is highly contagious.

Many people infected with genital herpes do not display symptoms or have mild symptoms that are not noticed. When symptoms are noticed, they present as blisters, open ulcers, scabs, fever, muscle aches, or swollen lymph nodes. Both HSV-1 and HSV-2 remain in a person's body for life, even when no signs of infection are present. While it is rare, HSV-2 may be transmitted from a mother to her baby during

the delivery process.[2] The incubation period for HSV-1 or HSV-2 ranges anywhere from 2 to 12 days.[3]

FINDINGS OF FACT:

Initial Pre-Natal Visit

On March 16, 2010, Vonshelle Brothers visited the Brevard County Health Department to determine if she was pregnant.

Regina Pappagallo, a registered nurse, performed the initial intake interview and obtained a Patient History from Vonshelle.

To complete the Prenatal History form, Nurse Pappagallo asked Vonshelle two pages of extensive questions about her previous pregnancies, medical history, genetic screening, and infection history. The nurse recorded Vonshelle's response to each question. Under the "infection history" portion of the screening, Vonshelle responded "no" when asked if she or her partner had a history of genital herpes.[4]

Elena Cruz-Hunter, a certified nurse mid-wife and advanced registered nurse practitioner, then reviewed the patient history taken by Nurse Pappagallo, performed a vaginal exam, and conducted a Pap test to screen for the presence of pre-cancerous cells on the cervix.[5]

In conducting the initial physical examination, Ms. Cruz-Hunter was required to examine and note whether 17 specific areas of Vonshelle's body were normal or abnormal. The notations from the physical exam recorded no lesions, discharge, or inflammation in the areas of the vulva, vagina,

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[2] WebMD, *Herpes Simplex: Herpes Type 1 and 2,* http://www.webmd.com/genital-herpes/pain-management-herpes#1; Center for Disease Control and Prevention, *2015 Sexually Transmitted Diseases Treatment Guidelines, Genital HSV Infections*, available at https://www.cdc.gov/std/tg2015/herpes.htm; World Health Organization, *Herpes simplex virus*, available at http://www.who.int/mediacentre/factsheets/fs400/en/; Mayo Clinic, *Genital herpes*, available at http://www.mayoclinic.org/diseases-conditions/genital-herpes/basics/complications/con-20020893; Johns Hopkins Medicine, *Herpes Meningoencephalitis*, available at http://www.hopkinsmedicine.org/healthlibrary/conditions/adult/nervous_system_disorders/herpes_meningoencephalitis_134,27/.

[3] The American College of Obstetricians and Gynecologists, ACOG Practice Bulletin, Clinical Management Guidelines for Obstetrician-Gynecologists, *Management of Herpes in Pregnancy*, Number 82, June 2007.

[4] The Prenatal History indicates that Vonshelle acknowledged smoking 4 cigarettes per day for about 2 years and noted "daily" drug use/abuse for about 3 years, and drinking socially for about 1 year, but stated that she did not participate with tobacco, drugs, or alcohol when pregnant.

[5] The Pap test, or Pap smear, is a screening, not a diagnostic test, in which cells are scraped from the cervix and sent to a lab for testing to determine if abnormal cells are present that could lead to cancer. Deposition testimony from medical professionals in the case and The American College of Obstetricians and Gynecologists, *Frequently Asked Questions*, available at http://www.acog.org/Patients/FAQs/Cervical-Cancer-Screening#cervical.

or cervix. She checked that each of the specific areas was normal. In her deposition, Ms. Cruz-Hunter testified that she did not see any indication of any lesions or any signs or symptoms that suggested the presence of the herpes simplex virus. The urine test performed on Vonshelle that day was negative and showed that her urine was "perfectly normal." She noted that Vonshelle's uterus size indicated that she was 8-10 weeks pregnant. The Pap test used to screen for precancers was sent to Quest Diagnostics for interpretation.

Pap Test Results from Quest Diagnostics

On March 22, 2010, Quest Diagnostics reported that the patient was 9 weeks pregnant[6] and that the Pap test culture was satisfactory for evaluation. In the category titled "Interpretation/Result" the report stated:

"Negative for intraepithelial lesion or malignancy.
Cellular changes consistent with Herpes simplex virus
Shift in vaginal flora suggestive of bacterial vaginosis."

Under the comment section, the following cryptic and ambiguous phrase was noted: "Queued for Alerts call." No deposition testimony of any Quest pathologist was submitted to clarify what Quest meant by this ambiguous notation or if Quest made a call to the Brevard County Health Department alerting them to this observation. Accordingly, it is unclear if this phrase meant that Quest was indicating that someone in its office would call the clinician to alert them to this additional observation, given that someone at Quest was commenting on an issue outside the scope of the initial test for precancer or pre-malignancy.

Brevard County Health Department's Lab Slip Tracking Policy

The Claimant attached, as an exhibit to Nurse Regina Pappagallo's deposition, the cover page for the Brevard County Health Department Tracking Policy, dated 07-10-06, which did not contain the terms of the policy. The Claimant also attached the Brevard County Health Department Tracking [Policy for] Lab Slips and Missed Appointments, dated 7/15/10,[7] which contained the policy's contents. This

[6] This was Vonshelle's third pregnancy, which would be followed by two additional pregnancies. None of the other four pregnancies involved herpes simplex virus issues or injuries.
[7] The date of "7/15/10" is almost 4 months after Vonshelle visited the Brevard County Health Department. It is unclear if this policy was also in place when she visited the Department for her initial pregnancy exam.

policy explains what the staff members are to do when they receive the result of lab tests, like the results of Vonshelle's Pap test.

The policy for reviewing lab slips was a two-step process, and how the second step was to be completed depended on whether the lab test results were positive or negative. The first step in the policy required that a nurse review and initial the incoming lab slip. The second step required the medical staff to file the slip in the client's medical record if the results were negative, or pull the slip and give it to a nurse/clinician for additional orders if the results were positive. Under the policy, all abnormal slips needed to be signed by a clinician. The nurse would then determine how the client was to be contacted about the positive results–whether by the health support technician or nurse and whether by a letter or phone call. Someone was then required to make three documented attempts to reach the client. The Sr. CHN Supervisor[8] or designee was to determine if there were a need to send a certified letter. The policy also established the procedure for notating when a client failed to make an appointment.

The Quest Diagnostic lab report for Vonshelle was initialed by Nurse Pappagallo in the upper right hand corner, as required. A checkmark was placed at the end of the phrase "Negative for intraepithelial lesion of malignancy" indicating that the diagnosis was reviewed. Accordingly, the Pap test lab slip was negative for a malignancy, so it was placed in Vonshelle's medical records, in compliance with the policy. The purpose of the test was to determine the existence of precancerous cells, not herpes or another sexually transmitted disease. Among Vonshelle's additional medical records, labeled "Laboratory Results" and the category of Pap Test, it is recorded "3/16/10" and the word "normal" is circled. If the results had been abnormal, or positive for a malignancy, the records should have been pulled by the medical records staff and given to the nurse/clinician for possible orders and the nurse would have determined the type of contact with the patient that was appropriate.

What is confusing in this case but important to the issue of liability is the meaning of the unusual and added verbiage stating, "Cellular changes consistent with Herpes simplex

[8] It is unclear what this designation means.

virus." This is apparently an unusual notation to be placed on a Pap test result. According to the deposition testimony of Nurse Pappagallo, she had never seen this writing on another Pap smear; it was the first time she had ever seen this notation. Dr. Mark Sargent, the Brevard County Health Department physician who was Vonshelle's obstetrician, testified that he had "never even heard of this result on a pap smear . . . it's not even supposed to be on a pap smear and I've never seen it on a pap smear." He said that he did not know if the nurse was confused by the remark, because it was so unusual, but if he had seen the notation he would have certainly pursued it.

Additionally, there is no evidence in the record to demonstrate that Quest Diagnostic contacted the Clinic as suggested by the phrase "Queued for Alerts call." Further, Quest's lab results did not state whether herpes simplex virus type 1 or type 2 might be indicated.

No additional tests were performed by the Brevard County Health Department during the pregnancy to determine whether Vonshelle was infected with the herpes virus. Additionally, there is no documentation in the medical records that Vonshelle complained to the medical staff or requested prescriptions to alleviate the common symptoms of the herpes simplex virus.

The Pregnancy

According to the medical records, the pregnancy was not without complications and Vonshelle did not consistently comply with medical advice. Vonshelle had low amniotic fluid, which can be dangerous for the baby. She was admitted to the hospital for a 3-day stay in September to monitor pre-term contractions and preterm labor at 31 weeks. She was advised to stay 3 days and increase her fluids. Vonshelle left the hospital 1 day early, against the doctor's recommendation. She was given multiple sonograms throughout the pregnancy to monitor the level of amniotic fluid.

Because she had given birth prematurely in two earlier pregnancies, Vonshelle was given a prescription of progesterone to help reduce the risk of early labor.[9] The

[9] In his deposition, Dr. Mark Sargent testified that he gave the nurse a progesterone prescription for Vonshelle on August 12, but Vonshelle later denied ever having it. He wrote another prescription for progesterone on August 26, and handed the prescription to Vonshelle. Dr. Sargent had someone call Vonshelle on August 30 to follow up

medical notes indicate that she smoked cigarettes and declined Quitline[10] at her initial visit and stated that she could quit smoking on her own.[11]

Delivery

On October 14, 2010, an ultrasound and non-stress test were performed on Vonshelle. Because of the stress test results and decreased fetal movement, she was admitted to the labor and delivery unit at Wuesthoff Memorial Hospital in Melbourne and labor was induced. Vonshelle gave birth by vaginal delivery to Iyonna Hughey that night at 36 weeks and 4 days gestation.

On October 16, 2010, Vonshelle and Iyonna were discharged 2 days later, both in good condition. In her deposition testimony, Vonshelle stated that at the time of Iyonna's delivery she did not have any lesions or sores on her vagina or elsewhere on her body. This was confirmed by Dr. Mark Sargent, the delivering doctor, who stated that Vonshelle never indicated any lesions either pre-pregnancy, early pregnancy, or during the labor and delivery process. He noted that other than the "spurious finding on the pap smear, there is no indication that she ever had herpes."

Vonshelle returned with Iyonna to her home where her two older daughters were living and another woman, Cynthia Retland. It is unclear if Cynthia Retland's sons were also living in the home at that time.

Emergency Room Visit

On October 31, 2010, at about 11:00 p.m., Vonshelle took Iyonna to the emergency room at Wuesthoff because Iyonna had a fever, was lethargic and pale, was not eating, and was sleeping a lot. She stated in her deposition that the fever may have been present for a couple of days. Vonshelle stated that

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to make certain that the prescription was filled, but Vonshelle said she was unable to fill the prescription. Vonshelle did not show for her next appointment, and it is unclear when she actually began taking the progesterone.

[10] Quitline is a tobacco cessation service that supplies nicotine replacement therapy at no cost to the participants. http://c.ymcdn.com/sites/www.naquitline.org/resource/resmgr/ppp/fl_bureau_of_tobacco_prevent.pdf.

[11] Smoking during pregnancy can cause problems with the placenta and reduce a baby's food and oxygen. Smoking is known to increase the risk that a baby will be born prematurely or have a low birth weight. This increases the likelihood that the baby will be sick and require a longer hospitalization. See Centers for Disease Control and Prevention, Reproductive Health, *Tobacco Use and Pregnancy*, available at https://www.cdc.gov/reproductivehealth/maternalinfanthealth/tobaccousepregnancy/index.htm.

her mother kept saying that night that something was not right with Iyonna, and she was pale.

Vonshelle's deposition states that she signed in and spoke with a nurse in the front area of the waiting room. She estimates that she was in the waiting room for a total of about 30 minutes during which she spoke with a nurse for about 10 minutes. Vonshelle said that the nurse told her that the way Iyonna was behaving was "what newborns do, they sleep." Vonshelle stated that the nurse told her to take a cold rag and rub it over Iyonna's body and see if that would wake her. Vonshelle stated that the nurse told her to go home and come back in the morning if something was not right. Vonshelle left the emergency room and did not wait for her name to be called to see medical personnel. She stated that she thought, "maybe we are just overreacting. So, we left."

Vonshelle stated that she did not tell the nurse that Iyonna was lethargic or had a fever. Vonshelle added that she really thought nothing was wrong. She took Iyonna home, and both slept through the night from about midnight until 7:00 a.m.

Wuesthoff Memorial Hospital
On November 1, the next morning, when Vonshelle woke, she noticed that Iyonna was not responsive, her eyes were rolling back in her head, her lips were dark, she would not eat, and her breathing was shallow. Vonshelle called her mother who came and drove them to the Wuesthoff Hospital. She did not call 911.

Transfer to Arnold Palmer Hospital
The staff at Wuesthoff performed a lumbar puncture on Iyonna and drew spinal fluid. She was transferred to Arnold Palmer Hospital for Children in Orlando for further evaluation and care. The lumbar puncture was repeated and the results came back positive for herpes simplex virus type 2. Iyonna was diagnosed with herpes meningoencephalitis, meaning that her brain tissue was infected. She remained at Arnold Palmer for 36 days, from November 1, 2010 until her discharge on December 6, 2010. While at the hospital, Iyonna was treated intravenously with acyclovir for 21 days, to stop the viral growth, followed by oral acyclovir for suppressive therapy. She was fed through a gastric tube and was on a ventilator.

Iyonna's Injuries and Disabilities

The viral infection caused severe brain damage and neurological disabilities that impair Iyonna's ability to develop and function as a normal child. This was caused by the herpes simplex virus type 2. At the time of the special master hearing Iyonna spoke only about 20 words, could feed herself, but could not walk independently or bathe herself, and wore diapers each day. She was in kindergarten in a special needs program at Palm Bay Elementary. Iyonna rode a special needs school bus to and from school each day. She had a walker and wheelchair at school for mobility. She enjoyed playing games on a tablet, coloring, and watching television. The professionals who have observed Iyonna believe that she is going to need continuous care throughout her lifetime and will never be able to live or function independently due to the brain damage she received from the herpes meningoencephalitis.

Subsequent Herpes Tests

Vonshelle returned to the Brevard County Health Department for a subsequent pregnancy test in 2014, almost 4 years after Iyonna's birth. She did not alert the Health Department that she might be carrying the herpes virus, which allegedly caused the severe brain damage to Iyonna. If Vonshelle believed she had herpes, one would have expected her to disclose this information to the Department in order to protect her next child from the virus and the potential for brain damage. However, the Department recognized Vonshelle's name because of the ongoing litigation and tested her for herpes to determine if an anti-viral medication needed to be prescribed to prevent the fetus from getting the disease.

Blood was drawn from Vonshelle on August 1, 2014, for two separate HerpeSelect tests[12] and sent to different labs. The first blood sample was collected on August 1, 2014, and tested by Health Management System. The second blood sample was collected a few minutes later and tested by Quest Diagnostics. Both tests were negative for HSV-1 and HSV-2.[13]

[12] According to a website, the HerpeSelect test "is the most commonly used HSV antibody test in the U.S." The test can detect antibodies and differentiate between HSV-1 and HSV-2. It generally takes about 3-6 weeks for someone to develop a detectable amount of antibodies to the herpes simplex virus. Most everyone will have detectable antibodies 16 weeks after exposure. http://www.healthassist.net/medical/herpes-test.shtml

[13] There is a third DOH hsv test result in the records, apart from the two tests discussed above, which shows that more blood was drawn from Vonshelle on August 4, 2014, and also sent to Quest Diagnostics. This was also

On November 20, 2014, Vonshelle's attorneys initiated a third, and different type, of herpes test on Vonshelle. Blood was collected in Florida for an HSV Western Blot test[14] and sent overnight to the University of Washington Medical Center in Washington state. That test found that Vonshelle had been exposed to HSV-1, but was "indeterminate" for antibodies to HSV-2. No additional Western Blot tests were performed to clarify the results. The Claimant's attorneys did not reveal this test to the Brevard County Health Department during discovery claiming it was protected under the Claimant's work product privilege. Because the attorneys for the Department were unaware of the test's existence, they did not question any experts on the Western Blot's credibility or reliability.

Not one of the three blood tests performed on Vonshelle has demonstrated that she was exposed to herpes simplex virus, type 2.

LITIGATION HISTORY:

Litigation
Vonshelle Brothers filed a medical malpractice suit, individually and on behalf of her daughter, Iyonna Hughey, a minor, against the Brevard County Health Department on October 9, 2012. The suit was filed in the Circuit Court of the Eighteenth Judicial Circuit in and for Brevard County. The Brevard County Health Department is a division of the Florida Department of Health, an agency of the State of Florida. An extensive period of discovery ensued, and depositions were taken in 2014, 2015, and 2016.

Mediation
The parties attempted to mediate the case on February 10, 2015, but were not able to reach a settlement.

Settlement
The trial was scheduled to begin April 25, 2016. Approximately 1 week before the trial, the parties reached their first of two settlement agreements. The Department of

initiated by DOH. The results were again negative for HSV type-1 and HSV type-2. The expert witness depositions seem to only discuss two tests initiated by the Department of Health, so the presence of this third hsv test, although present in the submitted records, does not appear to be mentioned in the depositions. Because the Department of Health did not present a case at the claim bill hearing, this third DOH test, nor any of their theories, were argued at the hearing.

[14] In the last paragraph of the HSV Western Blot test results two sentences are printed: "This test was developed and its performance characteristics determined by UW Medicine, Department of Laboratory Medicine. *It has not been cleared or approved by the U.S. Food and Drug Administration*." (Emphasis added.)

Health agreed to pay the statutory cap of $200,000, and the Claimant would pursue a claim bill for the excess amount of $3 million. However, the Department maintained the right to contest the claim bill during the legislative process.

The Department then paid the $200,000, the maximum amount that may be paid without legislative authority which was disbursed as follows:

$101,841.41	Litigation Expenses Paid to Plaintiff's Law Firm
$7,560.58	Payment of Medical Liens
$50,000.00	Purchase of Annuity for Iyonna Hughey[15]
$40,698.01	Disbursement to Vonshelle Brothers
$200,000.00	

As of the date of the special master hearing, the Claimant's law firm had not received any fees for its legal work, only reimbursements for costs. An additional $71.19 is due the firm for interest accrued.

The Claimant's attorneys later offered to reduce the claim to $1 million if the Department would not contest the claim bill. The Department accepted this offer and has agreed to maintain a neutral position on the claim bill, but it has not admitted liability.

Claim Bill Hearing

On February 24, 2017, a lengthy, almost day-long hearing was held before the House and Senate special masters. Ronald Gilbert and Jonathan Gilbert appeared with their clients, Vonshelle Brothers and Iyonna Hughey. Patrick Reynolds, Chief Legal Counsel for the Department, Michael J. Williams, Assistant General Counsel, and Maria Stahl, Health Officer for Brevard County, appeared for the Department of Health. Because the Department agreed that it would not oppose the claim bill, it did not present any theories, arguments, or evidence on the Department's behalf. However, the Department did provide documentation in response to specific requests by the special masters. The Department did not admit fault in this claim.

[15] The annuity will begin making payments to Iyonna Hughey when she is 18 years old. As the annuity is structured, Iyonna will receive annual income of $2,500 per year for 5 years when she turns 18, $3,500 per year for 5 years when she turns 23, $4,500 per year for 5 years when she turns 28, $5,500 per year for 5 years when she turns 33, and lump sum annual disbursements of $6,500 payable at ages 38, 39, and 40, then $3,825.85 when she is 41, for a total lifetime yield of $103,325.85.

CLAIMANT'S POSITION: Vonshelle Brothers' position is that the Brevard County Health Department was negligent and did not meet the standard of care when reviewing her Pap test. Her argument then follows that, if the lab slip had been properly reviewed, additional testing would have revealed that Vonshelle carried the herpes virus. A proper course of treatment could have then prevented Iyonna from contracting the herpes virus, suffering herpetic encephalitis, and sustaining substantial brain damage.

RESPONDENT'S POSITION: While the Respondent did not present a case at the special master hearing, a review of the depositions taken over the course of discovery in this case reveals what its arguments might have been. Based upon the depositions of expert witnesses, the Department was likely preparing to argue that Vonshelle did not have the herpes virus and therefore, could not have transmitted the virus to Iyonna during the pregnancy or delivery.

An alternative theory might have been that Vonshelle contributed to Iyonna's damage by transmitting the herpes virus to her. Additionally, it might have been argued, that Vonshelle did not seek timely medical attention when severe symptoms were apparent on the night that she left the emergency room without seeing a doctor, thereby delaying treatment for Iyonna by 7 or 8 hours. Prompt treatment for Iyonna might have prevented or mitigated her brain damage.

A case might also have been built on missed opportunities by Vonshelle. She missed many obstetrical appointments and apparently did not fill an initial progesterone prescription to prevent early labor, which required that a second prescription be written for her, thus causing the medicine to be taken later. Iyonna missed many appointments for speech therapy, physical therapy, occupational therapy, and Vonshelle chose not to acquire a wheelchair that was prescribed for Iyonna because she did not want people to see Iyonna in a wheelchair. It was questioned whether she made a diligent effort to enroll Iyonna in school as early as she could have.

CONCLUSIONS OF LAW: The Brevard County Health Department, a department of the Florida Department of Health, is an agency of the State of Florida. Under the legal doctrine of *respondeat superior*, the Department is liable for its employees' wrongful acts, or medical negligence, committed within the scope of their employment.

When a plaintiff seeks to recover damages for a personal injury and alleges that the injury resulted from the negligence of a health care provider, the plaintiff bears the legal burden of proving, by the greater weight of the evidence, that the alleged actions of the health care provider were a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care is defined in statute as "that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers."[16] The standard of care is established at trial by providing expert testimony from professionals in that field.

To establish liability in a medical malpractice action, the plaintiff must prove:
(1) A duty of care owed by the healthcare provider to the injured party;
(2) A breach of that duty;
(3) Causation--that the breach of the duty caused the plaintiff's injury;[17] and
(4) Damages.

In this case, the Department's liability turns on whether the Department breached a duty and whether it caused Iyonna's damages. To express these legal principles in the factual context of this case, the issues are whether the Department should have tested Vonshelle Brothers for the herpes simplex virus, and whether that testing would have led to treatment that could have prevented Iyonna Hughey from acquiring meningoencephalitis, which caused her brain damage.

These elements as outlined below are based upon depositions, testimony, and other information provided before and during the special master hearing. Medical malpractice cases generally "involve a battle of expert witnesses."[18] This claim is no exception. The parties deposed medical experts in several cities in Florida, Atlanta, New York City, and Michigan to support their cases.

[16] Section 766.102(1), F.S.
[17] *Saunders v. Dickens*, 151 So. 3d 434, 441 (Fla. 2014).
[18] *Id.*

Duty
As discussed above, a health care facility and its employees have a duty to provide a professional standard of care to its patients that is recognized as acceptable and appropriate by reasonably prudent similar health care providers.[19] The issue of whether the Brevard County Health Department owed a duty to Vonshelle Brothers is not contested in this case. The duty was owed.

Breach of Duty
If this case had proceeded to trial, it would likely have been disputed whether the duty of care owed to Vonshelle Brothers and Iyonna Hughey was breached. Three areas of a potential breach were identified:

(1) Whether the Department breached the standard of care when it received and filed the Pap test lab results in Vonshelle's medical records and did not have a clinician review the results or pursue additional testing to determine if she carried the herpes virus.

(2) Whether the Health Department breached its duty by not starting Vonshelle on a regimen of anti-viral medicines that would have suppressed the alleged hsv in her body, thereby preventing her from passing the disease to Iyonna during the birth process.

(3) Whether an anti-viral medicine should have been given to Vonshelle and when it should have been given because of her history of delivering two earlier babies before full-term gestation at 40 weeks.[20]

Based upon the deposition testimony of medical experts, each side would have had arguments to support its case before a jury.

The Claimant's Arguments
The Claimant provided experts who testified in depositions that the Brevard County Health Department breached the duty of care owed to Vonshelle.

[19] Section 766.102(1), F.S.
[20] Authoritative medical literature and expert witness medical testimony suggest waiting until the 36th week of pregnancy to begin an anti-viral medicine for the mother.

Dr. Berto Lopez

Dr. Berto Lopez, a medical doctor practicing in obstetrics and gynecology, testified as a standard of care expert. He stated that he personally reads the results of all Pap smears that he orders and that Dr. Mark Sargent, Vonshelle's obstetrician at the Brevard County Health Department, should have read the results himself rather than allowing a subordinate on staff to read the results. In his opinion, this was a breach of the standard of care. Regarding the issues of initiating an anti-viral medicine and when the anti-viral should be initiated, he stated that he generally starts women on an anti-viral drug early in the pregnancy. To prevent the passage of the disease to the baby at birth, he does not wait until 36 weeks to begin suppression therapy.

Nurse Sharon Hall

Sharon Hall[21] testified in her deposition about the nursing standard of care at the Brevard County Health Department. Nurse Hall is an obstetrical nurse who formerly practiced in high-risk labor and delivery. She stated that it was a deviation from the standard of care when the Department nurse did not report to Dr. Sargent the changes that were observed in the Pap smear report.

The Respondent's Arguments

Perhaps the Respondent's theory would have been that the added phrase "Cellular changes consistent with Herpes simplex virus" was so out of place on a Pap test report that it did not actually alert the nurse to notify a clinician. Because the test was negative for precancers, she technically complied with the policy for handling negative lab slips.

Dr. Mark Sargent

Dr. Mark Sargent, Vonshelle's treating obstetrician, stated in his deposition that he felt the findings should have been reported to him, but that he had "never even heard of this result on a Pap smear. It's not even – it's not even supposed to be on a pap smear and I've never seen it on a pap smear….I would have expected, had I seen it, I would have certainly pursued it." Dr. Sargent said that he would have expected the nurse to bring this report to someone's attention.

[21] Sharon Hall is an obstetrical nurse with approximately 30 years of experience. She has a bachelor's degree in nursing and a master's degree and is also certified in inpatient obstetric care and electronic fetal monitoring.

Dr. David Colombo

Dr. David Colombo was also deposed as a defense expert witness for the Department. He is a practicing physician in obstetrics and gynecology and maternal fetal medicine.[22] He stated in his deposition that he believed that Dr. Sargent deviated from the standard of care by not personally reviewing the Pap test results. However, as will be discussed later, he did not believe that this deviation caused any damage.

Conclusion

Accordingly, I find that the Brevard County Health Department deviated from the acceptable standard of care owed to Vonshelle Brothers by not having a clinician review the results of the Pap test that was ordered by a nurse midwife.[23]

Causation

If this case had proceeded to trial, it would likely have been disputed whether the damage to Iyonna was actually caused by the negligence of the employees of the Brevard County Health Department. The Claimant argues that the failure of the Brevard County Health Department to discover whether Vonshelle had herpes, and its subsequent failure to provide her with anti-viral medication that would have prevented her from passing the herpes virus to Iyonna at birth, is the cause of Iyonna's injuries. It is undisputed that Iyonna contracted HSV-2, which caused her brain damage. Whether she contracted the disease from her mother at birth is not so clear.

The Claimant's Arguments

Dr. Berto Lopez

Dr. Berto Lopez, an expert witness for the claimant, testified that, upon receiving and reviewing Vonshelle's Pap smear lab slip, he would have given her extra tests to determine whether she had herpes. He would have given her anti-viral medication early in the pregnancy and would not have waited until she was 36 weeks pregnant. He believed that there was

[22] Dr. Colombo is a former clinical assistant professor of maternal fetal medicine at the Ohio State University hospitals and associate professor of obstetrics and gynecology and maternal fetal medicine at Michigan State University.

[23] The Brevard County Health Department instituted a new policy for reviewing lab slips, on or around August, 2015, according to an affidavit submitted by Maria Stahl, the Administrator for the Brevard County Health Department. The ordering clinician must review and acknowledge the laboratory results, in addition to the review performed by the assigned nursing staff. The laboratory review process is reviewed at all new employee orientations for the Brevard County Health Department.

no harm in giving the anti-viral medication to Vonshelle early, but that there could be tremendous harm to the baby if the medication were not given.

Dr. Fred Gonzalez

Dr. Fred Gonzalez, a board certified perinatologist[24] or maternal fetal medicine specialist, practicing in New York City, was another expert witness for the claimant. He also testified that when he has a pregnant patient with a recurrent herpes infection and she has not had an outbreak in the last year, he puts her on an anti-viral drug for suppression therapy at 36 weeks. He then lets the pediatrician or neonatologist know that the mother has a history of herpes. According to Dr. Gonzalez, the mother's primary outbreak is the most dangerous to the baby. When asked if he recommended beginning anti-viral therapy earlier than 36 weeks for someone with previous pre-term births at 35 or 36 weeks, he said he did not. If a mother has herpes symptoms or a lesion at the time of delivery, the treatment is to do a Caesarean section.

Dr. Catherine Lamprecht

Dr. Catherine Lamprecht, a pediatric infectious disease specialist for the claimant, treated Iyonna at Arnold Palmer Hospital for Children. She testified that she could say with medical certainty that Iyonna was exposed to hsv and suffered meningoencephalitis as a result. Dr. Lamprecht was asked in her deposition if she was an expert in the prenatal care of a mother with herpes who was about to give birth. She stated that she did not consider herself an expert in that area. Dr. Lamprecht said that she could not give a medical expert opinion as to whether Vonshelle had herpes.

Respondent's Arguments

Dr. Mark Sargent

Diagnosing Herpes In Pregnant Women

Dr. Mark Sargent, Vonshelle's treating obstetrician, testified in his deposition that he had dealt with approximately 10,000 patients in his obstetrical career of which "a couple hundred" were pregnant women having confirmed cases of herpes simplex virus.

[24] Perinatology is a subspecialty within the field of obstetrics and gynecology. It focuses on high-risk, complicated pregnancies. Perinatology is also referred to as maternal-fetal medicine. http://www.perinatologist.net/

When asked how he confirms that a pregnant woman has herpes, Dr. Sargent responded that, if the woman has been diagnosed with herpes or told of it and treated for it, that is the first way. If the patient tells him that she has a lesion in the vaginal area or vulva, he cultures the lesion, sends it to a lab, and if it comes back positive, that is definitive. A third way, which is less definitive, is a blood test to determine the presence of herpes antibodies, because it means that a patient has been exposed to herpes.

Sores or Boils

Later in the deposition, Dr. Sargent discussed Vonshelle's claim that she had boils. Vonshelle stated that she had a sore under her arm and in the area of the crease in her leg near the vaginal area during the pregnancy. She described the sores to be boils about the size of a penny. When asked if this could be characteristic of a herpes lesion, Dr. Sargent said "No" and that boils are not cratered lesions characteristic of herpes. Moreover, Dr. Sargent testified that there was nothing in the medical records that indicated that Vonshelle had any boils during her pregnancy. He said that he would have examined those areas and the information would have been in Vonshelle's medical records if he had been notified, but there was nothing in her records about boils.

Standard of Care and Suppression Therapy

When asked what Dr. Sargent would have done if the Quest Pap test lab report had been brought to his attention, he replied that he would have gotten a second opinion about starting an anti-viral medicine on a baby in the first trimester. He does not order acyclovir, an anti-viral prescription that suppresses herpes, in the first trimester, but waits until the last trimester, at approximately 34 or 36 weeks, if the mother has a history of herpes. He stated that it is too late to treat a mother with acyclovir during the birthing process because it would not be helpful to her, the mother. Additionally, a Caesarean section was never recommended for Vonshelle because they were not aware that she had herpes.

Dr. Sargent testified that treating the mother at 34 to 36 weeks with acyclovir does not protect the baby and because Vonshelle delivered Iyonna at 36 weeks, the medicine would not have been in Vonshelle's system long enough to help the baby. He stated that the medical recommendation is that the

drug needs to be administered for 4 to 6 weeks before it is helpful.

When asked if Iyonna likely contracted herpes during the birthing process, Dr. Sargent responded, "No." He said that he really did not know when the transmission of the disease likely occurred, and commented that the case was very odd.[25]

Dr. Keith Van Dyke

Herpes Testing

Dr. Keith Van Dyke was also deposed as a defense expert witness. At the time of his deposition, he was a practicing gynecologist who had worked in high risk obstetrics. He stated that he had never had a patient who tested positive for hsv on a Pap test.

Whether Vonshelle Had the Herpes Simplex Virus

Dr. Van Dyke stated that Vonshelle "has never had herpes based on her lab test from 2014." He noted that Vonshelle took a blood serum test and the results test were negative.

Dr. Van Dyke was asked to comment on conclusions made by Dr. Lamprecht, the infectious disease specialist practicing at Arnold Palmer Hospital for Children. Dr. Lamprecht concluded that Iyonna contracted hsv during the vaginal birth. Dr. Van Dyke stated that Dr. Lamprecht was wrong to conclude that Iyonna was exposed to hsv during the vaginal delivery. He based this on the fact that Vonshelle tested negative for herpes.

When asked if false-negatives could occur, he responded that it is possible if the herpes test is performed on someone soon after the virus is transmitted to them. This is because the particular anti-body had not been around long enough in the body to register. However, Dr. Van Dyke said that he was not aware of any false negative tests in the literature he reviewed. When asked if Vonshelle could have had a false negative for the hsv test, Dr. Van Dyke stated, "I would think not."

Iyonna's Acquisition of Herpes

When asked his opinion of how Iyonna acquired the herpes simplex virus, Dr. Van Dyke stated, "I can only suppose that

[25] At the time of Dr. Sargent's deposition on March 13, 2014, Vonshelle had not been tested for herpes. The multiple HerpeSelect tests were not taken until almost 5 months later, in August 2014. It was then that people became aware that she did not have the herpes type 2 virus.

the baby acquired it after delivery." The follow up question was asked if there were any possibility that the baby would have acquired the virus before labor and delivery and he responded, "No."

Herpes Incubation Period
During Dr. Van Dyke's deposition, the issue was raised about the length of an incubation period for the herpes simplex virus. Dr. Van Dyke stated that generally, the incubation period before lesions appear is 2 to 12 days or so after exposure.

Validity of HSV Test
Dr. Van Dyke placed more validity on the negative hsv test than on the Pap test report which stated "cellular change consistent with herpes simplex virus." He explained his reasoning as being that the blood serology test, or the test that was performed on Vonshelle in 2014 after Iyonna's birth in 2010, is an antibody test, and if someone has been exposed to the herpes virus, the person will remain positive for antibodies for his or her lifetime. He said that this holds true if it was a blood sample test, regardless of the location of where the blood was drawn or the amount of blood that was drawn.

Dr. Van Dyke stated that, in his opinion, other than when the test was performed during the early stage of an initial or primary herpes outbreak, a negative result would be 100 percent confirmation that the patient had never had herpes.

Suppression Therapy
Dr. Van Dyke relies on the American Congress of Obstetrics and Gynecology's publication, the Herpes Management in Pregnancy document, published in 2007 and reaffirmed in 2014. It states that suppression therapy for herpes should begin at 36 weeks. He found the bulletin to be authoritative and follows its guidelines for suppression therapy.

Dr. Van Dyke was asked about suppression therapy for hsv and using a daily therapy drug such as acyclovir or Valtrex to prevent recurrences of herpes outbreaks, and whether that would affect the results of an antibody hsv test. He stated suppression therapy would not affect those test results because "antibodies" are for life and that "They don't go away."

When asked if he would have begun a regimen of suppression therapy based upon the Pap test results, he responded that it would not have been appropriate to initiate suppression therapy without a diagnosis of hsv with a serum blood test. He stated, once again, that Vonshelle did not have a diagnosis of herpes simplex, and in his opinion, because Vonshelle never had herpes, it would not matter. He noted that it is not good practice to give medicine for no reason. Dr. Van Dyke expounded that suppression therapy is a treatment for a known disease. He stated that suppression will decrease outbreaks, but some of his patients on daily suppression still get outbreaks of herpes. Unless it is a primary outbreak during pregnancy, suppression is used for recurrences at 36 weeks and up.

Standard of Care

When asked whether the handling of Vonshelle's Pap test met the standard of care, Dr. Van Dyke responded that he did not think there was a standard of care on this particular Pap test because it was so unusual. He said, "It's got to be rare because I've never seen one. I wouldn't know that there would be a standard." He noted that the Pap test result did not say "diagnostic of" herpes, and suggested that there are other possibilities that might not always be true, such as other infections. He concluded that the Pap test results did not need to be communicated to Vonshelle because the results were negative for what it was tested for, cervical disease, dysplasia, and malignancy.

Dr. Van Dyke also stated that the pathologist's notation about cellular changes did not make any distinction between herpes-1 and herpes-2. He stated, once again, that note on the Pap smear lab slip is odd and extremely rare and he could not say what the standard of care would be for it.

He further stated that a Pap test is not diagnostic of herpes.

Transmission from Mother to Baby

When asked his theories of how a baby could acquire HSV-2 after birth, Dr. Van Dyke said that if someone had lesions in his or her mouth, he or she could shed the virus through saliva. If someone has active herpes or lesions on their genitals and they touch themselves and then touch the baby, that is a possible way to transmit the virus as well. "So, kissing, touching."

In summary, when Dr. Van Dyke was asked if it was his opinion that the baby absolutely did not acquire hsv from the mother during vaginal birth but rather was exposed to the herpes simplex virus after birth by someone other than the mother, he replied, "Correct."

Dr. David Columbo

Dr. David Columbo was also deposed as a defense expert witness. He is board certified in obstetrics and gynecology and maternal fetal medicine.[26] He regularly addresses the prevention of neonatal herpes in his maternal fetal medicine practice.

Impact of Previous Pre-term Births on this Pregnancy

When asked if Vonshelle's two earlier pre-term births were important to the issues in this case, Dr. Columbo stated, "No." He said that he would not have done anything differently than what Dr. Sargent did in treating Vonshelle in 2010.

He agreed with the American Congress of Obstetrics and Gynecology's guidelines for maternal fetal medicine. Those guidelines recommend beginning an anti-viral medicine at 36 weeks, and he found those guidelines to be reliable and well thought out. This opinion is in direct conflict with the testimony offered by the Claimant's medical expert, Dr. Berto Lopez.

Whether Vonshelle had the Herpes Simplex Virus

Dr. Colombo commented on the testimony of Dr. Lamprecht, the pediatric infectious disease specialist. He stated that her testimony was actually very good but her conclusion was wrong when she was asked about the pathology results showing cellular changes consistent with herpes. He also said that Dr. Lamprecht was wrong to conclude that Vonshelle had hsv during her pregnancy. When asked to elaborate, he said that Vonshelle Brothers did not have hsv during her pregnancy. He based that opinion upon the 2014 test results of the antibody screen for HSV-1 and HSV-2, after the 2010 pregnancy. Those test results show that it was impossible for her to have had hsv during her pregnancy.

[26] Dr. Colombo served as a clinical assistant professor of maternal fetal medicine at the Ohio State University hospital system and at the time of the deposition was an associate professor at Michigan State University in obstetrics and gynecology and maternal fetal medicine.

Dr. Colombo expounded on the pathology notation about changes consistent with herpes. He said that the pathologist saw a multinucleated giant cell with inclusions in the nucleus that were not specific for herpes. At that point, he felt that it was the obstetrician's job to do an antibody screen to see if Vonshelle actually had herpes or if it were due to another cause. The fact that the obstetrician did not follow up then was not an issue because the fact that the tests were negative years later meant that the results would have been negative at the time that the Pap smear was done in 2010.

He felt that the pathologist was correct to say that he saw those type of cells, but those types of cells could also be human papilloma virus, chronic inflammation, or a lot of things that can give that appearance. He felt that the pathologist was unable to distinguish between herpes simplex virus and other viruses or infections at that point. Dr. Colombo felt that the pathologist made an incorrect assumption that the cells were herpes simplex virus.

The Method of Transmission to Iyonna
Dr. Colombo believed that Dr. Lamprecht actually gave the method of Iyonna's transmission in her deposition when she related the story of someone with a cold sore kissing a baby. He concluded that what happened to Iyonna was either "in the nursery or a family member, somebody with herpes contacted this child shortly after delivery and transmitted the herpes virus then." He stated, "But the mom didn't have it. So it had to be that other two percent where somebody else gave it to the kid shortly after delivery."

Standard of Care
Dr. Colombo felt that Dr. Sargent deviated from the standard of care by failing to review the lab report. However, because the mistake did not result in any damage, the mistake is less relevant. He found no causal connection between the deviation in the standard of care and the resulting damages.

Suppression Therapy
If he had received a positive antibody screen on Vonshelle, he would have offered acyclovir at 36 weeks. He would not have started it any sooner even though she had two pregnancies that delivered at 32 and 36 weeks.

Dr. Colombo stated that, if a mother has antibodies and a recurrent infection, the risk of transmitting herpes to the baby is about 1 in 4,000. Some people have a reaction or side effects to acyclovir or Valtrex which could be catastrophic, even fatal. He did not think that giving the medicines in a timely manner would prevent herpetic meningoencephalitis, but would decrease the risk of herpetic meningoencephalitis.

Dr. Colombo said that the HSV-2 antibody test used in 2014 for determining whether Vonshelle had herpes is a very good test.

Source of Transmission of HSV to Iyonna
Dr. Colombo testified that the virus likely came from a well-meaning relative who was excited for the baby, who came in with a cold sore and kissed the child. He noted that it could have been a nurse or tech in the newborn nursery who picked the child up without gloves and had a herpes lesion on her or his hand. He said that this method is consistent with the incubation period because it happened shortly after delivery.

Dr. Colombo expressed once again that Iyonna's exposure to the virus was not during labor and delivery and he based that upon the fact that Vonshelle tested negative for herpes in a subsequent pregnancy. He also noted that if Vonshelle were exposed to herpes, she would have antibodies in her blood for life. He stated that because she twice tested negative for herpes means that she was never exposed to the virus

Incubation Period
Dr. Colombo testified that herpes incubation periods generally occur with a general range of time. The shortest incubation period he has seen was 7 days and the longest was 21 days.

<u>Conclusion</u>
In light of the negative HerpeSelect tests[27] and expert witness testimony, as well as the Western Blot test, I find that Vonshelle did not have HSV-2 while pregnant with Iyonna. She was, therefore, incapable of transmitting the virus to Iyonna during the birth process and causing her neurological

[27] According to a website, the HerpeSelect test "is the most commonly used HSV antibody test in the U.S." The test can detect antibodies and differentiate between HSV-1 and HSV-2. It generally takes about 3-6 weeks for someone to develop a detectable amount of antibodies to the herpes simplex virus. Most everyone will have detectable antibodies 16 weeks after exposure. http://www.healthassist.net/medical/herpes-test.shtml

damage. Iyonna's infection must have originated from coming into contact with another person who had the infection.

Damages

The parties agreed to settle this claim for:

(1) The $200,000 statutory cap, which was previously paid to the Claimant and her attorneys; and
(2) The right to pursue a claim bill for no more than $1 million that would not be contested by the Department of Health.

As discussed on page 11, the attorneys have been reimbursed $101,841.41 for their costs, but have not received any compensation for their legal services. Vonshelle has received $40,698.01. An annuity costing $50,000 has been purchased for Iyonna.

Vonshelle has incurred no out-of-pocket medical expenses because she and Iyonna are covered by Medicaid. According to Vonshelle's deposition testimony in 2014, she received $720 per month in Social Security disability payments for Iyonna.

FINAL CONCLUSION IN LIGHT OF THE EVIDENCE:

I do not find that the Claimant has proven, by the greater weight of the evidence, that the Brevard County Health Department is responsible for Iyonna's neurological injuries.

The Department's breach of the standard of care when Dr. Sargent did not review the entire results of Vonshelle's Pap test did not cause Iyonna's injuries. Vonshelle has never tested positive for HSV-2, in separate tests submitted to the special masters, and therefore, she did not have the virus and was not capable of passing the virus to Iyonna. Any further testing by the Department for hsv after the lab slip noted the cellular changes consistent with the herpes virus would not have yielded a positive test result. Therefore, the Department is not liable for any damages.

ATTORNEY FEES:

Section 768.28, F.S, limits the claimant's attorney fees to 25 percent of the claimant's total recovery by way of any judgment or settlement obtained pursuant to s. 768.28, F.S. The claimant's attorney has agreed to limit attorney fees to 15 percent of the claim bill award.

RECOMMENDATIONS: Based upon the foregoing, the undersigned recommends that Senate Bill 42 be reported UNFAVORABLY.

Respectfully submitted,

Eva M. Davis
Senate Special Master

cc: Secretary of the Senate

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Appropriations Subcommittee on Finance and Tax
Appropriations Subcommittee on General Government
Commerce and Tourism
Community Affairs
Ethics and Elections

SENATOR JOSE JAVIER RODRIGUEZ
Deputy Democratic Whip
37th District

October 12, 2017

Senator Greg Steube, Chair
Judiciary Committee
404 S. Monroe St.
Tallahassee, FL 32399-1100
Sent via email to Steube.greg@flsenate.gov

Dear Chairman Steube,

I respectfully request that you place SB 44 relating to Relief of Cristina Alvarez and George Patnode by the Department of Health and SB 42 relating to Relief of Vonshelle Brothers/Brevard County Health Department on the agenda of the Judiciary Committee at your earliest convenience.

Should you have any questions or concerns, please feel free to contact me or my office. Thank you in advance for your consideration.

Respectfully,

Senator José Javier Rodríguez
District 37, Miami

CC: Tom Cibula, Staff Director
Joyce Butler, Administrative Assistant

REPLY TO:
☐ 2100 Coral Way, Suite 505, Miami, Florida 33145 (305) 854-0365
☐ 220 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5037

Senate's Website: *www.flsenate.gov*

JOE NEGRON
President of the Senate

ANITERE FLORES
President Pro Tempore

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/25
Meeting Date

SB 42
Bill Number (if applicable)

Amendment Barcode (if applicable)

Topic Brothers Claim (Relief)

Name Jonathan Gilbert

Job Title Plaintiff's Attorney

Address 301 N. Orange Ave. *Street*
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Email

Speaking: ☒ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Brothers, Vonstelle

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
515 Knott Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5198

DATE	COMM	ACTION
1/22/18	SM	Favorable
1/23/18	JU	Favorable
	AHS	
	AP	

January 22, 2018

The Honorable Joe Negron
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 44** – Senator Jose Rodriguez
HB 6501 – Representative Jackie Toledo
Relief of Christina Alvarez and George Patnode by the Department of Health

SPECIAL MASTER'S FINAL REPORT

THIS IS A CONTESTED EXCESS JUDGMENT CLAIM FOR $2.4 MILLION AGAINST THE DEPARTMENT OF HEALTH FOR THE NEGLIGENT MEDICAL CARE PROVIDED TO NICHOLAS PATNODE IN 1998 AT THE COUNTY HEALTH DEPARTMENT/PUBLIC HEALTH CLINIC OPERATED BY THE DEPARTMENT IN MARTIN COUNTY.

CURRENT STATUS:

This claim bill was previously filed with the Legislature for the 2004 through 2010 Legislative Sessions. At some point, it was heard by T. Kent Wetherell, an administrative law judge from the Division of Administrative Hearings, serving as a Senate Special Master. After the hearing, the judge issued a report containing findings of fact and conclusions of law and recommended that the bill be reported FAVORABLY. Judge Wetherell's special master report from SB 46 (2007), the latest report available, is attached.

According to counsel for the parties, no changes have occurred since the hearing which might have altered the findings and recommendations in the report. Additionally, the prior claim bills on which the attached special master report is based, is effectively identical to claim bill filed for the 2018

Legislative Session. Therefore, the undersigned recommends that Senate Bill 44 be reported FAVORABLY.

Respectfully submitted,

Thomas C. Cibula
Senate Special Master

cc: Secretary of the Senate

THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
1/17/07	SM	Favorable

January 17, 2007

The Honorable Ken Pruitt
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 46 (2007)** – Senator Dave Aronberg
Relief of Nicholas Patnode

SPECIAL MASTER'S FINAL REPORT

THIS IS A CONTESTED EXCESS JUDGMENT CLAIM FOR $2.4 MILLION AGAINST THE DEPARTMENT OF HEALTH FOR THE NEGLIGENT MEDICAL CARE PROVIDED TO NICHOLAS PATNODE IN 1998 AT THE COUNTY HEALTH DEPARTMENT/PUBLIC HEALTH CLINIC OPERATED BY THE DEPARTMENT IN MARTIN COUNTY.

FINDINGS OF FACT:

On December 26, 1997, 5-month-old Nicholas Patnode was taken to the Martin County Health Department - Indiantown Clinic (hereafter "the Clinic") by his mother, Christina Alvarez, because of a fever. Nicholas received his primary care through the Clinic, as did the claimants' other two children. Nicholas' regular pediatrician was Dr. Stephen Williams.

Dr. Williams diagnosed Nicholas with an ear infection. He prescribed an antibiotic, and told Ms. Alvarez to bring Nicholas back in 10 days. Nicholas completed the antibiotic, and went in for the follow-up appointment on January 6, 1998. At the follow-up appointment, Dr. Williams found that Nicholas had recovered from the ear infection.

Two days later, on Thursday, January 8, 1998, Nicholas again ran a fever causing his mother to bring him back to the Clinic. Dr. Williams saw Nicholas and measured his fever at 103.7

degrees. The fever was "without focus," meaning that there was no apparent cause for the fever. In order to rule out a dangerous bacterial infection, Dr. Williams properly ordered a complete blood count (CBC) and urine test.

The Clinic did not have lab facilities. Lab work, such as the CBC ordered by Dr. Williams, was sent to the lab at Martin Memorial Hospital for analysis. The lab faxed the results of the tests back to the Clinic physician who ordered the tests.

In addition to ordering the CBC, Dr. Williams prescribed Tylenol and Motrin for Nicholas, told his mother to keep cool clothes on him, and to watch him for a rash. He also told her that if there was a rash or if the fever persisted or got worse, she should take Nicholas immediately to the emergency room.

The next day, January 9, 1998, Ms. Alvarez stated that she checked Nicholas' temperature every 4 hours, and that his temperature was "normal" (i.e., 98.6 degrees) throughout the day. At about 4:30 p.m., Nicholas felt hot and had a fever of 100 degrees. Ms. Alvarez gave Nicholas a dose of Tylenol, and when she checked his temperature again an hour later, his fever was up to 101 degrees. At about the same time, Nicholas' father, George Patnode, arrived home from working on a friend's car.

Mr. Patnode and Ms. Alvarez proceeded directly to the Martin Memorial Hospital emergency room with Nicholas. They arrived at the hospital at approximately 6:50 p.m. Ms. Alvarez did not mention during the admission process that Nicholas had been seen by Dr. Williams on the prior day or that he had ordered a CBC test.

The emergency room physician ordered another CBC test, which showed an abnormal white blood cell count. While waiting for test results, Cristina noticed that Nicholas was getting limp and whining, and was starting to get blotches on his lips. A lumbar puncture (i.e., spinal tap) indicated that Nicholas had pneumoccoccal meningitis. Nicholas was given intravenous antibiotics, and transferred by ambulance to St. Mary Hospital's pediatric intensive care unit.

Nicholas arrived at St. Mary's at 1:57 a.m., on January 10, 1998. By that time, Nicholas had gone into septic shock. He was removed from life support and died later that morning.

Dr. Williams' Background

Dr. Williams obtained his medical degree in Nigeria in the 1980's. He came to the United States in 1991 after completing an internship in a Nigerian hospital and working for a year in a public health clinic in Nigeria. It took Dr. Williams two tries to pass the exams required for him to practice medicine in the United States. He did a residency program in pediatrics in New York before coming to the Clinic in July 1996. According the Department's website, Dr. Williams was licensed to practice medicine in Florida on July 1, 1996, and his license number is ME70792.

Dr. Williams was granted permanent resident status in the United States in 1996. He worked for the Clinic pursuant to an F-1 visa that required him to provide services in an underserved area for three years. It took Dr. Williams three tries to pass the exam for Board certification in pediatrics. He was Board certified at some point in 1998 after the incident involving Nicholas.

Negligent Medical Care Provided by Dr. Williams

Dr. Williams did not order a rush or "stat" CBC; he ordered a routine CBC. Had Dr. Williams ordered the CBC "stat," the results would have been ready by 5:30 p.m., the day that they were ordered, i.e., January 8, 1998. The more credible expert testimony establishes that, in order to meet standard of care, Dr. Williams should have ordered the CBC "stat" because the test involved a five-month old child who had a fever without a focus.

The tests were completed by the lab at 11:30 p.m., on January 8, 1998. The results were faxed to the Clinic at 12:17 p.m., on January 9, 1998.

The lab results showed that Nicholas had a white blood cell count of 24,900. The normal range for a child of Nicholas' age was between 6,000 to 15,000. Nicholas' elevated white blood cell count was an indication that he might have a serious bacterial infection which, in turn, might develop into bacterial meningitis. In such cases, the standard of care requires immediate treatment with antibiotics.

The Clinic policy in effect at the time required abnormal lab results to be followed-up on with the patient within 24 hours of receipt. Dr. Williams did not review Nicolas' lab results until January 14, 1998, four days after he passed away. His failure to do so violated the clinic policy, and more importantly, fell below the standard of care.

The Clinic had a policy that required the lab to call the physician immediately if the lab results exceeded "panic values" set by the Clinic. The "panic value" set for white blood cell counts was 25,000, which was 100 higher than Nicholas' white blood cell count. The claimants' expert testified that the "panic value" should have been 15,000, which was the reference range published by the American Academy of Pediatrics.

The claimants' expert ultimately opined that had the CBC test been ordered "stat," or if the regular and actual results that were received by the Clinic at 12:17 p.m. on January 9, 1998, had been promptly reviewed and acted upon by Dr. Williams, then a course of intravenous antibiotics could have been administered in time to save Nicholas' life. The Clinic's expert, while not agreeing that a "stat" CBC was required, agreed that had Nicholas been started on antibiotics at any point up until 4:30 p.m. or so on January 9, 1998, he most likely would not have died.

The Clinic

The Clinic a county health department/public health clinic operated by the Department, with funding support from Martin County. See generally ss. 154.001-.067, F.S. Employees of the Clinic are employees of the Department. s. 154.04(2), F.S.

The Clinic serves Medicaid recipients and other low income patients who do not otherwise have access to health care. It is one of only three facilities in Martin County serving that patient population. In fiscal year 2005-06, the Clinic served more than 19,000 patients and had a budget of $7.8 million. It now has 137 employees.

The Clinic was only one of only three county health departments in the state that provides prenatal care from pregnancy to birth. The Clinic delivers approximately one-

third of the babies born in Martin County. Pediatric care is provided to many of these children after birth, as was the case with Nicholas and his siblings.

The Clinic is funded with a mix of federal, state, and county funds. It receives approximately $3.5 million in state funds and $920,000 (or 12 percent of its budget) from Martin County. As of November 30, 2006, the Clinic had a cash reserve of $1.3 million and a cash-to-budget ratio of 17.85 percent, which exceeds the 8.5 percent operating reserve required by s. 154.02(5)(a), F.S.

The Claimants

Nicholas' parents, Cristina Alvarez and George Patnode had two children prior to Nicolas. One of the other children is emotionally handicapped, has ADHD, and has pervasive developmental disorder. The other child has ADHD.

Ms. Alvarez and Ms. Patnode had been married for 10 years at the time of Nicholas' death. They separated four days after Nicolas' death, and they divorced in 2000. Both have remarried, and they each have had additional children since Nicholas' death.

George Patnode is 45-years-old. He does not work. He is a disabled veteran, who receives $724 per month in Social Security disability benefits and $115 per month from the Veterans Administration. He has been on Social Security disability since 1998. He has been working on an Associate in Arts degree at Indian River Community College for several years. He expects to complete that degree soon and then he intends to pursue a Bachelor's degree at Florida Atlantic University.

Mr. Patnode pays a total of $1,200 per month in child support, $600 of which is paid to Ms. Alvarez. He is current on his child support obligations. He is a "recovering alcoholic." He has been sober for 8 years, except for a "brief relapse in 2004," and he is active in Alcoholics Anonymous. He had two criminal offenses in 2002. The offenses were misdemeanor domestic batteries to which he pled no contest and served 30 days in jail.

Ms. Alvarez does not work outside the home. She receives $982 per month in government benefits for the two children

fathered by Mr. Patnode who are disabled, in addition to the $600 per month in child support that she receives from Mr. Patnode. She has no history of drug or alcohol abuse.

Relevant Subsequent Events

Dr. Williams no longer works for the Clinic. He left the Clinic in June 1999, after the end of the 3-year term required by his visa. Dr. Williams is now in private practice in the Tampa area.

Dr. Williams was not disciplined by the Clinic as a result of the incident. No disciplinary action was taken against his medical license.

The only policy change that came about at the Clinic as a result of Nicholas' death was the that the white blood cell count "panic value" of 25,000 was changed. Now, the "panic value" for that and other tests depends upon the range established by the lab for the specific test. No Department-wide policy changes were made as a result of the incident.

Source of Funds to Pay this Claim Bill

The bill authorizes and directs payment of this claim out of General Revenue, not the funds of the Department or the Clinic. The Department argues that neither it nor the Clinic has funds available to pay this claim and that payment of the claim from funds earmarked for the Clinic would be contrary to state law and would seriously hamper the Clinic's ability to serve its patients.

The Clinic and other county health departments receive a majority of their state funding from the County Health Department Trust Fund (CHDTF). In the 2006-07 General Appropriations Act, for example, a total of approximately $980 million of state funds were appropriated for the operation of the 67 county health departments, with $192 million (19.6%), coming from General Revenue and $780 million (79.4%) coming from the CHDTF, and the remainder (1%) coming from other sources.

Section 154.02(2), F.S., provides that funds in the CHDTF "shall be expended by the Department of Health solely for the purposes of carrying out the intent and purposes of [Part I of Chapter 154, F.S.]." Nothing in Part I of Chapter 154.02, F.S., addresses payment of claims against county health

departments. Moreover, s. 154.02(3), F.S., provides very specific language regarding the use of funds in the CHDTF; limitations on the transfer of the funds; and specific accounting requirements for those funds. Thus, it does not appear that that funds from the CHDTF could be used to pay this claim, and, under the circumstances, it is appropriate to pay the claim from General Revenue.

If the claim is paid from General Revenue, the Legislature will have to make a policy decision as to whether to concomitantly increase the appropriation of General Revenue to the Department to offset the payment of the claim. Failure to do so will provide a measure of accountability to the Department, whose employee's negligence was the basis of the claim, but it will mean that the other 66 county health departments are effectively subsidizing the payment of this claim since they will receive proportionally less General Revenue than they otherwise would have received.

In my view, it is unlikely that a proportional reduction in General Revenue would have a material negative impact on the operation of the county health departments since the amount of the claim ($2.4 million) amounts to less than 1.3 percent of the General Revenue ($192 million) and only 0.25 percent of the total state funds ($980 million) appropriated to the county health departments in fiscal year 2006-07. Thus, I recommend that the bill be amended to require payment of the claim out of the General Revenue funds appropriated to the Department for the county health departments and not from a separate and additional appropriation of General Revenue to the Department specifically for the payment of this claim.

LITIGATION HISTORY:

In 2000, the claimants filed suit against the Clinic, Dr. Williams, Martin Memorial Hospital, and others involved in the care and treatment of Nicholas from January 8 through 10, 1998. The suit was filed in circuit court in Martin County.

The claimants offered to settle with the Clinic for $200,000 prior to trial, but the Clinic rejected the offer. Martin Memorial Hospital settled with the claimants for $35,000. The claims against the other defendants were dismissed, and the case proceeded to trial against the Clinic only.

A jury trial was held in February 2002. The trial judge granted a directed verdict in favor of Mr. Patnode on the issue of his comparative negligence, but the jury had the opportunity to apportion negligence to Ms. Alvarez. The jury returned a $2.6 million verdict in favor of the claimants, finding the Clinic 100 percent responsible for Nicholas' death. The damages award was for past and future pain and suffering; no economic damages were sought or awarded. The jury apportioned 61.5 percent of the damages ($1.6 million) to Ms. Alvarez and 38.5 percent ($1 million) to Mr. Patnode.

The Department's post-trial motions were denied, and a final judgment consistent with the jury verdict was entered on March 26, 2002. The Fourth District Court of Appeal affirmed the final judgment without an opinion on April 30, 2003. The Clinic paid $200,000 in partial satisfaction of the judgment pursuant to s. 768.28, F.S., in September 2003.

The final judgment reserved jurisdiction to tax costs and attorney's fees, but no subsequent order was entered. The claimant's attorney has advised that no costs are being sought as part of the claim bill.

CLAIMANTS' POSITION:

- The claim is based on a jury verdict that was affirmed on appeal, and the jury verdict should be given full effect because it is supported by the evidence.
- Government entities should be held to the same level of accountability as the private sector, especially in the area of health care.
- The Department had an opportunity to settle this case for $200,000, but it failed to do so and, therefore, it should be required to pay the full amount awarded by the jury.

DEPARTMENT'S POSITION:

- Nicholas' mother, Ms. Patnode, should be found comparatively negligent for not taking Nicolas to the emergency room sooner, and for not telling the emergency room nurse about seeing Dr. Williams the day before.
- Payment of the claim would hinder the Clinic's ability to provide services to its patients.

- Payment of the claim should come from a separate appropriation of General Revenue because the Clinic and the Department do not have the funds to pay the claim.

CONCLUSIONS OF LAW:

Dr. Williams was an employee of the Department acting within the course and scope of his employment at the time of the incidents giving rise to this claim. As a result, the Department is vicariously liable for his negligence.

Dr. Williams owed a duty to Nicholas and his parents to properly diagnose and treat his medical condition. Dr. Williams breached that duty by failing to follow-up on the blood test that he ordered for Nicholas for the purpose of ruling out a serious bacterial infection. His failure to do so fell below the prevailing professional standard of care and was a proximate cause of Nicholas' death because had he reviewed the results of the test, Dr. Williams would have (or, at least, should have) sent Nicholas to the emergency room for antibiotics.

It is a close question in my mind as to whether Nicholas' mother was comparatively negligent for failing to take Nicholas to the emergency room sooner. On one hand, she was following Dr. Williams advice by giving Nicholas Tylenol and Motrin to reduce his fever and by only taking him to the emergency room if the fever continued despite the medications. On the other hand, it is clear from the expert medical testimony that she could not have been truthful when she testified that Nicholas' temperature was "normal" (i.e., 98.6 degrees) throughout the day on January 9, 1998, and, as a result, she might bear some responsibility for not bringing Nicholas to the emergency room until it was too late. The jury rejected the Department's argument that Nicholas' mother was comparatively negligent and, on balance, I agree with the jury's conclusion on that issue.

The damages awarded by the jury are reasonable. The damage award should, however, be reduced by $35,000 to reflect the settlement that the claimants received from Martin Memorial Hospital. It would be a windfall to the claimants if the claim bill was not reduced by the amount of that settlement because the jury specifically found that the hospital's lab was not negligent and the claimants' medical expert testified that he had no criticism of the care provided to Nicholas in the hospital's emergency room. Each parent's share of the claim

bill should be reduced by $17,500 (i.e., half of the $35,000 settlement) because they split the settlement equally.

ATTORNEY'S FEES AND LOBBYIST'S FEES: The claimants' attorney submitted an affidavit stating that attorney's fees related to this claim bill, inclusive of lobbyist's fees and costs, will be limited to 25 percent of the final claim in accordance with s. 768.28(8), F.S.

LEGISLATIVE HISTORY: This is the fourth year that this claim has been presented to the Senate. It was first presented in 2004 (SB 26), and then again in 2005 (SB 42) and 2006 (SB 52). No Special Master hearings were held on the prior years' Senate bills. The House Special Master recommended favorable consideration of the claim, as presented in HB 235 in 2004.

OTHER ISSUES: The bill authorizes and directs payment of $1.5 million to Ms. Alvarez and $900,000 to Mr. Patnode, which is consistent with the allocation of damages by the jury and the final judgment. However, the proceeds received to date -- the $35,000 settlement with Martin Memorial Hospital and the $200,000 partial satisfaction of the judgment by the Clinic -- have been split equally between Ms. Alvarez and Mr. Patnode after payment of attorney's fees and costs.

RECOMMENDATIONS: For the reasons set forth above, I recommend that SB 46 be reported FAVORABLY, as amended.

Respectfully submitted,

T. Kent Wetherell
Senate Special Master

cc: Senator Dave Aronberg
Faye Blanton, Secretary of the Senate
House Claims Committee

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Appropriations Subcommittee on Finance and Tax
Appropriations Subcommittee on General Government
Commerce and Tourism
Community Affairs
Ethics and Elections

SENATOR JOSE JAVIER RODRIGUEZ
Deputy Democratic Whip
37th District

October 12, 2017

Senator Greg Steube, Chair
Judiciary Committee
404 S. Monroe St.
Tallahassee, FL 32399-1100
Sent via email to Steube.greg@flsenate.gov

Dear Chairman Steube,

I respectfully request that you place SB 44 relating to Relief of Cristina Alvarez and George Patnode by the Department of Health and SB 42 relating to Relief of Vonshelle Brothers/Brevard County Health Department on the agenda of the Judiciary Committee at your earliest convenience.

Should you have any questions or concerns, please feel free to contact me or my office. Thank you in advance for your consideration.

Respectfully,

Senator José Javier Rodríguez
District 37, Miami

CC: Tom Cibula, Staff Director
Joyce Butler, Administrative Assistant

REPLY TO:
❒ 2100 Coral Way, Suite 505, Miami, Florida 33145 (305) 854-0365
❒ 220 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5037

Senate's Website: *www.flsenate.gov*

JOE NEGRON
President of the Senate

ANITERE FLORES
President Pro Tempore

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/25/15
Meeting Date

SB 46
Bill Number (if applicable)

Topic Claims Bill

Amendment Barcode (if applicable)

Name Vanessa Brice

Job Title Attorney for Plaintiffs

Address 801 N. Orange Ave, Orlando
Street

Phone 407-756-0055

City *State* *Zip*

Email vbrice@theflfirm.com

Speaking: ☒ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Alvarez/Patnode

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

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 Committee on Judiciary

BILL:	CS/SB 536
INTRODUCER:	Judiciary Committee and Senator Passidomo
SUBJECT:	Limitations of Actions Other Than for the Recovery of Real Property
DATE:	January 26, 2018 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	**Fav/CS**
2.			CA	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 536 addresses two issues regarding the timeframes for bringing a lawsuit based on a defect in the design, planning, or construction of a building or other improvement to real property. First, the bill specifies that a person who is served with a pleading may file a related counterclaim, cross-claim, or third-party claim within 1 year, regardless of whether the filing of the claim would otherwise be time barred.

Second, the bill causes the timeframes for filing a construction-defect lawsuit[1] to begin and end sooner, in some circumstances, than under current law. Both under the bill and current law, the timeframes in which a property owner may file a construction-defect lawsuit begin to run at the latest of four events set forth in statute. One of these events is the completion of the construction contract.

Recent case law suggests that such a contract is not complete, and thus the timeframes for bringing a lawsuit cannot begin to run, until all punch-list or other follow-up work is complete. The bill substantially counters this case law by effectively providing that a construction contract performed pursuant to a building permit is complete when a final certificate of occupancy or certificate of completion is issued. After that point, the correction or o repair of completed work

[1] The term "construction-defect lawsuit" will often be used this Analysis in lieu of the very long, if more precise, statutory description of the type of lawsuit at issue: a "lawsuit based on a defect in the design, planning, or construction of an improvement to real property."

that is within the scope of the building permit and final certificate does not delay the running of the timeframes in which a construction-defect action may be filed.

II. Present Situation:

Overview

A lawsuit based on a defect resulting from the design, planning, or construction of a building or other improvement to real property must be filed within statutory timeframes, which vary depending on whether the defect is a latent defect or a nonlatent defect. If a lawsuit involves a nonlatent defect, the lawsuit must be filed within 4 years after the latest of four events set forth in statute, such as the issuance of a certificate of occupancy or the "completion . . . of the contract" with the builder. If a lawsuit involves a latent defect, the lawsuit must be filed within 4 years after the defect is discovered or should have been discovered through due diligence. But regardless of when a defect was discovered or should have been discovered, a lawsuit based on the defect must be filed within 10 years after the latest of the events listed in statute, including completion of the construction contract. However, current law does not specify what exactly constitutes completion of a construction contract.

Timeframes for Filing a Lawsuit Based on a Defect in an Improvement to Real Property

A construction-defect lawsuit must be filed within the timeframes set forth in s. 95.11(3)(c), F.S. If the suit involves a nonlatent defect, it must be filed within 4 years after the latest of:

- The date of actual possession by the owner;
- The date of the issuance of a certificate of occupancy;
- The date of abandonment of construction if not completed; or
- The date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer.

If a lawsuit instead involves a latent defect, the 4-year timeframe does not begin to run until the date on which the defect is discovered or the date on which the defect should have been discovered by the exercise of due diligence. However, regardless of when a defect was discovered or should have been discovered, a lawsuit based on the defect must be filed within 10 years after the latest of:

- The date of actual possession by the owner;
- The date of the issuance of a certificate of occupancy;
- The date of abandonment of construction if not completed; or
- The date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer.

What constitutes the completion of a construction contract has been the subject of litigation and legislation in recent years. In 2015, the Fifth District Court of Appeal held that the contract at issue in the case before it was not completed until the final payment was made under the contract. The court explained:

> Completion of the contract means completion of performance by both sides of the contract, not merely performance by the contractor. Had the

> legislature intended the statute to run from the time the contractor completed performance, it could have simply so stated. It is not our function to alter plain and unambiguous language under the guise of interpreting a statute.[2]

Thus, a buyer's delay in making a payment under the contract could prolong a builder's liability for construction defects.

In response to the DCA opinion, the Legislature amended s. 95.11(3)(c), F.S., to state:

> Completion of the contract means the later of the date of final performance of all the contracted services or the date that final payment for such services becomes due without regard to the date final payment was made.[3]

But in 2017, the Fifth DCA decided another case involving the issue of what "completion . . . of the contract" means in s. 95.11(3)(c), F.S.[4] In that case, the builder argued that the homeowner's complaint was filed more than 10 years after closing on the construction contract at issue, and thus was time-barred. However, the DCA noted that the contract expressly contemplated that work under the contract could occur after closing. The court essentially held that the closing on a contract is not equivalent to contract completion. As such, under this case, a builder's liability for construction defects may be prolonged by at least some construction activities after the closing on a contract.[5]

Though this case was decided before the effective date of the 2017 amendment to s. 95.11(3)(c), F.S., it does not appear that the court would have decided the case differently under the new language.

III. Effect of Proposed Changes:

The bill addresses two issues regarding the timeframes for bringing a lawsuit based on a defect in the design, planning, or construction of a building or other improvement to real property. First, the bill specifies that a person who is served with a pleading may file a related counterclaim, cross-claim, or third-party claim within 1 year, regardless of whether the filing of the claim would otherwise be time barred.

Second, the bill causes the timeframes for filing a construction-defect lawsuit to begin and end sooner, in some circumstances, than under current law. Both under the bill and current law, the timeframes in which a property owner may file a construction-defect lawsuit begin to run at the latest of four events set forth in statute. One of these events is the completion of the construction contract. Recent case law suggests that such a contract is not complete, and thus the timeframes for bringing a lawsuit cannot begin to run, until all punch-list or other follow-up work is complete. The bill substantially counters this case law by effectively providing that a construction contract performed pursuant to a building permit is complete when a final certificate

[2] *Cypress Fairway Condo. v. Bergeron Constr. Co.*, 164 So. 3d 706, 707 (Fla. 5th DCA 2015).
[3] *See* Ch. 2017-101, s. 1, Laws of Fla.
[4] *Busch v. Lennar Homes, LLC*, 219 So. 3d 93 (Fla. 5th DCA 2017).
[5] *See id.* at 95.

of occupancy or certificate of completion is issued. After that point, the correction or o repair of completed work that is within the scope of the building permit and final certificate does not delay the running of the timeframes in which a construction-defect action may be filed.

The bill applies to causes of action that accrue on or after the effective date of the bill which is July 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

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:

As the bill further specifies the timeframes in which a construction lawsuit may be filed, it may eliminate the need to litigate the issue in certain cases, thus reducing the cost of litigating these cases. On the other hand, the bill will reduce timeframes for some property owners to seek redress in court for construction defects.

C. Government Sector Impact:

As the bill specifies what constitutes completion of a contract, it may reduce the amount of the courts' resources that must be spent adjudicating whether given cases are time-barred.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 95.11 of the Florida Statutes.

IX. Additional Information:

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

CS by Judiciary on January 25, 2018:
The committee substitute allows a person 1 year from the date the person is served with a pleading in a construction-defect lawsuit to file a related counterclaim, cross-claim, or third-party claim, regardless of whether the claim would otherwise be time-barred. The underlying bill allowed 45 days to file the related claims. Also, the committee substitute further delineates what constitutes work that is necessary for the completion of a construction contract, which is an event that can commence the timeframe for filing a lawsuit.

B. Amendments:

None.

538518

LEGISLATIVE ACTION

Senate	.	House
Comm: WD	.	
01/25/2018	.	
	.	
	.	
	.	

The Committee on Judiciary (Steube) recommended the following:

Senate Amendment (with title amendment)

Delete lines 40 - 54

and insert:

out of the conduct, transaction or occurrence set out or attempted to be set out in a pleading may be commenced up to 1 year after the pleading to which such claims relate is served, even if such claims would otherwise be time barred. With respect to actions founded on the design, planning, or construction of an improvement to real property, if such construction is performed pursuant to a duly issued building permit and if a

538518

local enforcement agency, state enforcement agency, or special inspector, as those terms are defined in s. 553.71, has issued a final certificate of occupancy or certificate of completion, then as to the construction which is within the scope of such building permit and certificate, the correction of defects to completed work or repair of completed work, whether performed under warranty or otherwise, does not extend the period of time within which an action must be commenced ~~Completion of the contract means the later of the date of final performance of all the contracted services or the date that final payment for such services becomes due without regard to the date final payment is made~~.

Section 2. This act applies to causes of action that accrue on or after July 1, 2019.

Section 3. This act shall take effect July 1, 2019.

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

And the title is amended as follows:

Delete lines 6 - 11

and insert:

party claims that arise out of the conduct, transaction or occurrence set out or attempted to be set out in a pleading for which such claims relate; specifying that certain corrections and repairs do not extend the period of time within which an action must be commenced; providing applicability; providing an effective date.

758426

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
01/25/2018	.	
	.	
	.	
	.	

The Committee on Judiciary (Steube) recommended the following:

Senate Amendment (with title amendment)

Delete lines 40 - 54

and insert:

out of the conduct, transaction or occurrence set out or attempted to be set out in a pleading may be commenced up to 1 year after the pleading to which such claims relate is served, even if such claims would otherwise be time barred. With respect to actions founded on the design, planning, or construction of an improvement to real property, if such construction is performed pursuant to a duly issued building permit and if a

758426

local enforcement agency, state enforcement agency, or special inspector, as those terms are defined in s. 553.71, has issued a final certificate of occupancy or certificate of completion, then as to the construction which is within the scope of such building permit and certificate, the correction opf defects to completed work or repair of completed work, whether performed under warranty or otherwise, does not extend the period of time within which an action must be commenced. Completion of the contract means the later of the date of final performance of all the contracted services or the date that final payment for such services becomes due without regard to the date final payment is made.

Section 2. This act applies to causes of action that accrue on or after July 1, 2019.

Section 3. This act shall take effect July 1, 2019.

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

And the title is amended as follows:

Delete lines 6 - 11

and insert:

party claims that arise out of the conduct, transaction or occurrence set out or attempted to be set out in a pleading for which such claims relate; specifying that certain corrections and repairs do not extend the period of time within which an action must be commenced; providing applicability; providing an effective date.

By Senator Passidomo

28-00653B-18 2018536__

A bill to be entitled

An act relating to limitations of actions other than for the recovery of real property; amending s. 95.11, F.S.; authorizing the commencement, within a specified timeframe, of counterclaims, cross-claims, and third-party claims that arise out of the same transaction or occurrence and are the basis for an action previously brought; providing that the correction of defects and deficiencies or the performance of certain types of work do not extend the period of time within which an action must be commenced; providing an effective date.

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

Section 1. Paragraph (c) of subsection (3) of section 95.11, Florida Statutes, is amended to read:

95.11 Limitations other than for the recovery of real property.—Actions other than for recovery of real property shall be commenced as follows:

(3) WITHIN FOUR YEARS.—

(c) An action founded on the design, planning, or construction of an improvement to real property, with the time running from the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion of the contract or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest; except that, when the action involves a latent defect,

28-00653B-18 2018536__

the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. In any event, the action must be commenced within 10 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion of the contract or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest. However, counterclaims, cross-claims, and third-party claims that arise out of the same transaction or occurrence and are the basis for an action previously brought may be commenced up to 45 days after service of process upon the party asserting such claims, even if such claims would otherwise be time barred.

For purposes of this paragraph, the term "completion of the contract" ~~Completion of the contract~~ means the later of the date of final performance of all the contracted services or the date that final payment for such services becomes due without regard to the date final payment is made. Once a certificate of completion or occupancy has been issued by a governmental authority, the correction of defects or deficiencies, punch list work, and warranty work do not extend the time within which an action must be commenced.

Section 2. This act shall take effect July 1, 2018.

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

The Florida Senate

Committee Agenda Request

To: Senator Greg Steube, Chair
Committee on Judiciary

Subject: Committee Agenda Request

Date: November 3, 2017

I respectfully request that **Senate Bill #536**, relating to Limitations of Actions Other Than For the Recovery of Real Property, be placed on the:

☐ committee agenda at your earliest possible convenience.

☒ next committee agenda.

Senator Kathleen Passidomo
Florida Senate, District 28

File signed original with committee office

S-020 (03/2004)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/25/17	536
Meeting Date	*Bill Number (if applicable)*
	The Amendment
	Amendment Barcode (if applicable)

Topic Limitations of Actions Other Than Recovery of Real Property

Name Chris [redacted] Carmody

Job Title Attorney

Address 301 E. Pine Street, Ste 1400 *(Street)*

Phone 407.843.8880

Orlando *(City)* FL *(State)* 32801 *(Zip)*

Email chris.carmody[redacted]@gray-robinson.com

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Associated Builders and Contractors of FL

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

11/25/18
Meeting Date

536
Bill Number (if applicable)

Topic Statute of Repose

Amendment Barcode (if applicable)

Name Kari Hebrank

Job Title Lobbyist

Address 2600 Centennial Place
Street

Phone 850-545-9821

Tallahassee FL 32308
City *State* *Zip*

Email khebrank@williamsmar.com

Speaking: ☑ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Home Builders Assoc.

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

01/25/2018
Meeting Date

536
Bill Number (if applicable)

Topic Limitations of Actions

Amendment Barcode (if applicable)

Name Warren Husband

Job Title

Address PO Box 10909
Street

Phone (850) 205-9000

Tallahassee FL 32302
City *State* *Zip*

Email

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Associated General Contractors Council

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/25/18
Meeting Date

536
Bill Number (if applicable)

Topic Statute of Repose

Amendment Barcode (if applicable)

Name G.C. Murray II, Esq.

Job Title Dep. Gen. Counsel

Address _____ Phone _____
Street

_____ Email _____
City *State* *Zip*

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Representing FL Justice Ass'n

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

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 Committee on Judiciary

BILL:	CS/SB 1598
INTRODUCER:	Judiciary Committee and Senator Passidomo
SUBJECT:	Deployed Parent Custody and Visitation
DATE:	January 25, 2018
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cibula	JU	**Fav/CS**
2.			MS	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1598 creates the Uniform Deployed Parents Custody and Visitation Act. The act establishes a framework for resolving child custody and visitation issues when a parent is deployed in military or other forms of national service. In addition to providing definitions for the act, the bill:

- Requires parents to communicate about custody and visitation issues upon learning of an upcoming deployment.
- Addresses custody issues that arise when someone receives notice of deployment and during deployment by permitting an out-of-court agreement. If the parents do not reach an agreement, an expedited resolution of custody arrangement is available in court.
- Provides that no permanent custody order can be issued before or during deployment unless the service member consents.
- Governs termination of a temporary custody arrangement upon the service member's return from deployment.

The bill repeals s. 61.13002, F.S., pertaining to temporary time-sharing modification and child support modification due to military service. Repealing the current statute will prevent any conflicts between that section and the new act.

II. Present Situation:

Background

As military parents are deployed to serve around the world, complex child custody issues have arisen. These custody issues affect both the welfare of children and the ability of military members to serve their country. The Department of Defense has indicated that a significant number of deployed service members are single parents and that related child custody and visitation issues have detrimentally impacted them and the overall war effort as these parents struggle to complete their missions.[1]

The sole federal statutory scheme that protects single-parent service members is the Servicemembers Civil Relief Act (SCRA)[2] which generally governs the legal rights of a deployed service member. If military service materially affects a service member's ability to participate in his or her legal proceedings, a judge is required to grant a stay of the proceeding, even a custody proceeding. However, these mandatory stays only cover the first 90 day period after a member is deployed. When that time period ends, stays are discretionary with the court. The stays are then often overridden when the court tries to resolve custody issues for the children involved in the legal proceedings. The SCRA does not provide procedures for a temporary custody arrangement and does not provide courts with any guidance on how to balance the best interests of the child with the service members' interests.[3]

Under the principle of federalism,[4] the authority to resolve child custody and visitation issues resides with the states. As a result, many states have adopted differing approaches to deal with custody issues during a deployment. Because military families are often moving from one state to another and because one parent might live in one state and the other parent might live in a different state after divorce, custody issues have become very complex.[5]

Florida Law

Section 61.13002, F.S., addresses temporary time-sharing modifications and child support modifications due to military service. The statute allows for the filing of a petition or motion for modification of time-sharing and parental responsibility when a parent is activated, deployed, or temporarily assigned to military service and that parent's ability to comply with time-sharing is materially affected.[6] Generally, the court may not issue an order or modify a previous judgment or order that changes time-sharing as it existed on the date the parent was activated, deployed, or temporarily assigned.[7] However, the court may enter a temporary order to modify or amend

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[1] Uniform Law Commission, The National Conference of Commissioners on Uniform State Laws, *Deployed Parents Custody and Visitation Act Summary*, http://uniformlaws.org/ActSummary.aspx?title=Deployed%20Parents%20Custody%20and%20Visitation%20Act (last visited Jan. 23, 2018).
[2] 50 U.S.C. 3901–4043.
[3] *Id*.
[4] Federalism is defined as the legal relationship and distribution of power between federal and state governments. BLACK'S LAW DICTIONARY (10th ed. 2014).
[5] *Supra*, note 1.
[6] Section 61.13002(1), F.S.
[7] *Id*.

time-sharing if there is clear and convincing evidence that the temporary modification is in the best interests of the child.[8]

If a temporary order is entered, the court may address support by either:
- Ordering temporary support from the servicemember to the other parent;
- Requiring the servicemember to enroll the child as a military dependent for benefits available to military dependents; or
- Suspending, abating, or reducing the child support obligation of the nonservice member until the previous order in effect is reinstated.[9]

The law allows a deployed parent on orders in excess of 90 days to designate a person or persons to exercise time-sharing with the child on the parent's behalf.[10] This is limited to a family member, stepparent, or relative of the child by marriage.[11] The other parent may only object on the basis that the designee's time-sharing is not in the best interest of the child.[12] The law excludes permanent change of station moves by servicemembers.[13]

The law also requires the court to:
- Allow the servicemember to testify by telephone, video, webcam, affidavit, or other means if a motion is filed and the servicemember is unable to appear in person;[14] and
- Reinstate the time-sharing order previously in effect upon the servicemember's return.[15]

III. Effect of Proposed Changes:

Section 61.13002, F.S., the current statute dealing with temporary time-sharing modification and child support modification due to military service, discussed in the Present Situation above, is repealed.

The bill creates the "Uniform Deployed Parents Custody and Visitation Act." This is modeled after the Deployed Parents Custody and Visitation Act developed in 2012 by the Uniform Law Commission.[16] The model act has been adopted by 13 states: Arkansas, Colorado, Iowa, Minnesota, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Utah, and West Virginia.[17]

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[8] *Id*.
[9] Section 61.13002(6), F.S.
[10] Section 61.13002(2), F.S.
[11] *Id*.
[12] *Id*.
[13] Section 61.13002(7), F.S.
[14] Section 61.13002(5), F.S.
[15] Section 61.13002(4), F.S.
[16] The Uniform Law Commission, also known as the National Conference of Commissioners on Uniform State Laws, was established in 1892. The organization provides states with non-partisan legislation that is designed to promote uniform state laws in areas where uniformity is practical. http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC
[17] Uniform Law Commission, The National Conference of Commissioners on Uniform State Laws, *Legislative Fact Sheet – Deployed Parents Custody and Visitation Act*, http://uniformlaws.org/LegislativeFactSheet.aspx?title=Deployed Parents Custody and Visitation Act.

In general terms, the act provide definitions, contains provisions that apply to custody matters of service members, custody issues that arise in light of and during deployment, expedited resolution of a custody arrangement in court, and termination of temporary custody arrangement upon a return from deployment.

Definitions (s. 61.703, F.S.)

The bill defines familiar terms used in the act, such as "adult," "child," and "court." The bill also defines multiple terms that are unique to the act:

"Servicemember" means a member of a uniformed service.

"Uniformed service" means active and reserve components of the Army, Navy, Air Force, Marine Corps, or Coast Guard, United States Merchant Marine, commissioned corps of the United States Public Health Service, commissioned corps of the National Oceanic and Atmospheric Administration, and the National Guard of a state or territory of the United States, Puerto Rico, or the District of Columbia.
"Deployment" means the movement or mobilization of a servicemember for more than 90 days but less than 18 months pursuant to uniformed service orders that

- Are designated as unaccompanied;
- Do not authorize dependent travel; or
- Otherwise do not permit the movement of family members to the location to which the servicemember is deployed.

"Custodial responsibility" is used as an umbrella term for all powers and duties relating to caretaking authority and decisionmaking authority for a child. The term includes physical custody, legal custody, parenting time, right to access, visitation, and authority to grant limited contact with a child.

"Caretaking authority" means the right to live with and care for a child on a day-to-day basis. The term includes physical custody, parenting time, right to access, and visitation.

"Decisionmaking authority" means the power to make important decisions regarding a child, including decisions regarding the child's education, religious training, health care, extracurricular activities, and travel. The term does not include the power to make decisions that necessarily accompany a grant of caretaking authority.

"Close and substantial relationship" means a relationship in which a significant bond exists between a child and a nonparent.

"Nonparent" means an individual other than a deploying parent or other parent.

"Limited contact" means the authority of a nonparent to visit a child for a limited time. The term includes authority to take the child to a place other than the child's residence.

Remedies for Noncompliance (s. 61.705, F.S.)

If a court finds that a party acts in bad faith or intentionally fails to comply with the act or a court order issued under the act, in addition to other remedies authorized by general law, the court may assess reasonable attorney fees and costs against the party and order other appropriate relief.

Jurisdiction (s. 61.707, F.S.)

The bill allows any court with jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)[18] to issue an order regarding custodial responsibility. For purposes of the UCCJEA, the residence of the deploying parent does not change due to that deployment if:

- A court has issued a temporary order regarding custodial responsibility;
- A court has issued a permanent order regarding custodial responsibility before notice of deployment and the parents modify that order by temporary agreement; or
- A court in another state has issued a temporary order regarding custodial responsibility as a result of impending or current deployment.

The bill does not prevent a court from exercising temporary emergency jurisdiction under the UCCJEA.

Notice Requirement for Deploying Parent (s. 61.709, F.S.)

The bill requires a deploying parent to notify the other parent of a pending deployment no later than 7 days after receiving notice of the deployment, unless he or she is reasonably prevented from doing so, in which case the deploying parent must provide notice as soon as is reasonably possible. The bill also requires the deploying parent to notify the other parent of a plan fulfilling each parent's share of custodial responsibility during deployment as soon as reasonably possible after notice of deployment. The bill allows this notice to be provided to the issuing court if a court order prohibits disclosure of the address or contact information of the other parent. If the address of the other parent is available to the issuing court, the court shall forward the notice to the other parent, and keep confidential the address or contact information of the other parent. The bill does not require this notice if both parents are living in the same residence and have actual notice of the deployment or plan.

Duty to Notify of change of Address (s. 61.711, F.S.)

The bill requires an individual granted custodial responsibility during deployment to notify the deploying parent, any other individual with custodial responsibility of a child, and the court of any change of mailing address or residence, unless a court order prohibits disclosure of the address.

[18] The UCCJEA is a uniform law adopted by all states, except Massachusetts, that limits the state with jurisdiction over child custody to one, which avoids competing custody orders. It also provides enforcement provisions for child custody orders and the ability to exercise emergency jurisdiction if needed.

General Consideration in Custody Proceeding of Parent's Service (s. 61.713, F.S.)

A court is prohibited from considering a parent's past deployment or possible future deployment when determining the best interest of the child in a custodial responsibility proceeding.

Form of Custodial Responsibility Agreement (s. 61.721, F.S.)

Parents may enter into a temporary custodial responsibility agreement during deployment. The written agreement must be signed by both parents and any nonparent who is granted custodial responsibility. If feasible, the agreement must:

- Identify the destination, duration, and conditions of deployment;
- Specify the allocation of caretaking authority, any decisionmaking authority that accompanies that caretaking authority among the parties to the agreement and any grant of limited contact to a nonparent;
- Provide a process to resolve any dispute that may arise;
- Specify the frequency, duration, and means, including electronic, by which the deploying parent will have contact with the child, any role to be played by the other parent or nonparent in facilitating that contact, and allocate any costs of that contact;
- Acknowledge the agreement does not modify any existing child support obligation and that changing the terms of the obligation during deployment requires modification in the appropriate court;
- Provide that the agreement will terminate according to the act after the deploying parent returns from deployment; and
- Specify which parent is required to file the agreement, if the agreement must be filed with a court that has entered an order relating to custody or child support of the child.

Nature of Authority Created by Custodial Responsibility Agreement (s. 61.723, F.S.)

An agreement granting custodial responsibility during deployment is temporary and terminates after the deploying parent returns, unless the agreement has been terminated before that time by court order or modification. The custodial responsibility agreement does not create an independent, continuing right to caretaking authority, decisionmaking authority, or limited contact. A nonparent has standing to enforce the agreement until it is terminated.

Modification of Agreement (s. 61.725, F.S.)

The bill allows the parents of a child to modify an agreement granting custodial responsibility by mutual consent. If an agreement is modified before deployment of a deploying parent, the modification must be in writing and signed by both parents and any nonparent granted custodial responsibility under the modified agreement. If the agreement is modified during deployment of a deploying parent, the modification must be agreed to in some record by both parents and any nonparent granted custodial responsibility.

Power of Attorney (s. 61.727, F.S.)

A deploying parent, by power of attorney, may grant all or part of custodial responsibility to an adult nonparent for the period of deployment if no other parent possesses custodial

responsibility, or if a court order currently in effect prohibits contact between the child and the other parent. The deploying parent may revoke the power of attorney by signing a revocation of the power of attorney.

Filing Custodial Responsibility Agreement or Power of Attorney with Court (s. 61.729, F.S.)

The bill requires any agreement or power of attorney be filed within reasonable time with a court that has entered an order in effect relating to custody or child support. The case number and heading of the pending case must be provided to the court with the agreement or power of attorney.

Proceeding for Temporary Custody Order, Testimony (ss. 61.733 and 61.735, F.S.)

A court may issue a temporary order granting custodial responsibility after a deploying parent receives notice of deployment, unless prohibited by the SCRA. A court may not issue a permanent order granting custodial responsibility without the consent of the deploying parent.

Either parent may file a motion regarding custodial responsibility of a child during deployment. The motion must be filed in a pending proceeding for custodial responsibility in a court with jurisdiction, if a pending proceeding does not exist in a court with jurisdiction, the motion must be filed as a new action. If a motion to grant custodial responsibility is filed before a deploying parent deploys, the court must conduct an expedited hearing. The bill allows for testimony by electronic means unless the court finds good cause to require in-person testimony.

Effect of Prior Judicial Order or Agreement (s. 61.737, F.S.)

A prior judicial order granting custodial responsibility is binding on the court unless circumstances meet the requirements authorized by general law to modify a judicial order regarding custodial responsibility. The court must enforce a prior written agreement between the parties, unless the court finds that the agreement is not in the best interest of the child.

Grant of Caretaking Authority to Nonparent (s. 61.739, F.S.)

A court may, upon the request of a deploying parent, if it is in the best interests of the child, grant caretaking authority to a nonparent who is an adult family member of the child or an adult with whom the child has a close and substantial relationship. Unless agreed to by the other parent, the grant of caretaking authority may not exceed the amount of time granted to the deploying parent under a permanent custody order, or in the absence of a permanent custody order, the amount of time the deploying parent habitually cared for the child before being notified of deployment.

If the deploying parent is unable to exercise decisionmaking authority, a court may grant part of that authority to a nonparent, but must specify the decisionmaking powers granted.

Grant of Limited Contact (s. 61.741, F.S.)

A court must grant limited contact to a nonparent who is a family member of the child or an individual with whom the child has a close and substantial relationship on motion of a deploying parent unless the court finds that limited contact with a nonparent would not be in the best interest of the child.

Nature of Authority Created by Temporary Custody Order (s. 61.743, F.S.)

Any grant of authority to a nonparent is temporary and terminates after the deploying parent returns from deployment unless the grant has been terminated before then by a court order. A nonparent granted caretaking authority, decisionmaking authority, or limited contact has standing to enforce the grant until it is terminated by court order or under the act.

Content of Temporary Custody Order (s. 61.745, F.S.)

An order granting custodial responsibility, when applicable, must:

- Designate the order as temporary and provide for termination after the deploying parent returns from deployment;
- Identify the destination, duration, and conditions of the deployment;
- Specify the allocation of caretaking authority, decisionmaking authority, or limited contact among the deploying parent, the other parent, and any nonparent.
- Provide a process to resolve any dispute that may arise;
- Provide for liberal communication between the deploying parent and the child during deployment, including through electronic means, unless it is not in the best interest of the child, and allocate any costs of communication;
- Provide for liberal contact between the deploying parent and the child during the time the deploying parent is on leave or otherwise available, unless it is not in the best interest of the child; and
- Provide for reasonable contact between the deploying parent and the child after the parent's return from deployment until the temporary order is terminated, even if the time of contact exceeds the time the deploying parent spent with the child before entry of the temporary order.

Order for Child Support (s. 61.747, F.S.)

The court may enter a temporary order for child support authorized by general law if the court has jurisdiction and has issued an order granting caretaking authority or an agreement granting caretaking authority has been issued.

Modifying or Terminating a Grant of Custodial Responsibility or Limited Contact to Nonparent (s. 61.749, F.S.)

The bill allows a court to modify or terminate a temporary grant of custodial responsibility on the motion of a deploying parent, other parent, or any nonparent granted caretaking authority if the modification or termination is in the best interest of the child. A modification is temporary and terminates after the deploying parent returns from deployment unless the grant has been

terminated before then by court order. The court must terminate a grant of limited contact on motion of a deploying parent.

Procedure for Terminating a Temporary Agreement Granting Custodial Responsibility (s. 61.761, F.S.)

The bill details the procedure for terminating a temporary agreement granting custodial responsibility. The procedure provides that, after a deploying parent returns from deployment, a deploying parent and the other parent may file an agreement to terminate a temporary order for custodial responsibility. After an agreement to terminate has been filed, it must terminate on the date specified on the agreement or on the date the agreement is signed by the deploying parent and the other parent if the agreement to terminate does not specify a date.

In the absence of an agreement to terminate, a temporary agreement granting custodial responsibility terminates 60 days after the deploying parent gives notice of return from deployment to the other parent. If a temporary agreement granting custodial responsibility was filed with a court, an agreement to terminate must be filed with the court within a reasonable time after the deploying parent and other parent sign the agreement. A proceeding to prevent termination of a temporary order for custodial responsibility is governed by general law.

Visitation Before Termination of Temporary Grant of Custodial Responsibility (s. 61.763, F.S.)

The bill requires a court to issue a temporary order granting the deploying parent reasonable contact with the child from the time he or she returns from deployment until a temporary agreement or order is terminated, even if contact exceeds the time the deploying parent spent with the child before deployment unless it is not in the best interest of the child.

Applicability (61.773, F.S.)

The act does not affect the validity of temporary court orders entered before July 1, 2018.

The effective date of the bill is July1, 2018.

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 2002, the U.S. Supreme Court rendered a decision[19] in a case that pitted the rights of a mother against the visitation rights of the children's grandparents. The Court emphasized its history of recognizing "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." The Court further stated that the Due Process Clause prohibits a state from infringing on the fundaments right of a parent to make child rearing decisions. This legislation permits a deployed parent to delegate or assign his or her custodial rights to a non-parent. It could be argued that this assignment does not diminish the rights of the non-deployed parent because it is an assignment, not an expansion, of the deployed parent's existing rights.

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. Statutes Affected:

This bill creates the following sections of the Florida Statutes: 61.703, 61.773, 61.705, 61.707, 61.709, 61.711, 61.713, 61.723, 61.725, 61.727, 61.729, 61.733, 61.735, 61.737, 61.739, 61.741, 61.743, 61.745, 61.747, 61.749, 61.761, 61.763, and 61.771.

IX. Additional Information:

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

CS by Judiciary on January 25, 2018:
The committee substitute repeals s. 61.13002, F.S., the current statute pertaining to temporary time-sharing modification and child support modification due to military

[19] *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

service. This section is discussed above in the Present Situation under Florida Law. Repealing this provision will avoid any conflict between the new act and existing law.

B. Amendments:

None.

323296

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
01/25/2018	.	
	.	
	.	
	.	

The Committee on Judiciary (Passidomo) recommended the following:

Senate Amendment (with title amendment)

Before line 32

insert:

Section 1. Section 61.13002, Florida Statutes, is repealed.

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

And the title is amended as follows:

Delete line 3

and insert:

323296

visitation; repealing s. 61.13002, F.S., relating to temporary time-sharing modification and child support modification due to military service; creating part IV of ch. 61, F.S., entitled

By Senator Passidomo

28-01221A-18 20181598__

A bill to be entitled

An act relating to deployed parent custody and visitation; creating part IV of ch. 61, F.S., entitled "Uniform Deployed Parents Custody and Visitation Act"; providing definitions; providing remedies for noncompliance; authorizing a court to issue certain custodial orders only under certain jurisdiction; providing notice requirements; providing requirements for proceeding for custodial responsibility of a child of a servicemember; providing requirements for agreement forms, termination, modification, power of attorney, and filing; providing requirements for temporary orders of custodial responsibility; authorizing electronic testimony in a proceeding for temporary custody; providing for the effect of any prior judicial order or agreement; authorizing a court to grant caretaking authority or limited contact to a nonparent under certain conditions; providing for the termination of a grant of authority; providing requirements for an order of temporary custody; authorizing a court to enter a temporary order for child support under certain circumstances; authorizing a court to modify or terminate a temporary grant of custodial responsibility; providing procedures for termination of a temporary custodial responsibility agreement; providing for visitation; providing construction; providing applicability; providing an effective date.

28-01221A-18 20181598__

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

Section 1. Part IV of chapter 61, Florida Statutes, consisting of sections 61.703-61.773, Florida Statutes, is created and entitled "Uniform Deployed Parents Custody and Visitation Act."

61.703 Definitions.—As used in this part:

(1) "Adult" means an individual who has attained 18 years of age or who has had the disability of nonage removed under chapter 743.

(2) "Caretaking authority" means the right to live with and care for a child on a day-to-day basis. The term includes physical custody, parenting time, right to access, and visitation.

(3) "Child" means:

(a) An individual who has not attained 18 years of age and who has not had the disability of nonage removed under chapter 743; or

(b) An adult son or daughter by birth or adoption, or designated by general law, who is the subject of a court order concerning custodial responsibility.

(4) "Close and substantial relationship" means a relationship in which a significant bond exists between a child and a nonparent.

(5) "Court" means the court of legal jurisdiction.

(6) "Custodial responsibility" includes all powers and duties relating to caretaking authority and decisionmaking authority for a child. The term includes physical custody, legal custody, parenting time, right to access, visitation, and

authority to grant limited contact with a child.

(7) "Decisionmaking authority" means the power to make important decisions regarding a child, including decisions regarding the child's education, religious training, health care, extracurricular activities, and travel. The term does not include the power to make decisions that necessarily accompany a grant of caretaking authority.

(8) "Deploying parent" means a servicemember who is deployed or has been notified of impending deployment and is:

(a) A parent of a child; or

(b) An individual who has custodial responsibility for a child.

(9) "Deployment" means the movement or mobilization of a servicemember for more than 90 days but less than 18 months pursuant to uniformed service orders that:

(a) Are designated as unaccompanied;

(b) Do not authorize dependent travel; or

(c) Otherwise do not permit the movement of family members to the location to which the servicemember is deployed.

(10) "Family member" means a sibling, aunt, uncle, cousin, stepparent, or grandparent of a child or an individual recognized to be in a familial relationship with a child.

(11) "Limited contact" means the authority of a nonparent to visit a child for a limited time. The term includes authority to take the child to a place other than the child's residence.

(12) "Nonparent" means an individual other than a deploying parent or other parent.

(13) "Other parent" means an individual who, in addition to a deploying parent, is:

(a) A parent of a child; or

(b) An individual who has custodial responsibility for a child.

(14) "Record" means information that is created in a tangible medium or stored in an electronic or other medium and is retrievable in perceivable form.

(15) "Return from deployment" means the conclusion of a servicemember's deployment as specified in uniformed service orders.

(16) "Servicemember" means a member of a uniformed service.

(17) "Sign" means, with the intent to authenticate or adopt a record, to:

(a) Execute or adopt a tangible symbol; or

(b) Attach to or logically associate with the record an electronic symbol, sound, or process.

(18) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(19) "Uniformed service" means any of the following:

(a) Active and reserve components of the Army, Navy, Air Force, Marine Corps, or Coast Guard of the United States.

(b) The United States Merchant Marine.

(c) The commissioned corps of the United States Public Health Service.

(d) The commissioned corps of the National Oceanic and Atmospheric Administration.

(e) The National Guard of a state or territory of the United States, Puerto Rico, or the District of Columbia.

61.705 Remedies for noncompliance.—In addition to other remedies authorized by general law, if a court finds that a party to a proceeding acts in bad faith or intentionally fails to comply with this part or a court order issued under this part, the court may assess reasonable attorney fees and costs against the party, and order other appropriate relief.

61.707 Jurisdiction.—

(1) A court may issue an order regarding custodial responsibility only if the court has jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act.

(2) For purposes of the Uniform Child Custody Jurisdiction and Enforcement Act, the residence of the deploying parent does not change by reason of the deployment if:

(a) A court has issued a temporary order regarding custodial responsibility.

(b) A court has issued a permanent order regarding custodial responsibility before notice of deployment and the parents modify that order temporarily by agreement.

(c) A court in another state has issued a temporary order regarding custodial responsibility as a result of impending or current deployment.

(3) This section does not prevent a court from exercising temporary emergency jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act.

61.709 Notice requirement for deploying parent.—

(1) Except as otherwise provided in subsection (3), and subject to subsection (2), a deploying parent shall notify in a record to the other parent:

(a) A pending deployment not later than 7 days after

receiving notice of deployment unless he or she is reasonably prevented from doing so by the circumstances of service, in which case the deploying parent shall provide notice as soon as reasonably possible.

(b) A plan fulfilling each parent's share of custodial responsibility during deployment provided as soon as reasonably possible after notice of deployment is given under paragraph (a).

(2) If a court order prohibits disclosure of the address or contact information of the other parent, notice pursuant to subsection (1) must be provided to the issuing court. If the address of the other parent is available to the issuing court, the court shall forward the notice to the other parent. The court shall keep confidential the address or contact information of the other parent.

(3) Notice pursuant to subsection (1) is not required if both parents are living in the same residence and have actual notice of the deployment or plan.

(4) In a proceeding regarding custodial responsibility, a court may consider the reasonableness of a parent's efforts to comply with this section.

61.711 Duty to notify of change of address.—

(1) Except as otherwise provided in subsection (2), an individual granted custodial responsibility during deployment must notify the deploying parent and any other individual with custodial responsibility of a child of any change of mailing address or residence until the grant is terminated. The individual must provide the notice to any court that has issued a custody or child support order concerning the child.

(2) If a court order prohibits disclosure of the address or contact information of an individual to whom custodial responsibility has been granted, notice pursuant to subsection (1) must be provided to the issuing court. The court shall keep confidential the mailing address or residence of the individual granted custodial responsibility.

61.713 General consideration in custody proceeding of parent's service.—In a proceeding for custodial responsibility of a child of a servicemember, a court may not consider a parent's past deployment or possible future deployment in determining the best interest of the child.

61.721 Form of custodial responsibility agreement.—

(1) The parents of a child may enter into a temporary agreement granting custodial responsibility during deployment.

(2) The agreement must be in writing and signed by both parents and any nonparent granted custodial responsibility.

(3) Subject to subsection (4), the agreement, if feasible, must:

(a) Identify the destination, duration, and conditions of the deployment that is the basis for the agreement.

(b) Specify the allocation of caretaking authority among the deploying parent, the other parent, and any nonparent.

(c) Specify any decisionmaking authority that accompanies a grant of caretaking authority.

(d) Specify any grant of limited contact to a nonparent.

(e) Provide a process to resolve any dispute that may arise if custodial responsibility is shared by the other parent and a nonparent, or by other nonparents.

(f) Specify the frequency, duration, and means, including

electronic means, by which the deploying parent will have contact with the child, any role to be played by the other parent or nonparent in facilitating the contact, and the allocation of any costs of contact.

(g) Specify contact between the deploying parent and child during the time the deploying parent is on leave or is otherwise available.

(h) Acknowledge that the agreement does not modify any existing child support obligation and that changing the terms of the obligation during deployment requires modification in the appropriate court.

(i) Provide that the agreement will terminate according to the procedures under this part after the deploying parent returns from deployment.

(j) Specify which parent is required to file the agreement if the agreement must be filed pursuant to s. 61.729.

(4) The omission of any item in subsection (3) does not invalidate the agreement.

61.723 Nature of authority created by custodial responsibility agreement.—

(1) An agreement granting custodial responsibility during deployment is temporary and terminates after the deploying parent returns from deployment unless the agreement has been terminated before that time by court order or modification under s. 61.725. The agreement does not create an independent, continuing right to caretaking authority, decisionmaking authority, or limited contact for an individual granted custodial responsibility.

(2) A nonparent granted caretaking authority,

decisionmaking authority, or limited contact by agreement has standing to enforce the agreement until it is terminated by court order or under s. 61.761, or modified under s. 61.725.

61.725 Modification of agreement.—

(1) The parents of a child may modify an agreement granting custodial responsibility by mutual consent.

(2) If an agreement is modified before deployment of a deploying parent, the modification must be in writing and signed by both parents and any nonparent granted custodial responsibility under the modified agreement.

(3) If an agreement is modified during deployment of a deploying parent, the modification must be agreed to in a record by both parents and any nonparent granted custodial responsibility.

61.727 Power of attorney.—A deploying parent may, by power of attorney, grant all or part of custodial responsibility to an adult nonparent for the period of deployment if no other parent possesses custodial responsibility, or if a court order currently in effect prohibits contact between the child and the other parent. The deploying parent may revoke the power of attorney by signing a revocation of the power of attorney.

61.729 Filing custodial responsibility agreement or power of attorney with court.—An agreement or power of attorney must be filed within a reasonable time with a court that has entered an order in effect relating to custodial responsibility or child support concerning the child who is the subject of the agreement or power. The case number and heading of the pending case concerning custodial responsibility or child support must be provided to the court with the agreement or power.

61.733 Proceeding for temporary custody order.—

(1) After a deploying parent receives notice of deployment and until the deployment terminates, a court may issue a temporary order granting custodial responsibility unless prohibited by the Servicemembers Civil Relief Act, Title 50, Appendix U.S.C. ss. 501 et seq. A court may not issue a permanent order granting custodial responsibility without the consent of the deploying parent.

(2)(a) At any time after a deploying parent receives notice of deployment, either parent may file a motion regarding custodial responsibility of a child during deployment. The motion must be filed in a pending proceeding for custodial responsibility in a court with jurisdiction under s. 61.707 or, if a pending proceeding does not exist in a court with jurisdiction under s. 61.707, the motion must be filed in a new action for granting custodial responsibility during deployment.

(b) If a motion to grant custodial responsibility is filed under paragraph (a) before a deploying parent deploys, the court shall conduct an expedited hearing.

61.735 Testimony by electronic means.—In a proceeding for a temporary custody order, a party or witness who is not reasonably able to appear in person may appear, provide testimony, and present evidence by electronic means unless the court finds good cause to require in-person testimony.

61.737 Effect of prior judicial order or agreement.—In a proceeding for a temporary grant of custodial responsibility:

(1) A prior judicial order granting custodial responsibility in the event of deployment is binding on the court unless circumstances meet the requirements authorized by

general law for modifying a judicial order regarding custodial responsibility.

(2) The court shall enforce a prior written agreement between the parents for granting custodial responsibility in the event of deployment, including an agreement for custodial responsibility during deployment, unless the court finds that the agreement is not in the best interest of the child.

61.739 Grant of caretaking authority to nonparent.—

(1) Upon the motion of a deploying parent and in accordance with general law, if it is in the best interest of the child, a court may grant caretaking authority to a nonparent who is an adult family member of the child or an adult with whom the child has a close and substantial relationship.

(2) Unless a grant of caretaking authority to a nonparent is agreed to by the other parent, the grant is limited to an amount of time that may not exceed:

(a) The amount of time granted to the deploying parent under a permanent custody order; however, the court may add travel time necessary to transport the child; or

(b) In the absence of a permanent custody order that is currently in effect, the amount of time the deploying parent habitually cared for the child before being notified of deployment; however, the court may add travel time necessary to transport the child.

(3) If the deploying parent is unable to exercise decisionmaking authority, a court may grant part of that authority to a nonparent who is an adult family member of the child or an adult with whom the child has a close and substantial relationship. If a court grants the authority to a

nonparent, the court shall specify the decisionmaking powers granted.

61.741 Grant of limited contact.—A court shall grant limited contact to a nonparent who is a family member of the child or an individual with whom the child has a close and substantial relationship on motion of a deploying parent and in accordance with general law unless the court finds that limited contact with a nonparent would not be in the best interest of the child.

61.743 Nature of authority created by temporary custody order.—

(1) A grant of authority is temporary and terminates after the deploying parent returns from deployment unless the grant has been terminated before that time by court order. The grant does not create an independent, continuing right to caretaking authority, decisionmaking authority, or limited contact to an individual granted temporary custody.

(2) A nonparent granted caretaking authority, decisionmaking authority, or limited contact has standing to enforce the grant until it is terminated by court order or under this part.

61.745 Content of temporary custody order.—An order granting custodial responsibility, when applicable, must:

(1) Designate the order as temporary and provide for termination after the deploying parent returns from deployment.

(2) Identify, to the extent feasible, the destination, duration, and conditions of the deployment.

(3) Specify the allocation of caretaking authority, decisionmaking authority, or limited contact among the deploying

parent, the other parent, and any nonparent.

(4) Provide a process to resolve any dispute that may arise if the order divides caretaking or decisionmaking authority between individuals, or grants caretaking authority to one individual and limited contact to another individual.

(5) Provide for liberal communication between the deploying parent and the child during deployment, including through electronic means, unless it is not in the best interest of the child, and allocate any costs of communication.

(6) Provide for liberal contact between the deploying parent and the child during the time the deploying parent is on leave or otherwise available, unless it is not in the best interest of the child.

(7) Provide for reasonable contact between the deploying parent and the child after the parent's return from deployment until the temporary order is terminated, even if the time of contact exceeds the time the deploying parent spent with the child before entry of the temporary order.

61.747 Order for child support.—If a court has issued an order granting caretaking authority, or an agreement granting caretaking authority has been executed, the court may enter a temporary order for child support authorized by general law if the court has jurisdiction under the Uniform Interstate Family Support Act.

61.749 Modifying or terminating grant of custodial responsibility or limited contact to nonparent.—

(1) Except for an agreement under s. 61.723, or as otherwise provided in subsection (2), and consistent with the Servicemembers Civil Relief Act, Title 50, Appendix U.S.C. ss.

501 et seq, a court may modify or terminate a temporary grant of custodial responsibility on motion of a deploying parent, other parent, or any nonparent granted caretaking authority if the modification or termination is consistent with this part and is in the best interest of the child. A modification is temporary and terminates after the deploying parent returns from deployment, unless the grant has been terminated before that time by court order.

(2) The court shall terminate a grant of limited contact on motion of a deploying parent.

61.761 Procedure for terminating temporary agreement granting custodial responsibility.—

(1) After a deploying parent returns from deployment, a deploying parent and the other parent may file with the court an agreement to terminate a temporary order for custodial responsibility.

(2) After an agreement has been filed, it shall terminate:

(a) On the date specified on an agreement to terminate under subsection (1); or

(b) On the date the agreement is signed by the deploying parent and the other parent if the agreement to terminate does not specify a date.

(3) In the absence of an agreement to terminate under (1), a temporary agreement granting custodial responsibility terminates 60 days after the deploying parent gives notice of return from deployment to the other parent.

(4) If a temporary agreement granting custodial responsibility was filed with a court pursuant to s. 61.729, an agreement to terminate must be filed with the court within a

reasonable time after the deploying parent and other parent sign the agreement. The case number and heading of the case concerning custodial responsibility or child support must be provided to the court with the agreement to terminate.

(5) A proceeding seeking to prevent termination of a temporary order for custodial responsibility is governed by general law.

61.763 Visitation before termination of temporary grant of custodial responsibility.—From the time a deploying parent returns from deployment until a temporary agreement or order for custodial responsibility is terminated, the court shall issue a temporary order granting the deploying parent reasonable contact with the child even if the time of contact exceeds the time the deploying parent spent with the child before deployment unless it is not in the best interest of the child.

61.771 Relation to electronic signatures in Global and National Commerce Act.—This act modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. s. 7001 et seq., but does not modify, limit, or supersede s. 101(c) of that act, 15 U.S.C. s. 7001(c), or authorize electronic delivery of any of the notices described in s. 103(b) of that act, 15 U.S.C. s. 7003(b).

61.773 Applicability.—This act does not affect the validity of a temporary court order concerning custodial responsibility during deployment entered before July 1, 2018.

Section 2. This act shall take effect July 1, 2018.

The Florida Senate

Committee Agenda Request

To: Senator Greg Steube, Chair
Committee on Judiciary

Subject: Committee Agenda Request

Date: January 16, 2018

I respectfully request that **Senate Bill #1598**, relating to Deployed Parent Custody and Visitation, be placed on the:

☐ committee agenda at your earliest possible convenience.

☒ next committee agenda.

Senator Kathleen Passidomo
Florida Senate, District 28

File signed original with committee office

S-020 (03/2004)

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 Committee on Judiciary

BILL:	CS/SB 1048
INTRODUCER:	Judiciary Committee and Senator Baxley
SUBJECT:	Firearms
DATE:	January 26, 2018 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	**Fav/CS**
2.			RC	

I. Summary:

CS/SB 1048 enables a church, synagogue, or other religious institution to authorize a person who has a concealed handgun license to carry a concealed handgun in some places where even a licensee normally may not, subject to several restrictions. These places includes elementary or secondary schools and career centers, if they are also established places of worship.

Under current law, a person who has a concealed handgun license is authorized to carry a concealed handgun on the typical property of a religious institution, such as a church property that is not also home to a school. However, a license does not authorize a person to possess a firearm at a school, including a school that is on church property. There is even a question as to whether a licensee may carry a handgun on any part of a property on which both a church's worship building and its school are located.

Under the bill, a religious institution may authorize the holder of a concealed handgun license to carry a concealed handgun on certain school properties if they are "established physical place[s] of worship at which religious services are regularly conducted."

However, if the institution uses school property not owned by the institution, the institution must have the permission of the owner or administrator of the property to allow the licensed carrying of concealed handguns. Additionally, a person may not possess a handgun on school property during school hours or when any school-sponsored activity is taking place on the property. Finally, the bill expressly states that religious institutions may not authorize a person to carry a handgun on the property of a public or private college or university.

II. Present Situation:

Overview

A concealed handgun license authorizes a licensee to carry a concealed handgun throughout most of the state. Though the licensing statute expressly excludes several places from this authorization, none of these places are the typical meeting places of "churches, synagogues, or other religious institutions." Nonetheless, some congregations meet at, or are even located on the same property as, places where the authority under a concealed handgun license does not apply, including "school facilities and administration buildings," or "college or university facilities." Moreover, another statute broadly prohibits virtually all people, including concealed weapon licensees, from possessing a firearm on public or private school property. As such, a licensee may generally carry a concealed handgun when he or she meets with his or her congregation, but apparently may not do so if the congregation gathers on the property of a public or private school.

Lawful Concealed Carry of Weapons and Firearms

Although the statutes generally prohibit a person from carrying a firearm or carrying a concealed weapon, these prohibitions are subject to several exceptions.[1]

The most significant exception to the prohibition on a person carrying a concealed weapon or firearm may be the licensed carry of these items. The license authorizes a licensee to carry a concealed handgun in most places in the state.[2] To obtain a license, one must submit an application to the Department of Agriculture and Consumer Services, and the Department must grant the license to each applicant who:[3]

- Is a resident of the United States and a citizen of the United States or a permanent resident alien of the United States, as determined by the United States Bureau of Citizenship and Immigration Services, or is a consular security official of a foreign government that maintains diplomatic relations and treaties of commerce, friendship, and navigation with the United States and is certified as such by the foreign government and by the appropriate embassy in this country;
- Is 21 years of age or older;
- Does not suffer from a physical infirmity that prevents the safe handling of a weapon or firearm;
- Is not ineligible to possess a firearm by virtue of having been convicted of a felony;
- Has not been committed for the abuse of a controlled substance;
- Has not been found guilty of a crime relating to controlled substances within a 3-year period immediately preceding the date on which the application is submitted;
- Does not chronically and habitually use alcoholic beverages or other substances to the extent that his or her normal faculties are impaired;

[1] Many of these exceptions are set forth in s. 790.25, F.S.
[2] As of December 31, 2017, 1,836,954 Floridians held a standard concealed carry license. Fla. Dept. of Ag., *Number of Licensees by Type*, http://www.freshfromflorida.com/content/download/7471/118627/Number_of_Licensees_By_Type.pdf (last visited January 12, 2018).
[3] Section 790.06(2), F.S. However, the Department must *deny* a license to an applicant who meets any criterion set forth in s. 790.06(3), F.S, which also sets forth criteria for the mandatory revocation of a license.

- Desires a legal means to carry a concealed weapon or firearm for lawful self-defense;
- Demonstrates competency in the use of a firearm;[4]
- Has not been, or is deemed not to have been, adjudicated an incapacitated person in a guardianship proceeding;
- Has not been, or is deemed not to have been, committed to a mental institution;
- Has not had adjudication of guilt withheld or imposition of sentence suspended on any felony, or any misdemeanor crime of domestic violence, unless 3 years have elapsed since probation or any other conditions set by the court have been fulfilled, or expunction has occurred;
- Has not been issued an injunction that is currently in force and effect which restrains the applicant from committing acts of domestic violence or acts of repeat violence; and
- Is not prohibited from purchasing or possessing a firearm by any other provision of Florida or federal law.

Although the license generally authorizes a person to carry a concealed handgun throughout the state, a license "does not authorize" a person to carry a concealed handgun into several places, including any college or university facility, any career center, or any elementary or secondary school facility or administration building. A license also does not authorize a person to carry a concealed handgun into any school, college, or professional athletic event not related to firearms.[5] However, this list does *not* include the property of a church, synagogue or other religious institution, such as a typical church campus. So, a licensee generally may carry a concealed handgun when he or she goes to meet with his or her congregation, but not if they are meeting at a school facility or building, a college or university facility, or any other place at which even licensed carry is illegal.[6, 7]

While the licensing statute sets forth that the concealed carry license *does not authorize* carry into any school building or facility, another statute broadly *prohibits* the possession of a weapon or firearm on any public or private school property regardless of whether a person has a license.

Prohibited Possession of a Weapon or Firearm at a School or Related Location

In general, s. 790.115, F.S., prohibits a person from possessing any firearm, electric weapon or device, destructive device, or other weapon on the property of any school, school bus, or school bus stop. Although the word "school" is not defined in the statute authorizing the issuance of concealed weapon or firearm licenses, s. 790.115, F.S., expressly and broadly defines the term "school" as any preschool through postsecondary school, whether public or private.[8] The penalty

[4] See s. 790.06(2)(h), F.S., for the list of courses and other means of demonstrating competency, and for the required documentation that one must present to the state relative to this provision.
[5] See s. 790.06(12), F.S., for the list of the places that a license does not authorize a licensee to carry into.
[6] As used in the licensing statute, the terms referring to schools, colleges, and universities are not defined. As such, the statute makes no distinction between public and private schools.
[7] Additional exceptions to the prohibition against carrying a concealed firearm or openly carrying a firearm are created by s. 790.25(3), F.S. This statute authorizes an unlicensed individual to openly possess a firearm or to carry a concealed firearm in any of the manners described in the statute. The statute, for example, authorizes law enforcement officers to carry firearms while on duty. Additionally, the statute authorizes a person to carry a firearm while engaged in hunting, fishing, or camping or while traveling to and from these activities. A person may also possess a firearm at his or her home or place of business or in any of the other circumstances set forth in statute.
[8] It also means any career center. Section 790.115(2)(a), F.S.

for violating the ban on weapons varies depending on the weapon possessed and whether the violator has a concealed weapon or firearm license.[9] The limited exceptions in the statute authorize the possession of weapons and firearms "in support of school-sanctioned activities," "in a case" to a firearms class if approved by school authorities, and in parked cars.

Federal Law

The federal Gun-Free School Zones Act prohibits the possession of a firearm that has moved in or otherwise affects interstate or foreign commerce at a place the individual knows, or has reasonable cause to believe, is a school or is within 1,000 feet of a school.[10] However, this prohibition does not apply to a person who is licensed to carry a concealed weapon or firearm.[11]

Another federal law, the Gun-Free Schools Act, is more-narrowly focused on prohibiting *students* from possessing firearms at or near schools. This prohibition is also subject to exceptions.[12] The act expressly states that it does not apply to a firearm "that is lawfully stored inside a locked vehicle on school property, or if it is for activities approved and authorized by the local educational agency and the local educational agency adopts appropriate safeguards to ensure student safety."[13]

III. Effect of Proposed Changes:

The bill addresses the issue under current law of how persons who would otherwise be able to carry a concealed handgun to their worship services may not do so if their place of worship is also school property. Particularly, the bill enables a church, synagogue, or other religious institution[14] to authorize a person who has a concealed handgun licensee to carry a concealed handgun at certain places, including the property of public or private elementary or secondary school, or a career center, that is also an "established place of physical worship at which religious services are regularly conducted."

However, if the institution uses property that it does not own, the institution must have the permission of the owner or administrator of the property to allow the licensed carrying of concealed handguns. Additionally, a person may not possess a handgun on school property during school hours or when extracurricular school-sponsored activities are taking place on the

[9] A non-licensee possessing a firearm or other weapon commits a third degree felony, punishable by up to 5 years in prison and a fine not to exceed $5,000. *See* ss. 790.115(b)-(c), 775.082(9)(a)3.d. and 775.083(1)(c), F.S. However, licensees who commit this crime are guilty of a lesser crime, a second degree misdemeanor, punishable by up to 60 days in jail and a fine not to exceed $500. *See*, ss. 790.115(2)(e), 790.06(12)(d), 775.082(4)(b), and 775.083(1)(e), F.S.

[10] 18 U.S.C. § 922(q)(2)(A).

[11] *See* 18 U.S.C. § 922(q)(2)(B)(ii).

[12] *See* 20 U.S.C. § 7961.

[13] 20 U.S.C. § 7961(g).

[14] The bill adopts the definition of this term in s. 496.404, F.S.:

> "Religious institution" means a church, ecclesiastical or denominational organization, or established physical place for worship in this state at which nonprofit religious services and activities are regularly conducted and carried on and includes those bona fide religious groups that do not maintain specific places of worship. The term also includes a separate group or corporation that forms an integral part of a religious institution that is exempt from federal income tax under s. 501(c)(3) of the Internal Revenue Code and that is not primarily supported by funds solicited outside its own membership or congregation.

property. Finally, the bill expressly states that religious institutions may not authorize a person to carry a handgun on the property of a public or private college or university.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

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:

The bill enables a religious institution to authorize a person who has a license carry a concealed handgun to do so in certain places where even a licensee currently may not. These places include certain schools, subject to several restrictions. These restrictions include a restriction that handguns may not be carried on school property during school hours or during any school-sponsored activity.

The lack of a clear definition of what constitutes a school-sponsored activity and the lack of a required notice of when those activities are occurring may lead to unintentional violations of

criminal law by those authorized to carry a concealed handgun. If the activities of a religious intuition and a school it operates are closely interrelated, such as a student performance during the institution's worship service, the authority for a person to possess a concealed handgun even during a worship service seems uncertain. Therefore, the Legislature may wish to revise the bill to minimize the risk of unintentional violations of criminal law by otherwise law-abiding persons.

VIII. Statutes Affected:

This bill substantially amends section 790.06 of the Florida Statutes.

IX. Additional Information:

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

CS by Judiciary on January 25, 2018:
In the underlying bill, a religious institution could authorize a person who has a concealed weapon or firearms license to carry a firearm anywhere the religious institution could lawfully meet, regardless of whether a licensee's carrying in that place would otherwise be prohibited. Under the committee substitute, a religious institution may authorize a person who has a concealed weapon or firearms license to carry a concealed handgun only on certain properties that are used by a religious institution, and only under a number of limitations.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
01/25/2018	.	
	.	
	.	
	.	

The Committee on Judiciary (Baxley) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Subsection (12) of section 790.06, Florida Statutes, is amended to read:

790.06 License to carry concealed weapon or firearm.—

(12)(a) A license issued under this section does not authorize any person to openly carry a handgun or carry a concealed weapon or firearm into:

1. Any place of nuisance as defined in s. 823.05;

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2. Any police, sheriff, or highway patrol station;

3. Any detention facility, prison, or jail;

4. Any courthouse;

5. Any courtroom, except that nothing in this section would preclude a judge from carrying a concealed weapon or determining who will carry a concealed weapon in his or her courtroom;

6. Any polling place;

7. Any meeting of the governing body of a county, public school district, municipality, or special district;

8. Any meeting of the Legislature or a committee thereof;

9. Any school, college, or professional athletic event not related to firearms;

10. Any elementary or secondary school facility or administration building;

11. Any career center;

12. Any portion of an establishment licensed to dispense alcoholic beverages for consumption on the premises, which portion of the establishment is primarily devoted to such purpose;

13. Any college or university facility unless the licensee is a registered student, employee, or faculty member of such college or university and the weapon is a stun gun or nonlethal electric weapon or device designed solely for defensive purposes and the weapon does not fire a dart or projectile;

14. The inside of the passenger terminal and sterile area of any airport, provided that no person shall be prohibited from carrying any legal firearm into the terminal, which firearm is encased for shipment for purposes of checking such firearm as baggage to be lawfully transported on any aircraft; or

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15. Any place where the carrying of firearms is prohibited by federal law.

(b) A person licensed under this section may ~~shall~~ not be prohibited from carrying or storing a firearm in a vehicle for lawful purposes.

(c)1. Notwithstanding the prohibitions contained in this subsection or s. 790.115, a church, a synagogue, or any other religious institution, as that term is defined in s. 496.404, may authorize a person licensed under this section to carry a concealed handgun in an established physical place of worship at which religious services are regularly conducted provided that:

a. If such property is not owned by the religious institution, the religious institution receives the permission of the property owner or administrator; and

b. If the religious institution is using property that is an elementary or secondary school facility or career center or that is located on the property of a school, as defined in s. 790.115, the person may not carry a concealed handgun on school property during school hours or during any time when curricular or extracurricular school-sponsored activities are taking place on the property.

2. This paragraph does not authorize the carrying of a firearm in any place or in any manner prohibited by federal law or on the property of a public or private college, university, or other postsecondary educational institution.

(d) ~~(c)~~ This section does not modify the terms or conditions of s. 790.251(7).

(e) ~~(d)~~ Any person who knowingly and willfully violates any provision of this subsection commits a misdemeanor of the second

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degree, punishable as provided in s. 775.082 or s. 775.083.

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

========== 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 firearms; amending s. 790.06, F.S.; authorizing a church, a synagogue, or other religious institution to allow a concealed weapons or concealed firearms licensee to carry a concealed handgun in certain established physical places of worship under certain circumstances; providing applicability; providing an effective date.

By Senator Baxley

12-01094A-18 20181048__

A bill to be entitled

An act relating to firearms; amending s. 790.06, F.S.; authorizing a church, a synagogue, or other religious institution to allow a concealed weapons or concealed firearms licensee to carry a firearm on the property of the church, synagogue, or religious institution for certain purposes; providing an effective date.

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

Section 1. Subsection (12) of section 790.06, Florida Statutes, is amended to read:

790.06 License to carry concealed weapon or firearm.—

(12)(a) A license issued under this section does not authorize any person to openly carry a handgun or carry a concealed weapon or firearm into:

1. Any place of nuisance as defined in s. 823.05;
2. Any police, sheriff, or highway patrol station;
3. Any detention facility, prison, or jail;
4. Any courthouse;
5. Any courtroom, except that nothing in this section would preclude a judge from carrying a concealed weapon or determining who will carry a concealed weapon in his or her courtroom;
6. Any polling place;
7. Any meeting of the governing body of a county, public school district, municipality, or special district;
8. Any meeting of the Legislature or a committee thereof;
9. Any school, college, or professional athletic event not related to firearms;

12-01094A-18 20181048__

10. Any elementary or secondary school facility or administration building;
11. Any career center;
12. Any portion of an establishment licensed to dispense alcoholic beverages for consumption on the premises, which portion of the establishment is primarily devoted to such purpose;
13. Any college or university facility unless the licensee is a registered student, employee, or faculty member of such college or university and the weapon is a stun gun or nonlethal electric weapon or device designed solely for defensive purposes and the weapon does not fire a dart or projectile;
14. The inside of the passenger terminal and sterile area of any airport, provided that no person shall be prohibited from carrying any legal firearm into the terminal, which firearm is encased for shipment for purposes of checking such firearm as baggage to be lawfully transported on any aircraft; or
15. Any place where the carrying of firearms is prohibited by federal law.

(b) A person licensed under this section may ~~shall~~ not be prohibited from carrying or storing a firearm in a vehicle for lawful purposes.

(c) Notwithstanding any other law, for the purposes of safety, security, personal protection, or other lawful purposes, a church, a synagogue, or any other religious institution may authorize a person licensed under this section to carry a firearm on property owned, rented, leased, borrowed, or lawfully used by the church, synagogue, or religious institution.

(d) ~~(c)~~ This section does not modify the terms or conditions

of s. 790.251(7).

(e) ~~(d)~~ Any person who knowingly and willfully violates any provision of this subsection commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

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

THE FLORIDA SENATE

SENATOR DENNIS BAXLEY
12th District

COMMITTEES:
Governmental Oversight and Accountability, *Chair*
Criminal Justice, *Vice Chair*
Appropriations
Appropriations Subcommittee on Criminal and Civil Justice
Appropriations Subcommittee on Health and Human Services
Agriculture
Transportation

SELECT COMMITTEE:
Joint Select Committee on Collective Bargaining

JOINT COMMITTEE:
Joint Legislative Auditing Committee

December 15, 2017

The Honorable Senator Greg Steube
326 Senate Office Building
404 So Monroe Street
Tallahassee, FL 32399

Dear Chairman Steube,

I respectfully request SB 1048 Firearms (Church Protection) be placed on your next available agenda.

This bill for the purposes of safety, security, personal protection, or other lawful purposes, a church, a synagogue, or any other religious institution may authorize a person licensed under this section to carry a firearm on property owned, rented, leased, borrowed, or lawfully used by the church, synagogue, or religious institution.

I appreciate your favorable consideration.

Onward & Upward,

Dennis K Baxley

Senator Dennis Baxley
Senate District 12

DKB/dd

cc: Lauren Jones, Staff Director

320 Senate Office Building, 404 South Monroe St, Tallahassee, Florida 32399-1100 • (850) 487-5012
Email: baxley.dennis@flsenate.gov

Duplicate

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/25/2018
Meeting Date

SB-1048
Bill Number (if applicable)

Topic Church Private Property Rights/Firearms

Amendment Barcode (if applicable)

Name Marion P. Hammer

Job Title

Address PO Box 1387
Street

Phone 850-222-9518

Tallahassee FL 32302
City *State* *Zip*

Email

Speaking: ☑ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing National Rifle Association & Unified Sportsmen of Florida

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

11/25/18
Meeting Date

1048
Bill Number (if applicable)

Topic FIREARMS

Amendment Barcode (if applicable)

Name BILL BUNKLEY

Job Title PRESIDENT

Address PO BOX 341644 Phone 813. 264. 2977
Street

TAMPA FL 33694 Email
City *State* *Zip*

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing FLURIDA ETHICS AND RELIGIOUS LIBERTY COMMISSION

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

11 — *Meeting Date*

1078 — *Bill Number (if applicable)*

Topic Firearms

Amendment Barcode (if applicable)

Name Kathryn Plant

Job Title State Affairs

Address _____ *Street*

_____ *City* *State* *Zip*

Phone _____

Email Kathryn@keepgunsoffcampus.org

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☒ Against
(The Chair will read this information into the record.)

Representing The Campaign To Keep Guns Off Campus

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

1-25-18 (Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting) 1048

Meeting Date *Bill Number (if applicable)*

Topic FIREARMS *Amendment Barcode (if applicable)*

Name Stephanie Owens

Job Title Leg Advocate

Address _____ Phone 7176391243

Street

_____ Email _____

City *State* *Zip*

Speaking: ☐ For ☑ Against ☐ Information Waive Speaking: ☐ In Support ☐ Against

(The Chair will read this information into the record.)

Representing LEAGUE of Women Voters

Appearing at request of Chair: ☐ Yes ☐ No Lobbyist registered with Legislature: ☐ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1-25-18
Meeting Date

Bill Number (if applicable)
160384
Amendment Barcode (if applicable)
(SB1048-160384)

Topic Guns in Church/schools

Name Kate KILE

Job Title VOLUNTEER

Address 1564 Lee Ave
Street
Tallahassee FL 32303
City *State* *Zip*

Phone (850) 284 5511

Email K8Kile@yahoo.com

Speaking: ☒ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Moms Demand Action for Gun Sense in America

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

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 Committee on Judiciary

BILL:	CS/CS/SB 970
INTRODUCER:	Judiciary Committee; Criminal Justice Committee; and Senator Brandes
SUBJECT:	Alcohol and Drug-related Overdoses
DATE:	January 26, 2018 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Jones	CJ	**Fav/CS**
2.	Stallard	Cibula	JU	**Fav/CS**
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 970 expands the statute that grants a person immunity from a drug-possession prosecution that otherwise could result from the person's seeking medical help for his or her own overdose or for the overdose of another person.

Under the bill, this immunity is expanded in several ways, including that it:

- Shields a person from arrest, and not just charges, prosecution, or penalties;
- Shields a person from several crimes beyond drug-possession, including drug-trafficking, alcohol possession by a person under 21, and possession of a controlled substance with intent to sell it;
- Shields a person who is seeking medical help for another from arrest or prosecution for first-degree murder caused by giving another person a controlled substance (with or without the intent to kill the person);
- Applies to alcohol-related overdoses; and
- No longer requires a person seeking help for himself or herself to actually be experiencing an overdose as long as the person has a good faith belief that he or she is overdosing.

Additionally, the bill prohibits a person from being penalized for a violation of a condition of probation, parole, or pretrial release as the result of the person's seeking medical assistance for his or her own overdose. However, for the immunity to apply, the person must receive treatment for the overdose. Finally, the bill prohibits a person from being penalized for a violation of a

condition of probation, parole, or pretrial release as the result of his or her good-faith seeking of treatment for another person's overdose.

II. Present Situation:

Overview

The Legislature enacted Florida's "911 Good Samaritan Act" in 2012 to encourage people to seek medical assistance for persons having a drug overdose.[1] The act, which is codified in s. 893.21, F.S., prohibits a person from being charged, prosecuted, or penalized for possession of a controlled substance with evidence obtained as the result of the person's seeking medical assistance due to his or her overdose or the overdose of another person.

However, for the immunity to apply, the act requires a person seeking help for another to act in good faith. Moreover, the act specifies that it does not provide a basis for the suppression of evidence in other prosecutions.

The criminal conduct protected by the act is the "possession of a controlled substance." This general reference, however, does not clearly indicate whether the act protects a person possessing a sufficient quantity of a controlled substance to be charged with a trafficking offense. For example, a person who knowingly possesses at least 28 grams of cocaine commits the crime of trafficking in cocaine.[2]

"Good Samaritan" Laws Regarding Drug Overdoses

In addition to the 911 Good Samaritan Act, this state also has a statute, s. 381.887, F.S., which grants civil immunity to a person who administers a drug such as naloxone hydrochloride, which blocks the effects of opioids. Most other states have similar immunity laws, and these laws have been studied by the National Conference of State Legislatures (NCSL).

According to the NCSL, drug overdose rates continue to rise and these deaths are increasingly caused by opioids and opiates. The NCSL notes that "[o]pioid overdoses can be reversed with the timely administration of a medication called naloxone[,]" an FDA-approved drug that "can be administered in a number of ways that make it possible for a lay person to use."[3]

According to the NCSL, "[o]ften family and friends are in the best position to administer this lifesaving drug to their loved ones who overdose. Access to naloxone, however, was relatively limited until legislatures provided specific statutory protections for nonmedical professionals to possess and administer naloxone without a prescription."[4] Many legislatures have enacted a law allowing naloxone administration and this law is often coupled with a law providing limited immunity from criminal prosecution for providing such medical assistance.

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[1] Chapter 2012-36, Laws of Fla.
[2] *See* s. 893.135(1)(b), F.S.
[3] "Drug Overdose Immunity and Good Samaritan Laws" (June 5, 2017), National Conference of State Legislatures, available at http://www.ncsl.org/research/civil-and-criminal-justice/drug-overdose-immunity-good-samaritan-laws.aspx (last visited on Jan. 23, 2018).
[4] *Id.*

According to NCSL, 40 states and the District of Columbia have Good Samaritan laws. The NCSL's description of the components that these laws generally share reads quite similarly to this state's Good Samaritan statute.[5] One notable common component in other states' laws which Florida's statute lacks is a prohibition on the arrest of a person covered by the immunity.

Data on Drug-Overdose Deaths in Florida

A recent report by the Florida Medical Examiners Commission (FMEC) cited statics that 102,173 deaths occurred in Florida during the first 6 months of 2016.[6] Of the cases seen by medical examiners, toxicology results determined that ethanol (ethyl alcohol) and/or various controlled substances were present at the time of death in 5,392 cases.[7]

Some general statewide trends noted by the FMEC in its report include the following:

- Total drug-related deaths increased by 13.9 percent (658 more) when compared with the first half of 2015.
- 3,044 individuals (466 more deaths than the first half of 2015) died with one or more prescription drugs in their system. The drugs were identified as both the cause of death and present in the decedent. These drugs may have also been mixed with illicit drugs and/or alcohol.
- 1,616 individuals (440 more deaths than the first half of 2015) died with at least one prescription drug in their system that was identified as the cause of death. These drugs may have been mixed with other prescription drugs, illicit drugs, and/or alcohol.
- The drugs that caused the most deaths were fentanyl (704), cocaine (643), benzodiazepines (632, including 355 alprazolam deaths), morphine (559), heroin (406), ethyl alcohol (405), oxycodone (324), methadone (156), and fentanyl analogs (149). Of these drugs, heroin (93.5 percent), fentanyl (87.5 percent), fentanyl analogs (81.4 percent), methadone (65.0 percent), morphine (63.7 percent), cocaine (56.2 percent), and oxycodone (51.3 percent) were listed as causing death in more than 50 percent of the deaths in which these drugs were found.[8]

III. Effect of Proposed Changes:

The bill expands the statute that generally grants a person immunity from charges, prosecution, or penalties for possession of a controlled substance which could otherwise result from the person's seeking medical help for his or her own overdose or for the overdose of another person.

Under the bill, this immunity is expanded in several ways, including that it:

- Shields a person from arrest, and not just charges, prosecution, or penalties;

---

[5] *Id.*
[6] *Drugs Identified in Deceased Persons by Florida Medical Examiners – 2016 Interim Report* (May 2017), p. 1, Florida Medical Examiners Commission, Florida Department of Law Enforcement, available at http://www.fdle.state.fl.us/MEC/Publications-and-Forms/Documents/Drugs-in-Deceased-Persons/2016-Interim-Drug-Report.aspx.
[7] *Id.*
[8] *Id.* at p. 2.

- Shields a person from several crimes beyond drug-possession, including drug-trafficking, alcohol possession by a person under 21, and possession of a controlled substance with intent to sell it;
- Shields a person who is seeking medical help for another from arrest or prosecution for first-degree murder of the type that is caused by giving another person a controlled substance (with or without the intent to kill the person);
- Applies to alcohol-related overdoses; and
- Does not require a person seeking help for themselves to actually be experiencing an overdose as long as the person has a good faith belief that he or she is overdosing.

Additionally, the bill expands the immunity beyond the realm of criminal prosecution. Particularly, the bill prohibits a person from being penalized for a violation of a condition of probation, parole, or pretrial release based on evidence obtained as a result of the person's seeking medical assistance for his or her overdose or apparent overdose. However, for the immunity to apply, the person must receive treatment for the overdose.[9] Finally, the bill prohibits a person from being penalized for a violation of a condition of probation, parole, or pretrial release based on evidence obtained as a result of his or her good-faith seeking of treatment for another person's overdose.

The effective date of the bill is July 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

[9] This requirement is unique to this provision. The parts of the bill relating to immunity from criminal charges do not require that anyone actually receive treatment for the immunity to apply.

B. Private Sector Impact:

To the extent that the bill encourages people to seek medical assistance for drug and alcohol overdoses, the bill will increase medical costs. These additional costs will likely be borne by the person receiving treatment, insurers, health care providers, and the state.

C. Government Sector Impact:

To the extent that the bill encourages people to seek medical assistance for drug and alcohol overdoses, the bill will increase medical costs. These additional costs will likely be borne by the person receiving treatment, insurers, health care providers, and the state.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Most of the changes proposed by the bill are features of the overdose immunity laws of at least one other state,[10] and the inclusion of arrests in s. 893.21, F.S., was a recommendation of Florida's Statewide Drug Policy Advisory Council.[11] However, Senate Criminal Justice Committee staff was unable to find any overdose immunity law of another state that provides immunity from criminal arrest, charge, prosecution, or penalty for a law comparable to s. 782.04(1)(a)3., F.S., which punishes first degree murder involving unlawful distribution of a specified controlled substance. In fact, at least one state, Illinois, specifically states in its overdose immunity law that the law is not intended to prevent arrest or prosecution for drug-induced homicide.[12] As indicated by the NCSL, overdose immunity laws "generally provide immunity from arrest, charge or prosecution for certain controlled substance possession and paraphernalia offenses[.]"[13]

While the bill does not nullify s. 782.04(1)(a)3., F.S., the bill appears to effectively bar arrest or prosecution of a person who distributed a controlled substance to a user that was the proximate cause of the user's death but who also provided medical assistance to the user (albeit the user still died) in accordance with s. 893.21, F.S., as amended by the bill.

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[10] Provided are a few examples: Georgia law (Ga. Code Ann. s. 16-13-5) includes arrests; Colorado law (Colo. Rev. Stat. s. 18-1-711) includes alcohol overdose; New York law (N.Y. Penal Law s. 220.78) provides immunity for possession of alcohol by a person under 21 years of age; Mississippi law (Miss. Code. Ann. s. 41-29-149.1) provides immunity for drug paraphernalia offenses; and Tennessee law (Tenn. Code Ann. s. 63-1-156) provides immunity for pretrial, probation, or parole violations.

[11] *Statewide Drug Policy Advisory Council – 2016 Annual Report* (December 1, 2016), p. 15, Florida Department of Health, available at http://www.floridahealth.gov/provider-and-partner-resources/dpac/DPAC-Annual-Report-2016-FINAL.pdf (last visited on December 12, 2017).

[12] 720 Ill. Comp. Stat. Ann. 570/414.

[13] "Drug Overdose Immunity 'Good Samaritan' Laws" (July 1, 2014), National Conference of State Legislatures (on file with the Senate Committee on Criminal Justice).

Staff was also unable to find any overdose immunity law of another state that provides immunity from criminal arrest, charge, prosecution, or penalty for a law comparable to s. 893.135, F.S., which punishes drug trafficking.[14]

VIII. Statutes Affected:

This bill substantially amends section 893.21 of the Florida Statutes.

IX. Additional Information:

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

CS by Judiciary on January 25, 2018:
The committee substitute modifies the underlying bill's grant of immunity from a violation of a condition of pretrial release, probation, or parole for a person who seeks medical help for an individual who is overdosing or is believed to be overdosing. Particularly, the committee substitute makes it clear that immunity from these violations applies to a person who seeks help for the overdose of any person, including himself or herself. For the immunity to apply to a person seeking help for another person, he or she must do so "in good faith." For the immunity to apply to someone who seeks help for his or her own overdose, the person must have a "good faith belief" that he or she is experiencing an overdose and must receive medical assistance.

CS by Criminal Justice on January 9, 2018:
The Committee Substitute corrects incorrect statutory references and provides for uniform word usage.

B. Amendments:

None.

[14] The act of "trafficking" can include possession, purchase, sale, manufacture, delivery, or importation.

572144

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
01/25/2018	.	
	.	
	.	
	.	

The Committee on Judiciary (Brandes) recommended the following:

Senate Amendment (with title amendment)

Delete lines 46 - 50

and insert:

(3) A person who is experiencing, or has a good faith belief that he or she is experiencing, an alcohol or a drug-related overdose and receives medical assistance, or a person acting in good faith who seeks medical assistance for an individual experiencing, or believed to be experiencing, an alcohol or a drug-related overdose, may not be penalized for a violation of a condition of pretrial release, probation, or

572144

parole if the evidence for such a violation was obtained as a result of the person's seeking medical

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

And the title is amended as follows:

Delete line 15

and insert:

assistance for himself or herself or for an individual experiencing, or believed

By the Committee on Criminal Justice; and Senator Brandes

591-01945-18 2018970c1

A bill to be entitled

An act relating to alcohol and drug-related overdoses; amending s. 893.21, F.S.; prohibiting the arrest, charging, prosecution, or penalizing under specified provisions of a person acting in good faith who seeks medical assistance for an individual experiencing, or believed to be experiencing, an alcohol or a drug-related overdose; prohibiting the arrest, charging, prosecution, or penalizing under specified provisions of a person who experiences, or has a good faith belief that he or she is experiencing, an alcohol or a drug-related overdose; prohibiting a person from being penalized for a violation of a condition of certain programs if that person in good faith seeks medical assistance for an individual experiencing, or believed to be experiencing, an alcohol or a drug-related overdose; prohibiting the protection from arrest, charge, and prosecution for certain offenses from being grounds for suppression of evidence in other criminal prosecutions; providing an effective date.

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

Section 1. Section 893.21, Florida Statutes, is amended to read:

893.21 Alcohol and drug-related overdoses; medical assistance; immunity from arrest, charge, and prosecution.—

(1) A person acting in good faith who seeks medical assistance for an individual experiencing, or believed to be experiencing,

591-01945-18 2018970c1

an alcohol or a drug-related overdose may not be arrested, charged, prosecuted, or penalized ~~pursuant to this chapter~~ for a violation of s. 562.111, s. 782.04(1)(a)3., s. 893.13, s. 893.135, or s. 893.147, ~~possession of a controlled substance~~ if the evidence for such offense ~~possession of a controlled substance~~ was obtained as a result of the person's seeking medical assistance.

(2) A person who experiences, or has a good faith belief that he or she is experiencing, an alcohol or a drug-related overdose and is in need of medical assistance may not be arrested, charged, prosecuted, or penalized ~~pursuant to this chapter~~ for a violation of s. 562.111, s. 893.13, s. 893.135, or s. 893.147, ~~possession of a controlled substance~~ if the evidence for such offense ~~possession of a controlled substance~~ was obtained as a result of the person's seeking ~~the overdose and the need for~~ medical assistance.

(3) A person acting in good faith who seeks medical assistance for an individual experiencing, or believed to be experiencing, an alcohol or a drug-related overdose may not be penalized for a violation of a condition of pretrial release, probation, or parole as a result of the person's seeking medical assistance.

(4)~~(3)~~ Protection in this section from arrest, charge, and prosecution for an offense listed in this section ~~possession offenses under this chapter~~ may not be grounds for suppression of evidence in other criminal prosecutions.

Section 2. This act shall take effect July 1, 2018.

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

The Florida Senate

Committee Agenda Request

To: Senator Greg Steube
Committee on Judiciary

Subject: Committee Agenda Request

Date: January 12, 2018

I respectfully request that **Senate Bill #970**, relating to **Alcohol and Drug-related Overdoses**, be placed on the:

☒ committee agenda at your earliest possible convenience.

☐ next committee agenda.

Senator Jeff Brandes
Florida Senate, District 24

Duplicate

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1.25.18
Meeting Date

970
Bill Number (if applicable)

Topic Substance Abuse Overdoses
Amendment Barcode (if applicable)

Name Barney Bishop

Job Title CEO

Address 204 South Monroe Street
Street

Phone 510-9922

Tallahassee FL 32301
City *State* *Zip*

Email Barney@BarneyBisho.com

Speaking: ☑ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Smart Justice Alliance

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

11/25/18
Meeting Date

970
Bill Number (if applicable)

Topic ALCOHOL + DRUG-RELATED OVERDOSES

Amendment Barcode (if applicable)

Name DAPHNEE SAINVIL

Job Title POLICY ADVISOR

Address 115 S. ANDREWS AVE.
Street

Phone 954-253-7320

FT. LAUDERDALE FL 33301
City *State* *Zip*

Email dsainvil@broward.org

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing BROWARD COUNTY GOVT

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/25/18
Meeting Date

910
Bill Number (if applicable)

Topic ALCOHOL & DRUG RELATED OVERDOSES

Amendment Barcode (if applicable)

Name BILL BUNKLEY

Job Title PRESIDENT

Address PO BOX 341644 Phone 813.264.2977
Street

TAMPA FL 33694 Email
City *State* *Zip*

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Representing FLORIDA ETHICS AND RELIGIOUS LIBERTY COMMISSION

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1-25-18
Meeting Date

90
Bill Number (if applicable)

Topic Alcohol Overdoses

Amendment Barcode (if applicable)

Name Jill Gran

Job Title Sr Policy Advisor

Address 2868 Mahan Dr
Street

Tallahassee FL 32308
City *State* *Zip*

Phone 878 2196

Email jill@myfbha.org

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Behavioral Health Association

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/25/18
Meeting Date

970
Bill Number (if applicable)

Topic Overdose reporting

Amendment Barcode (if applicable)

Name Andy Thomas

Job Title Public Defender, 2nd Judicial Circuit

Address 301 S. Monroe St.
Street

Phone 850 606-1030

Tallahassee FL 32301
City State Zip

Email andy.thomas@flpd2.com

Speaking: ☑ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Public Defender Association

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☐ Yes ☑ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

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 Committee on Judiciary

BILL:	SB 1120
INTRODUCER:	Senator Perry
SUBJECT:	Expert Witnesses
DATE:	January 17, 2018
REVISED:	1/24/18

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Tulloch	Cibula	JU	**Pre-meeting**
2.			CJ	
3.			AP	

I. Summary:

SB 1120 amends several statutory provisions that require a trial court to appoint and pay for one of more expert witnesses out of the state court system's funds. The bill amends 13 separate statutory provisions, 11 of which are substantive, in an effort to clarify who pays the costs or to contain the state court system's costs associated with appointing expert witnesses.

Of the substantive changes, the bill:

- Permits the court to initially appoint only one expert in competency proceedings for adult criminal defendants, for adults who may be incompetent due to intellectual disability or autism, and for juvenile defendants who may be incompetent due to intellectual disability or autism. While the court may still be required to appoint and pay up to three experts, the bill provides that the parties may stipulate to the findings of the initial expert, thereby eliminating the need to appoint more experts.
- Shifts, from county funds to defense funds, the cost of hiring a physician to evaluate defendants who seek to avoid sentencing for cause based on insanity or pregnancy.
- Provides that regardless of indigent status, the court must appoint and pay for two experts to evaluate a capital criminal defendant who seeks to avoid the death penalty due to intellectual disability.
- Provides that in guardianship proceedings and in civil proceedings to determine involuntary commitment of a person to a residential program based on developmental disabilities, the court will pay the statutorily required examining committee consisting of three experts.

II. Present Situation:

Overview of State Court Funding

The judicial branch is governed under article V of the State Constitution. In 1998, section 14 of article V, entitled "Funding," was amended to "substantially and significantly revise[] judicial system funding, greatly reducing funding from local governments and placing the responsibility primarily on the state."[1] As amended, article V, section 14 generally provides that the state court system will be funded as follows:[2]

- Funding for state court systems as well as state attorney's offices, public defender's offices, and court-appointed counsel is generally paid from "state revenues appropriated by general law."[3]
- Funding for circuit and county court clerks' offices is generated from the filing fees, services charges, and costs collected for performing the clerks' court-related functions. However, where the clerks' offices are constitutionally precluded from imposing fees (such as in the case of an indigent criminal defendant), the state must "supplement funding from state revenues appropriated by general law" as determined by the Legislature.[4]
- Generally, funding for the state courts system will *not* be required by a county or municipality.[5] However, the counties are responsible to fund certain types of court infrastructure and maintenance,[6] as well as "reasonable and necessary salaries, costs, and expenses of the state courts system to meet local requirements as determined by general law."[7]

The 1998 amendment to Article V had to be implemented by July 1, 2004.[8] In order to implement the 1998 amendment, the Legislature responded "in stages, beginning with passage of SB 1212 in 2000 (Chapter 200-237, Laws of Florida), followed by additional changes to that law in 2001, and, finally in 2002, through the funding of a study to assist in the final phase of implementation."[9] During the 2003 legislative session, the Legislature implemented the final stage, which included a substantial overhaul of chapter 29, F.S., entitled "Court System Funding."[10]

---

[1] *City of Fort Lauderdale v. Crowder*, 983 So.2d 37, 39 (Fla. 4th DCA 2008) ("In its Statement of Intent, the Constitution Revision Commission explained: 'The state's obligation includes, but is not limited to, funding for all core functions and requirements of the state courts system and all other court-related functions and requirements *which are statewide in nature.*' [e.s.] 26 Fla. Stat. Ann. (Supp.) 67.").

[2] FLA. CONST. art. V, s. 14(d), Fla. Const. ("The judiciary shall have no power to fix appropriations").

[3] FLA. CONST. art. V, s. 14(a).

[4] FLA. CONST. art. V, s. 14(b).

[5] FLA. CONST. art. V. s. 14(c). ("No county or municipality, except as provided in this subsection, shall be required to provide any funding for the state courts system, state attorneys' offices, public defenders' offices, court-appointed counsel or the offices of the clerks of the circuit and county courts for performing court-related functions.").

[6] *Id.* ("Counties shall be required to fund the cost of communications services, existing radio systems, existing multi-agency criminal justice information systems, and the cost of construction or lease, maintenance, utilities, and security of facilities for the trial courts, public defenders' offices, state attorneys' offices, and the offices of the clerks of the circuit and county courts performing court-related functions."). *See also* s. 29.008, F.S. ("county funding of court-related functions").

[7] *Id.*

[8] *Office of State Attorney for Eleventh Judicial Circuit v. Polites*, 904 So. 2d 527, 530 (Fla. 3d DCA 2005).

[9] Florida Staff Analysis, H.B. 113A, 5/14/2003

[10] 2003 Fla. Sess. Law Serv. Ch. 2003-402 (H.B. 113–A). *See also City of Ft. Lauderdale v. Crowder*, 983 So. 2d 37, 39 (Fla. 4th DCA 2008).

State Court Funding of Due Process Costs for Indigent Defendants

Under article V, section 14(c) of the State Constitution and chapter 29, F.S., the circuit and county court clerk's offices are entitled to supplemental funding from state revenues in order to pay the costs of providing constitutionally required representation to indigent[11] defendants in both civil and criminal proceedings, also generally referred to as "due process costs."[12] Under chapter 29, F.S., "due process costs" include the costs of:

- A public defender or a criminal conflict and civil regional counsel attorney ;[13]
- A private court-appointed attorney in case of conflict with the public defender or regional counsel attorney;[14]
- Creating a record (transcripts, depositions, court reporting, and, when necessary, interpreters or translators);[15]
- Securing witnesses, including expert witnesses who "the public defender or regional counsel deem necessary for the performance of his or her duties" [16] or who is approved by the court at the request of a private, court-appointed attorney;[17]
- Mental health professionals appointed under ss. 394.473 and 916.115(2), F.S.;[18]
- Transportation;[19]
- Travel expenses;[20]
- Reasonable library and electronic legal research;[21] and
- Reasonable pretrial consultation fees.[22]

State revenues generally pay for the foregoing due process costs.[23] In cases involving the appointment of a private attorney for an indigent defendant, the body generally responsible for developing contract forms and processing payments for due process costs is the Justice Administrative Commission (JAC).[24] The JAC processes payments for due process costs "in

[11] BLACK'S LAW DICTIONARY (10th ed. 2014) ("indigent" means "**1.** A poor person. **2.** Someone who is found to be financially unable to pay filing fees and court costs and so is allowed to proceed *in forma pauperis*.").
[12] *See* Justice Administrative Commission, *What are Due Process Costs?*, available at https://www.justiceadmin.org/IFC/dueProcess/What%20are%20Due%20Process%20Costs.pdf (last visited January 14, 2018).
[13] Section 29.006(1), F.S.
[14] Section 29.007(1)-(2), F.S.
[15] Sections 29.006(2) and 29.007(3), F.S.
[16] Section 29.006(3), F.S.
[17] Section 29.007(4), F.S.
[18] Sections 29.006(4) and 29.007(5), F.S.
[19] Section 29.006(5), F.S.
[20] Sections 29.006(6) and 29.007(7), F.S.
[21] Section 29.006(7), F.S.
[22] Sections 29.006(8) and 29.007(6), F.S.
[23] Section 29.006, F.S. (providing that enumerated due process costs or "elements" of PD and RCC offices are paid out of state revenues appropriated by general law.
[24] Section 29.007(7), F.S.; s. 43.16(5), F.S.

criminal cases and dependency cases involving [private] court-appointed or indigent for cost[25] counsel or an indigent pro se defendant."[26]

State Court Funding for Court-Appointed Expert Witnesses

A trial court may be statutorily required to appoint an expert witness.[27] Before the implementation of the 1998 amendment to article V, section 14, "the counties paid for the costs of experts appointed by the trial courts out of their own budgets, whether the expert was appointed by the trial court because of a request by an indigent defendant or by the state attorney or by the trial court sua sponte."[28] Under current law, however, a *court-appointed* expert witness is paid "out of state revenues appropriated by general law" when "appointed by the court pursuant to an express grant of statutory authority."[29] As explained in *Office of State Attorney for Eleventh Judicial Circuit v. Polites*,

> [T]he party who requests the appointment of the expert must pay for the expert. It is true that court appointed experts historically have been deemed to be nonpartisan. . . .These court-appointed experts are necessary for the implementation of a fair system. . . . Furthermore, experts who are not requested by either party are supposed to be neutral experts. . . . Consequently, where neither party requests the appointment of a mental health expert, the state court system must pay for that expert. The construction of the statutes in any other manner would violate the doctrine of separation of powers.[30]

Proposed Cost Containment for Court-Appointed Expert Witnesses

In 2015, the Trial Court Budget Commission[31] and the Commission on Trial Court Performance and Accountability[32] formed the Due Process Workgroup to study the increasing costs associated with "due process contractual expenditures" in the state court budget.[33] The Workgroup determined that among the primary items increasing due process costs are the fees paid to expert witnesses, such as mental health professionals and physicians.[34]

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[25] "Indigent for cost" means "[a] person who is eligible to be represented by a public defender under s. 27.51 but who is represented by private counsel not appointed by the court for a reasonable fee as approved by the court or on a pro bono basis, or who is proceeding pro se, may move the court for a determination that he or she is indigent for costs and eligible for the provision of due process services, as prescribed by ss. 29.006 and 29.007, funded by the state." s. 27.52(5), F.S.
[26] *See* Justice Administrative Commission, *Guide to Obtaining Due Process Costs*, p. 4 ("JAC's Role") available at https://www.justiceadmin.org/faq/Training%20Modules/GuidetoDueProcessCosts.pdf (last visited January 14, 2018).
[27] *See, e.g.,* s. 393.11, F.S., (requiring the court to appoint examining committee of at least three experts upon receiving petition for involuntary admission of a person with an intellectual disability or autism into a residential services program).
[28] *Polites*, 904 So. 2d at 530 (noting the Legislature had set aside funds for "due process costs" including court-appointed expert witnesses not requested by the parties).
[29] Section 29.004(6), F.S. *See also id.* at 532.
[30] 904 So. 2d at 532.
[31] Fla. R. Jud. A. 2.230 (establishing the Trial Court Budget Commission for the purpose of developing and overseeing administration of trial court budgets).
[32] Admin. Order No. AOSC16-39 (establishing the Commission on Trial Court Performance and Accountability "to propose policies and procedures on matters related to the efficient and effective functioning of Florida's trial courts").
[33] Florida Supreme Court and State Court Administrators, *White Paper, Judicial Branch 2018 Legislative Agenda*, "Expert Witnesses in Trial Courts," p. 21, (2018) (on filed with Senate Judiciary Committee).
[34] *Id.* at 21-25.

"[I]n order to improve procedures for the appointment and payment of expert witnesses and the containment of due process costs[,]" the Workgroup identified and recommended changes to 13 separate statutory provisions categorized into seven subject areas that are "related to the appointment and payment of expert witnesses in the trial courts."[35] For two of the identified statutory provisions, the changes are technical and consist of conforming cross-references.[36] The other 11 statutory provisions fall within the following seven categories:
(A) Adult Competency (ss. 916.115, 916.12, and 916.17, F.S.).
(B) Forensic Services for Intellectually Disabled or Autistic Defendants (ss. 916.301-304, F.S.).
(C) Sentencing Evaluation (ss. 921.09 and 921.12, F.S.).
(D) Death Penalty – Intellectual Disability (s. 921.137, F.S.).
(E) Juvenile Competency – Mental Illness and Intellectual Disability or Autism (s. 985.19, F.S.).
(F) Developmental Disabilities (s. 393.11, F.S.).
(G) Guardianship Examining Committee (s. 744.331, F.S.).[37]

For ease of comparing present law with the changes proposed by the bill, the categories above will be discussed in more detail in the Effect of Proposed Changes section of this analysis.

III. Effect of Proposed Changes:

Adult Competency (Sections 3-5)

Present Situation:

Section 916.115, F.S., provides for the appointment and payment of pre-trial competency evaluations for adult criminal defendants. The court is only permitted to pay for up to three court-appointed experts and only to the extent the expert is evaluating competency. If the expert is also evaluating the defendant's sanity, the defense is responsible for that portion of the expert's fees. Additionally, the court may only pay an expert whose evaluation and testimony explicitly addresses each of the factors and follows the procedures in chapter 916, F.S., and the Florida Rules of Criminal Procedure.

The requesting party will otherwise pay for the expert's evaluation and testimony as follows:
- The public defender will pay expert fees under section 29.006, F.S.
- The state attorney will pay expert fees under section 29.005, F.S.
- The Justice Administrative Commission will pay fees of experts retained by private court-appointed counsel, indigent pro se defendants (representing self) and partially represented "indigent for cost" defendants.

Section 916.12, F.S., provides criteria a mental health expert must follow in evaluating an adult criminal defendant's competency to stand trial. It also reflects the requirement of s. 916.115, F.S., that at least two experts evaluate the defendant's competency.

[35] *Id.* at 21.
[36] Sections 29.006 and 29.007, F.S.
[37] *See* n. 2, *supra.*

Section 916.17, F.S., generally provides procedures by which a court may approve the conditional release of a criminal defendant to outpatient care in lieu of involuntary commitment. Section 916.17(2), F.S. requires the court to hold a hearing upon the filing of an affidavit or statement that the defendant's conditional release essentially needs be readdressed, during which the court may modify the defendant's release conditions or return the defendant to involuntary custody "after the appointment and report of experts."

Effect of Proposed Changes:

Section 3: The bill eliminates the requirement in **s. 916.115, F.S.**, that the court immediately appoint two mental health experts, providing instead that the court may initially appoint only one mental health expert to conduct the competency evaluation. The parties may then decide whether to stipulate to the single expert's findings. Based on the single expert's findings, the court may:

- Take less restrictive action than commitment; or
- Commit the defendant if the parties also stipulate to commitment.

Otherwise, if the parties do not stipulate to the single expert's findings and commitment, the court must appoint at least one additional expert but no more than two additional experts to evaluate the defendant before committing him or her based on incompetency. Additionally, if the initial single expert finds the defendant competent to proceed, the party disputing the competency finding may request up to two additional evaluations at the party's expense.

The bill adds that the court is authorized to determine and pay reasonable fees for court-appointed expert *testimony*, but that the requesting party (state or defendant) is responsible to pay for party-requested expert *testimony*.

Section 4: To conform to the change above, the bill eliminates the requirement in **s. 916.12(2), F.S.**, that the defendant be evaluated by at least two mental health experts when determining the defendant's competency to stand trial.

Section 5: For **s. 916.17(2)**, **F.S.,** the bill adds that the court must determine and pay reasonable fees for the evaluation and testimony of appointed experts for purposes of clarity and consistency with article V, section 14 of the State Constitution.

Forensic Services for Intellectually Disabled or Autistic Defendants (Sections 6 & 7)

Present Situation:

Section 916.301(2), F.S., provides that when a criminal defendant's competency to proceed is in question based on intellectual disability or autism, the court must:

- Appoint at least one expert to evaluate the defendant, or at a party's request appoint two experts to evaluate the defendant;[38] and
- Appoint both a qualified psychologist and a social service professional with experience in intellectual disability and autism to evaluate the defendant.[39]

[38] Section 916.301(2)(a), F.S.
[39] Section 916.301(2)(b), F.S.

Section 916.301(4), F.S., provides that the court shall pay the foregoing experts a reasonable fee for serving as an evaluator and witness so long as the experts' reports and testimonies "explicitly address each of the factors and follow the procedures set out in [chapter 916, F.S.,] and in the Florida Rules of Criminal Procedure."

Section 916.304, F.S., concerns the conditional release of a criminal defendant to a training program when found to be incompetent by virtue of intellectual disability or autism. Section 916.304(2), F.S. requires the court to hold a hearing upon the filing of an affidavit or statement that the defendant's conditional release essentially needs be readdressed, during which the court may order placement of the defendant into a more appropriate release program "after the appointment and report of experts."

Effect of Proposed Changes:

Section 6: The bill eliminates the requirement in **s. 916.301(4), F.S.**, that the court initially appoint at least one expert to evaluate the defendant, or at a party's request appoint two experts to evaluate the defendant, in addition to a psychologist and social services worker. Rather, the bill permits the court to appoint up to two experts at the party's request if the parties do not stipulate to the psychologist and social worker's findings of incompetence. Regarding payment, the bill authorizes the court to pay the first additional expert and requires the requesting party to pay for any other additional experts.

Section 7: For **s. 916.304(2)**, **F.S.,** the bill adds that the court must determine and pay reasonable fees for the evaluation and testimony of appointed experts for purposes of clarity and consistency with article V, section 14 of the State Constitution.

Sentencing Evaluation (Sections 8 &9)

Present Situation:

Sections 921.09 and 921.12, F.S., pertain to two types of convicted criminal defendants, respectively, claiming cause to not be sentenced: (1) a defendant alleging insanity at the time of sentencing, and (2) a defendant alleging pregnancy at the time of sentencing. For both, the court is required to appoint a physician to examine the defendant.[40] The court is also required to "allow" the examining physician a reasonable fee, which will be paid "by the county in which the indictment was found or the information or affidavit filed."[41]

Effect of Proposed Changes:

Sections 8 and 9: The bill substantially alters **ss. 921.09 and 921.12, F.S.**, to provide that a convicted defendant claiming insanity or claiming pregnancy as cause not to be sentenced, respectively, may be examined by one or more physicians at the defendant's own expense.

However, for indigent defendants, it appears that the cost of a physician will still be covered by state revenues, paid by either "the public defender or regional counsel" who deems the physician

[40] Sections 921.09 and 921.12, F.S.
[41] *Id.*

"necessary for the performance of his or her duties," [42] or by the Justice Administrative Commission when the court approves the request for a physician by a private, court-appointed attorney,[43] by an indigent-for-cost defendant, or by an indigent pro se defendant.[44]

Death Penalty – Intellectual Disability (Section 10)

Present Situation:

Section 921.137, F.S., requires that a defendant in a death penalty case provide notice that he or she intends to claim during the penalty phase that imposition of the death penalty is barred due to his or her intellectual disability.[45] If the defendant provides notice, is convicted of a capital felony, and receives a death sentence recommendation by an advisory jury, the defendant may file a motion to determine if he or she is intellectually disabled prior to the final sentencing hearing.[46] Upon receiving the motion, the court must appoint two experts in the field of intellectual disabilities, who, in turn, must evaluate the defendant and "report their findings prior to the final sentencing hearing."[47]

Effect of Proposed Changes:

Section 10: The bill amends **s. 921.137, F.S.**, to add that the court must determine and pay reasonable fees to the experts for their evaluations and testimonies concerning the defendant's intellectual disability regardless of whether the defendant is indigent.

Juvenile Competency – Mental Illness and Intellectual Disability or Autism (Section 11)

Present Situation:

Section 985.19, F.S., pertains to juvenile delinquency proceedings and provides that if the court has reason to believe the child is incompetent to proceed, the court on its own motion or by motion of one of the parties must stay all proceedings and order an evaluation of the child's mental condition.[48] In evaluating the child's mental health, the court is required to base its competency findings on "not less than two nor more than three" mental health experts, each of which are must make a recommendation concerning whether residential or nonresidential treatment should be required. [49] Each expert is also "allowed reasonable fees for services rendered."[50]

When the potential source of the child's incompetency is related to an intellectual disability or autism, the court must order the Agency for Persons with Disabilities to examine the child.[51]

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[42] Section 29.006(3), F.S.
[43] Section 29.007(4), F.S.
[44] Section 27.52(5), F.S. *See also* n. 25, *supra*.
[45] Section 921.137(1)-(3), F.S.
[46] Section 921.137(4), F.S.
[47] *Id*.
[48] Section 985.19(1), F.S.
[49] Section 985.19(1)(b), F.S.
[50] *Id*.
[51] Section 985.19(1)(e), F.S.

Section 985.19(7), F.S., also states that it will be implemented "only subject to specific appropriation."

Effect of Proposed Changes:

Section 11: The bill eliminates the requirement in **section 985.19, F.S.**, that the court immediately appoint two mental health experts providing instead that the court may initially appoint only one mental health expert to conduct the evaluation. The parties may then decide whether to stipulate to the single expert's findings. Based on the single expert's findings, the court may:

- Take less restrictive action than commitment; or
- Commit the child if the parties also stipulate to commitment.

Otherwise, if the parties' do not stipulate to commitment, the court must appoint at least two and no more than three experts to evaluate the child before committing the child.

The bill also requires the court to determine and pay a reasonable fee to the experts for their evaluation and testimony rather than "allow" a reasonable fee. It appears the court will have greater control over determining an expert's fee rather than simply approving a fee request.

The bill also changes the requirement that the court order the Agency for Persons with Disabilities to directly evaluate a child with intellectual disabilities or autism, to requiring the court to order the Agency to select an expert to conduct the same evaluation.

The bill also the strikes the specific appropriation provision.

Developmental Disabilities (Section 1)

Present Situation:

Section 393.11, F.S., sets out the procedure for petitioning the court for the involuntary admission of a person with an intellectual disability or autism into a residential services program. Upon receiving a petition, a court must immediately appoint an examining committee consisting of "at least three disinterested experts" with expertise in the intellectual disabilities or autism to examine the person: one physician, one psychologist, and on professional with a master's degree in social work, special education, or vacation rehabilitation counseling.[52] The examining committee must prepare a report to submit to the court.[53]

The examining committee members are entitled to a reasonable fee. The fee is determined by the court but paid from the county's general revenue fund.[54]

Effect of Proposed Changes:

Section 1: The bill amends **s. 393.11, F.S.**, to provide that examining committee member fees will be paid by the court instead of the county's general revenue fund.

[52] Section 393.11(5)(a)-(b), F.S.
[53] Section 393.11(5)(e)-(f), F.S.
[54] Section 393.11(5)(g), F.S.

Guardianship Examining Committee (Section 2)

Present Situation:

Section 744.331, F.S., sets out the procedures to petition to determine incapacity and appoint a guardian. Within five days after a petition is filed, the court must appoint a three-member examining committee consisting of one psychiatrist, one physician, and a third person (another psychiatrist, nurse, social worker, etc.) with appropriate training and expertise;[55] and at least one member must "have knowledge of the type of incapacity alleged in the petition."[56] Each committee member must conduct a comprehensive examination of the allegedly incapacitated person and file a report for the court's consideration.[57] If the court finds the allegedly incapacitated person is incapacitated, the court will appoint a guardian.[58]

The members of the examining committee are entitled to reasonable fees.[59] The fees are either paid by the guardian out of the ward's property, or by the state for an indigent ward. If paid by the state, the state retains a creditor's claim against the guardianship property.[60]

Effect of Proposed Changes:

Section 2: The bill amends **s. 744.331, F.S.**, to provide that the court rather that the state will pay the fees to the members of the examining committee. However, the bill retains the language that the state will retain a creditor's claim for "any amounts paid under this section."[61]

Sections 29.006 and 29.007, F.S.

Present Situation:

As stated in the overview, ss. 29.006 and 29.007, F.S., provide the "due process costs" that must be paid on behalf of indigent defendants.[62]

Effect of Proposed Changes:

Sections 12 and 13 makes technical, conforming changes to ss. 29.006 and 29.007, F.S.

Effective Date

Section 14 provides the bill will take effect July 1, 2018.

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[55] Section 744.331(3)(a), F.S. ("The remaining members must be either a psychologist, gerontologist, another psychiatrist, or other physician, a registered nurse, nurse practitioner, licensed social worker, a person with an advanced degree in gerontology from an accredited institution of higher education, or other person who by knowledge, skill, experience, training, or education may, in the court's discretion, advise the court in the form of an expert opinion.").
[56] *Id.*
[57] Section 744.331(3)(e)-(g), F.S.
[58] Section 744.331(6), F.S.
[59] Section 744.331(7)(a), F.S.
[60] Section 744.331(7)(b), F.S.
[61] *Id.*
[62] *See* n. 11-24, *supra*.

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 bill will likely impact convicted, non-indigent criminal defendants seeking to avoid sentencing due to insanity or pregnancy by requiring the defendant to pay for a physician.

All the other provisions of the bill appear to have little fiscal impact. While the bill requires that the court initially appoint only one rather than two mental health experts to evaluate a defendant or child's competency to proceed, generally, the bill maintains the court's authority to appoint and pay for up to three mental health experts if the parties do not stipulate to the initial expert's findings.

C. Government Sector Impact:

The bill implements several cost containment measures that the Trial Court Budget Commission believes will have some impact in reducing the state court system's due process costs for expert witnesses.[63] As already noted under the private sector impact, *supra*, the bill shifts the costs of a medical expert's opinion to a convicted, *non-indigent* criminal defendant seeking to avoid sentencing due to insanity or pregnancy. The bill also requires that trial courts initially appoint one rather than two mental health expert to criminal defendants or children when competency is an issue. If the parties stipulate to the findings of the one mental health expert, the courts will not have to appoint and pay another expert, thereby saving costs.

The Justice Administrative Commission notes that the bill will have limited policy impact and indeterminate fiscal impact.[64]

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[63] *See* n. 31, *supra*.
[64] Justice Administrative Commission, *Agency Analysis for HB 1063* (similar bill), January 12, 2018.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends sections 29.006, 29.007, 393.11, 744.331, 916.115, 916.12, 916.17, 916.301, 916.304, 921.09, 921.12, 921.137, and 985.19 of the Florida Statues.

IX. Additional Information:

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

None.

B. Amendments:

None.

By Senator Perry

8-01041A-18 20181120__

A bill to be entitled

An act relating to expert witnesses; amending s. 393.11, F.S.; requiring a court to pay reasonable fees to members of an examining committee for their evaluation and testimony regarding persons with disabilities; deleting a provision specifying the source of the fees to be paid; amending s. 744.331, F.S.; requiring a court, rather than the state, to pay certain fees if a ward is indigent; amending s. 916.115, F.S.; authorizing a court to initially appoint one expert under certain circumstances; authorizing a court to take less restrictive action than commitment if an expert finds a defendant incompetent; requiring that a defendant be evaluated by no fewer than two experts before a court commits the defendant; providing an exception; authorizing a court to pay for up to two additional experts appointed by the court under certain circumstances; requiring a court to pay for the first, rather than any, expert that it appoints under certain circumstances; authorizing a party disputing a determination of competence to request up to two additional expert evaluations at that party's expense; providing for payments to experts for their testimony under certain circumstances; amending s. 916.12, F.S.; deleting provisions relating to the evaluation and commitment of a defendant under certain circumstances; amending s. 916.17, F.S.; requiring the court to pay for the evaluation and testimony of an expert for a

8-01041A-18 20181120__

defendant on conditional release under certain circumstances; amending s. 916.301, F.S.; authorizing, rather than requiring, a court to appoint up to two additional experts to evaluate a defendant suspected of having an intellectual disability or autism under certain circumstances; providing for the payment of additional experts under certain circumstances; amending s. 916.304, F.S.; requiring the court to pay for the evaluation and testimony of an expert for a defendant on conditional release under certain circumstances; amending s. 921.09, F.S.; authorizing a defendant who has alleged insanity to retain, at the defense's expense rather than the county's, one or more physicians for certain purposes; deleting a provision requiring fees to be paid by the county; amending s. 921.12, F.S.; authorizing a defendant who has an alleged pregnancy to retain, at the defense's expense rather than the county's, one or more physicians for certain purposes; amending s. 921.137, F.S.; requiring the court to pay for the evaluation and testimony of an expert for a defendant who raises intellectual disability as a bar to a death sentence under certain circumstances; amending s. 985.19, F.S.; authorizing a court to initially appoint one expert to evaluate a child's mental condition, pending certain determinations; authorizing a court to take less restrictive action than commitment if an expert finds a child incompetent; requiring that a child be evaluated by no fewer than two experts before a court

commits the child; providing an exception; authorizing a court to appoint up to two additional experts under certain circumstances; authorizing a court to require a hearing with certain testimony before ordering the commitment of a child; requiring the court to pay reasonable fees to the experts for their evaluations and testimony; requiring a court to order the Agency for Persons with Disabilities to select an expert to examine a child for intellectual disability or autism; deleting a provision requiring a specific appropriation before the implementation of specified provisions; amending ss. 29.006 and 29.007, F.S.; conforming cross-references; providing an effective date.

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

Section 1. Paragraph (g) of subsection (5) of section 393.11, Florida Statutes, is amended to read:

393.11 Involuntary admission to residential services.—

(5) EXAMINING COMMITTEE.—

(g) The court ~~Members of the examining committee~~ shall pay ~~receive a~~ reasonable fees, as ~~fee to be~~ determined by the court, for the evaluation and testimony by members of the examining committee. ~~The fees shall be paid from the general revenue fund of the county in which the person who has the intellectual disability or autism resided when the petition was filed.~~

Section 2. Paragraph (b) of subsection (7) of section 744.331, Florida Statutes, is amended, and paragraph (a) of that

subsection is republished, to read:

744.331 Procedures to determine incapacity.—

(7) FEES.—

(a) The examining committee and any attorney appointed under subsection (2) are entitled to reasonable fees to be determined by the court.

(b) The fees awarded under paragraph (a) shall be paid by the guardian from the property of the ward or, if the ward is indigent, by the court ~~state~~. The state shall have a creditor's claim against the guardianship property for any amounts paid under this section. The state may file its claim within 90 days after the entry of an order awarding attorney ad litem fees. If the state does not file its claim within the 90-day period, the state is thereafter barred from asserting the claim. Upon petition by the state for payment of the claim, the court shall enter an order authorizing immediate payment out of the property of the ward. The state shall keep a record of the payments.

Section 3. Section 916.115, Florida Statutes, is amended to read:

916.115 Appointment of experts.—

(1) The court shall appoint no more than three experts to determine the mental condition of a defendant in a criminal case, including competency to proceed, insanity, involuntary placement, and treatment. The court may initially appoint one expert for the evaluation, pending a determination of the defendant's competency and the parties' positions on stipulating to the findings. The experts may evaluate the defendant in jail or in another appropriate local facility or in a facility of the Department of Corrections.

(a) To the extent possible, the appointed experts shall have completed forensic evaluator training approved by the department, and each shall be a psychiatrist, licensed psychologist, or physician.

(b) The department shall maintain and annually provide the courts with a list of available mental health professionals who have completed the approved training as experts.

(2) The court may take less restrictive action than commitment authorized by this chapter or the Florida Rules of Criminal Procedure if an expert determines that the defendant is incompetent to proceed. A defendant must be evaluated by no fewer than two experts before the court commits the defendant; however, the court may commit the defendant without further evaluation or hearing if one expert finds that the defendant is incompetent to proceed and the parties stipulate to that finding. If the parties do not stipulate to the finding of the expert that the defendant is incompetent, the court may appoint no more than two additional experts to evaluate the defendant. Notwithstanding any stipulation by the parties, the court may require a hearing with testimony from the experts before ordering the commitment of a defendant.

(3)(a) ~~(2)~~ The court shall pay for the first ~~any~~ expert that it appoints by court order, upon motion of counsel for the defendant or the state or upon its own motion, and up to two additional experts appointed by the court when the defendant is found incompetent and the parties do not stipulate to the findings.

(b) If the defense or the state retains an expert and waives the confidentiality of the expert's report, the court may

pay for no more than two additional experts appointed by court order.

(c) If a first evaluation determines the defendant is competent to proceed and a party disputes the findings, the party disputing the determination may request up to two additional experts to perform evaluations at the party's expense.

(d) If an expert appointed by the court upon motion of counsel for the defendant specifically to evaluate the competence of the defendant to proceed also addresses issues related to sanity as an affirmative defense, the court shall pay only for that portion of the expert's fees relating to the evaluation on competency to proceed, and the balance of the fees shall be chargeable to the defense.

(e) If testimony from an expert is ordered by the court, the court shall pay reasonable fees, as determined by the court, to the expert. Testimony requested by the state or the defendant shall be paid by the requesting party.

(f) ~~(a)~~ Pursuant to s. 29.006, the office of the public defender shall pay for any expert retained by the office.

(g) ~~(b)~~ Pursuant to s. 29.005, the office of the state attorney shall pay for any expert retained by the office and for any expert whom the office retains and whom the office moves the court to appoint in order to ensure that the expert has access to the defendant.

(h) ~~(c)~~ An expert retained by the defendant who is represented by private counsel appointed under s. 27.5303 shall be paid by the Justice Administrative Commission.

(i) ~~(d)~~ An expert retained by a defendant who is indigent

for costs as determined by the court and who is represented by private counsel, other than private counsel appointed under s. 27.5303, on a fee or pro bono basis, or who is representing himself or herself, shall be paid by the Justice Administrative Commission from funds specifically appropriated for these expenses.

(j) ~~(e)~~ State employees shall be reimbursed for expenses pursuant to s. 112.061.

(k) ~~(f)~~ The fees shall be taxed as costs in the case.

(l) ~~(g)~~ In order for an expert to be paid for the services rendered, the expert's report and testimony must explicitly address each of the factors and follow the procedures set out in this chapter and in the Florida Rules of Criminal Procedure.

Section 4. Subsection (2) of section 916.12, Florida Statutes, is amended, and subsection (1) of that section is republished, to read:

916.12 Mental competence to proceed.—

(1) A defendant is incompetent to proceed within the meaning of this chapter if the defendant does not have sufficient present ability to consult with her or his lawyer with a reasonable degree of rational understanding or if the defendant has no rational, as well as factual, understanding of the proceedings against her or him.

(2) Mental health experts appointed pursuant to s. 916.115 shall first determine whether the defendant has a mental illness and, if so, consider the factors related to the issue of whether the defendant meets the criteria for competence to proceed as described in subsection (1). ~~A defendant must be evaluated by no fewer than two experts before the court commits the defendant or~~

~~takes other action authorized by this chapter or the Florida Rules of Criminal Procedure, except if one expert finds that the defendant is incompetent to proceed and the parties stipulate to that finding, the court may commit the defendant or take other action authorized by this chapter or the rules without further evaluation or hearing, or the court may appoint no more than two additional experts to evaluate the defendant. Notwithstanding any stipulation by the state and the defendant, the court may require a hearing with testimony from the expert or experts before ordering the commitment of a defendant.~~

Section 5. Subsection (2) of section 916.17, Florida Statutes, is amended to read:

916.17 Conditional release.—

(2) Upon the filing of an affidavit or statement under oath by any person that the defendant has failed to comply with the conditions of release, that the defendant's condition has deteriorated to the point that inpatient care is required, or that the release conditions should be modified, the court shall hold a hearing within 7 days after receipt of the affidavit or statement under oath. After the hearing, the court may modify the release conditions. The court may also order that the defendant be returned to the department if it is found, after the appointment and report of experts, that the person meets the criteria for involuntary commitment under s. 916.13 or s. 916.15. The court shall pay reasonable fees, as determined by the court, for the evaluation and testimony of the expert.

Section 6. Subsection (2) of section 916.301, Florida Statutes, is amended to read:

916.301 Appointment of experts.—

(2) If a defendant's suspected mental condition is intellectual disability or autism, the court ~~shall appoint the following~~:

(a) ~~At least one, or at the request of any party, two experts to evaluate whether the defendant meets the definition of intellectual disability or autism and, if so, whether the defendant is competent to proceed; and~~

~~(b)~~ Shall appoint a psychologist selected by the agency who is licensed or authorized by law to practice in this state, with experience in evaluating persons suspected of having an intellectual disability or autism, and a social service professional, with experience in working with persons who have an intellectual disability or autism.

1. The psychologist shall evaluate whether the defendant meets the definition of intellectual disability or autism and, if so, whether the defendant is incompetent to proceed due to intellectual disability or autism.

2. The social service professional shall provide a social and developmental history of the defendant; and

(b) May, at the request of any party that does not stipulate to findings of incompetence, appoint up to two additional experts to evaluate whether the defendant meets the definition of intellectual disability or autism and, if so, whether the defendant is competent to proceed. The first additional expert shall be paid by the court and the second additional expert shall be paid by the requesting party. However, if the first evaluation determines the defendant is competent to proceed and a party disputes the findings, that party may request up to two additional experts to perform

evaluations at the party's expense.

Section 7. Subsection (2) of section 916.304, Florida Statutes, is amended to read:

916.304 Conditional release.—

(2) Upon the filing of an affidavit or statement under oath by any person that the defendant has failed to comply with the conditions of release, that the defendant's condition has deteriorated, or that the release conditions should be modified, the court shall hold a hearing within 7 days after receipt of the affidavit or statement under oath. With notice to the court and all parties, the agency may detain a defendant in a forensic facility until the hearing occurs. After the hearing, the court may modify the release conditions. The court may also order that the defendant be placed into more appropriate programs for further training or may order the defendant to be committed to a forensic facility if it is found, after the appointment and report of experts, that the defendant meets the criteria for placement in a forensic facility. The court shall pay reasonable fees, as determined by the court, for the evaluation and testimony of the expert.

Section 8. Section 921.09, Florida Statutes, is amended to read:

921.09 Fees of physicians who determine sanity at time of sentence. ~~The court shall allow reasonable fees to physicians appointed by the court to determine the mental condition of~~ A defendant who has alleged insanity as a cause for not pronouncing sentence may, at the defense's expense, retain one or more physicians to determine the mental condition of the defendant. ~~The fees shall be paid by the county in which the~~

~~indictment was found or the information or affidavit filed.~~

Section 9. Section 921.12, Florida Statutes, is amended to read:

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence. ~~The court shall allow reasonable fees to the physicians appointed to examine~~ A defendant who has alleged her pregnancy as a cause for not pronouncing sentence may, at the defense's expense, retain one or more physicians to examine the defendant. ~~The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.~~

Section 10. Subsection (4) of section 921.137, Florida Statutes, is amended to read:

921.137 Imposition of the death sentence upon an intellectually disabled defendant prohibited.—

(4) After a defendant who has given notice of his or her intention to raise intellectual disability as a bar to the death sentence is convicted of a capital felony and an advisory jury has returned a recommended sentence of death, the defendant may file a motion to determine whether the defendant is intellectually disabled. Upon receipt of the motion, the court shall appoint two experts in the field of intellectual disabilities who shall evaluate the defendant and report their findings to the court and all interested parties before ~~prior to~~ the final sentencing hearing. The court shall pay reasonable fees, as determined by the court, for the evaluation and testimony of the expert regardless of whether the defendant is indigent. Notwithstanding s. 921.141 or s. 921.142, the final sentencing hearing shall be held without a jury. At the final

sentencing hearing, the court shall consider the findings of the court-appointed experts and consider the findings of any other expert which is offered by the state or the defense on the issue of whether the defendant has an intellectual disability. If the court finds, by clear and convincing evidence, that the defendant has an intellectual disability as defined in subsection (1), the court may not impose a sentence of death and shall enter a written order that sets forth with specificity the findings in support of the determination.

Section 11. Paragraphs (b) and (e) of subsection (1) and subsection (7) of section 985.19, Florida Statutes, are amended to read:

985.19 Incompetency in juvenile delinquency cases.—

(1) If, at any time prior to or during a delinquency case, the court has reason to believe that the child named in the petition may be incompetent to proceed with the hearing, the court on its own motion may, or on the motion of the child's attorney or state attorney must, stay all proceedings and order an evaluation of the child's mental condition.

(b) All determinations of competency shall be made at a hearing, with findings of fact based on an evaluation of the child's mental condition made by no ~~not less than two nor~~ more than three experts appointed by the court. The court may initially appoint one expert for the evaluation, pending a determination of the child's competency and the parties' positions on stipulating to the findings. The basis for the determination of incompetency must be specifically stated in the evaluation. In addition, a recommendation as to whether residential or nonresidential treatment or training is required

must be included in the evaluation. The court may take less restrictive action than commitment authorized by this chapter or the Florida Rules of Juvenile Procedure based on the determination by one expert that the child is incompetent to proceed. A child must be evaluated by no fewer than two experts before the court commits the child; however, the court may commit the child without further evaluation or hearing if one expert finds that the child is incompetent to proceed and the parties stipulate to that finding. If the parties do not stipulate to the finding of the expert that the child is incompetent, the court may appoint no more than two additional experts to evaluate the child. Notwithstanding any stipulation by the parties, the court may require a hearing with testimony from one or more experts before ordering the commitment of a child. ~~Experts appointed by~~ The court ~~to determine the mental condition of a child~~ shall pay ~~be allowed~~ reasonable fees, as determined by the court, for the evaluation and testimony provided by the experts ~~services rendered~~. State employees may be paid expenses pursuant to s. 112.061. The fees shall be taxed as costs in the case.

(e) For incompetency evaluations related to intellectual disability or autism, the court shall order the Agency for Persons with Disabilities to select the expert to examine the child to determine if the child meets the definition of "intellectual disability" or "autism" in s. 393.063 and, if so, whether the child is competent to proceed with delinquency proceedings.

~~(7) The provisions of this section shall be implemented only subject to specific appropriation.~~

Section 12. Subsection (4) of section 29.006, Florida Statutes, is amended to read:

29.006 Indigent defense costs.—For purposes of implementing s. 14, Art. V of the State Constitution, the elements of the public defenders' offices and criminal conflict and civil regional counsel offices to be provided from state revenues appropriated by general law are as follows:

(4) Mental health professionals appointed pursuant to s. 394.473 and required in a court hearing involving an indigent, and mental health professionals appointed pursuant to s. 916.115(3) ~~s. 916.115(2)~~ and required in a court hearing involving an indigent.

Section 13. Subsection (5) of section 29.007, Florida Statutes, is amended to read:

29.007 Court-appointed counsel.—For purposes of implementing s. 14, Art. V of the State Constitution, the elements of court-appointed counsel to be provided from state revenues appropriated by general law are as follows:

(5) Mental health professionals appointed pursuant to s. 394.473 and required in a court hearing involving an indigent, mental health professionals appointed pursuant to s. 916.115(3) ~~s. 916.115(2)~~ and required in a court hearing involving an indigent, and any other mental health professionals required by law for the full adjudication of any civil case involving an indigent person.

Subsections (3), (4), (5), (6), and (7) apply when court-appointed counsel is appointed; when the court determines that the litigant is indigent for costs; or when the litigant is

acting pro se and the court determines that the litigant is indigent for costs at the trial or appellate level. This section applies in any situation in which the court appoints counsel to protect a litigant's due process rights. The Justice Administrative Commission shall approve uniform contract forms for use in processing payments for due process services under this section. In each case in which a private attorney represents a person determined by the court to be indigent for costs, the attorney shall execute the commission's contract for private attorneys representing persons determined to be indigent for costs.

Section 14. This act shall take effect July 1, 2018.

The Florida Senate

Committee Agenda Request

To: Senator Greg Steube, Chair
Committee on Judiciary

Subject: Committee Agenda Request

Date: December 18, 2017

I respectfully request that **Senate Bill #1120**, relating to Expert Witnesses, be placed on the:

☒ committee agenda at your earliest possible convenience.

☐ next committee agenda.

W. Keith Perry

Senator Keith Perry
Florida Senate, District 8

File signed original with committee office

S-020 (03/2004)

Duplicate

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/25/18
Meeting Date

1120
Bill Number (if applicable)

Amendment Barcode (if applicable)

Topic Expert Witnesses

Name Andy Thomas

Job Title Public Defender, 2d Circuit

Address 301 N. Monroe St. Ste 401
Street

Tallahassee FL 32301
City *State* *Zip*

Phone (850) 606-1014

Email andy.thomas@flpd2.com

Speaking: ☐ For ☐ Against ☒ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Public Defender Association

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

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 Committee on Judiciary

BILL:	CS/SB 1412
INTRODUCER:	Judiciary Committee and Senator Simmons
SUBJECT:	Office of the Judges of Compensation Claims
DATE:	January 26, 2018 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	**Fav/CS**
2.			AGG	
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1412 requires that the judges of compensation claims be paid "a salary equal to that of a county court judge," which is currently $27,527.80 higher than the salary of a judge of compensation claims. County court judges are currently paid $151,822 per year. The salary of the Deputy Chief Judge of Compensation Claims, however, is set by the bill at $1,000 more than that of a county court judge. Accordingly, if the salary of the county court judges rises or falls, so will that of the judges of compensation claims.

II. Present Situation:

The judges of compensation claims have exclusive jurisdiction over workers' compensation cases.[1] When an employer disputes an employee's claim for workers' compensation, the employee may initiate litigation of the matter by filing a petition with the Office of the Judges of Compensation Claims (OJCC). Even after a petition is filed, a workers' compensation dispute may be resolved through mediation[2] or arbitration.[3] But, when necessary, a judge of compensation claims may hold a hearing to resolve the matter.[4] Upon the conclusion of the

[1] *See Sanders v. City of Orlando*, 997 So. 2d 1089, 1094 (Fla. 2008).
[2] *See* s. 440.25, F.S.
[3] *See* s. 440.1926, F.S.
[4] *See* s. 440.25(4), F.S.

hearing, the judge's order may be appealed to the First District Court of Appeal, which has sole appellate jurisdiction.[5]
The OJCC is headed by the Deputy Chief Judge, who reports to the director and Chief Judge of the Division of Administrative Hearings (DOAH). The DOAH Chief Judge acts as the OJCC's "agency head for all purposes."[6]

Judges of compensation claims are nominated by a statewide nominating commission and appointed by the Governor to a 4-year term. The Governor may re-appoint a judge to successive 4-year terms and may remove a judge for cause during any term.[7]

Judges of compensation claims are paid $124,564.20 per year, except the Deputy Chief Judge, who is paid $127,422.12 per year.[8]

These salaries are roughly equivalent to those of administrative law judges (ALJs), who preside at the DOAH. The standard ALJ salary is $123,070 per year, while Senior ALJs are paid $124,320 per year and the Deputy Chief ALJ is paid $125,820 per year. The Chief Judge determines these salaries, except for his own, which is $131,409.36 and was set by the Florida Cabinet upon his hiring.[9]

Until January 1, 1994, the salary of the judges of compensation claims was linked to the salary of Circuit Court judges, who are now paid $160,688.04 annually.[10] But since 1994, the salary of judges of compensation claims has increased only when the Legislature has appropriated general state-employee salary increases. The salaries and other expenses of the OJCC are paid from the Workers' Compensation Administration Trust Fund.[11]

III. Effect of Proposed Changes:

The bill requires that the judges of compensation claims be paid "a salary equal to that of a county court judge," which is currently $27,527.80 higher than the salary of a judge of compensation claims. County court judges are currently paid $151,822 per year. The salary of the Deputy Chief Judge of Compensation Claims, however, is set by the bill at $1,000 more than that of a county court judge. Accordingly, if the salary of the county court judges rises or falls, so will that of the judges of compensation claims.

The bill does not appear to affect the salary of the Chief Judge of the Division of Administrative Hearings. Though the Chief Judge serves as the "agency head" of the OJCC, he is not listed as a judge of compensation claims on the OJCC's website, nor does the statutory description of his

[5] Section 440.271, F.S.
[6] Section 440.45(1)(a), F.S. DOAH and the OJCC exist within the Department of Management Services, but the department may not direct DOAH or the OJCC in any way. Instead the department must "provide administrative support and service to the office to the extent requested by the director of the Division of Administrative Hearings." Section 440.45(1)(a), F.S.
[7] *Id.*
[8] Div. of Admin. Hearings, *Analysis of Senate Bill 1412* (Jan. 4, 2018) (on file with the Senate Committee on Judiciary).
[9] Conversation with Cindy Ardoin, Budget Officer, Florida Division of Administrative Hearings (Jan. 22, 2018).
[10] Ch. 2017-88, s. 17, Laws of Fla.
[11] Div. of Admin. Hearings, *Analysis of Senate Bill 1412* (Jan. 4, 2018) (on file with the Senate Committee on Judiciary).

position include service as a JCC.[12] Under the bill, the salary of the current DOAH Chief Judge will be approximately $7,500 less than that of the Deputy Chief Judge of Compensation Claims.

The bill takes effect July 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

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:

According the Division of Administrative Hearings, increasing the salaries of the judges of compensation claims will increase expenditures from the Workers' Compensation Administration Trust Fund by $539,742 for each of the next 3 fiscal years.[13]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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[12] Office of the Judges of Compensation Claims, *Judges of Compensation Claims*, https://www.jcc.state.fl.us/JCC/judges/ (last visited Jan. 22, 2018).
[13] Div. of Admin. Hearings, *Analysis of Senate Bill 1412* (Jan. 4, 2018) (on file with the Senate Committee on Judiciary).

VIII. Statutes Affected:

This bill substantially amends section 440.45 of the Florida Statutes.

IX. Additional Information:

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

CS by Judiciary on January 25, 2018:
The committee substitute removed the provision of the bill that would have increased the initial term of a judge of compensation claims to 6 years, which is 2 more than under current law.

B. Amendments:

None.

783328

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
01/25/2018	.	
	.	
	.	
	.	

The Committee on Judiciary (Simmons) recommended the following:

Senate Amendment (with directory and title amendments)

Delete lines 19 - 44.

====== D I R E C T O R Y C L A U S E A M E N D M E N T ======
And the directory clause is amended as follows:
Delete lines 14 - 16
and insert:
Section 1. Paragraph (f) is added to subsection (2) of section 440.45, Florida Statutes, to read:

783328

12 ================= T I T L E A M E N D M E N T ================
13 And the title is amended as follows:
14 Delete lines 4 - 6
15 and insert:
16 specifying the

By Senator Simmons

9-01212-18 20181412__

A bill to be entitled

An act relating to the Office of the Judges of Compensation Claims; amending s. 440.45, F.S.; revising the duration of the initial term of a judge of compensation claims; specifying the duration of each subsequent term of appointment; specifying the salaries of full-time judges of compensation claims and the Deputy Chief Judge; requiring salaries to be paid out of the Workers' Compensation Administration Trust Fund; providing an effective date.

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

Section 1. Paragraph (c) of subsection (2) of section 440.45, Florida Statutes, is amended, and paragraph (f) is added to that subsection, to read:

440.45 Office of the Judges of Compensation Claims.—

(2)

(c) Each judge of compensation claims shall be appointed for a term of 6 ~~4~~ years, with each subsequent term of appointment being for a term of 4 years. A judge of compensation claims, ~~but~~ during the term of office, may be removed by the Governor for cause. Before ~~Prior to~~ the expiration of a judge's term of office, the statewide nominating commission shall review the judge's conduct and determine whether the judge's performance is satisfactory. Effective July 1, 2002, in determining whether a judge's performance is satisfactory, the commission shall consider the extent to which the judge has met the requirements of this chapter, including, but not limited to,

Florida Senate - 2018 **SB 1412**

9-01212-18 20181412__

the requirements of ss. 440.25(1) and (4)(a)-(e), 440.34(2), and 440.442. If the judge's performance is deemed satisfactory, the commission shall report its finding to the Governor no later than 6 months before ~~prior to~~ the expiration of the judge's term of office. The Governor shall review the commission's report and may reappoint the judge for an additional 4-year term. If the Governor does not reappoint the judge, the Governor shall inform the commission. The judge shall remain in office until the Governor has appointed a successor judge in accordance with paragraphs (a) and (b). If a vacancy occurs during a judge's unexpired term, the statewide nominating commission does not find the judge's performance is satisfactory, or the Governor does not reappoint the judge, the Governor shall appoint a successor judge for a term of 4 years in accordance with paragraph (b).

(f) All full-time judges of compensation claims shall receive a salary equal to that of a county court judge. The Deputy Chief Judge shall receive a salary of $1,000 more per year than the salary paid to a full-time judge of compensation claims. The salaries for the judges of compensation claims must be paid out of the Workers' Compensation Administration Trust Fund established under s. 440.50.

Section 2. This act shall take effect July 1, 2018.

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

The Florida Senate

Committee Agenda Request

To: Senator Greg Steube, Chair
Committee on Judiciary

Subject: Committee Agenda Request

Date: January 16, 2018

I respectfully request that **Senate Bill 1412**, relating to Office of the Judges of Compensation Claims, be placed on the:

☐ committee agenda at your earliest possible convenience.

☒ next committee agenda.

Senator David Simmons
Florida Senate, District 9

File signed original with committee office

S-020 (03/2004)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1-25-18
Meeting Date

1412
Bill Number (if applicable)

Topic _____

Amendment Barcode (if applicable)

Name Gary Guzzo

Job Title Lobbyist/Consultant

Address 108 S. Monroe St
Street

Tall - Fla 32301
City *State* *Zip*

Phone 850-681-0024

Email gguzzo@flapartners.com

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Insurance Council

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/25/18
Meeting Date

1412
Bill Number (if applicable)

Topic Judges of Comp Claims

Amendment Barcode (if applicable)

Name Carolyn Johnson

Job Title Policy Director

Address 136 S Bronough St
Street

Tallahassee
City *State* *Zip*

Phone 521-1200

Email cjohnson@flchamber.com

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Chamber of Commerce

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

01.25.18
Meeting Date

1412
Bill Number (if applicable)

Topic JUDGES OF COMPENSATION CLAIMS

Amendment Barcode (if applicable)

Name DAVID LANGHAM

Job Title DEPT. CHIEF JUDGE

Address 700 S. PALAFOX
Street

PENSACOLA FL 32502
City *State* *Zip*

Phone 850 595 6310

Email david.langham@doah.state.fl.us

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing OFFICE OF JUDGES OF COMPENSATION CLAIMS

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/25/18
Meeting Date

1412
Bill Number (if applicable)

Topic Office of the Judges of Compensation Claims

Amendment Barcode (if applicable)

Name Claudia Davant

Job Title Lobbyist

Address 205 S. Adams St.
Street

Phone 8505670979

Tallahassee FL 32301
City *State* *Zip*

Email claudia@adamsstadvocates.com

Speaking: ☑ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Workers Compensation Section of the Florida Bar

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

Duplicate

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/25/2018
Meeting Date

1412
Bill Number (if applicable)

Topic Office of the Judges of Compensation Claims

Amendment Barcode (if applicable)

Name Robert S. Cohen

Job Title Director and Chief Judge of DOAH

Address 1230 Apalachee Parkway
Street

Phone 850-488-9675

Tallahassee — *City* | FL — *State* | 32301-3060 — *Zip*

Email bob.cohen@doah.state.fl.us

Speaking: ☑ For ☐ Against ☑ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing DOAH and the Office of Judges of Compensation Claims

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/25
Meeting Date

1412
Bill Number (if applicable)

Topic JUDGES OF COMPENSATION CLAIMS

Amendment Barcode (if applicable)

Name DONOVAN BROWN

Job Title VP, SUSKEY CONSULTING

Address 113 E COLLEGE AVE
Street

Phone 850.815.6010

TLH FL 32301
City *State* *Zip*

Email donovan@suskeyconsulting.com

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing ASSOCIATED INDUSTRIES OF FLORIDA

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

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 Committee on Judiciary

BILL:	SB 1424
INTRODUCER:	Senator Gainer
SUBJECT:	Court-ordered Treatment Programs
DATE:	January 18, 2018 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Tulloch	Cibula	JU	**Favorable**
2.			ACJ	
3.			AP	

I. Summary:

SB 1424 expands the eligibility criteria for individuals who may participate in a military veterans' and servicemembers' court program, more commonly known as veterans' courts. A veterans' court is a problem-solving court providing treatment intervention to military veterans and servicemembers who are charged with or convicted of criminal offenses and who are also suffering military-related injuries, such as post-traumatic stress disorder, traumatic brain injury, or a substance abuse disorder. Currently, individuals who are eligible to participate in the veterans' court include:

- Honorably discharged veterans;
- Generally discharged veterans; and
- Active duty servicemembers.

The bill expands participation eligibility by eliminating the requirement that a veteran be honorably or generally discharged. Instead, the bill provides that any veteran discharged or released under any condition is eligible to participate in a veteran's court.

Additionally, the bill expands participation eligibility beyond veterans and active duty servicemembers to individuals who are:

- Current or former United States defense contractors; and
- Current or former military members of a foreign allied country.

II. Present Situation:

Veterans' Courts for Criminal Offenders

Veterans' courts are problem-solving courts, modeled after drug courts, which are aimed at addressing the root causes of criminal behavior.[1] The purpose of veterans' courts is to divert eligible defendants who are veterans or servicemembers into treatment programs for military-related conditions or war-related trauma, either before trial or at sentencing. Veterans' courts consider whether an individual's military-related condition, such as post-traumatic stress disorder, mental illness, traumatic brain injury, or substance abuse, can be addressed through a program specifically designed to serve the individual's needs.[2]

Veterans' courts implement the 10 key components required of drug courts[3] in Florida:

- Integration of alcohol, drug treatment, and mental health services into justice system case processing;
- Nonadversarial approach;
- Early identification of eligible participants;
- Continuum of services;
- Alcohol and drug testing for abstinence;
- Coordinated strategy for responses to participants' compliance;
- Ongoing judicial interaction;
- Monitoring and evaluation for program effectiveness;
- Interdisciplinary education; and
- Partnerships with stakeholders.[4]

Significantly, veterans' courts involve not only nonadversarial cooperation among "traditional partners found in drug courts, such as the judge, state attorney, public defender, case manager, treatment provider, probation, and law enforcement[,]" but also cooperation with "representatives of the Veterans Health Administration (VHA) and the Veterans Benefit Administration as well as State Departments of Veterans Affairs, Vet Centers, Veterans Service Organizations, Department of Labor, volunteer veteran mentors, and other veterans support groups."[5] Veterans' courts are also able to "leverage resources available from the U.S. Department of Veterans Affairs" to provide treatment and other services to veterans and servicemembers.[6]

---

[1] Florida Courts, *Problem-Solving Courts*, http://www.flcourts.org/resources-and-services/court-improvement/problem-solving-courts/ (last visited Jan. 21, 2018).
[2] Section 394.47891, F.S.
[3] Section 397.334(4), F.S.
[4] *See* n. 3, *supra*, noting that "[t]he components of veterans courts, from The Ten Key Components of Veterans Treatment Court, Justice for Vets (a division of the National Association of Drug Court Professionals)[.]" *See also* Justice for Vets, *The Ten Key Components of Veterans Treatment Courts*, https://justiceforvets.org/wp-content/uploads/2017/02/The-Ten-Key-Components-of-Veterans-Treatment-Courts.pdf (last visited Jan. 21, 2018).
[5] *See* n. 3, *supra*.
[6] *Id.*

Florida's Veterans' Courts

In 2012, the Florida Legislature passed the "T. Patt Maney Veterans' Treatment Intervention Act."[7] The Act created the military veterans and servicemembers court program,[8] better known as veterans' courts.[9] Specifically, the Act authorizes the chief judge of each judicial circuit to establish a veterans' court program to serve the special needs of eligible veterans[10] and active duty servicemembers[11] who are:

- Suffering a military-related condition, such as mental illness, traumatic brain injury, or substance abuse; and
- Charged with or convicted of a criminal offense.[12]

The Act also added provisions to chapter 948, F.S., providing when veterans and servicemembers may be eligible to participate in the veterans' court program for treatment and services. Eligible individuals may participate after being:

- Charged with a criminal misdemeanor[13] or certain felony offenses but before being convicted (pretrial intervention);[14] or
- Convicted and sentenced, as a condition of probation or community control.[15]

Pretrial Intervention Participation

Prior to placement in a program, a veterans' treatment intervention team must develop an individualized coordinated strategy for the veteran. The team must present the coordinated strategy to the veteran in writing before he or she agrees to enter the program. The strategy is modeled after the ten therapeutic jurisprudence principles and key components for treatment-based drug court programs.[16]

During the time that the defendant is allotted participation in the treatment program, the court retains jurisdiction in the case. At the end of the program, the court considers recommendations for disposition by the state attorney and the program administrator. If the veteran successfully completes the treatment program, the court must dismiss the criminal charges. If the court finds

[7] CS/CS/SB 922 (ch. 2012-159, Laws of Fla.).
[8] Section 394.47891, F.S.
[9] Florida Courts, *Veterans' Courts*, http://www.flcourts.org/resources-and-services/court-improvement/problem-solving-courts/veterans-court.stml (last visited Jan. 21, 2018).
[10] Section 1.01(14), F.S., defines a veteran as a person who served in active military, naval, or air service who was discharged or released under honorable conditions or who later received an upgraded discharge under honorable conditions.
[11] A servicemember is defined as a person serving as a member of the United States Armed Forces on active duty or state active duty and members of the Florida National Guard and United States Reserve Forces. Section 250.01(19), F.S.
[12] *See* n. 2, *supra.*
[13] Section 948.16(2)(a), F.S., establishes the misdemeanor pretrial veterans' treatment intervention program.
[14] Section 948.08(7)(a), F.S., authorizes courts to consider veterans charged with non-disqualifying felonies for pretrial veterans' treatment intervention programs. Section 948.08(7), F.S., references the disqualifying felony offenses listed in s. 948.06(8)(c), F.S. Section 948.06(8)(c), F.S., lists 19 disqualifying felony offenses of a serious nature, such as kidnapping, murder, sexual battery, treason, etc.
[15] Section 948.21, F.S.
[16] Section 948.08(7)(b), F.S., requires a coordinated strategy for veterans charged with felonies who are participating in pretrial intervention programs. Section 948.16(2)(b), F.S., requires a coordinated strategy for veterans charged with misdemeanors. Section 397.334(4), F.S., requires treatment based court programs to include therapeutic jurisprudence principles and components recognized by the United States Department of Justice and adopted by the Florida Supreme Court Treatment-based Drug Court Steering Committee.

that the veteran did not successfully complete the program, the court can either order the veteran to continue in education and treatment or authorize the state attorney to proceed with prosecution.[17]

Eligible veterans who successfully complete the diversion program may petition the court to order the expunction of the arrest record and the plea.[18]

Participation in Treatment Program while on Probation or Community Control

Veterans and servicemembers on probation or community control who committed a crime on or after July 1, 2012, and suffer from a military-related mental illness, a traumatic brain injury, or a substance abuse disorder may also qualify for treatment programs. A court may impose, as a condition of probation or community control, successful completion of a mental health or substance abuse treatment program.[19]

Current Court Statistics

According to the State Court Administrator's Office of Court Improvement, as of April 2017, there were 30 veterans' courts in Florida.[20] Additionally, the Office of Court Improvement reports that in 2016, "Florida's veterans' courts admitted 1,090 participants and graduated 640."[21]

Expansion of Participant Eligibility in Florida's Veterans' Courts

Under current law, to be eligible to participate in the veterans' court program, the defendant must allege that he or she is suffering a military-related injury and establish that he or she is:

- An honorably discharged veteran;[22]
- A generally discharged veteran;[23] or
- An active duty servicemember.[24]

By the recommendation of the Task Force on Substance Abuse and Mental Health Issues in the Courts,[25] Florida's court system has proposed that eligibility to participate in the veterans' courts be expanded to all veterans of any discharge status and to military-related individuals in the following two categories:

- Current or former United States defense contractors; and

[17] Section 948.08(7)(b)-(c), F.S.
[18] *See* n. 14, *supra*.
[19] Section 948.21, F.S.
[20] *See* n. 3, *supra*.
[21] *Id.*
[22] *See* n. 10, *supra*.
[23] CS/CS/CS/HB 439 (chapter 2016-127, Laws of Fla.) (expanding eligibility for veterans to include not only those who were honorably discharged but also to those generally discharged).
[24] *See* n. 11, *supra*.
[25] The "Task Force on Substance Abuse and Mental Health Issues in the Courts" is the task forced "charged with developing a strategy for ensuring fidelity to nationally accepted key components of veterans courts" pursuant to Florida Supreme Court Administrative Order 14-46. *See* Judicial Branch 2018 Legislative Agenda, *Expansion of Veterans Court Eligibility*, p. 41 (on file with Senate Judiciary Committee).

- Current or former military members of a foreign allied country.[26]

The proposed expansion to include contractors and military members of foreign allied countries is in response to nationwide reports "that a large number of service personnel are being excluded from veterans courts because they do not meet the definition of 'veteran' or 'servicemember'" who have "served our country and would respond well to veterans court interventions."[27]

III. Effect of Proposed Changes:

Section 1: The bill expands the eligibility criteria for who may participate in the Military Veterans' and Servicemembers' Court Program under s. 394.47891, F.S.

For veterans, the bill eliminates the requirement that a veteran be honorably or generally discharged, providing instead that any veteran discharged or released under any condition is eligible to participate.

The bill also expands eligibility beyond veterans and active duty servicemembers to individuals who are:
- Current or former United States defense contractors; and
- Current or former military members of a foreign allied country.

Section 2: The bill makes a conforming change in s. 948.08(7)(a), F.S., to clarify that pretrial intervention programs extend to any person charged with a felony (except the more serious felony offenses listed in s. 948.06(8)(c), F.S.), who is a veteran discharged for any reason, an active duty servicemember, a current or former United States defense contractor, or a current or former military member of a foreign allied country.

Section 3: The bill makes a conforming change in s. 948.16(2)(a), F.S., to clarify that misdemeanor pretrial intervention programs extend to any person charged with a misdemeanor who is a veteran discharged for any reason, an active duty servicemember, a current or former United States defense contractor, or a current or former military member of a foreign allied country.

Section 4: The bill makes a conforming change in s. 948.21(2), F.S., to clarify that a court may impose a condition of probation or community control requiring participation in a treatment program to any person who is a veteran discharged for any reason, an active duty servicemember, a current or former United States defense contractor, or a current or former military member of a foreign allied country.

Section 5: The bill provides an effective date of October 1, 2019.

[26] *Id.* at 42.
[27] *Id.* at 41.

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's expansion of eligible veterans and other military-related individuals (contractors and allied country military members) for purposes of veterans' courts will increase the number of people eligible to participate in veterans' court programs, which will likely increase the costs associated with these programs. However, such costs will be limited by the amount of state funds appropriated to such programs. Additionally, such costs may be offset to the extent that the need for prison beds is reduced by placement in veterans' court programs.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 394.47891, 948.08, 948.16, and 948.21.

IX. Additional Information:

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

None.

B. Amendments:

None.

By Senator Gainer

2-01412-18 20181424__

A bill to be entitled

An act relating to court-ordered treatment programs; amending s. 394.47891, F.S.; providing that veterans who were discharged or released under any condition, individuals who are current or former United States Department of Defense contractors, and individuals who are current or former military members of a foreign allied country are eligible in a certain Military Veterans and Servicemembers Court Program; amending s. 948.08, F.S.; authorizing a person who is charged with a certain felony and identified as a veteran who is discharged or released under any condition, an individual who is a current or former United States Department of Defense contractor, or an individual who is a current or former military member of a foreign allied country to be eligible for voluntary admission into a pretrial veterans' treatment intervention program under certain circumstances; amending s. 948.16, F.S.; authorizing a veteran who is discharged or released under any condition, an individual who is a current or former United States Department of Defense contractor, or an individual who is a current or former military member of a foreign allied country and who is charged with a misdemeanor to be eligible for voluntary admission into a misdemeanor pretrial veterans' treatment intervention program under certain circumstances; amending s. 948.21, F.S.; authorizing the court to impose a condition requiring a probationer or community controllee who is a veteran

2-01412-18 20181424__

discharged or released under any condition, an individual who is a current or former United States Department of Defense contractor, or an individual who is a current or former military member of a foreign allied country to participate in a certain treatment program under certain circumstances; providing an effective date.

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

Section 1. Section 394.47891, Florida Statutes, is amended to read:

394.47891 Military veterans and servicemembers court programs.—The chief judge of each judicial circuit may establish a Military Veterans and Servicemembers Court Program under which veterans, as defined in s. 1.01; ~~, including~~ veterans who were discharged or released under any condition; ~~a general discharge, and~~ servicemembers, as defined in s. 250.01; individuals who are current or former United States Department of Defense contractors; and individuals who are current or former military members of a foreign allied country, who are charged or convicted of a criminal offense, and who suffer from a military-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem can be sentenced in accordance with chapter 921 in a manner that appropriately addresses the severity of the mental illness, traumatic brain injury, substance abuse disorder, or psychological problem through services tailored to the individual needs of the participant. Entry into any Military Veterans and Servicemembers

Court Program must be based upon the sentencing court's assessment of the defendant's criminal history, military service, substance abuse treatment needs, mental health treatment needs, amenability to the services of the program, the recommendation of the state attorney and the victim, if any, and the defendant's agreement to enter the program.

Section 2. Paragraph (a) of subsection (7) of section 948.08, Florida Statutes, is amended to read:

948.08 Pretrial intervention program.—

(7)(a) Notwithstanding any provision of this section, a person who is charged with a felony, other than a felony listed in s. 948.06(8)(c), and identified as a veteran, as defined in s. 1.01; ~~, including~~ a veteran who is discharged or released under any condition; a ~~general discharge, or~~ servicemember, as defined in s. 250.01; an individual who is a current or former United States Department of Defense contractor; or an individual who is a current or former military member of a foreign allied country, who suffers from a military service-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem~~,~~ is eligible for voluntary admission into a pretrial veterans' treatment intervention program approved by the chief judge of the circuit, upon motion of either party or the court's own motion, except:

1. If a defendant was previously offered admission to a pretrial veterans' treatment intervention program at any time before trial and the defendant rejected that offer on the record, the court may deny the defendant's admission to such a program.

2. If a defendant previously entered a court-ordered

veterans' treatment program, the court may deny the defendant's admission into the pretrial veterans' treatment program.

Section 3. Paragraph (a) of subsection (2) of section 948.16, Florida Statutes, is amended to read:

948.16 Misdemeanor pretrial substance abuse education and treatment intervention program; misdemeanor pretrial veterans' treatment intervention program; misdemeanor pretrial mental health court program.—

(2)(a) A veteran, as defined in s. 1.01; ~~, including~~ a veteran who is discharged or released under any condition; a ~~general discharge, or~~ servicemember, as defined in s. 250.01; an individual who is a current or former United States Department of Defense contractor; or an individual who is a current or former military member of a foreign allied country, who suffers from a military service-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem, and who is charged with a misdemeanor is eligible for voluntary admission into a misdemeanor pretrial veterans' treatment intervention program approved by the chief judge of the circuit, for a period based on the program's requirements and the treatment plan for the offender, upon motion of either party or the court's own motion. However, the court may deny the defendant admission into a misdemeanor pretrial veterans' treatment intervention program if the defendant has previously entered a court-ordered veterans' treatment program.

Section 4. Subsection (2) of section 948.21, Florida Statutes, is amended to read:

948.21 Condition of probation or community control; military servicemembers and veterans.—

(2) Effective for a probationer or community controllee whose crime is committed on or after July 1, 2016, and who is a veteran, as defined in s. 1.01;~~, including~~ a veteran who is discharged or released under any condition; a ~~general discharge, or~~ servicemember, as defined in s. 250.01; an individual who is a current or former United States Department of Defense contractor; or an individual who is a current or former military member of a foreign allied country, who suffers from a military service-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem, the court may, in addition to any other conditions imposed, impose a condition requiring the probationer or community controllee to participate in a treatment program capable of treating the probationer or community controllee's mental illness, traumatic brain injury, substance abuse disorder, or psychological problem.

Section 5. This act shall take effect October 1, 2019.

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Transportation, *Chair*
Commerce and Tourism, *Vice Chair*
Appropriations
Appropriations Subcommittee on General Government
Appropriations Subcommittee on Transportation, Tourism, and Economic Development
Banking and Insurance
Military and Veterans Affairs, Space, and Domestic Security

JOINT COMMITTEE:
Joint Administrative Procedures Committee

SENATOR GEORGE B. GAINER
2nd District

January 15, 2018

Re: SB 1424

Dear Chair Steube,

I am respectfully requesting Senate Bill 1424, related to Court-ordered Treatment Programs, be placed on the agenda for the next meeting of the Judiciary Committee.

I appreciate your consideration of this bill. If there are any questions or concerns, please do not hesitate to call my office at (850) 487-5002.

Thank you,

Senator George Gainer
District 2

Cc. Tim Cibula, Joyce Butler, Alex Blair, Elizabeth Bolles, Rita Faulkner

REPLY TO:
☐ 840 West 11th Street, Panama City, Florida 32401 (850) 747-5454
☐ Northwest Florida State College, 100 East College Boulevard, Building 330, Room 105 and 112, Niceville, Florida 32578 (850) 803-8395
☐ 302 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5002

Senate's Website: *www.flsenate.gov*

JOE NEGRON
President of the Senate

ANITERE FLORES
President Pro Tempore

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/25/18
Meeting Date

SB-1424
Bill Number (if applicable)

Topic Court Ordered Treatment Programs

Amendment Barcode (if applicable)

Name Augustus D. Aikens

Job Title Veterans Treatment Court Judge

Address 301 S. Monroe St.
Street

Phone (850) 606 4456

Tallahassee FL 32301
City *State* *Zip*

Email aikensa@leoncountyfl.gov

Speaking: ☒ For ☐ Against ☒ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing State Courts

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

11/25/18
Meeting Date

1424
Bill Number (if applicable)

Topic Veterans Court eligibility

Amendment Barcode (if applicable)

Name Andy Thomas

Job Title Public Defender, 2nd Judicial Circuit

Address 301 S. Monroe St.
Street

Phone 850 606-1030

Tallahassee FL 32301
City *State* *Zip*

Email andy.thomas@flpdz.com

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Public Defender Association

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☐ Yes ☑ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1-25-18
Meeting Date

1424
Bill Number (if applicable)

Topic Court-Ordered Programs | Veterans

Amendment Barcode (if applicable)

Name Jill Gran

Job Title Sr Policy Advisor

Address 2868 Mahan Dr
Street

Phone 8782196

Tallahassee FL 32308
City *State* *Zip*

Email jill@myfbha.org

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Behavioral Health Association

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
515 Knott Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5198

DATE	COMM	ACTION
01/22/18	SM	Favorable
1/23/18	JU	**Favorable**
	ATD	
	AP	

January 22, 2018

The Honorable Joe Negron
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 14** – Senator Gibson
HB 6519 – Representative Sean Shaw
Relief of the Estate of Danielle Maudsley

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNCONTESTED EQUITABLE CLAIM FOR $1,750,000 PAYABLE FROM THE GENERAL REVENUE FUND OF THE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, BASED ON A SETTLEMENT AGREEMENT BETWEEN THE ESTATE OF DANIELLE MAUDSLEY AND THE FLORIDA HIGHWAY PATROL AND TROOPER DANIEL COLE, WHICH RESOLVED A CIVIL ACTION THAT AROSE FROM THE ALLEGED NEGLIGENT USE OF AN ELECTRONIC CONTROL DEVICE THAT CAUSED THE DEATH OF DANIELLE MAUDSLEY.

FINDINGS OF FACT:

On September 19, 2011, Trooper Daniel Cole of the Florida Highway Patrol (FHP) arrested 20 year old Danielle Maudsley for two counts of leaving the scene of a crash with property damage and two counts of driving with no valid driver's license. The charges are all second degree misdemeanors.

The first hit-and-run crash occurred at approximately 8:47 a.m. on September 19, 2011. Trooper Cole was dispatched to the scene and while responding, a second hit-and-run crash, which occurred at approximately 9:41 a.m., was reported with tag numbers, vehicle descriptions, and driver descriptions consistent in both crashes. Trooper Cole requested a *Be on*

the Lookout (BOLO) for the suspect's vehicle. Both crashes occurred in Pinellas County.

A short time later, deputies from the Pinellas County Sheriff's Office (PCSO) located the suspect vehicle, which was damaged, at Ms. Maudsley's residence in Pinellas Park. Trooper Cole was notified and went to the Maudsley residence. Upon arrival Deputy Chad Earl (PCSO) informed Trooper Cole that Danielle Maudsley resisted his attempts to detain her, without violence, and he intended to charge her for that offense, and that she was already on probation for driving with no valid driver's license. After deputies informed Trooper Cole that Danielle Maudsley had made spontaneous statements to the deputies that she had been involved in the hit-and-run crashes, Trooper Cole arrested Ms. Maudsley.

Trooper Cole handcuffed Ms. Maudsley behind her back and transported her to the Pinellas Park FHP station at 7651 U.S.19 North to complete the investigative paperwork prior to taking her to the county jail.

Trooper Cole had activated the in-car video and audio system for the transport. The video shows that Danielle Maudsley is a slightly built woman and while fidgeting in the back of the patrol car removed one of her hands from the handcuffs. Upon arrival at the FHP station at approximately 11:04 a.m., and while exiting the patrol car, Ms. Maudsley passively informed Trooper Cole that her hand was free and she was unable to reinsert it into the handcuffs. Trooper Cole re-cuffed Ms. Maudsley behind her back and they entered the side door of the FHP station near the conference room.

Trooper Cole seated Ms. Maudsley in a chair in the conference room farthest from the door. Trooper Cole seated himself at the conference room table between Ms. Maudsley and the door to complete the investigative paperwork. At approximately 11:11 a.m. Ms. Maudsley advised Trooper Cole that she was thirsty. While escorting her to get a drink of water, she complained about the handcuffs and turned so that he could see that her wrist was caught in one of the handcuffs. Trooper Cole had her adjust her wrist so that it was not caught and he checked to be sure the handcuffs were still secure.

At approximately 11:41 a.m., Trooper Cole requested another FHP officer watch Ms. Maudsley so that he could use the

restroom. According to the investigative report, Trooper Cole returned about one and a half minutes later and assumed sole control of Ms. Maudsley while he resumed the paperwork.

Throughout the period from initially entering the conference room, there was no indication of aggressive or uncooperative behavior on the part of Danielle Maudsley while in custody.

At approximately 11:45 a.m., while Trooper Cole was still engaged in the paperwork, Danielle Maudsley ran past him, out of the conference room, down the short hallway, and exited the side door in which she had entered. At that time, Danielle Maudsley was no longer handcuffed behind her back. According to Trooper Cole, he was unable to discern whether she was handcuffed at all.

Trooper Cole indicated that he never heard Ms. Maudsley get up, the jingle of a handcuff, or anything. He felt a presence move behind him and when he looked up, she was even with the doorway to the conference room.

The in-car video and audio in Trooper Cole's transport vehicle were still activated and recorded the ensuing events. Off camera, Trooper Cole is heard asking, "Where are you going?" and he whistled at her. The next sound, which is almost immediately, is the squeak of the push bar on the station's exit door. Investigative reports and the video support the conclusion that the sound was from Danielle Maudsley pushing the bar to exit the building.

According to the investigative report, when Trooper Cole got to the exit door, it was swinging back in his direction. He pushed the door open with his left hand as he pulled his electronic control device (Taser) from the holster on his belt with his right hand. He weighed almost three times Danielle's weight, and according to Trooper Cole believed that [tackling] going to the ground with Danielle would certainly have resulted in her being injured.

The audio/video recording shows[1] Ms. Maudsley in full stride with her body posture leaning forward, within a distance of approximately one to two feet from Trooper Cole. Trooper Cole has the Taser in his right hand drawn and horizontal but

[1] At time stamp 11:45:49 a.m. on the in-car video recording.

his right elbow is still at his side. His posture is more erect. The left side of his body is not visible in the frame. Both are on the sidewalk under the eave of the building's roof.

According to the audio/video recording and still photographs from the recording, one second later, at 11:45:50 a.m., Trooper Cole's right hand with the Taser is outstretched approximately two feet from Ms. Maudsley's back. Both are still on the sidewalk beside the side door. The next still photograph with the same time stamp shows Ms. Maudsley stepping off the sidewalk in full stride, her back still to Trooper Cole, with her body posture indicating that she had received a Taser discharge into her back. She also released an audible squeal at this time. Trooper Cole had not warned the fleeing Maudsley that he was going to discharge the Taser. The distance between Trooper Cole and Ms. Maudsley had increased to approximately three to four feet by this point; however, the front of the Taser was approximately two feet away at the point of discharge.

At 11:45:51 a.m., Ms. Maudsley's body is twisting toward Trooper Cole in the parking lot. Still clearly handcuffed but in the front of her body, she falls backwards, striking the back of her head on the pavement of the parking lot.[2] She is whimpering and sits up. Trooper Cole instructs her to "lay down" several times, which she does. Other FHP troopers come out of the building to assist. Ms. Maudsley, while still whimpering and crying tries to sit up again and at 11:47:02 complains that she cannot not get up. This interchange continues until approximately 11:48 a.m., when she becomes quiet and still. Emergency Medical Services arrived at approximately 11:51 a.m., and transported Ms. Maudsley to Bayfront Medical Center.

At approximately 5:00 p.m., the physician attending to Ms. Maudsley advised that her condition was critical and her prognosis was not good due to the lack of activity in her brain. In addition Maudsley had tested positive for oxycodone, and cocaine in her system. Danielle Maudsley never regained consciousness, was diagnosed with a traumatic brain injury, remained in a constant vegetative state on life-support, and passed away on September 15, 2013.

[2] The FDLE Investigative Report of the incident reports a measurement between the approximate point on the concrete pad where Trooper Cole fired his Taser at Daniele Maudsley to the point on the pavement/asphalt where Ms. Maudsley fell and fractured her skull at 15.217 feet.

The FHP Supervisor's Use of Control Report, signed in October, 2011, by the district shift commander, district commander, and troop commander concluded that based on the totality of the circumstances, the force used exceeded the minimum amount of force needed to effectuate the apprehension of Danielle Maudsley. Within that report, the supervising investigator noted that Trooper Cole was in no apparent danger and because of his closeness to the suspect, the time necessary to warn Ms. Maudsley would not have prevented him from being able to use the ECD if she continued to flee. He further noted that the ECD cartridges issued by the agency have a maximum range of 25 feet.

On or about September 20, 2011, the FHP requested the Florida Department of Law Enforcement (FDLE) investigate this incident as a Use of Force incident. On November 7, 2011, the FDLE concluded that Trooper Cole was in the legal performance of his official law enforcement duties and acted within the scope of his assignment. The investigation determined that the use of force by Trooper Cole was within the allowable parameters outlined in Chapter 776, Florida Statutes.

The Department of Highway Safety and Motor Vehicles (DHSMV) Office of Inspector General's administrative investigation likewise determined that Trooper Cole acted in accordance with Florida law and FHP policy.

Florida Statutes, FHP policies and procedures, and officer/trooper training programs provide structure, parameters, and guidance for the use of force to prevent escape, including the use of electronic control devices (ECD). Although not a complete recitation of these documents, the following considerations demonstrate the complexity of the issues presented in the facts of this claim bill:

- A law enforcement officer or other person who has an arrested person in his or her custody is justified in the use of any force which he or she reasonably believes to be necessary to prevent the escape of the arrested person from custody. Section 776.07, F.S.
- Members of the FHP shall in every instance seek to employ the minimum amount of control required to successfully overcome physical resistance, prevent escapes, and effect arrests. Members' actions must be

objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. FHP Procedures 10.01.07 and Policy 10.05.02 specific to ECD.

- In accordance with s. 943.1717(1), F.S., a member's decision to deploy the ECD shall involve an arrest or custodial situation during which the person who is the subject of the arrest or custody escalates resistance to the member from passive physical resistance to active physical resistance, and the person (a) has the apparent ability to physically threaten the member or others; or, (b) is preparing or attempting to flee or escape. (Note: Fleeing cannot be the sole reason for deployment of the ECD.) FHP Policy Manual 10.05.04 C.
- There may be incidents in which the use of an ECD conflicts with [a list of 6 situations a member shall not use the device unless exigent circumstances exist, including use on a handcuffed prisoner]. In those cases, the use of the ECD must be based on justifiable facts and are subject to "Use of Control" supervisory review. FHP Policy Manual specific to ECD – Deployment 10.05.04 C 1.
- As in all uses of control, certain individuals may be more susceptible to injury. Members should be aware of the greater potential for injury when using an ECD against … persons of small build regardless of age. FHP Policy Manual specific to ECD – Deployment 10.05.04 C 2.
- When reasonable, members preparing to fire the device should announce a verbal warning such as "Stop Resisting, Taser!, Taser!, Taser!" to warn the violator … FHP Policy Manual specific to ECD – Deployment 10.05.04 C 4.

On November 2, 2012, Danielle Maudsley was determined to be incapacitated, and Julie Goddard was appointed her Guardian by the Circuit Court of the Ninth District in and for Orange County. Ms. Maudsley was residing in a nursing facility in Orange County at the time. When Ms. Maudsley died, Ms. Goddard became the Personal Representative of the Estate of Danielle Maudsley.

Litigation originated on May 23, 2013, in state court against Trooper Cole and the FHP in the Sixth Circuit of Pinellas County while Ms. Maudsley was still alive. The complaint alleged that Trooper Cole acted in a manner exhibiting wanton

and willful disregard of human rights and safety, by among other ways:

- Failing to use his Taser in a proper, safe and appropriate manner;
- Deploying his Taser on a handcuffed and running Danielle Maudsley when he knew or should have known that the use of the Taser under the circumstances would likely result in severe injuries to her;
- Failing to use other available, safer means to stop Danielle Maudsley, such as reaching out with his hands and grabbing her;
- Failing to provide a verbal warning in accordance with the policies and procedures set forth by the Florida Highway Patrol; and
- Failing to follow other accepted policies and procedures set forth by the FHP.

The complaint also alleged that the FHP was negligent in its training and instruction of Trooper Cole in the proper, safe, and appropriate use of his Taser.

On July 7, 2014, after Danielle Maudsley's death, an amended complaint was filed that also alleged excessive force and Fourth Amendment constitutional violation claims. The case was removed to the United States District Court, Middle District of Florida.

On August 10, 2015, the parties settled all claims for $1,950,000 to avoid the cost of protracted and expensive litigation. The settlement agreement refers to the allegations of negligence against the FHP and Trooper Cole that are contained in the Complaint. While maintaining no admission of liability or responsibility, the FHP and Trooper Cole acknowledge that if this case went to trail, a federal jury could reasonably award damages to the Plaintiff in the amount of $1,950,000 based on the facts of the case.

The limit of the State's sovereign immunity in the amount of $200,000 has been paid by the Division of Risk Management pursuant to s. 768.28, F.S. The remaining $1,750,000 is the subject of the claim bill and will be paid from General Revenue appropriated to the DHSMV if the claim bill becomes law. The FHP and Trooper Cole have agreed not to oppose a claim bill in this amount.

In the settlement agreement, the Plaintiff agreed to voluntarily dismiss the lawsuit, with prejudice, upon court approval. The United States District Court for the Middle District of Florida issued a Final Judgment of Dismissal with Prejudice on March 1, 2016.

The net proceeds to the estate from this claim bill for $1,750,000, after medical liens and attorney fees is expected to be approximately $1,262,249.80. The probate court may award estate and personal representative fees, estimated at approximately $114,030, in accordance with Florida law from all net proceeds to the estate.

Counsel for the Plaintiff represents it is his understanding from discussion with the attorney for the personal representative of the estate, that the proposed distribution of any claim bill will be made in accordance with Florida Statute, in that both parents will receive damages equally, [after liens, costs, and expenses have been paid]. However, Cheryl Maudsley, mother and primary caregiver of Danielle, both during her life and while she was hospitalized, will be petitioning the probate court for a greater apportionment of those damages. Cheryl Maudsley currently resides in Michigan. Danielle Maudsley's father is currently incarcerated, with the current release date of December 9, 2022. According to Counsel, Cheryl Maudsley also intends to establish a trust for her 10 year old daughter, Danielle's sister, with a majority of her portion of the funds.

CONCLUSIONS OF LAW:

A common law duty of care is owed to a person in custody. Kaiser v. Kolb, 543 So. 2d 732 (Fla 1989) Accordingly, Trooper Cole had a duty to reasonably carry out his operational responsibilities of maintaining custody of Danielle Maudsley and apprehending her when she attempted to flee. Under the doctrine of respondeat superior, the FHP, a Division of the DHSMV, is vicariously liable for the negligent acts of its employees, when such acts are within the course and scope of employment. *See* Mallory v. O'Neil, 69 So.2d 313 (Fla.1954), and s. 768.28, F.S.

Whether Trooper Cole implemented his responsibilities negligently or in accordance with statutory and departmental policy was an appropriate question for the jury. This hearing officer concludes that Trooper Cole negligently performed his duties in the firing of his Taser at the point in time that he discharged it, without first issuing a warning to allow her the

opportunity to stop, without ascertaining to the best of his ability whether Ms. Maudsley was still handcuffed and to reassess the situation in that light, and without at least attempting to stop or overtake her in a manner that did not include a full body tackle. He had a 25 foot discharge range within which these actions could have been employed prior to a Taser discharge. Discharging the Taser was the proximate cause of Danielle Maudsley injuries and subsequent demise. The parties agreed to execute the settlement agreement to resolve this question as well as all allegations in the Amended Complaint. The settlement agreement is reasonable given the unfortunate outcome of this incident.

ATTORNEYS FEES: Section 768.28(8), F.S., states that no attorney may charge, demand, receive, or collect for services rendered, fees in excess of 25 percent of any judgment or settlement. Claimant's counsel, Ralph M. Guito, III, Esq., has submitted an affidavit that the attorney fees, including lobbying fees, will not exceed 25 percent of the total amount awarded under the claim bill.

RECOMMENDATIONS: Based upon the foregoing, I recommend that SB 14 be reported FAVORABLY.

Respectfully submitted,

Sandra R. Stovall
Senate Special Master

cc: Secretary of the Senate

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

SENATOR AUDREY GIBSON
6th District

COMMITTEES:
Military and Veterans Affairs, Space, and Domestic Security, *Chair*
Appropriations
Appropriations Subcommittee on Transportation, Tourism, and Economic Development
Commerce and Tourism
Judiciary
Regulated Industries
Joint Legislative Auditing Committee

October 12, 2017

Senator Greg Steube, Chair
Committee on Judiciary
515 Knott Building
404 South Monroe Street
Tallahassee, Florida 32399-1100

Chair Steube:

I respectfully request that SB 14, a claims bill on behalf of Danielle Maudsley, relating to alleged negligence by the Florida Highway Patrol, be placed on the next committee agenda. The claim arises from alleged tasing by a Florida Highway Patrol officer.

SB 14, requires $1,750,000.00 to be paid upon approval of the claims bill minus payments required to satisfy outstanding Medicaid liens.

Thank you for your time and consideration.

Sincerely,

Audrey Gibson
State Senator
District 6

101 E. Union Street, Suite 104, Jacksonville, Florida 32202 (904)359-2553
405 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5006

Senate's Website: *www.flsenate.gov*

JOE NEGRON
President of the Senate

ANITERE FLORES
President Pro Tempore

THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
515 Knott Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5198

DATE	COMM	ACTION
1/22/18	SM	Fav/1 amendment
1/23/18	JU	**Favorable**
	GO	
	RC	

January 22, 2018

The Honorable Joe Negron
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 36** – Senator Denise Grimsley
HB 6525 – Representative Byrd
Relief of Marcus Button

SPECIAL MASTER'S FINAL REPORT

THIS IS A CONTESTED CLAIM BASED ON A JURY AWARD FOR MARCUS BUTTON AGAINST THE DISTRICT SCHOOL BOARD OF PASCO COUNTY, TO COMPENSATE THE CLAIMANT FOR INJURIES SUSTAINED IN A MOTOR VEHICLE ACCIDENT RESULTING FROM THE NEGLIGENT OPERATION OF A PASCO COUNTY SCHOOL BUS.

CURRENT STATUS:

On December 6, 2010, an administrative law judge from the Division of Administrative Hearing, serving as a Senate special master, held a de novo hearing on a previous version of this bill, SB 38 (2011). After the hearing, the judge issued a report containing findings of fact and conclusions of law and recommended that the bill be reported favorably with an amendment. That report is attached as an addendum to this report.

Due to the passage of time since the hearing, the Senate President reassigned the claim to me, Miguel Oxamendi. My responsibilities were to review the records relating to the claim bill, be available for questions from the members, and to determine whether changes have occurred since the hearing,

which if known at the hearing, would have significantly altered the findings or recommendation in the Special Master report.

According to information provided by the counsel for the claimant, no changes have occurred since the hearing which might have altered the findings or recommendation in the Special Master's report for SB 38 (2011).

This report recommends an amendment to the bill to correctly reflect the amount of responsibility for the crash that the jury apportioned to the claimant, Marcus Button. The bill provides that the jury apportioned 10 percent of the responsibility to the claimant, but the correct amount is 15 percent.

Additionally, SB 36 is effectively identical to the claim bill filed for the 2011 Legislative Session. However, the 2011 claim bill did not include a claim on behalf of the parents Mark and Robin Button, but the Special Master Report on SB 38 (2011) included relevant findings of fact and conclusions of law to support their claim. Therefore, the undersigned recommends that SB 36 be reported favorably, as amended.

Respectfully submitted,

Miguel Oxamendi
Senate Special Master

cc: Secretary of the Senate

THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
2/1/11	SM	

February 1, 2011

The Honorable Mike Haridopolous
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 38 (2011)** – Senator Mike Fasano
Relief of Marcus Button

SPECIAL MASTER'S FINAL REPORT

THIS IS A CONTESTED CLAIM BASED ON A JURY AWARD FOR MARCUS BUTTON AGAINST THE DISTRICT SCHOOL BOARD OF PASCO COUNTY, TO COMPENSATE THE CLAIMANT FOR INJURIES SUSTAINED IN A MOTOR VEHICLE ACCIDENT RESULTING FROM THE NEGLIGENT OPERATION OF A PASCO COUNTY SCHOOL BUS.

FINDINGS OF FACT:

On September 22, 2006, the Claimant, Marcus Button, was traveling in the front passenger's seat of a 2005 Dodge Neon, which was being driven by Jessica Juettner, a high school classmate of the Claimant's. The Dodge Neon was owned by Donald Juettner, Ms. Juettner's father.

At approximately 7:50 a.m., the Claimant and Ms. Juettner were headed to school on State Road 54 in Zephyrhills, which is located in Pasco County. As the Claimant and Ms. Juettner traveled east on State Road 54, they approached Meadow Point Boulevard, which runs from north to south and intersects State Road 54 at a right angle. Vehicles heading east and west on State Road 54 are not required to stop at the intersection, as there is no stop sign or traffic light. However, vehicles traveling on Meadow Point Boulevard are required to

come to rest at a stop sign prior to turning onto State Road 54.

As the Claimant and Ms. Juettner approached the intersection described above, a District School Board of Pasco County ("District") school bus, which was 35 feet long and weighed 27,500 pounds, was headed north on Meadow Point Boulevard. The bus driver, District employee John Kinne, brought the bus to rest at the stop sign posted at the intersection of State Road 54. However, due to the heavy volume of morning traffic, Mr. Kinne moved the bus beyond the stop bar to facilitate a left turn onto State Road 54.

Despite the absence of any visual obstructions, Mr. Kinne failed to notice the Dodge Neon being driven by Ms. Juettner that was approaching the intersection from the west and within the speed limit. Believing that the intersection was clear, Mr. Kinne pulled forward and began to turn left (headed west) onto State Road 54, directly in the path of the Dodge Neon that was only several car lengths away. Tragically, Ms. Juettner's vehicle impacted the side of the bus, which was in the early process of making the turn and was pointing northwest. According to William Fox, an eyewitness positioned directly behind the bus, there was nothing Ms. Juettner could have done to avoid the collision.

Due to height disparity between the two vehicles, the front of the Dodge Neon went underneath the bus. As a result, the windshield and a portion of the Neon's roof were crushed. After this initial impact, the bus continued forward for a short distance, with the rear wheels of the bus striking the passenger's side of the Neon. Photographs of the Dodge Neon reveal significant intrusion on the driver's side of the vehicle, as well as some degree of intrusion on the passenger's side.

The accident was investigated by Trooper Jose Ramos of the Florida Highway Patrol. Trooper Ramos concluded that Mr. Kinne failed to yield to Ms. Juettner's vehicle, and was therefore at fault. Significantly, Trooper Ramos further determined that Ms. Juettner did not contribute to the accident.

Ms. Juettner, who was wearing her seatbelt, was not seriously injured in the collision. However, the Claimant, who did not

have his seatbelt fastened, sustained significant injuries to his head. Specifically, the Claimant suffered trauma center, where he was hospitalized for nearly a month. The Claimant was then transferred to a rehabilitation center, where he remained for approximately four weeks.

As a result of the accident, the Claimant, who is now 20 years old, continues to suffer from a variety of maladies, which include:

- Impaired judgment and the inability to make simple decisions, such as when it is safe to cross a road. Accordingly, the claimant requires almost constant supervision.
- Substantially impaired vision in one eye. In addition, neither eye can look up or down, and both are permanently dilated.
- No sense of smell.
- A misshapen and asymmetrical head.
- Hallucinations and other mental health issues that require numerous psychiatric medications. At present, the Claimant takes 13 daily medications, ten of which are anti-psychotic drugs. Although there is evidence indicating that the Claimant suffered from minor emotional issues prior to the accident (e.g., fighting and other disruptive behavior at school), his present psychiatric problems are clearly a manifestation of the injuries sustained in the September 22, 2006, traffic accident.
- Memory and cognitive deficits.

According to Dr. Paul Kornberg, a physician specializing in pediatric rehabilitation, the impairments to the Claimant's judgment, memory, and cognitive ability, combined with his psychiatric issues, will make it nearly impossible for the Claimant to find and maintain employment.

LITIGATION HISTORY:

In September 2007, the Claimant filed a negligence action against the District. The matter proceeded to a jury trial in July of 2009, during which the Claimant presented the testimony of multiple witnesses, which included Dr. Kornberg, Dr. John Dabrowski (a neuropsychologist), Brenda Mulder (a certified public accountant and forensic economist), Dr. Mitchell Drucker (a neurooptha mologist), and a seatbelt expert, Dr. Michael Freeman. The Claimant

elicited evidence that his future medical bills would range from $6.2 million to $10.8 million.

During its defense, the District presented the testimony of Dr. Robert Martinez, who opined that the Claimant would not need to reside in an assisted living facility. As one of its other significant witnesses, the District called an accident reconstructionist, James Parrish, who testified that Ms. Juettner could have avoided the accident if she had applied her brakes sufficiently.

On July 27, 2009, the jury returned a verdict in favor of the Claimant, in which it determined that the Claimant was permanently and totally disabled and that 65 percent of the responsibility should be apportioned to the District, 20 percent to Ms. Juettner (for failing to slow her vehicle and/or failing to require the Claimant to wear his seatbelt), and 15 percent to the Claimant. The jury further concluded that the Claimant sustained the following damages:

- $564,294.50 for future medical expenses.
- $9800.00 for lost earning up to age 18.
- $467,137.50 for future lost earnings.
- $324,999.90 for past pain and suffering.
- $758,333.31 for future pain and suffering.
- Total damages: $2,124,565.21.

Based on the jury's finding that the District was 65 percent responsible, final judgment was entered for the Claimant against the school board in the amount of $1,380,967.39. The school board has paid $163,000 against this award, leaving $1,217,967.39 unpaid.

A separate judgment for the Claimant's parents was entered against the District in the amount of $289,396.85, based upon an award for past medical expenses and a loss of consortium. However, during the final hearing before the undersigned, counsel for the Claimant stated that the parents are not seeking any recovery through the claim bill process.

No appeal of the final judgment was taken to the Second District Court of Appeal.

CLAIMANT'S POSITION: The Claimant contends that John Kinne, the operator of a bus owned by the District, was negligent by failing to yield to the vehicle in which he was traveling as a passenger. As a result of Mr. Kinne's negligence, the Claimant suffered permanent injuries. The Claimant further argues that:

- The jury should not have apportioned any responsibility to himself or Ms. Juettner.
- The jury erred by determining that future medical expenses totaled only $564,294.50, where the evidence established that the low range for future medical expenses was $6,222,038. Although the Claimant's counsel never provided the undersigned with a precise figure, it appears that the Claimant is requesting that Senate Bill 38 direct the District to pay, at the least, $6,222,038 for future medical expenses, $9,800 for lost earnings up to age 18, $467,137.50 for future lost earnings, $324,999.90 for past pain and suffering, and $758,333.31 for future pain and suffering. Taking into account the $163,000 the District has already paid, this would leave $7,619,308.71 unpaid. The Claimant suggests that that this sum could be payable over a ten year period.

RESPONDENT'S POSITION: The District objects to any payment to the Claimant through a claim bill. The District also contends that:

- The jury should have allocated a greater percentage of responsibility to the Claimant for failing to wear his seatbelt, and to Ms. Juettner for not taking sufficient action to avoid the collision.
- The Claimant is not deserving of the legislature's grace due to his criminal background and marijuana use, all of which preceded the accident in this cause.
- In the event the legislature determines that the passage of a claim bill is appropriate, the outstanding jury award should be payable in equal amounts over a five-year period.

CONCLUSIONS OF LAW: Mr. Kinne had a duty to operate the bus at all times with consideration for the safety of pedestrians and other drivers. Pedigo v. Smith, 395 So. 2d 615, 616 (Fla. 5th DCA 1981). Specifically, it was Mr. Kinne's duty to observe and yield to Ms. Juettner's vehicle as it approached the intersection. See §316.123(2)(a), Fla. Stat. (2006) ("[E]very driver of a vehicle

approaching a stop intersection indicated by a stop sign shall stop at a clearly marked stop line. After having stopped, the driver shall yield the right-of-way to any vehicle which has entered the intersection from another highway"). Mr. Kinne breached this duty of care and the breach was the proximate cause of the Claimant's injuries.

The Pasco County School District, as Mr. Kinne's employer, is liable for his negligent act. Hollis v. Sch. Bd. of Leon Cnty., 384 So. 2d 661, 665 (Fla. 1st DCA 1980}"{holding that a school board is liable for any negligent act committed by a public school bus driver whom it employs, provided the act is within the scope of the driver's employment); see also Aurbach v. Gallina, 753 So. 2d 60, 62 (Fla. 2000) (holding that the dangerous instrumentality doctrine "imposes strict vicarious liability upon the owner of a motor vehicle who voluntarily entrusts that motor vehicle to an individual whose negligent operation causes damage to another").

The jury's findings regarding damages and the allocation of responsibility were reasonable and should not be disturbed. Although the undersigned does not believe that Ms. Juettner could have avoided the accident (the undersigned rejects the contrary opinion of the school board's accident reconstructionist, whose conclusions were based on the erroneous premise that the school bus was accelerating at the same rate as a passenger vehicle), Ms. Juettner was obliged to require the Claimant to wear his seatbelt. An allocation of 20 percent to Ms. Juettner for her failure to do so was appropriate.

Although the Claimant contends that the jury's award with respect to future medical expenses was against the manifest weight of the evidence, the Claimant could have pursued this issue on appeal. As discussed above, however, neither the Claimant nor the District appealed the final judgment to the Second District Court of Appeal. Accordingly, the undersigned rejects the Claimant's argument that he is entitled to a sum greater than the amount of the excess judgment.

LEGISLATIVE HISTORY:

This is the first claim bill presented to the Senate in this matter.

ATTORNEYS FEES: The Claimant's attorneys have agreed to limit their fees to 25 percent of any amount awarded by the Legislature in compliance with section 768.28(8), Florida Statutes. Lobbyist's fees are included with the attorney's fees.

COLLATERAL SOURCES: The Claimant received $100,000 from his underinsured motorist coverage, and $10,000 From Ms. Juettner's insurance carrier. At present, the Claimant is also receiving Social Security Disability Insurance.

SPECIAL ISSUES: On October 16, 2002, approximately four years prior to the accident giving rise to this matter, the Claimant was arrested for burglary of an unoccupied dwelling, a second degree felony, and petit theft, a first degree misdemeanor. With respect to both charges, The adjudication of guilt was withheld and the Claimant was placed on probation with special conditions. Based on the Claimant's age at the time (12}, as well as the underlying facts of the offense, the undersigned rejects the District's argument that these criminal charges should militate against the passage of a claim bill.

Senate Bill 38, as it is presently drafted, erroneously reads that the jury allocated 10 percent of the responsibility to the Claimant. As noted above, the Claimant was found to be 15 percent responsible. Senate Bill 38 also provides that a final judgment of $875,000 was entered for the Claimant against the District, and that a sum of $675,000 remains unpaid. Both figures are incorrect, as a final judgment of $1,380,967.39 was entered for the Claimant against the school board, $1,217,967.39 of which remains unpaid. Senate Bill 38 should be amended to reflect these corrections.

Although a special needs trust has been created for the Claimant, the bill as drafted does not specify that any funds awarded be placed in trust for the Claimant's care. Accordingly, the undersigned further recommends that the bill be amended before approval to require that such funds be held in trust.

RECOMMENDATIONS: For the reasons set forth above, the undersigned recommends that Senate Bill 38 (2011) be reported FAVORABLY, as amended.

Respectfully submitted,

Edward T. Bauer
Senate Special Master

cc: Secretary of the Senate

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

SENATOR AUDREY GIBSON
6th District

COMMITTEES:
Military and Veterans Affairs, Space, and Domestic Security, *Chair*
Appropriations
Appropriations Subcommittee on Transportation, Tourism, and Economic Development
Commerce and Tourism
Judiciary
Regulated Industries
Joint Legislative Auditing Committee

October 12, 2017

Senator Greg Steube, Chair
Committee on Judiciary
515 Knott Building
404 South Monroe Street
Tallahassee, Florida 32399-1100

Chair Steube:

I respectfully request that SB 36, a claims bill on behalf of Marcus Button, relating to alleged negligence by the Pasco County School Board, be placed on the next committee agenda. The claim arises from a crash on September 26, 2006 while Marcus Button was lawfully using the roadways in Wesley Chapel.

SB 36, requires $1,507,364.00 to be paid upon approval of the claims bill to the parents Mark and Robin Button for injuries sustained.

Thank you for your time and consideration.

Sincerely,

Audrey Gibson
State Senator
District 6

THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
515 Knott Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5198

DATE	COMM	ACTION
1/22/18	SM	Favorable
1/23/18	JU	**Favorable**
	ATD	
	AP	

January 22, 2018

The Honorable Joe Negron
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 40** – Senator Perry E. Thurston, Jr.
HB 6535 – Representative Wengay "Newt" Newton
Relief of Estate of Dr. Sherrill Lynn Aversa

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNOPPOSED EQUITABLE CLAIM FOR $650,000 FROM UNAPPROPRIATED TRUST FUNDS OF THE DEPARTMENT OF TRANSPORTATION FOR THE DEATH OF THE CLAIMANT IN AN AUTOMOBILE ACCIDENT CAUSED WHEN A LADDER FELL OFF A DEPARTMENT TRUCK.

CURRENT STATUS:

Before a prior legislative session, Judge Bram D. E. Canter, an administrative law judge from the Division of Administrative Hearings, serving as a Senate Special Master, held a de novo hearing on a previous version of this bill. After the hearing, the judge issued a report containing findings of fact and conclusions of law and recommended that the bill be reported FAVORABLY.

Judge Canter's report was reissued for SB 30 (2012), the most recent version of the claim bill for which a report is available. The 2012 report is attached as an addendum to this document.

Due to the passage of time since the hearing, the Senate President reassigned the claim to me, Thomas C. Cibula. My responsibilities were to review the records relating to the claim

bill, be available for questions from Senators, and determine whether any changes have occurred since the hearing before Judge Canter, which if known at the hearing might have significantly altered the findings or recommendation in the report.

As part of my review of this matter, counsel for the parties were asked to describe any developments that have occurred since the original special master hearing. After reviewing the responses, I find that there are no new facts that would justify altering the original findings. Additionally, the 2012 claim bill on which Judge Canter's report is based similar to the claim bill filed for the 2018 Legislative Session. The 2018 bill, however, incorporates several corrections recommended by Judge Canter. Therefore, the undersigned recommends that SB 40 be reported FAVORABLY.

Respectfully submitted,

Thomas C. Cibula
Senate Special Master

cc: Secretary of the Senate

THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
12/1/11	SM	Fav/1 amendment

December 1, 2011

The Honorable Mike Haridopolos
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 30 (2012)** – Senator Thad Altman
Relief of Sherrill Lynn Aversa

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNOPPOSED EQUITABLE CLAIM FOR $650,000 FROM UNAPPROPRIATED TRUST FUNDS OF THE DEPARTMENT OF TRANSPORTATION FOR THE DEATH OF THE CLAIMANT IN AN AUTOMOBILE ACCIDENT CAUSED WHEN A LADDER FELL OFF A DEPARTMENT TRUCK.

FINDINGS OF FACT:

On June 21, 1999, Dr. Sherrill Lynn Aversa, 33 years old, was traveling southbound on I-75 in Tampa in rush hour traffic. She was wearing her seatbelt. At the same time, a Department of Transportation (DOT) truck driven by DOT employee Domingo Alvarado was traveling northbound. A 12-foot extension ladder on the DOT truck was not well-secured and fell off the truck into the path of a vehicle driven by Roxann Hodge. Ms. Hodge veered sharply left to avoid the ladder and went into the median where she lost control of her vehicle. Ms. Hodge's car crossed the median into the southbound traffic and struck Dr. Aversa's car head-on. Dr. Aversa was killed instantly. Three other vehicles were also involved in the crash, but those drivers were not seriously injured.

When Mr. Alvarado realized that the ladder had fallen off his truck, he pulled off the roadway, backed up, and retrieved the ladder, which had come to a rest in the center northbound lane. Mr. Alvarado re-secured the ladder and then proceeded on his way. He said that he was unaware that his ladder caused a crash, although he acknowledged seeing smoke and commotion in the southbound lanes of I-75. Later that evening, Mr. Alvarado saw news coverage of the crash and called the Florida Highway Patrol to report his probable involvement.

Mr. Alvarado was cited for a violation of section 316.520, Florida Statutes, for failing to secure a load. DOT suspended him for four weeks without pay for violating DOT's policy regarding securing equipment on his truck.

Dr. Aversa was survived by her husband, Dr. Lee Crandall. They had no children. Dr. Aversa was an epidemiologist at the University of Miami Medical School and a leading researcher in the field of HIV/AIDS. An economist's report estimated that Dr. Aversa's economic damages (lost wages, etc.) were approximately $2.6 million.

Dr. Crandall created a non-profit foundation to honor Dr. Aversa. The foundation awards scholarships to assist epidemiology students in completing their doctoral degrees. Dr. Crandall testified at the claim bill hearing that it is his intention to deposit most of the funds awarded from this claim bill into the foundation in order to endow the scholarships in perpetuity.

The other injured drivers settled with DOT for a total of $50,000. That left $150,000 under the sovereign immunity cap to pay Dr. Aversa's estate. DOT paid $150,000 to Dr. Aversa's estate. All but $727 was used to pay for attorney's fees and costs. Dr. Crandall received approximately $110,000 from a life insurance policy, $100,000 in underinsured motorist coverage, and $10,000 in settlement proceeds from Ms. Hodge's insurer. Some of these funds were used to pay off Dr. Aversa's student loans and some will be transferred to the foundation once Dr. Aversa's estate is closed.

LITIGATION HISTORY:

Dr. Crandall, as husband and personal representative of Dr. Aversa's estate, filed an action for negligence against DOT in the circuit court for Hillsborough County in 2000. In May 2003, on the eve of trial, the parties entered into a stipulated settlement agreement wherein DOT agreed to pay Dr. Aversa's estate a total of $800,000. DOT has already paid $150,000, leaving $650,000 to be paid by way of this claim bill. As a part of the settlement agreement, DOT agreed to cooperate and support the passage of a claim bill in the amount of $650,000.

CONCLUSIONS OF LAW:

The claim bill hearing was a *de novo* proceeding to determine, based on the evidence presented to the Special Master, whether DOT is liable in negligence for the death of the Claimant and, if so, whether the amount of the claim is reasonable.

Mr. Alvarado had a duty to secure the load to his truck pursuant to section 316.520, Florida Statutes, and DOT policy. His failure to do so was the direct and proximate cause of the crash that killed Dr. Aversa. Mr. Alvarado was an employee of DOT acting in the course and scope of his employment at the time of the crash. His negligence is therefore attributable to DOT.

The amount of the claim is fair and reasonable.

ATTORNEY'S FEES:

Claimant's attorneys have agreed to limit their fees to 25 percent of any amount awarded by the Legislature in compliance with section 768.28(8), Florida Statutes. There is an agreement to pay the lobbyist's fee from the claim bill proceeds, which could conflict with the requirement in SB 30 that the lobbyist's fee must be paid from the 25 percent attorney's fees.

OTHER ISSUES:

DOT states that the claim should be paid from the State Transportation Fund.

There are some errors in SB 30. The bill states that the consent judgment was for $797,500. The correct figure is $800,000. The bill states that DOT paid $100,000 to Dr. Aversa's estate, but DOT paid $150,000.

RECOMMENDATIONS: For the reasons set forth above, I recommend that Senate Bill 30 (2012) be reported FAVORABLY, as amended.

Respectfully submitted,

Bram D. E. Canter
Senate Special Master

cc: Senator Thad Altman
Debbie Brown, Interim Secretary of the Senate
Counsel of Record

The Florida Senate

Committee Agenda Request

To: Senator Greg Steube, Chair
Committee on Judiciary

Subject: Committee Agenda Request

Date: November 13, 2017

I respectfully request that **Senate Bill #40**, relating to Relief of the Estate of Dr. Sherrill Lynn Aversa by the Department of Transportation, be placed on the:

☐ Committee agenda at your earliest possible convenience.

☒ Next committee agenda.

Senator Perry E. Thurston, Jr.
Florida Senate, District 33

File signed original with committee office

S-020 (03/2004)

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 Committee on Judiciary

BILL:	CS/SB 298
INTRODUCER:	Criminal Justice Committee and Senator Bracy
SUBJECT:	Criminal History Records
DATE:	January 24, 2018 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Storch	Jones	CJ	**Fav/CS**
2.	Stallard	Cibula	JU	**Favorable**
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 298 relaxes two of the numerous requirements that a person must meet to obtain a court-ordered expunction (destruction) of a criminal history record, and the bill similarly relaxes one of the many requirements for obtaining a court-ordered sealing of a criminal history record.

Under current law, a person is disqualified from obtaining a court-ordered expunction or sealing of a criminal history record if he or she, as a minor, was adjudicated to have committed specified misdemeanors that generally involve firearms, violence, or the mistreatment of children. Under the bill, the disqualification expires 10 years after the most recent adjudication of delinquency for one of those crimes.

Under current law, a person is also disqualified from obtaining a court order for the expunction of a criminal history record if the case to which the record relates went to trial. Under the bill, however, the occurrence of a trial does not disqualify the expunction of a related record as long as the trial resulted in a judgment of acquittal or a not-guilty verdict.

II. Present Situation:

Overview

The statutes set forth the processes for petitioning a court for an order to seal or expunge (destroy) a criminal history record. A criminal history record is "any nonjudicial record

maintained by a criminal justice agency containing criminal history information."[1] Unless sealed or expunged, a criminal history record must be accessible to the public. And the term "record" refers not to any single document, but instead to all documents or other records of a particular arrest or incident.[2]

The processes for obtaining a court order to seal or expunge a criminal history record involve several steps and are largely similar. Regarding expungement only, a person must first obtain a certified statement demonstrating the person's eligibility from the appropriate prosecutor's office. Then, whether seeking expungement or sealing of a record, a person must obtain a certificate of eligibility from the Florida Department of Law Enforcement (FDLE). Finally, a person must file a petition with the court for an order to seal or expunge one of his or her records.

To successfully complete this process and receive a court order, a person must meet several requirements.

The court-ordered expunction of criminal history records is one of several methods by which a criminal history record may be expunged. Other methods of expunction set forth in the statutes include:

- Administrative, for records of arrests determined to have been made contrary to law or by mistake;[3]
- Juvenile diversion, for records of arrests of minors who complete a prearrest or postarrest diversion program;[4]
- Lawful self-defense, for records relating to a person who is later found to have acted in lawful self-defense;[5]
- Human trafficking, for records of offenses committed while the person was being victimized as part of a human trafficking scheme;[6]
- Automatic juvenile, for records of juvenile offenses as long as the person does not commit any serious offenses between age 18 and 26;[7] and
- Early juvenile, for records of juvenile offenses as long as the person does not commit any serious offenses between age 18 and 21.[8]

Court-Ordered Expunction of a Criminal History Record

Process for Obtaining Court-Ordered Expunction of a Criminal History Record

To proceed toward a court-ordered expungement, a person must first obtain documents demonstrating his or her eligibility from the appropriate prosecutor's office. Next, he or she must obtain a certificate of eligibility from the FDLE. To obtain a certificate of eligibility for expunction, a person must submit each of the following to the FDLE:

[1] Section 943.0045(6), F.S.
[2] *See* s. 943.0585(17), F.S.
[3] Section 943.0581, F.S.
[4] Section 943.0582, F.S.
[5] Section 943.0585(5), F.S.
[6] Section 943.0583, F.S.
[7] Section 943.0515, F.S.
[8] Section 943.0515(1)(b)2., F.S.

- A written, certified statement from the appropriate state attorney or statewide prosecutor which indicates:
  - A charging document was not filed or issued in the case.
  - A charging document, if filed or issued in the case, was dismissed or prosecution was otherwise formally abandoned by the prosecutor, and that the charges that the person is seeking to expunge did not result in a trial.
  - The criminal history record does not relate to certain violations, which tend to be sex crimes or crimes involving the mistreatment of children.[9]
- A $75 processing fee, unless it is waived by the executive director.
- A certified copy of the disposition of the charge.[10]

In addition, the applicant must not:

- Prior to the filing of the certificate of eligibility, have been adjudicated guilty of a criminal offense or comparable ordinance violation or have been adjudicated delinquent for committing certain felonies or misdemeanors involving violence, firearms, or the mistreatment of children;[11]
- Have been adjudicated as committing any of the acts stemming from the arrest or alleged criminal activity to which the petition to expunge pertains;
- Be under court supervision for the arrest or alleged criminal activity to which the petition pertains; or
- Have secured a prior sealing of a criminal history record, unless the expunction sought is of a criminal history record previously sealed for 10 years pursuant to s. 943.0585(2)(h), F.S.[12]

Upon receipt of a certificate of eligibility for expunction, the person must then petition the court for an order of expungement. Along with the certificate of eligibility, the petition must include a sworn statement attesting that the petitioner:

- Has never been adjudicated guilty of a criminal offense or comparable ordinance violation, or been adjudicated delinquent for committing any felony or a specified misdemeanor involving violence, firearms or mistreatment of children;
- Has not been adjudicated guilty of, or adjudicated delinquent for committing, any of the acts stemming from the arrest or alleged criminal activity to which the petition pertains;
- Has never secured a prior sealing or expunction of a criminal history record, unless the expunction is sought for a criminal history record previously sealed for 10 years pursuant to s. 943.0585(2)(h), F.S., and the record is otherwise eligible for expunction; and
- Is eligible for such an expunction and does not have any other petition to expunge or seal pending before any court.[13]

---

[9] These violations include sexual misconduct, luring or enticing a child, sexual battery, procuring a person under 18 for prostitution, lewd or lascivious offenses committed in front of a minor, an elderly person, or a disabled person, voyeurism, violations of the Florida Communications Fraud Act, sexual abuse of a child, offenses by public officers and employees, acts in connection with obscenity and minors, child pornography, selling or buying of minors, drug trafficking, violation of pretrial detention, and any violation specified as a predicated offense for registration as a sexual predator pursuant to the Florida Sexual Predators Act. Section 943.0585(2)(a)3., F.S.

[10] Section 943.0585(2)(a)-(c), F.S.

[11] *See* s. 943.051(3)(b), F.S.

[12] Section 943.0585(2)(d)-(g), F.S.

[13] Section 943.0585(1)(b), F.S.

A copy of the completed petition to expunge is then served upon the appropriate state attorney or statewide prosecutor and the arresting agency, any of which may respond to the court regarding the petition.[14] Finally, the court decides whether to grant the petition—a decision over which it has sole discretion.[15]

Effect of Expunction of a Criminal History Record

If the court grants a petition to expunge, the clerk of the court then certifies copies of the order to the appropriate state attorney or statewide prosecutor and the arresting agency. The arresting agency must provide the expunction order to any agencies that received the criminal history record information from the arresting agency. The FDLE must provide the expunction order to the Federal Bureau of Investigation.[16]

Any record that the court orders expunged must be physically destroyed. The only exception is any record held by the FDLE, which must be maintained. The FDLE's record is confidential and exempt from disclosure requirements under the public records laws, and only a court order would make the record available to a person or entity that is otherwise excluded.[17]

The person who has their criminal history record expunged has the right to lawfully deny or fail to acknowledge arrests relating to the expunged records. However, several categories of persons are excepted from this right, including defendants in criminal cases, persons seeking certain position of trust with regard to children or the elderly, persons seeking to a law enforcement position, and candidates for admission to The Florida Bar.[18]

Court-ordered Sealing of a Criminal History Record

Process for Obtaining Court-Ordered Sealing of a Criminal History Record

To qualify for a court-ordered sealing, a person must first obtain documents demonstrating his or her eligibility from the appropriate prosecutor's office. Then, he or she must obtain a certificate of eligibility from the FDLE. To obtain a certificate of eligibility for sealing, the applicant must not:

- Prior to the date on which the application is filed, have been adjudicated guilty of a criminal offense or comparable ordinance violation, or been adjudicated delinquent for committing certain felonies or misdemeanors generally involving violence, firearms, or the mistreatment of children;
- Have been adjudicated guilty of or adjudicated delinquent for committing any of the acts stemming from the arrest or alleged criminal activity to which the petition to seal pertains;
- Have secured a prior sealing or expunction of a criminal history record; and

[14] Section 943.0585(3)(a), F.S.
[15] Section 943.0585, F.S.
[16] Section 943.0585(3)(b), F.S.
[17] Section 943.0585(4), F.S.
[18] Section 943.0585(4)(a), F.S.

- Be under court supervision for the arrest or alleged criminal activity to which the petition to seal pertains.[19, 20]

Upon receipt of a certificate of eligibility for sealing, the person must then petition the court to seal the criminal history record. Along with the certificate of eligibility, the petitioner must include a sworn statement attesting that the petitioner:

- Has not previously been adjudicated guilty of a criminal offense or comparable ordinance violation, or been adjudicated delinquent for committing any felony or a specified misdemeanor generally involving firearms, violence, or mistreatment of children;[21]
- Has not been adjudicated guilty of or adjudicated delinquent for committing any of the acts stemming from the arrest or alleged criminal activity to which the petition to seal pertains;
- Has never secured a prior sealing or expunction of a criminal history record; and
- Is eligible for such a sealing and does not have any other petition to seal or expunge pending before any court.[22]

A copy of the completed petition to seal is then served upon the appropriate prosecutor and the arresting agency, any of which may respond to the court regarding the petition.[23] There is no statutory right to a court-ordered sealing and any request for sealing of a criminal history record may be denied at the sole discretion of the court.[24]

Effect of Sealing a Criminal History Record

If the court grants a petition to seal, the clerk of the court then certifies copies of the order to the appropriate state attorney or the statewide prosecutor and the arresting agency. The arresting agency must provide the sealing order to any agencies that received the criminal history record information from the arresting agency. The FDLE must provide the expunction order to the Federal Bureau of Investigation.[25] An order sealing a criminal history record does not require that record to be surrendered to the court. Additionally, the FDLE and other criminal justice agencies must continue to maintain the record.[26]

A person who has his or her criminal history record sealed may lawfully deny or fail to acknowledge arrests relating to the records that were sealed. However, several categories of persons are excepted from this right, including criminal defendants, persons seeking a position of trust in relation to vulnerable people such as the elderly and children, those attempting to buy a firearm from a licensed dealer, and candidates for The Florida Bar.[27]

[19] Section 943.059(2)(c)-(f), F.S.
[20] The applicant must also submit to the FDLE a $75 processing fee, unless waived by the executive director, and a certified copy of the disposition of the charge. Section 943.059(2)(a)-(b), F.S.
[21] See s. 943.051(3)(b), F.S.
[22] Section 943.059(1)(b), F.S.
[23] Section 943.059(3)(a), F.S.
[24] Section 943.059, F.S.
[25] Section 943.059(3)(b), F.S.
[26] Section 943.059(3)(e), F.S.
[27] Section 943.059(4)(a), F.S.

III. Effect of Proposed Changes:

This bill relaxes two of the numerous requirements that a person must meet to obtain a court-ordered expunction (destruction) of a criminal history record, and the bill makes similar changes to one of the many requirements for obtaining a court-ordered sealing of such a record.

Under current law, a person is disqualified from obtaining a court-ordered expunction or sealing of a criminal history record if he or she, as a minor, was adjudicated to have committed specified misdemeanors that generally involve firearms, violence, or the mistreatment of children. Under the bill, the disqualification expires 10 years after the most recent adjudication of delinquency.

Under current law, a person is also disqualified from obtaining a court order for the expunction of one of his or her criminal history records if the case to which the record relates went to trial. Under the bill, however, the occurrence of a trial does not disqualify the expunction of a related record as long as the trial resulted in a judgment of acquittal or a not-guilty verdict.

The bill is effective July 1, 2018.

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:

This bill makes more people eligible to seek the court-ordered sealing or expunction of their criminal history records. As a result, there will likely be increases in judicial workloads to hear the petitions for sealing and expunction. Additionally, FDLE will likely incur increased costs for due to increases in the number of applications for a certificate of eligibility for court-ordered sealing or expunction of records.

According to FDLE's estimates for the original version of this bill, the bill will result in an additional 106,522 applications for a certificate of eligibility.[28] With an application fee of $75, the additional applications will result in additional revenue to the agency of $7,989,150. FDLE describes the costs to process these applications as follows:

> There are 1,065,226 criminal history records that have an arrest that would be eligible to expunge a conviction for a misdemeanor from over 10 years ago.
>
> If 10% of those eligible submitted an application, the application submissions would increase by 106,522. Based on this potential increase in applications, 150 additional FTE would be needed to handle various duties and responsibilities:
>
> Positions requested include 1 Bureau Chief, 4 Senior Management Analyst Supervisor, 8 Operations and Management Consultant Manager, 2 Criminal Justice Information Consultant II, 10 Criminal Justice Information Consultant I, 105 Criminal Justice Information Analyst II, 10 Criminal Justice Information Analysts I, and 10 Criminal Justice Information Examiners.
>
> It would cost $9,612,004 in year one for salary, benefits, expense, and human resources services and $9,048,754 in recurring years.
>
> In addition, the increase in necessary positions will require obtaining additional office space to house the new members, as the FDLE headquarters building is currently at capacity. The cost associated with new space is yet to be determined.[29]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 943.0585 and 943.059.

[28] Florida Department of Law Enforcement, *2018 FDLE Legislative Bill Analysis for SB 298* (Oct. 17, 2017) (on file with the Senate Committee on Judiciary).
[29] *Id.*

IX. Additional Information:

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

CS by Criminal Justice on October 23, 2017:
The Committee Substitute:

- Clarifies that a person who has not been adjudicated delinquent of committing a specified misdemeanor offense in s. 943.051(3)(b), F.S., in the past 10 years is eligible to seek an expunction of a criminal history record; and
- Enables a person to be eligible to seek the sealing of a criminal history record if he or she has not been adjudicated delinquent for committing a specified misdemeanor generally involving firearms, violence, of the mistreatment of children in the previous 10 years.[30]

B. Amendments:

None.

[30] See s. 943.051(3)(b), F.S., for a list of these offenses.

By the Committee on Criminal Justice; and Senator Bracy

591-00907-18 2018298c1

A bill to be entitled

An act relating to criminal history records; amending s. 943.0585, F.S.; revising the elements that must be attested to by a petitioner in a statement submitted in support of the expunction of a criminal history record; revising the circumstances under which the Department of Law Enforcement must issue a certificate of eligibility for expunction of a criminal history record; amending s. 943.059, F.S.; revising the elements that must be attested to by a petitioner in a statement submitted in support of the sealing of a criminal history record; revising the circumstances under which the Department of Law Enforcement must issue a certificate of eligibility for sealing of a criminal history record; providing an effective date.

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

Section 1. Paragraph (b) of subsection (1) and paragraphs (a) and (d) of subsection (2) of section 943.0585, Florida Statutes, are amended to read:

943.0585 Court-ordered expunction of criminal history records.—The courts of this state have jurisdiction over their own procedures, including the maintenance, expunction, and correction of judicial records containing criminal history information to the extent such procedures are not inconsistent with the conditions, responsibilities, and duties established by this section. Any court of competent jurisdiction may order a criminal justice agency to expunge the criminal history record

591-00907-18 2018298c1

of a minor or an adult who complies with the requirements of this section. The court shall not order a criminal justice agency to expunge a criminal history record until the person seeking to expunge a criminal history record has applied for and received a certificate of eligibility for expunction pursuant to subsection (2) or subsection (5). A criminal history record that relates to a violation of s. 393.135, s. 394.4593, s. 787.025, chapter 794, former s. 796.03, s. 800.04, s. 810.14, s. 817.034, s. 825.1025, s. 827.071, chapter 839, s. 847.0133, s. 847.0135, s. 847.0145, s. 893.135, s. 916.1075, a violation enumerated in s. 907.041, or any violation specified as a predicate offense for registration as a sexual predator pursuant to s. 775.21, without regard to whether that offense alone is sufficient to require such registration, or for registration as a sexual offender pursuant to s. 943.0435, may not be expunged, without regard to whether adjudication was withheld, if the defendant was found guilty of or pled guilty or nolo contendere to the offense, or if the defendant, as a minor, was found to have committed, or pled guilty or nolo contendere to committing, the offense as a delinquent act. The court may only order expunction of a criminal history record pertaining to one arrest or one incident of alleged criminal activity, except as provided in this section. The court may, at its sole discretion, order the expunction of a criminal history record pertaining to more than one arrest if the additional arrests directly relate to the original arrest. If the court intends to order the expunction of records pertaining to such additional arrests, such intent must be specified in the order. A criminal justice agency may not expunge any record pertaining to such additional arrests if the

order to expunge does not articulate the intention of the court to expunge a record pertaining to more than one arrest. This section does not prevent the court from ordering the expunction of only a portion of a criminal history record pertaining to one arrest or one incident of alleged criminal activity. Notwithstanding any law to the contrary, a criminal justice agency may comply with laws, court orders, and official requests of other jurisdictions relating to expunction, correction, or confidential handling of criminal history records or information derived therefrom. This section does not confer any right to the expunction of any criminal history record, and any request for expunction of a criminal history record may be denied at the sole discretion of the court.

(1) PETITION TO EXPUNGE A CRIMINAL HISTORY RECORD.—Each petition to a court to expunge a criminal history record is complete only when accompanied by:

(b) The petitioner's sworn statement attesting that the petitioner:

1. Has never, before ~~prior to~~ the date on which the petition is filed, been adjudicated guilty of a criminal offense or comparable ordinance violation, or been adjudicated delinquent for committing any felony ~~or a misdemeanor specified in s. 943.051(3)(b)~~.

2. Has not been adjudicated delinquent for committing a misdemeanor offense specified in s. 943.051(3)(b) in the previous 10 years.

3.~~2.~~ Has not been adjudicated guilty of, or adjudicated delinquent for committing, any of the acts stemming from the arrest or alleged criminal activity to which the petition

pertains.

4.~~3.~~ Has never secured a prior sealing or expunction of a criminal history record under this section, s. 943.059, former s. 893.14, former s. 901.33, or former s. 943.058, unless expunction is sought of a criminal history record previously sealed for 10 years pursuant to paragraph (2)(h) and the record is otherwise eligible for expunction.

5.~~4.~~ Is eligible for such an expunction to the best of his or her knowledge or belief and does not have any other petition to expunge or any petition to seal pending before any court.

Any person who knowingly provides false information on such sworn statement to the court commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) CERTIFICATE OF ELIGIBILITY FOR EXPUNCTION.—Prior to petitioning the court to expunge a criminal history record, a person seeking to expunge a criminal history record shall apply to the department for a certificate of eligibility for expunction. The department shall, by rule adopted pursuant to chapter 120, establish procedures pertaining to the application for and issuance of certificates of eligibility for expunction. A certificate of eligibility for expunction is valid for 12 months after the date stamped on the certificate when issued by the department. After that time, the petitioner must reapply to the department for a new certificate of eligibility. Eligibility for a renewed certification of eligibility must be based on the status of the applicant and the law in effect at the time of the renewal application. The department shall issue a certificate of

eligibility for expunction to a person who is the subject of a criminal history record if that person:

(a) Has obtained, and submitted to the department, a written, certified statement from the appropriate state attorney or statewide prosecutor which indicates:

1. That an indictment, information, or other charging document was not filed or issued in the case.

2. That an indictment, information, or other charging document, if filed or issued in the case, was dismissed or nolle prosequi by the state attorney or statewide prosecutor~~,~~ or was dismissed by a court of competent jurisdiction, that a judgment of acquittal was rendered by a judge, or that a verdict of not guilty was rendered by a judge or jury ~~and that none of the charges related to the arrest or alleged criminal activity to which the petition to expunge pertains resulted in a trial, without regard to whether the outcome of the trial was other than an adjudication of guilt~~.

3. That the criminal history record does not relate to a violation of s. 393.135, s. 394.4593, s. 787.025, chapter 794, former s. 796.03, s. 800.04, s. 810.14, s. 817.034, s. 825.1025, s. 827.071, chapter 839, s. 847.0133, s. 847.0135, s. 847.0145, s. 893.135, s. 916.1075, a violation enumerated in s. 907.041, or any violation specified as a predicate offense for registration as a sexual predator pursuant to s. 775.21, without regard to whether that offense alone is sufficient to require such registration, or for registration as a sexual offender pursuant to s. 943.0435, where the defendant was found guilty of, or pled guilty or nolo contendere to any such offense, or that the defendant, as a minor, was found to have committed, or

pled guilty or nolo contendere to committing, such an offense as a delinquent act, without regard to whether adjudication was withheld.

(d)1. Has never, before ~~prior to~~ the date on which the application for a certificate of eligibility is filed, been adjudicated guilty of a criminal offense or comparable ordinance violation, or been adjudicated delinquent for committing any felony ~~or a misdemeanor specified in s. 943.051(3)(b)~~.

2. Has not been adjudicated delinquent for committing a misdemeanor offense specified in s. 943.051(3)(b) in the previous 10 years.

Section 2. Paragraph (b) of subsection (1) and paragraph (c) of subsection (2) of section 943.059, Florida Statutes, are amended to read:

943.059 Court-ordered sealing of criminal history records.—The courts of this state shall continue to have jurisdiction over their own procedures, including the maintenance, sealing, and correction of judicial records containing criminal history information to the extent such procedures are not inconsistent with the conditions, responsibilities, and duties established by this section. Any court of competent jurisdiction may order a criminal justice agency to seal the criminal history record of a minor or an adult who complies with the requirements of this section. The court shall not order a criminal justice agency to seal a criminal history record until the person seeking to seal a criminal history record has applied for and received a certificate of eligibility for sealing pursuant to subsection (2). A criminal history record that relates to a violation of s. 393.135, s. 394.4593, s. 787.025, chapter 794, former s. 796.03,

s. 800.04, s. 810.14, s. 817.034, s. 825.1025, s. 827.071, chapter 839, s. 847.0133, s. 847.0135, s. 847.0145, s. 893.135, s. 916.1075, a violation enumerated in s. 907.041, or any violation specified as a predicate offense for registration as a sexual predator pursuant to s. 775.21, without regard to whether that offense alone is sufficient to require such registration, or for registration as a sexual offender pursuant to s. 943.0435, may not be sealed, without regard to whether adjudication was withheld, if the defendant was found guilty of or pled guilty or nolo contendere to the offense, or if the defendant, as a minor, was found to have committed or pled guilty or nolo contendere to committing the offense as a delinquent act. The court may only order sealing of a criminal history record pertaining to one arrest or one incident of alleged criminal activity, except as provided in this section. The court may, at its sole discretion, order the sealing of a criminal history record pertaining to more than one arrest if the additional arrests directly relate to the original arrest. If the court intends to order the sealing of records pertaining to such additional arrests, such intent must be specified in the order. A criminal justice agency may not seal any record pertaining to such additional arrests if the order to seal does not articulate the intention of the court to seal records pertaining to more than one arrest. This section does not prevent the court from ordering the sealing of only a portion of a criminal history record pertaining to one arrest or one incident of alleged criminal activity. Notwithstanding any law to the contrary, a criminal justice agency may comply with laws, court orders, and official requests of other jurisdictions

relating to sealing, correction, or confidential handling of criminal history records or information derived therefrom. This section does not confer any right to the sealing of any criminal history record, and any request for sealing a criminal history record may be denied at the sole discretion of the court.

(1) PETITION TO SEAL A CRIMINAL HISTORY RECORD.—Each petition to a court to seal a criminal history record is complete only when accompanied by:

(b) The petitioner's sworn statement attesting that the petitioner:

1. Has never, before ~~prior to~~ the date on which the petition is filed, been adjudicated guilty of a criminal offense or comparable ordinance violation, or been adjudicated delinquent for committing any felony ~~or a misdemeanor specified in s. 943.051(3)(b)~~.

2. Has not been adjudicated delinquent for committing a misdemeanor offense specified in s. 943.051(3)(b) in the previous 10 years.

3.~~2.~~ Has not been adjudicated guilty of or adjudicated delinquent for committing any of the acts stemming from the arrest or alleged criminal activity to which the petition to seal pertains.

4.~~3.~~ Has never secured a prior sealing or expunction of a criminal history record under this section, s. 943.0585, former s. 893.14, former s. 901.33, or former s. 943.058.

5.~~4.~~ Is eligible for such a sealing to the best of his or her knowledge or belief and does not have any other petition to seal or any petition to expunge pending before any court.

Any person who knowingly provides false information on such sworn statement to the court commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) CERTIFICATE OF ELIGIBILITY FOR SEALING.—Prior to petitioning the court to seal a criminal history record, a person seeking to seal a criminal history record shall apply to the department for a certificate of eligibility for sealing. The department shall, by rule adopted pursuant to chapter 120, establish procedures pertaining to the application for and issuance of certificates of eligibility for sealing. A certificate of eligibility for sealing is valid for 12 months after the date stamped on the certificate when issued by the department. After that time, the petitioner must reapply to the department for a new certificate of eligibility. Eligibility for a renewed certification of eligibility must be based on the status of the applicant and the law in effect at the time of the renewal application. The department shall issue a certificate of eligibility for sealing to a person who is the subject of a criminal history record provided that such person:

(c)1. Has never, before ~~prior to~~ the date on which the application for a certificate of eligibility is filed, been adjudicated guilty of a criminal offense or comparable ordinance violation, or been adjudicated delinquent for committing any felony ~~or a misdemeanor specified in s. 943.051(3)(b)~~.

2. Has not been adjudicated delinquent for committing a misdemeanor offense specified in s. 943.051(3)(b) in the previous 10 years.

Section 3. This act shall take effect July 1, 2018.

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

The Florida Senate

Committee Agenda Request

To: Senator Greg Steube, Chair
Judiciary Committee

Subject: Committee Agenda Request

Date: January 19, 2018

I respectfully request that **Senate Bill #298**, relating to Criminal History Records, be placed on the:

☐ committee agenda at your earliest possible convenience.

☒ next committee agenda.

Senator Randolph Bracy
Florida Senate, District 11

File signed original with committee office

S-020 (03/2004)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/25/18
Meeting Date

298
Bill Number (if applicable)

Topic Expungement & Sealing

Amendment Barcode (if applicable)

Name Andy Thomas

Job Title Public Defender, 2nd Judicial Circuit

Address 301 S. Monroe St.
Street

Phone 850 606-1030

Tallahassee FL
City *State* *Zip*

Email andy.thomas@flpd2.com

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Public Defender Association

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☐ Yes ☑ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

Duplicate

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1.25.18
Meeting Date

298
Bill Number (if applicable)

Amendment Barcode (if applicable)

Topic Criminal Records

Name Barney Bishop

Job Title CEO

Address FL204 South Monroe Street
Street

Phone 510-9922

Tallahassee FL 32301
City *State* *Zip*

Email Barney@BarneyBishop.com

Speaking: ☑ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Smart Justice Alliance

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

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 Committee on Judiciary

BILL:	SB 866
INTRODUCER:	Senator Bracy
SUBJECT:	Sentencing
DATE:	January 25, 2018
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Jones	CJ	**Favorable**
2.	Tulloch	Cibula	JU	**Favorable**
3.			ACJ	
4.			AP	

I. Summary:

SB 866 amends several sentencing provisions to raise the sentencing point ceiling for determining the lowest permissible sentence a court may impose in a felony case. Specifically, the bill amends s. 775.082(10), F.S., to raise the point ceiling from 22 points to 44 points for certain nonviolent felony offenders. Similarly, the bill amends s. 921.0024(2), F.S., of the Criminal Punishment Code (Code) to raise the point ceiling from 44 points to 52 points for imposing nonstate prison sentences. The bill also makes conforming changes to the calculation for determining the lowest permissible sentence when the points exceed 52 points under the Code. The effect of these changes is that more offenders will score low enough to qualify for a nonstate prison sentence, like probation. And for offenders who score more than 52 total sentence points, the effect of the new calculation equates to a 6-month reduction in the offender's overall sentence.

Additionally, the bill responds to the First District Court of Appeal's en banc, plurality opinion in *Woods v. State* in which part of the court suggests s. 775.082(10), F.S. is unconstitutional. The bill amends the statute to permit the trial court to sentence the defendant to a state prison sentence if *a jury* or a court (if the defendant waives a jury trial) finds that a nonstate prison sanction could present a danger to the public.

II. Present Situation:

Criminal Punishment Code

The Criminal Punishment Code[1] (Code) is Florida's "primary sentencing policy."[2] Under the code, noncapital felonies receive an offense severity level ranking, Levels 1-10.[3] When a defendant is sentenced under the Code, the highest points are assigned and accrue based upon the ranking of the defendant's primary offense, followed by the defendant's additional and prior offenses.[4] For example, if the defendant's primary charge is a level 10 felony, such as human trafficking,[5] the Criminal Punishment Code scoresheet (scoresheet) assigns 116 points for that offense. If the defendant has a second count of human trafficking listed as an additional or prior offense, the scoresheet assigns 58 points.[6]

Sentencing points also escalate as the level escalates. Using the example above, a level 10 felony like human trafficking, is assigned 116 points as the primary offense. But a level 1 felony, like possession of a stolen driver's license,[7] is assigned 4 points.[8] Points may also be added or multiplied for other factors as well, such as victim injury or the commission of certain offenses like a Level 7 or 8 drug trafficking offense.[9]

The purpose of the scoresheet is to develop the sentencing range for the defendant and determine the lowest permissible sentence. Absent mitigation,[10] the permissible sentencing range under the Code is generally the lowest permissible sentence scored up to and including the maximum penalty provided under s. 775.082, F.S., for the offenses committed.[11]

Thus, under current law, if the defendant's total sentence points are equal to or less than 44 points, the defendant's lowest permissible sentence may be any nonstate prison sanction, such as probation. However, the highest permissible sentence is still the statutory maximum for the felony offense committed. On the other hand, if the defendant's total sentence points exceed 44 points, the lowest permissible sentence is a state prison sanction. To determine the number of months the defendant will be sentenced to serve in prison, 28 points are subtracted from the total

---

[1] Sections 921.002-921.0027, F.S. See chs. 97-194 and 98-204, Laws of Fla. The Code is effective for offenses committed on or after October 1, 1998.
[2] Florida Department of Corrections, *Florida's Criminal Punishment Code: A Comparative Assessment (FY 2012-2013)* Executive Summary (Offenses Committed On or After October 1, 1998), , http://www.dc.state.fl.us/pub/sg_annual/1213/executives.html (last visited on Dec. 12, 2017).
[3] Offenses are either ranked in the offense severity level ranking chart in s. 921.0022, F.S., or are ranked by default based on a ranking assigned to the felony degree of the offense as provided in s. 921.0023, F.S.
[4] Section 921.0024(1)(a), F.S.
[5] Section 921.0022(3)(j), F.S.
[6] *See* n. 4, *supra*.
[7] Section 921.0022(3)(a), F.S.
[8] *See* n. 4, *supra*.
[9] *Id.*
[10] The court may "mitigate" or "depart downward" from the scored lowest permissible sentence if the court finds a mitigating circumstance. Section 921.0026, F.S., provides a list of mitigating circumstances.
[11] If the scored lowest permissible sentence exceeds the maximum penalty in s. 775.082, F.S., the sentence required by the Code must be imposed. If total sentence points are greater than or equal to 363 points, the court may sentence the offender to life imprisonment. Section 921.0024(2), F.S.

sentence points, and the remaining total is decreased by 25 percent.[12] For example, if the defendant scored 116 points for the primary count and 58 points for the additional count on the scoresheet, the total would be 174 points. Subtracting 28 points from 174 points, yields 146 points. Decreasing those 146 points by 25 percent equals 36.5. This number, 36.5, is the lowest number of months the defendant must be sentenced to prison on the scoresheet.

Length of Stay

According to a 2015 study of the operations of the Department of Corrections (DOC), length of stay in Florida correctional facilities exceeds the national length of stay average of 30 months. Length of Stay has consistently increased in Florida "from just under 30 months on average in 2008 to almost 40 months by 2015,"[13] according to a recent study. The study's authors further found that the longer average length of stay in Florida "explains to a large degree Florida's significantly higher incarceration rate of 522 per 100,000 population versus the U.S. state incarceration rate of 416 per 100,000."[14]

Departure from a Code Sentence

An exception to typical Code sentencing is found in s. 775.082(10), F.S. Under this subsection, if a defendant is sentenced for an offense committed on or after July 1, 2009, which is a third degree felony but not a forcible felony,[15] and if the defendant's total sentence points pursuant to s. 921.0024, F.S., are 22 points or fewer, the court must sentence the defendant to a nonstate prison sanction. However, if the court makes written findings that a nonstate prison sanction could present a danger to the public, the court may sentence the defendant to a state correctional facility.[16]

Woods v. State

In *Woods v. State*, the First District Court of Appeal issued an en banc,[17] plurality opinion[18] by which part of the court suggested that s. 775.082(10), F.S., was unconstitutional under *Apprendi v. New Jersey*. In *Apprendi*, the U.S. Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be

[12] Section 921.0024, F.S. Unless otherwise noted, information on the Code is from this source.
[13] *Study of Operations of the Florida Department of Corrections* (prepared by Carter Goble Associates, LLC), Report No. 15-FDC (November 2015), Office of Program Policy Analysis and Government Accountability, Florida Legislature, p. 80 (footnote omitted). This study is available at http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/15-FDC.pdf.
[14] *Id.*
[15] Section 776.08, F.S., defines a "forcible felony" as treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.
[16] Section 775.082(10), F.S.
[17] En banc means "with all of the judges present and participating; in full court." BLACK'S LAW DICTIONARY (10th ed. 2014). Florida's district courts of appeal generally sit in panels of three. In going en banc, 14 of the 15 judges at the First District considered the *Woods* case together. The decision reflects Judge Jay was recused.
[18] *Woods v. State*, 214 So. 3d 803 (Fla. 1st DCA 2017).

submitted to a jury, and proved beyond a reasonable doubt."[19] "[T]he Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt."[20]

In *Woods*, the First District Court of Appeal, which is made up of 15 judges, went en banc to reconsider a decision made by a three-judge panel.[21] Because one judge was recused, the remaining 14 judges deliberated. Of those 14 judges, 10 agreed that the sentence imposed by the trial court should be affirmed, while four dissented.[22] However, of the 10 that voted to affirm, five would have held that s. 775.082(10), F.S. was unconstitutional;[23] whereas, five others would *not* have found it unconstitutional.[24] Of the dissenters, none would have reached the question of s. 775.082(10)'s constitutionality at all.[25]

Generally, when there is a plurality opinion, courts look to the narrowest possible holding with which the majority of judges agree.[26] The narrowest possible holding in *Woods* by a majority of the judges is that the sentence was affirmable and not reversible. Thus, the case was affirmed per curiam with multiple concurrences (which is an unusual disposition for a case). However, there is no narrow rationale that these multiple concurring opinions agree upon in the *Woods* case.

Additionally, the Florida Supreme Court has denied review of the *Woods* decision,[27] and no other Florida appellate court appears to have addressed the same constitutional question addressed in *Woods*.[28] As a general rule, a legal issue decided by one Florida district court of appeal that has not been overruled by the Florida Supreme Court is the controlling law that must be followed by all Florida trial courts.[29] However, because there is no majority holding in *Woods* on the issue of whether s. 775.082(10), F.S. is constitutional, it appears *Woods* might not be not binding precedent at this time.

Nonetheless, the concurring opinion in the *Woods* case that would have held s. 775.082(10), F.S. unconstitutional under *Apprendi* has, at the very least, strong persuasive value. This concurring opinion reasoned as follows: "The statutory authority in the last sentence of subsection (10), allowing a trial judge to make factual findings to increase an offender's sentence to a state correctional facility, is unconstitutional because only a jury may make findings that increase a

[19] *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).
[20] *Alleyne v. United States*, 570 U.S. 99, 111-12 (2013), citing *Apprendi v. New Jersey*, 530 U.S. at 484.
[21] *See* n. 17, *supra*.
[22] *Woods*, 214 So. 3d at 804.
[23] *Id.* at 804-12 (Makar, J. concurring).
[24] *Id.* at 812-19 (Osterhaus, J., concurring); *id.* at 819-22 (Winokur, J., concurring).
[25] *Id.* at 822-25 (Wolf, J., dissenting); *id.* at 825-26 (Windsor, J., dissenting).
[26] *Heynard v. State*, 992 So. 2d 120, 129-30, n. 7 (Fla. 2008) ("*See Marks v. United States*, 430 U.S. 188, (1977) (stating that when the Court issues a decision where no rationale receives the vote of five justices, the holding of the Court is the "position taken by those members who concurred in the judgments on the narrowest of grounds.") (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)).
[27] *Woods v. State*, 2017 WL 2264740 (Fla. May 27, 2017).
[28] In a 2016 case, the Second District Court of Appeal did not reach a constitutional argument raised by the appellant that was similar to the argument raised in *Woods*, but the court noted that "no court in Florida has yet reached the issue." *Reed v. State*, 192 So. 3d 641, 644, n. 2 (Fla. 2d DCA 2016) (citations omitted). Senate Criminal Justice Committee staff reviewed cases subsequent to *Reed* but did not find any Florida Supreme Court case overruling *Woods* or any Florida appellate case addressing a constitutional argument similar to that raised in *Woods.*
[29] *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992).

penalty beyond a statutory maximum (which is up to twelve months of incarceration as a nonstate sanction)."[30]

III. Effect of Proposed Changes:

Section 1: The bill amends s. 775.082(10), F.S., to require a nonstate prison sanction for certain nonviolent offenders who commit an offense on or after October 1, 2018, and whose total sentence points are 44 points or fewer, unless a jury or a court (if the defendant waives a jury trial) finds that a nonstate prison sanction could present a danger to the public. Under current s. 775.082(10), F.S., this provision is triggered when the offender's total sentence points are 22 points or fewer. Current law also requires a court to make the "danger to the public" findings. The change to require jury findings (unless there is a jury waiver) is intended to address *Woods v. State* (discussed, supra), in which a concurring opinion suggests that s. 775.082(10), F.S., is unconstitutional because a court, rather than a jury, makes the "danger to the public" findings.

Section 2: The bill also amends s. 921.0024(2), F.S., of the Criminal Punishment Code (Code), to provide that, for offenses committed on or after October 1, 2018, the lowest permissible sentence under the Code is a nonstate prison sanction if total sentence points equal or are less than 52 points. Current s. 921.0024(2), F.S., specifies the lowest permissible sentence under the Code is a nonstate prison sanction if total sentence points equal or are less than 44 points.

Under current s. 921.0024(2), F.S., an offender can only score a state prison sentence as the lowest permissible sentence if total sentence points exceed 44 points. The lowest permissible sentence in state prison months is calculated by subtracting 28 points from the total sentence points (exceeding 44 points) and decreasing the remaining total by 25 percent. A prison sentence must exceeds 12 months.[31] This calculation will always result in a state prison sentence that exceeds 12 months.

The bill also amends s. 921.0024(2), F.S., to make conforming changes to the calculation for determining the lowest permissible sentence in state prison months when total sentence points exceed 52 points. Under the bill, for offenses committed on or after October 1, 2018, the lowest permissible sentence in state prison months is calculated by subtracting 36 points from the total sentence points (exceeding 52 points) and decreasing the remaining total by 25 percent. This calculation will always result in a state prison sentence that exceeds 12 months.

The effect of these changes is:

- There will be more offenders who score a nonstate prison sanction as the lowest permissible sentence.
- Those offenders having total sentence points exceeding 52 points, will score a lowest permissible sentence in state prison months that is 6 months less than they would score under current s. 921.0024(2), F.S. For example, a Level 7 primary offense (one count) scores 56 sentence points. Under s. 921.0024(2), F.S., as amended by the bill, a first-time offender with

[30] *Woods*, 214 So. 3d at 805-806 (Makar, J., concurring) (also citing *Blakely v. Washington*, 542 U.S. 296, 310 (2004) (applying *Apprendi* to plea deals); *Plott v. State*, 148 So. 3d 90, 95 (Fla. 2014) ("[W]e hold that upward departure sentences that are unconstitutionally enhanced in violation of *Apprendi* and *Blakely* patently fail to comport with constitutional limitations, and consequently, the sentences are illegal under rule 3.800(a).").

[31] Section 921.0024(2), F.S.

only a Level 7 primary offense (one count)[32] would score a state prison sentence of 15 months as the lowest permissible sentence in state prison months. In contrast, under current s. 921.0024(2), F.S., the same offender would score a state prison sentence of 21 months as the lowest permissible sentence in state prison months.

Sections 3-9: This bill reenacts the following sections of the Florida Statutes for the purpose of incorporating the amendments made to section 921.0024 of the Florida Statutes: 921.00241, 921.0026, 921.00265, 924.06, 948.01, 948.06, and 948.20.

Section 4: The effective date of the bill is October 1, 2018.

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 Criminal Justice Impact Conference (CJIC), which provides the final, official estimate of the prison bed impact, if any, of legislation, estimates that the bill will have a "negative significant" prison bed impact (a decrease of more than 25 prison beds).[33]

[32] In this example, the offender does not score points for any factor other than one count of the primary offense.
[33] Telephonic communication on Jan. 9, 2018, between staff of the Senate Committee on Criminal Justice and staff of the Office of Economic and Demographic Research.

The Legislature's Office of Economic and Demographic Research (EDR) provided information relevant to the CJIC impact estimate.[34] Regarding Section 1 of the bill, which amends s. 775.02(10), F.S., the EDR comments:

> Per DOC, in FY 16-17, 4.1% of those sentenced for offenses prior to the creation of s. 775.082(10), F.S. (July 1st, 2009) were sentenced to prison, and 1.5% of those sentenced for offenses committed after this law was created received a prison sentence. For those with sentencing points between 23 and 44 whose criteria matches s. 775.082(10), F.S., 10.7% received a prison sentence in FY 16-17 (3,163 adj.)….[35]
>
> It is not known how the inclusion of the jury will impact sentencing decisions for those with 44 points or less, nor is it known how judges will respond in the other 96.2% of cases, given that they tended to incarcerate at a higher rate than those under 22 points before the initial statute passed (10.7% compared to 4.1%). However, it is likely that judicial activity will change in some form with the implementation of this new scoring structure, and though the magnitude of the reduction cannot be quantified, with 3,163 (adj.) offenders receiving prison sentences, even a small shift in judicial and jury activity in response to this change could produce a significant effect.

Regarding Section 2 of the bill, which amends s. 921.0024(2), F.S., the EDR comments:

> Under this bill, 52 points or less would be the new range where the lowest permissible sentence is a nonstate prison sanction, "unless the court determines within its discretion that a prison sentence, which may be up to the statutory maximums for the offenses committed, is appropriate," and prison sentence length above 52 points would be calculated by subtracting 36 points from the total sentence points and decreasing the remaining total by 25%. *This would reduce future prison sentences by 6 months for point calculations.*[36]
>
> Per DOC, in FY 16-17, about 14.2% of sentences up to 44 points were state prison sanctions, excluding those fitting the criteria in amended s. 775.082(10), F.S. Between 44 and 52 points, prison sentences jumped to 47.9% of all sentences, and above 52 points they reached 62.6%. This shows that judges already give nonstate prison sanctions to offenders between 44 and 52 points in over half of the sentences. Furthermore, such discretion also applies for prison sentence length. Currently, a person with 53 points should receive a prison sentence of 18.75 months, with the new bill dropping that to 12.75 months. However, a close examination of the 53 point category shows that 34% of

[34] Information provided by EDR staff (on file with the Senate Committee on Criminal Justice). All EDR impact analysis information is from this source.
[35] The abbreviation "adj." means "adjusted." Sentencing data from the DOC is incomplete, which means that the numbers the EDR receives are potentially lower than what the actual numbers are. The EDR adjusts these numbers by the percentage of scoresheets received for the applicable fiscal year.
[36] Emphasis provided by Senate Criminal Justice Committee staff.

offenders sentenced under this point total received a prison sentence that was 18 months or less.

It is not known how this section of the bill will impact current judicial discretion. However, it is likely that judicial activity will change in some form with the implementation of this new scoring structure, with a reduction in prison sentencing between 45 and 52 points. Although the magnitude of that reduction cannot be quantified, there are 4,419 (adj.) offenders who received prison sentences across these points, so even a small shift among judges toward nonstate sanctions could significantly impact prison sentences, as well as with the additional shift downwards in prison sentence length for those with 53 points or more.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 775.082 and 921.0024.

This bill also reenacts the following sections of the Florida Statutes for the purpose of the amendments made to section 921.0024 of the Florida Statutes: 921.00241, 921.0026, 921.00265, 924.06, 948.01, 948.06, and 948.20.

IX. Additional Information:

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

None.

B. Amendments:

None.

By Senator Bracy

11-00302B-18 2018866__

A bill to be entitled

An act relating to sentencing; amending s. 775.082, F.S.; revising the threshold of assessed sentence points below which a court must sentence nonviolent felony offenders who commit certain offenses on or after a specified date to a nonstate prison sanction; providing an exception; amending s. 921.0024, F.S.; revising the computation of the lowest permissible sentence under the Criminal Punishment Code for certain offenses; reenacting ss. 921.00241(1), 921.0026(1) and (2)(m), 921.00265(1), 924.06(1)(e), 948.01(7) and (8), 948.06(2)(i) and (j) and (8)(b), and 948.20(1), F.S., relating to prison diversion programs, mitigating circumstances, recommended sentences, appeals by defendants, placement on probation or into community control, violations of probation and community control, and drug offender probation, respectively, to incorporate the amendment made to s. 921.0024, F.S., in references thereto; providing an effective date.

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

Section 1. Subsection (10) of section 775.082, Florida Statutes, is amended to read:

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

(10) If a defendant is sentenced for an offense committed

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on or after October 1, 2018 ~~July 1, 2009~~, which is a third degree felony but not a forcible felony as defined in s. 776.08, and excluding any third degree felony violation under chapter 810, and if the total sentence points pursuant to s. 921.0024 are 44 ~~22~~ points or fewer, the court must sentence the offender to a nonstate prison sanction. However, if the jury makes findings, or the defendant waives the right to a jury trial and the court makes written findings, that a nonstate prison sanction could present a danger to the public, the court may sentence the offender to a state correctional facility pursuant to this section.

Section 2. Subsection (2) of section 921.0024, Florida Statutes, is amended to read:

921.0024 Criminal Punishment Code; worksheet computations; scoresheets.—

(2)(a) The lowest permissible sentence is the minimum sentence that may be imposed by the trial court, absent a valid reason for departure.

(b) For offenses committed on or after October 1, 1998, and before October 1, 2018, the lowest permissible sentence is any nonstate prison sanction in which the total sentence points equals or is less than 44 points, unless the court determines within its discretion that a prison sentence, which may be up to the statutory maximums for the offenses committed, is appropriate. When the total sentence points exceeds 44 points, the lowest permissible sentence in prison months shall be calculated by subtracting 28 points from the total sentence points and decreasing the remaining total by 25 percent.

(c) For offenses committed on or after October 1, 2018, the

lowest permissible sentence is any nonstate prison sanction in which the total sentence points equal or are fewer than 52 points, unless the court determines within its discretion that a prison sentence, which may be up to the statutory maximums for the offenses committed, is appropriate. When the total sentence points exceed 52 points, the lowest permissible sentence in prison months shall be calculated by subtracting 36 points from the total sentence points and decreasing the remaining total by 25 percent.

(d) The total sentence points shall be calculated only as a means of determining the lowest permissible sentence. The permissible range for sentencing shall be the lowest permissible sentence up to and including the statutory maximum, as defined in s. 775.082, for the primary offense and any additional offenses before the court for sentencing. The sentencing court may impose such sentences concurrently or consecutively. However, any sentence to state prison must exceed 1 year. If the lowest permissible sentence under the code exceeds the statutory maximum sentence as provided in s. 775.082, the sentence required by the code must be imposed. If the total sentence points are greater than or equal to 363, the court may sentence the offender to life imprisonment. An offender sentenced to life imprisonment under this section is not eligible for any form of discretionary early release, except executive clemency or conditional medical release under s. 947.149.

Section 3. For the purpose of incorporating the amendment made by this act to section 921.0024, Florida Statutes, in a reference thereto, subsection (1) of section 921.00241, Florida Statutes, is reenacted to read:

921.00241 Prison diversion program.—

(1) Notwithstanding s. 921.0024 and effective for offenses committed on or after July 1, 2009, a court may divert from the state correctional system an offender who would otherwise be sentenced to a state facility by sentencing the offender to a nonstate prison sanction as provided in subsection (2). An offender may be sentenced to a nonstate prison sanction if the offender meets all of the following criteria:

(a) The offender's primary offense is a felony of the third degree.

(b) The offender's total sentence points score, as provided in s. 921.0024, is not more than 48 points, or the offender's total sentence points score is 54 points and 6 of those points are for a violation of probation, community control, or other community supervision, and do not involve a new violation of law.

(c) The offender has not been convicted or previously convicted of a forcible felony as defined in s. 776.08, but excluding any third degree felony violation under chapter 810.

(d) The offender's primary offense does not require a minimum mandatory sentence.

Section 4. For the purpose of incorporating the amendment made by this act to section 921.0024, Florida Statutes, in references thereto, subsection (1) and paragraph (m) of subsection (2) of section 921.0026, Florida Statutes, are reenacted to read:

921.0026 Mitigating circumstances.—This section applies to any felony offense, except any capital felony, committed on or after October 1, 1998.

(1) A downward departure from the lowest permissible sentence, as calculated according to the total sentence points pursuant to s. 921.0024, is prohibited unless there are circumstances or factors that reasonably justify the downward departure. Mitigating factors to be considered include, but are not limited to, those listed in subsection (2). The imposition of a sentence below the lowest permissible sentence is subject to appellate review under chapter 924, but the extent of downward departure is not subject to appellate review.

(2) Mitigating circumstances under which a departure from the lowest permissible sentence is reasonably justified include, but are not limited to:

(m) The defendant's offense is a nonviolent felony, the defendant's Criminal Punishment Code scoresheet total sentence points under s. 921.0024 are 60 points or fewer, and the court determines that the defendant is amenable to the services of a postadjudicatory treatment-based drug court program and is otherwise qualified to participate in the program as part of the sentence. For purposes of this paragraph, the term "nonviolent felony" has the same meaning as provided in s. 948.08(6).

Section 5. For the purpose of incorporating the amendment made by this act to section 921.0024, Florida Statutes, in a reference thereto, subsection (1) of section 921.00265, Florida Statutes, is reenacted to read:

921.00265 Recommended sentences; departure sentences; mandatory minimum sentences.—This section applies to any felony offense, except any capital felony, committed on or after October 1, 1998.

(1) The lowest permissible sentence provided by

calculations from the total sentence points pursuant to s. 921.0024(2) is assumed to be the lowest appropriate sentence for the offender being sentenced. A departure sentence is prohibited unless there are mitigating circumstances or factors present as provided in s. 921.0026 which reasonably justify a departure.

Section 6. For the purpose of incorporating the amendment made by this act to section 921.0024, Florida Statutes, in a reference thereto, paragraph (e) of subsection (1) of section 924.06, Florida Statutes, is reenacted to read:

924.06 Appeal by defendant.—

(1) A defendant may appeal from:

(e) A sentence imposed under s. 921.0024 of the Criminal Punishment Code which exceeds the statutory maximum penalty provided in s. 775.082 for an offense at conviction, or the consecutive statutory maximums for offenses at conviction, unless otherwise provided by law.

Section 7. For the purpose of incorporating the amendment made by this act to section 921.0024, Florida Statutes, in references thereto, subsections (7) and (8) of section 948.01, Florida Statutes, are reenacted to read:

948.01 When court may place defendant on probation or into community control.—

(7)(a) Notwithstanding s. 921.0024 and effective for offenses committed on or after July 1, 2009, the sentencing court may place the defendant into a postadjudicatory treatment-based drug court program if the defendant's Criminal Punishment Code scoresheet total sentence points under s. 921.0024 are 60 points or fewer, the offense is a nonviolent felony, the defendant is amenable to substance abuse treatment, and the

defendant otherwise qualifies under s. 397.334(3). The satisfactory completion of the program shall be a condition of the defendant's probation or community control. As used in this subsection, the term "nonviolent felony" means a third degree felony violation under chapter 810 or any other felony offense that is not a forcible felony as defined in s. 776.08.

(b) The defendant must be fully advised of the purpose of the program, and the defendant must agree to enter the program. The original sentencing court shall relinquish jurisdiction of the defendant's case to the postadjudicatory drug court program until the defendant is no longer active in the program, the case is returned to the sentencing court due to the defendant's termination from the program for failure to comply with the terms thereof, or the defendant's sentence is completed.

(8)(a) Notwithstanding s. 921.0024 and effective for offenses committed on or after July 1, 2016, the sentencing court may place the defendant into a postadjudicatory mental health court program if the offense is a nonviolent felony, the defendant is amenable to mental health treatment, including taking prescribed medications, and the defendant is otherwise qualified under s. 394.47892(4). The satisfactory completion of the program must be a condition of the defendant's probation or community control. As used in this subsection, the term "nonviolent felony" means a third degree felony violation under chapter 810 or any other felony offense that is not a forcible felony as defined in s. 776.08. Defendants charged with resisting an officer with violence under s. 843.01, battery on a law enforcement officer under s. 784.07, or aggravated assault may participate in the mental health court program if the court

so orders after the victim is given his or her right to provide testimony or written statement to the court as provided in s. 921.143.

(b) The defendant must be fully advised of the purpose of the mental health court program, and the defendant must agree to enter the program. The original sentencing court shall relinquish jurisdiction of the defendant's case to the postadjudicatory mental health court program until the defendant is no longer active in the program, the case is returned to the sentencing court due to the defendant's termination from the program for failure to comply with the terms thereof, or the defendant's sentence is completed.

(c) The Department of Corrections may establish designated and trained mental health probation officers to support individuals under supervision of the mental health court program.

Section 8. For the purpose of incorporating the amendment made by this act to section 921.0024, Florida Statutes, in references thereto, paragraphs (i) and (j) of subsection (2) and paragraph (b) of subsection (8) of section 948.06, Florida Statutes, are reenacted to read:

948.06 Violation of probation or community control; revocation; modification; continuance; failure to pay restitution or cost of supervision.—

(2)

(i)1. Notwithstanding s. 921.0024 and effective for offenses committed on or after July 1, 2009, the court may order the defendant to successfully complete a postadjudicatory treatment-based drug court program if:

a. The court finds or the offender admits that the offender has violated his or her community control or probation;

b. The offender's Criminal Punishment Code scoresheet total sentence points under s. 921.0024 are 60 points or fewer after including points for the violation;

c. The underlying offense is a nonviolent felony. As used in this subsection, the term "nonviolent felony" means a third degree felony violation under chapter 810 or any other felony offense that is not a forcible felony as defined in s. 776.08;

d. The court determines that the offender is amenable to the services of a postadjudicatory treatment-based drug court program;

e. The court has explained the purpose of the program to the offender and the offender has agreed to participate; and

f. The offender is otherwise qualified to participate in the program under the provisions of s. 397.334(3).

2. After the court orders the modification of community control or probation, the original sentencing court shall relinquish jurisdiction of the offender's case to the postadjudicatory treatment-based drug court program until the offender is no longer active in the program, the case is returned to the sentencing court due to the offender's termination from the program for failure to comply with the terms thereof, or the offender's sentence is completed.

(j)1. Notwithstanding s. 921.0024 and effective for offenses committed on or after July 1, 2016, the court may order the offender to successfully complete a postadjudicatory mental health court program under s. 394.47892 or a military veterans and servicemembers court program under s. 394.47891 if:

a. The court finds or the offender admits that the offender has violated his or her community control or probation;

b. The underlying offense is a nonviolent felony. As used in this subsection, the term "nonviolent felony" means a third degree felony violation under chapter 810 or any other felony offense that is not a forcible felony as defined in s. 776.08. Offenders charged with resisting an officer with violence under s. 843.01, battery on a law enforcement officer under s. 784.07, or aggravated assault may participate in the mental health court program if the court so orders after the victim is given his or her right to provide testimony or written statement to the court as provided in s. 921.143;

c. The court determines that the offender is amenable to the services of a postadjudicatory mental health court program, including taking prescribed medications, or a military veterans and servicemembers court program;

d. The court explains the purpose of the program to the offender and the offender agrees to participate; and

e. The offender is otherwise qualified to participate in a postadjudicatory mental health court program under s. 394.47892(4) or a military veterans and servicemembers court program under s. 394.47891.

2. After the court orders the modification of community control or probation, the original sentencing court shall relinquish jurisdiction of the offender's case to the postadjudicatory mental health court program until the offender is no longer active in the program, the case is returned to the sentencing court due to the offender's termination from the program for failure to comply with the terms thereof, or the

offender's sentence is completed.

(8)

(b) For purposes of this section and ss. 903.0351, 948.064, and 921.0024, the term "violent felony offender of special concern" means a person who is on:

1. Felony probation or community control related to the commission of a qualifying offense committed on or after the effective date of this act;

2. Felony probation or community control for any offense committed on or after the effective date of this act, and has previously been convicted of a qualifying offense;

3. Felony probation or community control for any offense committed on or after the effective date of this act, and is found to have violated that probation or community control by committing a qualifying offense;

4. Felony probation or community control and has previously been found by a court to be a habitual violent felony offender as defined in s. 775.084(1)(b) and has committed a qualifying offense on or after the effective date of this act;

5. Felony probation or community control and has previously been found by a court to be a three-time violent felony offender as defined in s. 775.084(1)(c) and has committed a qualifying offense on or after the effective date of this act; or

6. Felony probation or community control and has previously been found by a court to be a sexual predator under s. 775.21 and has committed a qualifying offense on or after the effective date of this act.

Section 9. For the purpose of incorporating the amendment made by this act to section 921.0024, Florida Statutes, in a

reference thereto, subsection (1) of section 948.20, Florida Statutes, is reenacted to read:

948.20 Drug offender probation.—

(1) If it appears to the court upon a hearing that the defendant is a chronic substance abuser whose criminal conduct is a violation of s. 893.13(2)(a) or (6)(a), or other nonviolent felony if such nonviolent felony is committed on or after July 1, 2009, and notwithstanding s. 921.0024 the defendant's Criminal Punishment Code scoresheet total sentence points are 60 points or fewer, the court may either adjudge the defendant guilty or stay and withhold the adjudication of guilt. In either case, the court may also stay and withhold the imposition of sentence and place the defendant on drug offender probation or into a postadjudicatory treatment-based drug court program if the defendant otherwise qualifies. As used in this section, the term "nonviolent felony" means a third degree felony violation under chapter 810 or any other felony offense that is not a forcible felony as defined in s. 776.08.

Section 10. This act shall take effect October 1, 2018.

The Florida Senate

Committee Agenda Request

To: Senator Greg Steube, Chair
Judiciary Committee

Subject: Committee Agenda Request

Date: January 19, 2018

I respectfully request that **Senate Bill #866**, relating to Sentencing, be placed on the:

☐ committee agenda at your earliest possible convenience.

☒ next committee agenda.

Senator Randolph Bracy
Florida Senate, District 11

File signed original with committee office

S-020 (03/2004)

Duplicate

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1.25.18
Meeting Date

866
Bill Number (if applicable)

Topic Sentencing

Amendment Barcode (if applicable)

Name Barney Bishop

Job Title CEO

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Street

Phone 510-9922

Tallahassee FL 32301
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Email Barney@BarneyBishop.com

Speaking: ☑ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Smart Justice Alliance

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/25/18
Meeting Date

866
Bill Number (if applicable)

Amendment Barcode (if applicable)

Topic Sentencing

Name Andy Thomas

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Address 301 S. Monroe St. *Street*

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Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Public Defender Association

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☐ Yes ☑ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

11/25/18
Meeting Date

8660
Bill Number (if applicable)

Topic SENTENCING

Amendment Barcode (if applicable)

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(The Chair will read this information into the record.)

Representing BROWARD COUNTY GOVT.

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

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 Committee on Judiciary

BILL:	CS/SB 928
INTRODUCER:	Criminal Justice Committee and Senator Bracy and others
SUBJECT:	Theft
DATE:	January 19, 2018
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Jones	CJ	**Fav/CS**
2.	Davis	Cibula	JU	**Favorable**
3.			RC	

Please see Section IX. for Additional Information:

PLEASE MAKE SELECTION

I. Summary:

CS/SB 928 increases the threshold dollar amounts and revises the types of property that qualify for criminal theft offenses. Primarily, the bill:

- Increases the property dollar values that form the basis of levels of theft crimes and penalties:
  - From less than $100 to less than $500 for a second degree misdemeanor;
  - From $100 or more to $500 or more and from less than $300 to less than $1,500 for a first degree misdemeanor; and
  - From $300 or more to $1,500 or more for a third degree felony theft and retail theft.
- Changes enhancements in the degree of crime and penalties for repeat theft offenses by:
  - Limiting the third degree felony petit theft and second degree felony retail theft enhancements to adult offenders;
  - Requiring that the third theft offense that qualifies an adult for the third degree felony petit theft enhancement be a first degree misdemeanor offense; and
  - Creating a time frame after which the qualifying theft offense must be committed in order to trigger the enhancements.
- Eliminates the theft of specific property as an automatic third degree felony offenses. These properties include:
  - A will, codicil, or other testamentary instrument;
  - Any fire extinguisher;
  - Property taken from a posted construction site;
  - Any stop sign; and
  - Anhydrous ammonia.

A preliminary review of the bill by the Office of Economic and Demographic Research staff indicates that the prison bed impact of the bill may result in a decrease of more than 25 prison beds.

The bill amends s. 921.0022, F.S., to make conforming changes to the Criminal Punishment Code severity ranking chart to changes made by the bill, and amends s. 985.557, F.S., to conform cross-references.

Multiple sections of law are reenacted by the bill to incorporate the changes made by the bill.

The bill is effective October 1, 2018.

II. Present Situation:

There are approximately 3,300 people currently incarcerated in the Department of Corrections for felony theft convictions and 21,000 on state community supervision for a felony theft crime in Florida.[1] Since 2005, at least 26 states have increased the threshold dollar amounts for felony theft crimes.[2] These states had various reasons for increasing the thresholds, including ensuring that the "amounts keep pace with inflation and the increase in the price of consumer goods."[3] Such increases ensure that associated "criminal sentences don't become more severe over time simply because of natural increases in the prices of consumer goods."[4] "Raising felony thresholds also complements state reforms designed to focus prison beds on the most serious offenders, rather than relatively low-level ones."[5]

The majority of states (30 states) and the District of Columbia set a $1,000-or-greater property value threshold for felony grand theft. Fifteen states have thresholds between $500 and $950, and five states, including Florida, have thresholds below $500. Between 2003 and 2015, nine states, including Alabama, Mississippi, and Louisiana, raised their felony thresholds twice.[6]

Property Theft

Section 812.014, F.S., defines and categorizes thefts into misdemeanor or felony criminal violations. Whether a theft is a misdemeanor or a felony generally depends upon the value of the property taken by the defendant, the defendant's history of theft convictions or, in some cases, the type of property taken. A person commits theft if he or she knowingly obtains or uses, or

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[1] Department of Corrections, *2015-2016 Agency Statistics: Inmate Population* and *Community Supervision Population*, data of population by primary offenses, as of June 30, 2016, available at http://www.dc.state.fl.us/pub/annual/1516/stats/ip_primary.html and http://www.dc.state.fl.us/pub/annual/1516/stats/csp_primary.html (last visited January 20, 2018).
[2] Alison Lawrence, *Making Sense of Sentencing: State Systems and Policies*, National Conference of State Legislatures, http://www.ncsl.org/documents/cj/sentencing.pdf (last visited January 19, 2018).
[3] *Id*.
[4] John Gramlich and Katie Zafft, *Updating State Theft Laws Can Bring Less Incarceration – and Less*, Stateline, Pew Charitable Trusts, http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/03/31/updating-state-theft-laws-can-bring-less-incarceration-and-less-crime (January 20, 2018).
[5] See *supra* note 2.
[6] *Id.*

endeavors to obtain or use, the property of another with intent to, either temporarily or permanently:

- Deprive the other person of a right to the property or a benefit from the property; or
- Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.[7]

Second degree petit theft, a second degree misdemeanor, is theft of property valued at less than $100.[8] First degree petit theft, a first degree misdemeanor, is theft of property valued at $100 or more but less than $300.[9] Second degree petit theft incurs greater penalties if there is a prior theft conviction: a first degree misdemeanor if there is one prior conviction,[10] and a third degree felony if there are two or more prior convictions.[11]

Third degree grand theft, a third degree felony,[12] is theft of:

- Property valued at $300 or more, but less than $20,000.
- Specified property including:
  - A will, codicil, or testamentary instrument;
  - A firearm;
  - A motor vehicle;
  - Any commercially farmed animal, bee colony, aquaculture species or citrus fruit of over 2,000 pieces;
  - Any fire extinguisher;
  - Any stop sign;
  - Anhydrous ammonia;
  - Any amount of citrus fruit consisting of 2,000 or more individual pieces of fruit;
  - Property taken from a designated, posted construction site; and
  - Any amount of a controlled substance as defined in s. 893.02, F.S.[13]
- Property from a dwelling or its unenclosed curtilage if the property is valued at $100 or more, but less than $300.[14]

Second degree grand theft, a second degree felony,[15] is theft of:

- Property valued at $20,000 or more, but less than $100,000;
- Cargo valued at less than $50,000 in specified circumstances; or

[7] Section 812.014(1), F.S.
[8] Section 812.014(3)(a), F.S. A second degree misdemeanor is punishable by up to 60 days in jail and a fine of up to $500. Sections 775.082 and 775.083, F.S.
[9] Section 812.014(2)(e), F.S. A first degree misdemeanor is punishable by up to one year in jail and a fine of up to $1,000. Sections 775.082 and 775.083, F.S.
[10] Section 812.014(3)(b), F.S.
[11] Section 812.014(3)(c), F.S.
[12] A third degree felony is punishable by up to 5 years' incarceration and a fine of up to $5,000. Sections 775.082 and 775.083, F.S.
[13] Section 812.014(2)(c), F.S.
[14] Section 812.014(2)(d), F.S.
[15] A second degree felony is punishable by up to 15 years' incarceration and a fine of up to $10,000. Sections 775.082 and 775.083, F.S.

- Emergency medical equipment or law enforcement equipment valued at $300 or more in specified circumstances.[16]

First degree grand theft, a first degree felony,[17] is theft of:
- Property valued at $100,000 or more;
- A semitrailer deployed by a law enforcement officer; or
- Cargo valued at $50,000 or more in specified circumstances.[18]

First degree grand theft also includes any grand theft in which, in the course of committing the offense, a motor vehicle is used as specified or the offender causes damage to the real or personal property of another in excess of $1,000.[19]

The last time the Legislature increased the minimum threshold property value for third degree grand theft was in 1986.[20] The third degree grand theft provisions related to property taken from a dwelling or its unenclosed curtilage were added in 1996. The petit theft provisions were amended, including the thresholds, in 1996.[21]

Retail Theft

Section 812.015(1)(d), F.S., defines retail theft as:
- The taking possession of or carrying away of merchandise, property, money, or negotiable documents;
- Altering or removing a label, universal product code, or price tag;
- Transferring merchandise from one container to another; or
- Removing a shopping cart, with intent to deprive the merchant of possession, use, benefit, or full retail value.

Theft defined as retail theft is punishable under s. 812.015, F.S., and like any other type of theft, must meet the elements of the applicable theft offense under that statute. However, s. 812.015, F.S., also provides that retail theft is a third degree felony if the theft involves property valued at $300 or more and the person commits the theft in a specified manner (e.g., commits theft from more than one location within a 48-hour period, in which case the amount of each individual theft is aggregated to determine the value of the property stolen).[22]

Retail theft is a second degree felony if the person has previously been convicted of third degree felony retail theft or individually, or in concert with one or more other persons, coordinates the activities of one or more persons in committing the offense of retail theft where the stolen

[16] Section 812.014(2)(b), F.S. However, this theft is reclassified from a second degree felony to a first degree felony if the theft occurs within a county subject to a state of emergency declared by the Governor, is committed after the declaration is made, and is facilitated by conditions arising from the emergency.
[17] A first degree felony is punishable by up to 30 years' incarceration and a fine of up to $10,000. Sections 775.082 and 775.083, F.S.
[18] Section 812.014(2)(a), F.S.
[19] *Id.*
[20] Ch. 86-161, s. 1, Laws Of Fla.
[21] Ch. 96-388, s. 49, Laws Of Fla.
[22] Section 812.015(8), F.S.

property has a value in excess of $3,000.[23] The statute also requires a fine of not less than $50 and no more than $1,000 for a second or subsequent conviction for petit theft from a merchant, farmer, or transit agency[24] and provides that it is a third degree felony to possess, or use or attempt to use, any antishoplifting or inventory control device countermeasure within any premises used for the retail purchase or sale of any merchandise.[25]

The thresholds for third degree felony retail theft were created and set by the Legislature in 2001.[26]

Farm Theft and Transit Fare Evasion

Farm theft is defined as unlawfully taking possession of any items grown or produced on land owned, rented, or leased by another person. It includes equipment and materials used to grow or produce farm products.[27] Farm theft is punishable under s. 812.014, F.S.

Transit fare evasion is classified as a petit theft and is the unlawful refusal to pay the appropriate fare for transportation upon a mass transit vehicle, or to evade the payment of such fare, or to enter any mass transit vehicle or facility by any door, passageway, or gate, except as provided for the entry of fare-paying passengers.[28]

Degree of Crime and Penalty Enhancements for Second or Subsequent Theft Offenses

Current law provides that a person who commits a petit theft (a misdemeanor offense) and who has any other theft conviction commits a first degree misdemeanor.[29] A person who commits a petit theft and who has been previously convicted two or more times of any theft commits a third degree felony.[30] A person who commits retail theft and has been previously convicted of retail theft commits a second degree felony.[31]

There are no time limits between theft convictions related to theft crime level and penalty enhancements.

Juvenile offenders who are adjudicated delinquent for theft offenses are considered to have been "convicted" of theft and are treated the same as adult offenders for purposes of these penalty enhancements.[32]

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[23] Section 812.015(9), F.S.
[24] Section 812.015(2), F.S.
[25] Section 812.015(7), F.S.
[26] Ch. 2001-115, s. 3, Laws Of Fla.
[27] Section 812.015(1)(g), F.S. Farm product is defined in s. 823.14(3)(c), F.S., as any plant, as defined in s. 581.011, or animal or insect useful to humans and includes, but is not limited to, any product derived therefrom. Section 581.011, F.S., defines plants and plant products as trees, shrubs, vines, forage and cereal plants, and all other plants and plant parts, including cuttings, grafts, scions, buds, fruit, vegetables, roots, bulbs, seeds, wood, lumber, and all products made from them, unless specifically excluded by the rules of the Department of Agriculture.
[28] Section 812.015(1)(j), F.S.
[29] Section 812.014(3)(b), F.S.
[30] Section 812.014(3)(c), F.S.
[31] Section 812.015(9)(a), F.S.
[32] *T.S.W. v. State*, 489 So. 2d 1146 (Fla. 2d DCA 1986); *R.D.D. v. State*, 493 So. 2d 534 (Fla. 5th DCA 1986).

III. Effect of Proposed Changes:

The bill increases the minimum threshold values for several theft provisions in the Florida Statutes. The bill alters the application of the crime level and penalty enhancements for repeat theft convictions. It also eliminates theft of certain items of property as specific theft crimes.

Property Theft

The bill amends misdemeanor and third degree felony property theft provisions in s. 812.014, F.S., to increase the values that are the basis for the level of crime and penalties for these offenses:

- Second degree misdemeanor petit theft property value is changed (by default) to any value less than $500.[33]
- First degree misdemeanor petit theft property value threshold is changed to $500 or more from $100 or more.[34] Under the bill it would be a first degree misdemeanor petit theft if the property value is between $500 or more but less than $1,500.
- Third degree felony theft property value threshold is changed to $1,500 or more from $300 or more.[35] Under the bill a third degree felony theft would be a theft where the property value is $1,500 or more but less than $20,000.[36]

Certain property items specifically set forth in s. 812.014(2)(c), F.S., are eliminated as third degree felony theft offenses, although a person can be charged with theft for unlawfully taking these items based upon their actual values. The items eliminated by the bill are:

- A will, codicil, or other testamentary instrument.
- Any fire extinguisher.
- Property taken from a posted construction site.
- Any stop sign.
- Anhydrous ammonia.[37]

The value threshold amounts related to property taken from a dwelling or from the unenclosed curtilage of a dwelling specified in s. 812.014(2)(d), F.S., as a third degree felony offense, are increased by the bill:

- From $100 or more to $1,500 or more; and
- From less than $300 to less than $5,000 in value.[38]

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[33] Section 812.014(3)(a), F.S.
[34] Section 812.014(2)(e), F.S.
[35] Sections 812.014(2)(c)1., and 812.014(2)(d), F.S.
[36] According to the Consumer Price Index Inflation Calculator of the U.S. Department of Labor's Bureau of Labor Statistics, $300 in November 1986 (when the grand theft valuation was last increased) has the same buying power as $670.30 in November 2017 dollars. https://www.bls.gov/data/inflation_calculator.htm (last visited Jan. 20, 2018).
[37] According to the Center for Disease Control and Prevention, anhydrous ammonia is a colorless gas with suffocating fumes. It is used in agricultural fertilizers and industrial refrigerants. Exposure can be fatal when someone is exposed to high concentrations of this gas. https://www.cdc.gov/healthcommunication/toolstemplates/entertainmented/tips/anhydrousammonia.html
[38] The theft provisions related to the theft of property from a dwelling or unenclosed curtilage thereof were created in 1996. In November 1996, according to the Consumer Price Index Inflation Calculator of the U.S. Department of Labor's Bureau of Labor Statistics, $100 had the same buying power as $155.53 in November 2017; In November 1996, $300 had the same

Retail Theft

The bill amends s. 812.015, F.S., to increase the value that is the basis for the third degree felony retail theft offense under s. 812.015, F.S., to $1,500 or more, instead of $300.[39]

Degree of Crime and Penalty Enhancements for Second or Subsequent Theft Offenses

The bill changes the level of crime and penalty enhancements for repeat theft and retail theft offenders.

Under current law a person who commits a first or second degree misdemeanor level petit theft and who has previously been convicted two or more times of any theft commits a third degree felony.[40] The bill changes the petit theft enhancements to apply when:

- An adult who has been previously convicted two or more times of any theft as an adult and who commits a first degree misdemeanor petit theft within 3 years of his or her most recent theft conviction commits a third degree felony theft.

Therefore, the bill limits the enhancement to adult offenders who commit a new first degree misdemeanor within three years of his or her last theft conviction.

Similarly, under current law a person who has previously been convicted of a third degree felony retail theft and who commits another retail theft is subject to second degree felony penalties for the second conviction.[41] The bill changes the current retail theft second degree felony enhancement to apply when:

- An adult who has previously been convicted as an adult for a retail theft commits another retail theft within 3 years of his or her prior retail theft conviction.

In a similar way to the petit theft enhancement change, the retail theft enhancement applies only to adults who commit a subsequent retail theft within the specified time frame.

Both the retail theft and the petit theft enhancement changes appear to be limited to adult offenders although it could be argued that a juvenile who has "previously been convicted as an adult" may be subject to the retail theft enhancement.

Other

The bill amends s. 921.0022, F.S., the Criminal Punishment Code Offense Severity Ranking Chart, to conform changes made by the bill.

The bill amends s. 985.557, F.S., to conform cross-references.

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buying power as $466.59 in November 2017 dollars. https://www.bls.gov/data/inflation_calculator.htm (last visited Jan. 20, 2018).

[39] According to the Consumer Price Index Inflation Calculator of the U.S. Department of Labor's Bureau of Labor Statistics, $300 in November 2001 had the same buying power as $417.14 in November 2017 dollars. https://www.bls.gov/data/inflation_calculator.htm (last visited Jan. 20, 2018).

[40] Section 812.014(3)(c), F.S.

[41] Section 812.015(9)(a), F.S.

The bill reenacts ss. 95.18, 373.6055, 400.9935, 409.910, 489.126, 538.09, 538.23, 550.6305, 634.319, 634.421, 636.238, 642.038, 705.102, 718.111, 812.015, 812.0155, 812.14, 893.138, 943.051, and 985.11, F.S., to incorporate the amendments made by the act in cross-references to provisions amended by the bill.

The bill is effective October 1, 2018.

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 Florida Department of Corrections submitted its 2018 Agency Legislative Bill Analysis on January 4, 2018. The analysis states that the overall inmate and community supervision population fiscal impact resulting from this bill is indeterminate.[42]

The Criminal Justice Impact Conference (CJIC), which provides the final, official prison bed impact, if any, reviewed the bill on January 8, 2018. CJIC determined that the prison bed impact of the bill will likely be "negative significant", meaning that the bill will result in a decrease of more than 25 prison beds.[43]

VI. Technical Deficiencies:

None.

[42] Department of Corrections, 2018 Agency Legislative Bill Analysis for Senate Bill 928, p. 3, (Jan. 4, 2018) (on file with the Senate Committee on Criminal Justice).
[43] Email from Matthew Hasbrouck, Ph.D., Office of Economic and Demographic Research, (Jan. 19, 2018) (on file with the Senate committee on Judiciary).

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 812.014, 812.015, 921.0022, and 985.557.

This bill reenacts the following sections of the Florida Statutes: 95.18, 373.6055, 400.9935, 409.910, 489.126, 538.09, 538.23, 550.6305, 634.319, 634.421, 636.238, 642.038, 705.102, 718.111, 812.0155, 812.14, 893.138, 943.051, and 985.11.

IX. Additional Information:

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

CS by Criminal Justice on January 9, 2018:
The Committee Substitute specifies the last theft conviction rather than the end of sentence on the most recent theft as the reference point for calculating the time limitations related to prior theft offenses for the purpose of crime level and penalty enhancements.

B. Amendments:

None.

By the Committee on Criminal Justice; and Senators Bracy and Rouson

591-01946-18 2018928c1

A bill to be entitled

An act relating to theft; amending s. 812.014, F.S.; revising threshold amounts and types of property which qualify for theft offenses; amending s. 812.015, F.S.; revising threshold amounts for retail theft; amending s. 921.0022, F.S.; conforming provisions to changes made by the act; conforming a cross-reference; amending s. 985.557, F.S.; conforming cross-references; reenacting ss. 95.18(10), 373.6055(3)(c), 400.9935(3), 409.910(17)(g), 489.126(4), 538.09(5), 538.23(2), 550.6305(10), 634.319(2), 634.421(2), 636.238(3), 642.038(2), 705.102(4), 718.111(1)(d), 812.015(2), 812.0155(1) and (2), 812.14(4),(7), and (8), 893.138(3), 943.051(3)(b), and 985.11(1)(b), F.S., relating to adverse possession without color of title, criminal history checks for certain water management district employees and others, clinic responsibilities, responsibility for payments on behalf of Medicaid-eligible persons when other parties are liable, moneys received by contractors, secondhand dealer registration, secondary metals recycler violations and penalties, intertrack wagering, diversion or appropriation of funds by warranty association sales representatives, collection of fees for purported membership in discount plan organizations, diversion or appropriation of funds by legal expense insurance sales representatives, reporting lost or abandoned property, condominium associations, retail and farm theft, suspension of

591-01946-18 2018928c1

driver license following an adjudication of guilt for theft, trespass and larceny with relation to utility fixtures and theft of utility services, local administrative action to abate drug-related, prostitution-related, or stolen-property-related public nuisances and criminal gang activity, fingerprinting of certain minors, and fingerprinting and photographing of certain children, respectively, to incorporate the amendments made by the act in cross-references to amended provisions; providing an effective date.

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

Section 1. Paragraphs (c), (d), and (e) of subsection (2) and paragraphs (a), (b), and (c) of subsection (3) of section 812.014, Florida Statutes, are amended to read:

812.014 Theft.—

(2)

(c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property stolen is:

1. Valued at $1,500 ~~$300~~ or more, but less than $5,000.

2. Valued at $5,000 or more, but less than $10,000.

3. Valued at $10,000 or more, but less than $20,000.

~~4. A will, codicil, or other testamentary instrument.~~

4.~~5.~~ A firearm.

5.~~6.~~ A motor vehicle, except as provided in paragraph (a).

6.~~7.~~ Any commercially farmed animal, including any animal

of the equine, bovine, or swine class or other grazing animal; a bee colony of a registered beekeeper; and aquaculture species raised at a certified aquaculture facility. If the property stolen is aquaculture species raised at a certified aquaculture facility, then a $10,000 fine shall be imposed.

~~8. Any fire extinguisher.~~

7.~~9.~~ Any amount of citrus fruit consisting of 2,000 or more individual pieces of fruit.

~~10. Taken from a designated construction site identified by the posting of a sign as provided for in s. 810.09(2)(d).~~

~~11. Any stop sign.~~

~~12. Anhydrous ammonia.~~

8.~~13.~~ Any amount of a controlled substance as defined in s. 893.02. Notwithstanding any other law, separate judgments and sentences for theft of a controlled substance under this subparagraph and for any applicable possession of controlled substance offense under s. 893.13 or trafficking in controlled substance offense under s. 893.135 may be imposed when all such offenses involve the same amount or amounts of a controlled substance.

However, if the property is stolen within a county that is subject to a state of emergency declared by the Governor under chapter 252, the property is stolen after the declaration of emergency is made, and the perpetration of the theft is facilitated by conditions arising from the emergency, the offender commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property is valued at $5,000 or more, but less than $10,000, as

provided under subparagraph 2., or if the property is valued at $10,000 or more, but less than $20,000, as provided under subparagraph 3. As used in this paragraph, the term "conditions arising from the emergency" means civil unrest, power outages, curfews, voluntary or mandatory evacuations, or a reduction in the presence of or the response time for first responders or homeland security personnel. For purposes of sentencing under chapter 921, a felony offense that is reclassified under this paragraph is ranked one level above the ranking under s. 921.0022 or s. 921.0023 of the offense committed.

(d) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property stolen is valued at $1,500 ~~$100~~ or more, but less than $5,000 ~~$300~~, and is taken from a dwelling as defined in s. 810.011(2) or from the unenclosed curtilage of a dwelling pursuant to s. 810.09(1).

(e) Except as provided in paragraph (d), if the property stolen is valued at $500 ~~$100~~ or more, but less than $1,500 ~~$300~~, the offender commits petit theft of the first degree, punishable as a misdemeanor of the first degree, as provided in s. 775.082 or s. 775.083.

(3)(a) Theft of any property not specified in subsection (2) is petit theft of the second degree and a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, and as provided in subsection (5), as applicable.

(b) A person who commits petit theft and who has previously been convicted of any theft commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(c) A person who commits petit theft of the first degree

and who has previously been convicted two or more times of any theft as an adult commits a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083, if the third or subsequent petit theft offense occurs within 3 years of his or her most recent theft conviction.

Section 2. Subsections (8) and (9) of section 812.015, Florida Statutes, are amended to read:

812.015 Retail and farm theft; transit fare evasion; mandatory fine; alternative punishment; detention and arrest; exemption from liability for false arrest; resisting arrest; penalties.—

(8) Except as provided in subsection (9), a person who commits retail theft commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property stolen is valued at $1,500 ~~$300~~ or more, and the person:

(a) Individually, or in concert with one or more other persons, coordinates the activities of one or more individuals in committing the offense, in which case the amount of each individual theft is aggregated to determine the value of the property stolen;

(b) Commits theft from more than one location within a 48-hour period, in which case the amount of each individual theft is aggregated to determine the value of the property stolen;

(c) Acts in concert with one or more other individuals within one or more establishments to distract the merchant, merchant's employee, or law enforcement officer in order to carry out the offense, or acts in other ways to coordinate efforts to carry out the offense; or

(d) Commits the offense through the purchase of merchandise in a package or box that contains merchandise other than, or in addition to, the merchandise purported to be contained in the package or box.

(9) A person commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the person:

(a) Violates subsection (8) as an adult and within 3 years prior to the violation he or she has ~~previously~~ been convicted as an adult of a violation of subsection (8); or

(b) Individually, or in concert with one or more other persons, coordinates the activities of one or more persons in committing the offense of retail theft where the stolen property has a value in excess of $3,000.

Section 3. Paragraphs (a), (b), (d), (e), and (f) of subsection (3) of section 921.0022, Florida Statutes, are amended to read:

921.0022 Criminal Punishment Code; offense severity ranking chart.—

(3) OFFENSE SEVERITY RANKING CHART

(a) LEVEL 1

Florida Statute	Felony Degree	Description
24.118(3)(a)	3rd	Counterfeit or altered state lottery ticket.
212.054(2)(b)	3rd	Discretionary sales surtax;

		limitations, administration, and collection.
212.15(2)(b)	3rd	Failure to remit sales taxes, amount greater than $300 but less than $20,000.
316.1935(1)	3rd	Fleeing or attempting to elude law enforcement officer.
319.30(5)	3rd	Sell, exchange, give away certificate of title or identification number plate.
319.35(1)(a)	3rd	Tamper, adjust, change, etc., an odometer.
320.26(1)(a)	3rd	Counterfeit, manufacture, or sell registration license plates or validation stickers.
322.212 (1)(a)-(c)	3rd	Possession of forged, stolen, counterfeit, or unlawfully issued driver license; possession of simulated identification.

322.212(4)	3rd	Supply or aid in supplying unauthorized driver license or identification card.
322.212(5)(a)	3rd	False application for driver license or identification card.
414.39(3)(a)	3rd	Fraudulent misappropriation of public assistance funds by employee/official, value more than $200.
443.071(1)	3rd	False statement or representation to obtain or increase reemployment assistance benefits.
509.151(1)	3rd	Defraud an innkeeper, food or lodging value greater than $300.
517.302(1)	3rd	Violation of the Florida Securities and Investor Protection Act.
562.27(1)	3rd	Possess still or still apparatus.

713.69	3rd	Tenant removes property upon which lien has accrued, value more than $50.
812.014(3)(c)	3rd	Petit theft as adult (3rd or subsequent conviction) within certain time; theft of any property not specified in subsection (2).
812.081(2)	3rd	Unlawfully makes or causes to be made a reproduction of a trade secret.
815.04(5)(a)	3rd	Offense against intellectual property (i.e., computer programs, data).
817.52(2)	3rd	Hiring with intent to defraud, motor vehicle services.
817.569(2)	3rd	Use of public record or public records information or providing false information to facilitate commission of a felony.
826.01	3rd	Bigamy.

828.122(3)	3rd	Fighting or baiting animals.
831.04(1)	3rd	Any erasure, alteration, etc., of any replacement deed, map, plat, or other document listed in s. 92.28.
831.31(1)(a)	3rd	Sell, deliver, or possess counterfeit controlled substances, all but s. 893.03(5) drugs.
832.041(1)	3rd	Stopping payment with intent to defraud $150 or more.
832.05(2)(b) & (4)(c)	3rd	Knowing, making, issuing worthless checks $150 or more or obtaining property in return for worthless check $150 or more.
838.15(2)	3rd	Commercial bribe receiving.
838.16	3rd	Commercial bribery.
843.18	3rd	Fleeing by boat to elude a law enforcement officer.

847.011(1)(a)	3rd	Sell, distribute, etc., obscene, lewd, etc., material (2nd conviction).
849.01	3rd	Keeping gambling house.
849.09(1)(a)-(d)	3rd	Lottery; set up, promote, etc., or assist therein, conduct or advertise drawing for prizes, or dispose of property or money by means of lottery.
849.23	3rd	Gambling-related machines; "common offender" as to property rights.
849.25(2)	3rd	Engaging in bookmaking.
860.08	3rd	Interfere with a railroad signal.
860.13(1)(a)	3rd	Operate aircraft while under the influence.
893.13(2)(a)2.	3rd	Purchase of cannabis.
893.13(6)(a)	3rd	Possession of cannabis (more than 20 grams).

934.03(1)(a)	3rd	Intercepts, or procures any other person to intercept, any wire or oral communication.

(b) LEVEL 2

Florida Statute	Felony Degree	Description
379.2431 (1)(e)3.	3rd	Possession of 11 or fewer marine turtle eggs in violation of the Marine Turtle Protection Act.
379.2431 (1)(e)4.	3rd	Possession of more than 11 marine turtle eggs in violation of the Marine Turtle Protection Act.
403.413(6)(c)	3rd	Dumps waste litter exceeding 500 lbs. in weight or 100 cubic feet in volume or any quantity for commercial purposes, or hazardous

		waste.
517.07(2)	3rd	Failure to furnish a prospectus meeting requirements.
590.28(1)	3rd	Intentional burning of lands.
784.05(3)	3rd	Storing or leaving a loaded firearm within reach of minor who uses it to inflict injury or death.
787.04(1)	3rd	In violation of court order, take, entice, etc., minor beyond state limits.
806.13(1)(b)3.	3rd	Criminal mischief; damage $1,000 or more to public communication or any other public service.
810.061(2)	3rd	Impairing or impeding telephone or power to a dwelling; facilitating

		or furthering burglary.
810.09(2)(e)	3rd	Trespassing on posted commercial horticulture property.
812.014(2)(c)1.	3rd	Grand theft, 3rd degree; $1,500 ~~$300~~ or more but less than $5,000.
812.014(2)(d)	3rd	Grand theft, 3rd degree; $1,500 ~~$100~~ or more but less than $5,000 ~~$300~~, taken from unenclosed curtilage of dwelling.
812.015(7)	3rd	Possession, use, or attempted use of an antishoplifting or inventory control device countermeasure.
817.234(1)(a)2.	3rd	False statement in support of insurance claim.
817.481(3)(a)	3rd	Obtain credit or purchase with false, expired, counterfeit,

		etc., credit card, value over $300.
817.52(3)	3rd	Failure to redeliver hired vehicle.
817.54	3rd	With intent to defraud, obtain mortgage note, etc., by false representation.
817.60(5)	3rd	Dealing in credit cards of another.
817.60(6)(a)	3rd	Forgery; purchase goods, services with false card.
817.61	3rd	Fraudulent use of credit cards over $100 or more within 6 months.
826.04	3rd	Knowingly marries or has sexual intercourse with person to whom related.
831.01	3rd	Forgery.
831.02	3rd	Uttering forged

		instrument; utters or publishes alteration with intent to defraud.
831.07	3rd	Forging bank bills, checks, drafts, or promissory notes.
831.08	3rd	Possessing 10 or more forged notes, bills, checks, or drafts.
831.09	3rd	Uttering forged notes, bills, checks, drafts, or promissory notes.
831.11	3rd	Bringing into the state forged bank bills, checks, drafts, or notes.
832.05(3)(a)	3rd	Cashing or depositing item with intent to defraud.
843.08	3rd	False personation.
893.13(2)(a)2.	3rd	Purchase of any s. 893.03(1)(c), (2)(c)1.,

		(2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) drugs other than cannabis.
893.147(2)	3rd	Manufacture or delivery of drug paraphernalia.

(d) LEVEL 4

Florida Statute	Felony Degree	Description
316.1935(3)(a)	2nd	Driving at high speed or with wanton disregard for safety while fleeing or attempting to elude law enforcement officer who is in a patrol vehicle with siren and lights activated.
499.0051(1)	3rd	Failure to maintain or deliver transaction history, transaction information, or transaction statements.

499.0051(5)	2nd	Knowing sale or delivery, or possession with intent to sell, contraband prescription drugs.
517.07(1)	3rd	Failure to register securities.
517.12(1)	3rd	Failure of dealer, associated person, or issuer of securities to register.
784.07(2)(b)	3rd	Battery of law enforcement officer, firefighter, etc.
784.074(1)(c)	3rd	Battery of sexually violent predators facility staff.
784.075	3rd	Battery on detention or commitment facility staff.
784.078	3rd	Battery of facility employee by throwing,

		tossing, or expelling certain fluids or materials.
784.08(2)(c)	3rd	Battery on a person 65 years of age or older.
784.081(3)	3rd	Battery on specified official or employee.
784.082(3)	3rd	Battery by detained person on visitor or other detainee.
784.083(3)	3rd	Battery on code inspector.
784.085	3rd	Battery of child by throwing, tossing, projecting, or expelling certain fluids or materials.
787.03(1)	3rd	Interference with custody; wrongly takes minor from appointed guardian.
787.04(2)	3rd	Take, entice, or remove

		child beyond state limits with criminal intent pending custody proceedings.
787.04(3)	3rd	Carrying child beyond state lines with criminal intent to avoid producing child at custody hearing or delivering to designated person.
787.07	3rd	Human smuggling.
790.115(1)	3rd	Exhibiting firearm or weapon within 1,000 feet of a school.
790.115(2)(b)	3rd	Possessing electric weapon or device, destructive device, or other weapon on school property.
790.115(2)(c)	3rd	Possessing firearm on school property.
800.04(7)(c)	3rd	Lewd or lascivious

		exhibition; offender less than 18 years.
810.02(4)(a)	3rd	Burglary, or attempted burglary, of an unoccupied structure; unarmed; no assault or battery.
810.02(4)(b)	3rd	Burglary, or attempted burglary, of an unoccupied conveyance; unarmed; no assault or battery.
810.06	3rd	Burglary; possession of tools.
810.08(2)(c)	3rd	Trespass on property, armed with firearm or dangerous weapon.
812.014(2)(c)3.	3rd	Grand theft, 3rd degree $10,000 or more but less than $20,000.
812.014 (2)(c)4.-7. ~~812.014~~	3rd	Grand theft, 3rd degree, a ~~will,~~ firearm, motor vehicle, livestock, bee

~~(2)(c)4.-10.~~		colony, aquaculture species, citrus fruit ~~etc~~.
812.0195(2)	3rd	Dealing in stolen property by use of the Internet; property stolen $300 or more.
817.505(4)(a)	3rd	Patient brokering.
817.563(1)	3rd	Sell or deliver substance other than controlled substance agreed upon, excluding s. 893.03(5) drugs.
817.568(2)(a)	3rd	Fraudulent use of personal identification information.
817.625(2)(a)	3rd	Fraudulent use of scanning device, skimming device, or reencoder.
817.625(2)(c)	3rd	Possess, sell, or deliver skimming device.

828.125(1)	2nd	Kill, maim, or cause great bodily harm or permanent breeding disability to any registered horse or cattle.
837.02(1)	3rd	Perjury in official proceedings.
837.021(1)	3rd	Make contradictory statements in official proceedings.
838.022	3rd	Official misconduct.
839.13(2)(a)	3rd	Falsifying records of an individual in the care and custody of a state agency.
839.13(2)(c)	3rd	Falsifying records of the Department of Children and Families.
843.021	3rd	Possession of a concealed handcuff key by a person in custody.

843.025	3rd	Deprive law enforcement, correctional, or correctional probation officer of means of protection or communication.
843.15(1)(a)	3rd	Failure to appear while on bail for felony (bond estreature or bond jumping).
847.0135(5)(c)	3rd	Lewd or lascivious exhibition using computer; offender less than 18 years.
874.05(1)(a)	3rd	Encouraging or recruiting another to join a criminal gang.
893.13(2)(a)1.	2nd	Purchase of cocaine (or other s. 893.03(1)(a), (b), or (d), (2)(a), (2)(b), or (2)(c)4. drugs).
914.14(2)	3rd	Witnesses accepting bribes.

914.22(1)	3rd	Force, threaten, etc., witness, victim, or informant.
914.23(2)	3rd	Retaliation against a witness, victim, or informant, no bodily injury.
918.12	3rd	Tampering with jurors.
934.215	3rd	Use of two-way communications device to facilitate commission of a crime.

(e) LEVEL 5

Florida Statute	Felony Degree	Description
316.027(2)(a)	3rd	Accidents involving personal injuries other than serious bodily injury, failure to stop; leaving scene.
316.1935(4)(a)	2nd	Aggravated fleeing or eluding.
316.80(2)	2nd	Unlawful conveyance of fuel; obtaining fuel fraudulently.
322.34(6)	3rd	Careless operation of motor vehicle with suspended license, resulting in death or serious bodily injury.
327.30(5)	3rd	Vessel accidents involving personal injury; leaving scene.
379.365(2)(c)1.	3rd	Violation of rules relating to: willful molestation of stone crab traps, lines, or buoys; illegal bartering, trading, or sale, conspiring or aiding in such barter, trade, or sale, or supplying, agreeing to supply, aiding in supplying, or giving away stone crab trap

		tags or certificates; making, altering, forging, counterfeiting, or reproducing stone crab trap tags; possession of forged, counterfeit, or imitation stone crab trap tags; and engaging in the commercial harvest of stone crabs while license is suspended or revoked.
379.367(4)	3rd	Willful molestation of a commercial harvester's spiny lobster trap, line, or buoy.
379.407(5)(b)3.	3rd	Possession of 100 or more undersized spiny lobsters.
381.0041(11)(b)	3rd	Donate blood, plasma, or organs knowing HIV positive.
440.10(1)(g)	2nd	Failure to obtain workers' compensation

		coverage.
440.105(5)	2nd	Unlawful solicitation for the purpose of making workers' compensation claims.
440.381(2)	2nd	Submission of false, misleading, or incomplete information with the purpose of avoiding or reducing workers' compensation premiums.
624.401(4)(b)2.	2nd	Transacting insurance without a certificate or authority; premium collected $20,000 or more but less than $100,000.
626.902(1)(c)	2nd	Representing an unauthorized insurer; repeat offender.
790.01(2)	3rd	Carrying a concealed firearm.

790.162	2nd	Threat to throw or discharge destructive device.
790.163(1)	2nd	False report of bomb, explosive, weapon of mass destruction, or use of firearms in violent manner.
790.221(1)	2nd	Possession of short-barreled shotgun or machine gun.
790.23	2nd	Felons in possession of firearms, ammunition, or electronic weapons or devices.
796.05(1)	2nd	Live on earnings of a prostitute; 1st offense.
800.04(6)(c)	3rd	Lewd or lascivious conduct; offender less than 18 years of age.
800.04(7)(b)	2nd	Lewd or lascivious exhibition; offender 18 years of age or older.

806.111(1)	3rd	Possess, manufacture, or dispense fire bomb with intent to damage any structure or property.
812.0145(2)(b)	2nd	Theft from person 65 years of age or older; $10,000 or more but less than $50,000.
812.015(8)	3rd	Retail theft; property stolen is valued at $1,500 ~~$300~~ or more and one or more specified acts.
812.019(1)	2nd	Stolen property; dealing in or trafficking in.
812.131(2)(b)	3rd	Robbery by sudden snatching.
812.16(2)	3rd	Owning, operating, or conducting a chop shop.
817.034(4)(a)2.	2nd	Communications fraud, value $20,000 to $50,000.

817.234(11)(b)	2nd	Insurance fraud; property value $20,000 or more but less than $100,000.
817.2341(1), (2)(a) & (3)(a)	3rd	Filing false financial statements, making false entries of material fact or false statements regarding property values relating to the solvency of an insuring entity.
817.568(2)(b)	2nd	Fraudulent use of personal identification information; value of benefit, services received, payment avoided, or amount of injury or fraud, $5,000 or more or use of personal identification information of 10 or more persons.
817.611(2)(a)	2nd	Traffic in or possess 5 to 14 counterfeit credit cards or related documents.
817.625(2)(b)	2nd	Second or subsequent fraudulent use of scanning device, skimming device, or reencoder.
825.1025(4)	3rd	Lewd or lascivious exhibition in the presence of an elderly person or disabled adult.
827.071(4)	2nd	Possess with intent to promote any photographic material, motion picture, etc., which includes sexual conduct by a child.
827.071(5)	3rd	Possess, control, or intentionally view any photographic material, motion picture, etc., which includes sexual conduct by a child.

839.13(2)(b)	2nd	Falsifying records of an individual in the care and custody of a state agency involving great bodily harm or death.
843.01	3rd	Resist officer with violence to person; resist arrest with violence.
847.0135(5)(b)	2nd	Lewd or lascivious exhibition using computer; offender 18 years or older.
847.0137 (2) & (3)	3rd	Transmission of pornography by electronic device or equipment.
847.0138 (2) & (3)	3rd	Transmission of material harmful to minors to a minor by electronic device or equipment.
874.05(1)(b)	2nd	Encouraging or recruiting another to join a criminal gang;

		second or subsequent offense.
874.05(2)(a)	2nd	Encouraging or recruiting person under 13 years of age to join a criminal gang.
893.13(1)(a)1.	2nd	Sell, manufacture, or deliver cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4. drugs).
893.13(1)(c)2.	2nd	Sell, manufacture, or deliver cannabis (or other s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) drugs) within 1,000 feet of a child care facility, school, or state, county, or municipal park or publicly owned recreational facility or

		community center.
893.13(1)(d)1.	1st	Sell, manufacture, or deliver cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4. drugs) within 1,000 feet of university.
893.13(1)(e)2.	2nd	Sell, manufacture, or deliver cannabis or other drug prohibited under s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) within 1,000 feet of property used for religious services or a specified business site.
893.13(1)(f)1.	1st	Sell, manufacture, or deliver cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), or (2)(a), (2)(b), or (2)(c)4. drugs) within

		1,000 feet of public housing facility.
893.13(4)(b)	2nd	Use or hire of minor; deliver to minor other controlled substance.
893.1351(1)	3rd	Ownership, lease, or rental for trafficking in or manufacturing of controlled substance.

(f) LEVEL 6

Florida Statute	Felony Degree	Description
316.027(2)(b)	2nd	Leaving the scene of a crash involving serious bodily injury.
316.193(2)(b)	3rd	Felony DUI, 4th or subsequent conviction.
400.9935(4)(c)	2nd	Operating a clinic, or offering services requiring licensure, without a license.

499.0051(2)	2nd	Knowing forgery of transaction history, transaction information, or transaction statement.
499.0051(3)	2nd	Knowing purchase or receipt of prescription drug from unauthorized person.
499.0051(4)	2nd	Knowing sale or transfer of prescription drug to unauthorized person.
775.0875(1)	3rd	Taking firearm from law enforcement officer.
784.021(1)(a)	3rd	Aggravated assault; deadly weapon without intent to kill.
784.021(1)(b)	3rd	Aggravated assault; intent to commit felony.
784.041	3rd	Felony battery; domestic battery by strangulation.

784.048(3)	3rd	Aggravated stalking; credible threat.
784.048(5)	3rd	Aggravated stalking of person under 16.
784.07(2)(c)	2nd	Aggravated assault on law enforcement officer.
784.074(1)(b)	2nd	Aggravated assault on sexually violent predators facility staff.
784.08(2)(b)	2nd	Aggravated assault on a person 65 years of age or older.
784.081(2)	2nd	Aggravated assault on specified official or employee.
784.082(2)	2nd	Aggravated assault by detained person on visitor or other detainee.
784.083(2)	2nd	Aggravated assault on code inspector.

787.02(2)	3rd	False imprisonment; restraining with purpose other than those in s. 787.01.
790.115(2)(d)	2nd	Discharging firearm or weapon on school property.
790.161(2)	2nd	Make, possess, or throw destructive device with intent to do bodily harm or damage property.
790.164(1)	2nd	False report concerning bomb, explosive, weapon of mass destruction, act of arson or violence to state property, or use of firearms in violent manner.
790.19	2nd	Shooting or throwing deadly missiles into dwellings, vessels, or vehicles.
794.011(8)(a)	3rd	Solicitation of minor to

		participate in sexual activity by custodial adult.
794.05(1)	2nd	Unlawful sexual activity with specified minor.
800.04(5)(d)	3rd	Lewd or lascivious molestation; victim 12 years of age or older but less than 16 years of age; offender less than 18 years.
800.04(6)(b)	2nd	Lewd or lascivious conduct; offender 18 years of age or older.
806.031(2)	2nd	Arson resulting in great bodily harm to firefighter or any other person.
810.02(3)(c)	2nd	Burglary of occupied structure; unarmed; no assault or battery.
810.145(8)(b)	2nd	Video voyeurism; certain minor victims; 2nd or

		subsequent offense.
812.014(2)(b)1.	2nd	Property stolen $20,000 or more, but less than $100,000, grand theft in 2nd degree.
812.014(6)	2nd	Theft; property stolen $3,000 or more; coordination of others.
812.015(9)(a)	2nd	Retail theft as adult; property stolen $1,500 ~~$300~~ or more; second or subsequent conviction within certain time.
812.015(9)(b)	2nd	Retail theft; property stolen $3,000 or more; coordination of others.
812.13(2)(c)	2nd	Robbery, no firearm or other weapon (strong-arm robbery).
817.4821(5)	2nd	Possess cloning paraphernalia with intent to create cloned cellular telephones.

817.505(4)(b)	2nd	Patient brokering; 10 or more patients.
825.102(1)	3rd	Abuse of an elderly person or disabled adult.
825.102(3)(c)	3rd	Neglect of an elderly person or disabled adult.
825.1025(3)	3rd	Lewd or lascivious molestation of an elderly person or disabled adult.
825.103(3)(c)	3rd	Exploiting an elderly person or disabled adult and property is valued at less than $10,000.
827.03(2)(c)	3rd	Abuse of a child.
827.03(2)(d)	3rd	Neglect of a child.
827.071(2) & (3)	2nd	Use or induce a child in a sexual performance, or promote or direct such

		performance.
836.05	2nd	Threats; extortion.
836.10	2nd	Written threats to kill or do bodily injury.
843.12	3rd	Aids or assists person to escape.
847.011	3rd	Distributing, offering to distribute, or possessing with intent to distribute obscene materials depicting minors.
847.012	3rd	Knowingly using a minor in the production of materials harmful to minors.
847.0135(2)	3rd	Facilitates sexual conduct of or with a minor or the visual depiction of such conduct.
914.23	2nd	Retaliation against a

		witness, victim, or informant, with bodily injury.
944.35(3)(a)2.	3rd	Committing malicious battery upon or inflicting cruel or inhuman treatment on an inmate or offender on community supervision, resulting in great bodily harm.
944.40	2nd	Escapes.
944.46	3rd	Harboring, concealing, aiding escaped prisoners.
944.47(1)(a)5.	2nd	Introduction of contraband (firearm, weapon, or explosive) into correctional facility.
951.22(1)	3rd	Intoxicating drug, firearm, or weapon introduced into county facility.

Section 4. Paragraph (a) of subsection (1) and paragraph (c) of subsection (2) of section 985.557, Florida Statutes, are amended to read:

985.557 Direct filing of an information; discretionary and mandatory criteria.—

(1) DISCRETIONARY DIRECT FILE.—

(a) With respect to any child who was 14 or 15 years of age at the time the alleged offense was committed, the state attorney may file an information when in the state attorney's judgment and discretion the public interest requires that adult sanctions be considered or imposed and when the offense charged is for the commission of, attempt to commit, or conspiracy to commit:

1. Arson;

2. Sexual battery;

3. Robbery;

4. Kidnapping;

5. Aggravated child abuse;

6. Aggravated assault;

7. Aggravated stalking;

8. Murder;

9. Manslaughter;

10. Unlawful throwing, placing, or discharging of a destructive device or bomb;

11. Armed burglary in violation of s. 810.02(2)(b) or specified burglary of a dwelling or structure in violation of s. 810.02(2)(c), or burglary with an assault or battery in violation of s. 810.02(2)(a);

12. Aggravated battery;

13. Any lewd or lascivious offense committed upon or in the presence of a person less than 16 years of age;

14. Carrying, displaying, using, threatening, or attempting to use a weapon or firearm during the commission of a felony;

15. Grand theft in violation of s. 812.014(2)(a);

16. Possessing or discharging any weapon or firearm on school property in violation of s. 790.115;

17. Home invasion robbery;

18. Carjacking; or

19. Grand theft of a motor vehicle in violation of s. 812.014(2)(c)5. ~~s. 812.014(2)(c)6.~~ or grand theft of a motor vehicle valued at $20,000 or more in violation of s. 812.014(2)(b) if the child has a previous adjudication for grand theft of a motor vehicle in violation of s. 812.014(2)(c)5. ~~s. 812.014(2)(c)6.~~ or s. 812.014(2)(b).

(2) MANDATORY DIRECT FILE.—

(c) The state attorney must file an information if a child, regardless of the child's age at the time the alleged offense was committed, is alleged to have committed an act that would be a violation of law if the child were an adult, that involves stealing a motor vehicle, including, but not limited to, a violation of s. 812.133, relating to carjacking, or s. 812.014(2)(c)5. ~~s. 812.014(2)(c)6.~~, relating to grand theft of a motor vehicle, and while the child was in possession of the stolen motor vehicle the child caused serious bodily injury to or the death of a person who was not involved in the underlying offense. For purposes of this section, the driver and all willing passengers in the stolen motor vehicle at the time such

serious bodily injury or death is inflicted shall also be subject to mandatory transfer to adult court. "Stolen motor vehicle," for the purposes of this section, means a motor vehicle that has been the subject of any criminal wrongful taking. For purposes of this section, "willing passengers" means all willing passengers who have participated in the underlying offense.

Section 5. For the purpose of incorporating the amendment made by this act to section 812.014, Florida Statutes, in a reference thereto, subsection (10) of section 95.18, Florida Statutes, is reenacted to read:

95.18 Real property actions; adverse possession without color of title.—

(10) A person who occupies or attempts to occupy a residential structure solely by claim of adverse possession under this section and offers the property for lease to another commits theft under s. 812.014.

Section 6. For the purpose of incorporating the amendment made by this act to section 812.014, Florida Statutes, in a reference thereto, paragraph (c) of subsection (3) of section 373.6055, Florida Statutes, is reenacted to read:

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

(3)

(c) In addition to other requirements for employment or access established by any water management district pursuant to its water management district's security plan for buildings, facilities, and structures, each water management district's security plan shall provide that:

1. Any person who has within the past 7 years been convicted, regardless of whether adjudication was withheld, for a forcible felony as defined in s. 776.08; an act of terrorism as defined in s. 775.30; planting of a hoax bomb as provided in s. 790.165; any violation involving the manufacture, possession, sale, delivery, display, use, or attempted or threatened use of a weapon of mass destruction or hoax weapon of mass destruction as provided in s. 790.166; dealing in stolen property; any violation of s. 893.135; any violation involving the sale, manufacturing, delivery, or possession with intent to sell, manufacture, or deliver a controlled substance; burglary; robbery; any felony violation of s. 812.014; any violation of s. 790.07; any crime an element of which includes use or possession of a firearm; any conviction for any similar offenses under the laws of another jurisdiction; or conviction for conspiracy to commit any of the listed offenses may not be qualified for initial employment within or authorized regular access to buildings, facilities, or structures defined in the water management district's security plan as restricted access areas.

2. Any person who has at any time been convicted of any of the offenses listed in subparagraph 1. may not be qualified for initial employment within or authorized regular access to buildings, facilities, or structures defined in the water management district's security plan as restricted access areas unless, after release from incarceration and any supervision imposed as a sentence, the person remained free from a subsequent conviction, regardless of whether adjudication was withheld, for any of the listed offenses for a period of at least 7 years prior to the employment or access date under

consideration.

Section 7. For the purpose of incorporating the amendment made by this act to section 812.014, Florida Statutes, in a reference thereto, subsection (3) of section 400.9935, Florida Statutes, is reenacted to read:

400.9935 Clinic responsibilities.—

(3) A charge or reimbursement claim made by or on behalf of a clinic that is required to be licensed under this part but that is not so licensed, or that is otherwise operating in violation of this part, regardless of whether a service is rendered or whether the charge or reimbursement claim is paid, is an unlawful charge and is noncompensable and unenforceable. A person who knowingly makes or causes to be made an unlawful charge commits theft within the meaning of and punishable as provided in s. 812.014.

Section 8. For the purpose of incorporating the amendment made by this act to section 812.014, Florida Statutes, in a reference thereto, paragraph (g) of subsection (17) of section 409.910, Florida Statutes, is reenacted to read:

409.910 Responsibility for payments on behalf of Medicaid-eligible persons when other parties are liable.—

(17)

(g) The agency may investigate and request appropriate officers or agencies of the state to investigate suspected criminal violations or fraudulent activity related to third-party benefits, including, without limitation, ss. 414.39 and 812.014. Such requests may be directed, without limitation, to the Medicaid Fraud Control Unit of the Office of the Attorney General or to any state attorney. Pursuant to s. 409.913, the

Attorney General has primary responsibility to investigate and control Medicaid fraud.

Section 9. For the purpose of incorporating the amendment made by this act to section 812.014, Florida Statutes, in a reference thereto, subsection (4) of section 489.126, Florida Statutes, is reenacted to read:

489.126 Moneys received by contractors.—

(4) Any person who violates any provision of this section is guilty of theft and shall be prosecuted and punished under s. 812.014.

Section 10. For the purpose of incorporating the amendment made by this act to section 812.015, Florida Statutes, in a reference thereto, subsection (5) of section 538.09, Florida Statutes, is reenacted to read:

538.09 Registration.—

(5) In addition to the fine provided in subsection (4), registration under this section may be denied or any registration granted may be revoked, restricted, or suspended by the department if the department determines that the applicant or registrant:

(a) Has violated any provision of this chapter or any rule or order made pursuant to this chapter;

(b) Has made a material false statement in the application for registration;

(c) Has been guilty of a fraudulent act in connection with any purchase or sale or has been or is engaged in or is about to engage in any practice, purchase, or sale which is fraudulent or in violation of the law;

(d) Has made a misrepresentation or false statement to, or

concealed any essential or material fact from, any person in making any purchase or sale;

(e) Is making purchases or sales through any business associate not registered in compliance with the provisions of this chapter;

(f) Has, within the preceding 10-year period for new registrants who apply for registration on or after October 1, 2006, been convicted of, or has entered a plea of guilty or nolo contendere to, or had adjudication withheld for, a crime against the laws of this state or any other state or of the United States which relates to registration as a secondhand dealer or which involves theft, larceny, dealing in stolen property, receiving stolen property, burglary, embezzlement, obtaining property by false pretenses, possession of altered property, any felony drug offense, any violation of s. 812.015, or any fraudulent dealing;

(g) Has had a final judgment entered against her or him in a civil action upon grounds of fraud, embezzlement, misrepresentation, or deceit; or

(h) Has failed to pay any sales tax owed to the Department of Revenue.

In the event the department determines to deny an application or revoke a registration, it shall enter a final order with its findings on the register of secondhand dealers and their business associates, if any; and denial, suspension, or revocation of the registration of a secondhand dealer shall also deny, suspend, or revoke the registration of such secondhand dealer's business associates.

Section 11. For the purpose of incorporating the amendment made by this act to section 812.014, Florida Statutes, in a reference thereto, subsection (2) of section 538.23, Florida Statutes, is reenacted to read:

538.23 Violations and penalties.—

(2) A secondary metals recycler is presumed to know upon receipt of stolen regulated metals property in a purchase transaction that the regulated metals property has been stolen from another if the secondary metals recycler knowingly and intentionally fails to maintain the information required in s. 538.19 and shall, upon conviction of a violation of s. 812.015, be punished as provided in s. 812.014(2) or (3).

Section 12. For the purpose of incorporating the amendment made by this act to section 812.014, Florida Statutes, in a reference thereto, subsection (10) of section 550.6305, Florida Statutes, is reenacted to read:

550.6305 Intertrack wagering; guest track payments; accounting rules.—

(10) All races or games conducted at a permitholder's facility, all broadcasts of such races or games, and all broadcast rights relating thereto are owned by the permitholder at whose facility such races or games are conducted and constitute the permitholder's property as defined in s. 812.012(4). Transmission, reception of a transmission, exhibition, use, or other appropriation of such races or games, broadcasts of such races or games, or broadcast rights relating thereto without the written consent of the permitholder constitutes a theft of such property under s. 812.014; and in addition to the penal sanctions contained in s. 812.014, the

permitholder has the right to avail itself of the civil remedies specified in ss. 772.104, 772.11, and 812.035 in addition to any other remedies available under applicable state or federal law.

Section 13. For the purpose of incorporating the amendment made by this act to section 812.014, Florida Statutes, in a reference thereto, subsection (2) of section 634.319, Florida Statutes, is reenacted to read:

634.319 Reporting and accounting for funds.—

(2) Any sales representative who, not being entitled thereto, diverts or appropriates such funds or any portion thereof to her or his own use is, upon conviction, guilty of theft, punishable as provided in s. 812.014.

Section 14. For the purpose of incorporating the amendment made by this act to section 812.014, Florida Statutes, in a reference thereto, subsection (2) of section 634.421, Florida Statutes, is reenacted to read:

634.421 Reporting and accounting for funds.—

(2) Any sales representative who, not being entitled thereto, diverts or appropriates funds or any portion thereof to her or his own use commits theft as provided in s. 812.014.

Section 15. For the purpose of incorporating the amendment made by this act to section 812.014, Florida Statutes, in a reference thereto, subsection (3) of section 636.238, Florida Statutes, is reenacted to read:

636.238 Penalties for violation of this part.—

(3) A person who collects fees for purported membership in a discount plan but purposefully fails to provide the promised benefits commits a theft, punishable as provided in s. 812.014.

Section 16. For the purpose of incorporating the amendment

made by this act to section 812.014, Florida Statutes, in a reference thereto, subsection (2) of section 642.038, Florida Statutes, is reenacted to read:

642.038 Reporting and accounting for funds.—

(2) Any sales representative who, not being entitled thereto, diverts or appropriates such funds or any portion thereof to his or her own use commits theft as provided in s. 812.014.

Section 17. For the purpose of incorporating the amendment made by this act to section 812.014, Florida Statutes, in a reference thereto, subsection (4) of section 705.102, Florida Statutes, is reenacted to read:

705.102 Reporting lost or abandoned property.—

(4) Any person who unlawfully appropriates such lost or abandoned property to his or her own use or refuses to deliver such property when required commits theft as defined in s. 812.014, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 18. For the purpose of incorporating the amendment made by this act to section 812.014, Florida Statutes, in a reference thereto, paragraph (d) of subsection (1) of section 718.111, Florida Statutes, is reenacted to read:

718.111 The association.—

(1) CORPORATE ENTITY.—

(d) As required by s. 617.0830, an officer, director, or agent shall discharge his or her duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner he or she reasonably believes to be in the interests of the association.

An officer, director, or agent shall be liable for monetary damages as provided in s. 617.0834 if such officer, director, or agent breached or failed to perform his or her duties and the breach of, or failure to perform, his or her duties constitutes a violation of criminal law as provided in s. 617.0834; constitutes a transaction from which the officer or director derived an improper personal benefit, either directly or indirectly; or constitutes recklessness or an act or omission that was in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Forgery of a ballot envelope or voting certificate used in a condominium association election is punishable as provided in s. 831.01, the theft or embezzlement of funds of a condominium association is punishable as provided in s. 812.014, and the destruction of or the refusal to allow inspection or copying of an official record of a condominium association that is accessible to unit owners within the time periods required by general law in furtherance of any crime is punishable as tampering with physical evidence as provided in s. 918.13 or as obstruction of justice as provided in chapter 843. An officer or director charged by information or indictment with a crime referenced in this paragraph must be removed from office, and the vacancy shall be filled as provided in s. 718.112(2)(d)2. until the end of the officer's or director's period of suspension or the end of his or her term of office, whichever occurs first. If a criminal charge is pending against the officer or director, he or she may not be appointed or elected to a position as an officer or a director of any association and may not have access to the official records of any association,

except pursuant to a court order. However, if the charges are resolved without a finding of guilt, the officer or director must be reinstated for the remainder of his or her term of office, if any.

Section 19. For the purpose of incorporating the amendment made by this act to section 812.014, Florida Statutes, in a reference thereto, subsection (2) of section 812.015, Florida Statutes, is reenacted to read:

812.015 Retail and farm theft; transit fare evasion; mandatory fine; alternative punishment; detention and arrest; exemption from liability for false arrest; resisting arrest; penalties.—

(2) Upon a second or subsequent conviction for petit theft from a merchant, farmer, or transit agency, the offender shall be punished as provided in s. 812.014(3), except that the court shall impose a fine of not less than $50 or more than $1,000. However, in lieu of such fine, the court may require the offender to perform public services designated by the court. In no event shall any such offender be required to perform fewer than the number of hours of public service necessary to satisfy the fine assessed by the court, as provided by this subsection, at the minimum wage prevailing in the state at the time of sentencing.

Section 20. For the purpose of incorporating the amendment made by this act to section 812.014, Florida Statutes, in a reference thereto, subsections (1) and (2) of section 812.0155, Florida Statutes, are reenacted to read:

812.0155 Suspension of driver license following an adjudication of guilt for theft.—

(1) Except as provided in subsections (2) and (3), the court may order the suspension of the driver license of each person adjudicated guilty of any misdemeanor violation of s. 812.014 or s. 812.015, regardless of the value of the property stolen. Upon ordering the suspension of the driver license of the person adjudicated guilty, the court shall forward the driver license of the person adjudicated guilty to the Department of Highway Safety and Motor Vehicles in accordance with s. 322.25.

(a) The first suspension of a driver license under this subsection shall be for a period of up to 6 months.

(b) A second or subsequent suspension of a driver license under this subsection shall be for 1 year.

(2) The court may revoke, suspend, or withhold issuance of a driver license of a person less than 18 years of age who violates s. 812.014 or s. 812.015 as an alternative to sentencing the person to:

(a) Probation as defined in s. 985.03 or commitment to the Department of Juvenile Justice, if the person is adjudicated delinquent for such violation and has not previously been convicted of or adjudicated delinquent for any criminal offense, regardless of whether adjudication was withheld.

(b) Probation as defined in s. 985.03, commitment to the Department of Juvenile Justice, probation as defined in chapter 948, community control, or incarceration, if the person is convicted as an adult of such violation and has not previously been convicted of or adjudicated delinquent for any criminal offense, regardless of whether adjudication was withheld.

Section 21. For the purpose of incorporating the amendment

made by this act to section 812.014, Florida Statutes, in a reference thereto, subsections (4), (7), and (8) of section 812.14, Florida Statutes, are reenacted to read:

812.14 Trespass and larceny with relation to utility fixtures; theft of utility services.—

(4) A person who willfully violates subsection (2) commits theft, punishable as provided in s. 812.014.

(7) An owner, lessor, or sublessor who willfully violates subsection (5) commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. Prosecution for a violation of subsection (5) does not preclude prosecution for theft pursuant to subsection (8) or s. 812.014.

(8) Theft of utility services for the purpose of facilitating the manufacture of a controlled substance is theft, punishable as provided in s. 812.014.

Section 22. For the purpose of incorporating the amendment made by this act to section 812.014, Florida Statutes, in a reference thereto, subsection (3) of section 893.138, Florida Statutes, is reenacted to read:

893.138 Local administrative action to abate drug-related, prostitution-related, or stolen-property-related public nuisances and criminal gang activity.—

(3) Any pain-management clinic, as described in s. 458.3265 or s. 459.0137, which has been used on more than two occasions within a 6-month period as the site of a violation of:

(a) Section 784.011, s. 784.021, s. 784.03, or s. 784.045, relating to assault and battery;

(b) Section 810.02, relating to burglary;

(c) Section 812.014, relating to theft;

(d) Section 812.131, relating to robbery by sudden snatching; or

(e) Section 893.13, relating to the unlawful distribution of controlled substances,

may be declared to be a public nuisance, and such nuisance may be abated pursuant to the procedures provided in this section.

Section 23. For the purpose of incorporating the amendment made by this act to section 812.014, Florida Statutes, in a reference thereto, paragraph (b) of subsection (3) of section 943.051, Florida Statutes, is reenacted to read:

943.051 Criminal justice information; collection and storage; fingerprinting.—

(3)

(b) A minor who is charged with or found to have committed the following offenses shall be fingerprinted and the fingerprints shall be submitted electronically to the department, unless the minor is issued a civil citation pursuant to s. 985.12:

1. Assault, as defined in s. 784.011.

2. Battery, as defined in s. 784.03.

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

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

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

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

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

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

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

10. Petit theft, as defined in s. 812.014(3).

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

12. Arson, as defined in s. 806.031(1).

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

Section 24. For the purpose of incorporating the amendment made by this act to section 812.014, Florida Statutes, in a reference thereto, paragraph (b) of subsection (1) of section 985.11, Florida Statutes, is reenacted to read:

985.11 Fingerprinting and photographing.—

(1)

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

1. Assault, as defined in s. 784.011.

2. Battery, as defined in s. 784.03.

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

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

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

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

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

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

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

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

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

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

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

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

open to inspection by anyone upon a showing of cause. The fingerprint and photograph records shall be produced in the court whenever directed by the court. Any photograph taken pursuant to this section may be shown by a law enforcement officer to any victim or witness of a crime for the purpose of identifying the person who committed such crime.

Section 25. This act shall take effect October 1, 2018.

The Florida Senate

Committee Agenda Request

To: Senator Greg Steube, Chair
Judiciary Committee

Subject: Committee Agenda Request

Date: January 19, 2018

I respectfully request that **Senate Bill #928**, relating to Theft, be placed on the:

☐ committee agenda at your earliest possible convenience.

☒ next committee agenda.

Senator Randolph Bracy
Florida Senate, District 11

File signed original with committee office

S-020 (03/2004)

Duplicate

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1.25.18
Meeting Date

928
Bill Number (if applicable)

Topic Theft

Amendment Barcode (if applicable)

Name Barney Bishop

Job Title CEO

Address 204 South Monroe Street
Street

Phone 510-9922

Tallahassee FL 32301
City *State* *Zip*

Email Barney@BarneyBishop.com

Speaking: ☐ For ☑ Against ☐ Information

Waive Speaking: ☐ In Support ☑ Against
(The Chair will read this information into the record.)

Representing Florida Smart Justice Alliance

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/25/18
Meeting Date

98
Bill Number (if applicable)

Topic Theft

Amendment Barcode (if applicable)

Name Andy Thomas

Job Title Public Defender, 2nd Judicial Circuit

Address 301 S. Monroe St. (*Street*)
Tallahassee FL 32301 (*City / State / Zip*)

Phone 850 606-1030

Email andy.thomas@flpd2.com

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Public Defender Association

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☐ Yes ☑ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1.25.18
Meeting Date

926
Bill Number (if applicable)

Topic _____

Amendment Barcode (if applicable)

Name Amy Bisceglia

Job Title _____

Address _____ Phone _____
Street

_____ Email _____
City *State* *Zip*

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Campaign for Criminal Justice Reform

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/25/2018
Meeting Date

928
Bill Number (if applicable)

Amendment Barcode (if applicable)

Topic Thresholds

Name Sal Nuzzo

Job Title VP of Policy

Address 100 N Duval Street
Street

Phone 850-322-9941

Tallahassee FL 32301
City *State* *Zip*

Email snuzzo@jamesmadison.org

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing The James Madison Institute

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☐ Yes ☑ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

1/25/18.
Meeting Date

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

928.
Bill Number (if applicable)

Topic Theft

Amendment Barcode (if applicable)

Name Chelsea Murphy.

Job Title State Director

Address 324 N. Duval St.
Street

Phone

TLH FL 32303
City State Zip

Email

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Right on Crime.

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/25/18
Meeting Date

928
Bill Number (if applicable)

Topic Felony thresholds

Amendment Barcode (if applicable)

Name Melissa Ramba

Job Title VP Gov't Affairs

Address 227 S Adams St
Street
Tallahassee FL
City *State* *Zip*

Phone 850 570-0269

Email melissa@FRF.ORG

Speaking: ☐ For ☒ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Retail Federation

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/2
Meeting Date

928
Bill Number (if applicable)

Topic THEFT

Amendment Barcode (if applicable)

Name NANCY STEPHENS

Job Title

Address 1625 SUMMIT LAKE DRIVE
Street

Phone

TALLAHASSEE FL 32309
City *State* *Zip*

Email nancy@nstephens.com

Speaking: ☐ For ☒ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing MANUFACTURERS ASSOCIATION OF FLORIDA

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

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 Committee on Judiciary

BILL:	CS/SB 908
INTRODUCER:	Judiciary Committee and Senator Steube
SUBJECT:	Construction Bonds
DATE:	January 25, 2018
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Tulloch	Cibula	JU	**Fav/CS**
2.			CA	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 908 amends several statutes relating to the notice requirements for asserting a claim against a payment bond in a construction project. Under Florida law, contractors, subcontractors, and others providing work and materials on construction projects may help secure or guarantee payment either by filing a lien against the owner's property (when privately owned) or by making a claim against a payment bond (public or private projects). When there is a payment bond, a private property owner may avoid liens.

In order to make a claim against a payment bond, the contractors, subcontractors and others must comply with two sets of notice requirements: (1) file a notice to the owner or contractor within 45 days of first furnishing work or materials; and (2) serve a notice of nonpayment within 90 days of finally furnishing work or materials on the project to the contractor and surety.

The bill seeks to make the notice requirements for seeking payment under a bond consistent for both public and private construction projects. For public projects, subcontractors and others must wait for 45 days before serving a notice of nonpayment on the general contractor and surety. The bill creates the same requirement for serving a notice of nonpayment for private projects.

Concerning the form of the notice of nonpayment for private and public projects, the bill requires that a claimant provide more details concerning work or materials and amounts due. Additionally, the bill requires that the notice of nonpayment be verified under oath or affirmation, under penalty of perjury.

The bill provides that fraud in the notice of nonpayment (for example, willfully exaggerating costs) is a complete defense to payment under the bond, and that the prevailing party will be entitled to attorney's fees. Attorney's fees are also authorized by the bill for general contractors who bring suit to enforce payment under a subcontractor's bond.

II. Present Situation:

Overview: Securing Payment for Construction Projects

Under Florida law, there are generally two ways a contractor,[1] subcontractor,[2] sub-subcontractor,[3] materialman,[4] or laborer[5] may help secure or guarantee payment for work performed on a construction project.[6] The first is by filing a lien against the owner's[7] property. Liens may only be filed against private property.[8] If the lien is perfected, the lienholder[9] may foreclose on the property and be paid out of the proceeds from the sale of the property.[10] In the case of subcontractors, sub-subcontractors, and materialmen, they can file a lien only after providing timely notice to the owner, advising the owner that they were hired by the general contractor and did work or provided materials for the owner's property.[11]

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[1] Section 713.01(8), F.S. ("'Contractor' means a person other than a materialman or laborer who enters into a contract with the owner of real property for improving it, or who takes over from a contractor as so defined the entire remaining work under such contract. The term 'contractor' includes an architect, landscape architect, or engineer who improves real property pursuant to a design-build contract authorized by s. 489.103(16).").

[2] Section 713.01(28), F.S. ("'Subcontractor' means a person other than a materialman or laborer who enters into a contract with a contractor for the performance of any part of such contractor's contract, including the removal of solid waste from the real property. The term includes a temporary help firm as defined in s. 443.101.").

[3] Section 713.01 (29), F.S. ("'Sub-subcontractor' means a person other than a materialman or laborer who enters into a contract with a subcontractor for the performance of any part of such subcontractor's contract, including the removal of solid waste from the real property. The term includes a temporary help firm as defined in s. 443.101.").

[4] Section 713.01(20), F.S. ("'Materialman' means any person who furnishes materials under contract to the owner, contractor, subcontractor, or sub-subcontractor on the site of the improvement or for direct delivery to the site of the improvement or, for specially fabricated materials, off the site of the improvement for the particular improvement, and who performs no labor in the installation thereof.").

[5] Section 713.01(16), F.S. ("'Laborer' means any person other than an architect, landscape architect, engineer, surveyor and mapper, and the like who, under properly authorized contract, personally performs on the site of the improvement labor or services for improving real property and does not furnish materials or labor service of others.").

[6] Chapter 713, F.S., is Florida's "Construction Lien Law." s. 713.001, F.S.

[7] Section 713.01(23), F.S. ("'Owner' means a person who is the owner of any legal or equitable interest in real property, which interest can be sold by legal process, and who enters into a contract for the improvement of the real property.").

[8] *Id.* (providing that the term "owner" does not include "any political subdivision, agency, or department of the state, a municipality, or other governmental entity.").

[9] Section 713.01(18), F.S. (defining "lienor" to include contractors, subcontractors, sub-subcontractors, materialmen, and laborers, as well as a professional lienor under s. 713.03, F.S.). Contractors, subcontractors and sub-subcontractors must also be licensed. Section 713.02 (7), F.S. ("Notwithstanding any other provision of this part, no lien shall exist in favor of any contractor, subcontractor, or sub-subcontractor who is unlicensed as provided in s. 489.128 or s. 489.532.").

[10] *See generally Halls Ceramic Tile, Inc. v. Tiede-Zoeller Tile Corp.*, 522 So. 2d 111, 112 (Fla. 5th DCA 1988) (determining forum in case where "bonds were posted to exempt the land from foreclosure of mechanics liens").

[11] Section 713.06(2)(a) & (c), F.S. (requiring that the "notice to owner" be served within 45 days after beginning work, and requiring that the notice advise the property owner how to avoid liens, by obtaining a written release from the contractor for all subcontractors who served a notice to owner.).

The second way of helping to secure or guarantee payment for work on a construction project is by filing a claim against a payment bond. A "payment bond" is "[a] bond given by a surety to cover any amounts that, because of the general contractor's default, are not paid to a subcontractor or materials supplier."[12] In Florida, a surety issuing a contract bond,[13] such as a payment bond, is treated as an insurer and regulated by the Insurance Code.[14]

Generally, a payment bond "serves two purposes: it assures the owner a lien-free project, and it induces suppliers and subcontractors to accept work on the project, perhaps at a lower price, because of the assurance that they will be paid."[15] Private real property owners are exempt from liens when there is payment bond in place.[16] And for public projects, payment bonds are generally required.[17]

Construction Bonds

"Federal, state, and local governmental agencies, as well as an increasing number of private project owners, require general contractors to obtain surety bonds before they commence work on construction projects."[18] Three types of surety bonds are generally "used on construction projects: (1) bid bonds, (2) payment bonds, and (3) performance bonds[:]"[19]

- A bid bond is issued by a surety to guarantee that a bidder on a construction project "has submitted its bid in good faith and, if awarded the contract, will execute the contract at the bid price and provide the required payment and performance bonds."[20]
- A payment bond is issued by the surety to guarantee that the general contractor "or principal will pay certain subcontractors, suppliers, and materialmen associated with the project."[21]
- A performance bond is issued by the surety to guarantee that the general contractor or "principal will complete the work required under the bonded contract."[22]

"Since no additional charge is generally made for a payment bond when a performance bond is being purchased, the two are usually issued simultaneously."[23]

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[12] BLACK'S LAW DICTIONARY (10th ed. 2014).
[13] *Id.* (defining "surety" as "someone who is primarily liable for paying another's debt or performing another's obligation").
[14] *See* Section 624.606(1)(a), F.S. ("'Surety insurance' includes: (a) A contract bond, including a bid, payment, or maintenance bond, or a performance bond, which guarantees the execution of a contract other than a contract of indebtedness or other monetary obligation[.]"). *See also* BLACK'S LAW DICTIONARY (10th ed. 2014) ("Although a surety is similar to an insurer, one important difference is that a surety often receives no compensation for assuming liability. A surety differs from a guarantor, who is liable to the creditor only if the debtor does not meet the duties owed to the creditor; the surety is directly liable.").
[15] *Id.* (quoting Grant S. Nelson, *Real Estate Finance Law* § 12.2, at 881 (3d ed. 1994)). *See also* n. 9.
[16] Section 713.02(6), F.S.
[17] *See* s. 255.05, F.S., *infra*.
[18] Etcheverry, Edward, *Rights and Liabilities of Sureties*, Florida Construction Law and Practice, ch. 8, s. 8.4 (8th ed. 2016)
[19] *Id.*
[20] *Id.* (citing *City of Wildwood v. Gibbs & Register, Inc.*, 694 So. 2d 763 (Fla. 5th DCA 1997)).
[21] *Id.* (citing *Coastal Caisson Drill Co. v. American Casualty Co. of Reading, Pennsylvania*, 523 So. 2d 791 (Fla. 2d DCA 1988), *approved* 542 So. 2d 957 (Fla. 1989).).
[22] *Id.* (citing See *American Home Assurance Co. v. Larkin General Hospital, Ltd.*, 593 So. 2d 195 (Fla. 1992)).
[23] BLACK'S LAW DICTIONARY (10th ed. 2014) (quoting Grant S. Nelson, *Real Estate Finance Law* § 12.2, at 881 (3d ed. 1994)).

Additionally, a "common-law bond" is a performance bond that "exceeds the requirements of a statutory performance bond because it provides additional coverage for construction projects."[24] "Whether a contractor's bond is considered a common-law or statutory bond is relevant in determining the applicable statute of limitations."[25]

Generally, the beneficiary of the surety bond or "obligee" is the property owner or "owner of the construction project."[26] Additionally, a "dual obligee" may be named in the bond and usually includes the owner and the "construction lender or a party having some other financial interest in the construction project."[27]

In addition, "to shift risk, general contractors may require their subcontractors to obtain surety bonds."[28] When there is a subcontractor surety bond, the general contractor will be the obligee or beneficiary.[29] When there is a dual obligee on a subcontractor bond, "the dual obligee is usually the owner."[30]

Sections 713.23, F.S.: Payment Bonds

Under Florida law, in order for a private real property owner to be exempt from a lien, the general contractor must furnish a payment bond prior to commencement that:

- At minimum, is equal in amount to the original contract price;
- Is executed by an authorized surety insurer;
- Requires the contractor to promptly pay for labor, services, and materials of all lienors under the construction contract; and
- Is attached to the notice of commencement when it is recorded.[31]

A copy of the payment bond must be provided to any potential lienor demanding it.[32]

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[24] *Id*.
[25] 7 FLA. JUR 2D BONDS § 20 ("In this regard, although a suit on a common-law performance bond is subject to the five-year limitation period in the statutory provision governing actions on a contract, obligation, or liability founded on a written instrument, an action on a bond that required to exempt an owner under the Mechanic's Lien Law may not be instituted against the contractor or the surety on the bond after one year from the performance of the labor or completion of the delivery of the materials and supplies, and a similar limitation applies with regard to actions on the bonds of public contractors.").
[26] Etcheverry, Edward, *Rights and Liabilities of Sureties*, Florida Construction Law and Practice, ch. 8, s. 8.5 (8th ed. 2016).
[27] *Id.*
[28] *Id.* "With project owners and general contractors becoming more risk averse, bonding subcontracts has become more prevalent than ever. Decades ago, many sureties viewed bonding subcontractors as more risky than bonding prime contractors. Today, most sureties do an excellent job of mitigating their exposure to the unique risks within the subcontract market. As a result, there is increased surety appetite and capacity to bond subcontractors." Marla McIntyre, *Subcontractor Bonding: What General Contractors and Subcontractors Need to Know*, Construction Executive Risk Management enewsletters, http://enewsletters.constructionexec.com/riskmanagement/2015/04/subcontractor-bonding-what-general-contractors-and-subcontractors-need-to-know/ (last visited Jan. 23, 2018).
[29] *Id.*
[30] *Id.*
[31] Section 713.23 (1)(a), F.S.
[32] Section 713.23 (1)(b), F.S.

Notice Requirements

To maintain a claim against the bond, sub-subcontractors and materialmen (except laborers) who were not directly hired by the contractor must:

- Provide the contractor or the owner with a written notice that the lienor intends to look to the bond for protection within 45 days of commencing work;[33] and
- As a condition precedent to any recovery under the bond, serve a written notice of nonpayment to the contractor and surety which must:
  - Specify the performance of the labor or delivery of the materials or supplies that has not been paid;
  - Specify the amount unpaid; and
  - Be served no later than 90 days after concluding to furnish labor, services, or materials.[34]

Sections 713.245, F.S.: Conditional Payment Bonds

A conditional payment bond is a bond that limits the surety's responsibility to pay lienors to the time when the general contractor is contractually obligated to pay lienors; that is, when the general contractor has been paid by the owner.[35] A conditional bond is only permitted, however, when it complies with the following conditions:

- The bond is both listed as a conditional payment bond in the notice of commencement and recorded with the notice of commencement;
- The bond's title uses the words "conditional payment bond"; and
- The bond's cover page contains the following statement in at least 10-point font:

> THIS BOND ONLY COVERS CLAIMS OF SUBCONTRACTORS, SUB-SUBCONTRACTORS, SUPPLIERS, AND LABORERS TO THE EXTENT THE CONTRACTOR HAS BEEN PAID FOR THE LABOR, SERVICES, OR MATERIALS PROVIDED BY SUCH PERSONS. THIS BOND DOES NOT PRECLUDE YOU FROM SERVING A NOTICE TO OWNER OR FILING A CLAIM OF LIEN ON THIS PROJECT.[36]

[33] Section 713.23(1)(c), F.S. (requiring that sub-subcontractors and materialmen provide the contractor with a written notice "that the lienor will look to the contractor's bond for protection on work" within 45 days of beginning to work or furnishing materials; or when a copy of the bond is not attached to the notice of commencement, provide the contractor with the written notice up to 45 days after the lienor is served with a copy of the bond. A notice to owner within 45 days of beginning to work or furnishing materials under s. 713.06, F.S. is also sufficient.).

[34] Section 713.23(1)(d), F.S. ("The time period for serving a written notice of nonpayment shall be measured from the last day of furnishing labor, services, or materials by the lienor . . . The failure of a lienor to receive retainage sums not in excess of 10 percent of the value of labor, services, or materials furnished by the lienor is not considered a nonpayment requiring the service of the notice provided under this paragraph.").

[35] Section 713.245(1), F.S.

[36] *Id.*

Section 255.05: Bonds for Public Buildings and Works

Section 255.05, F.S. requires that a person entering into a "formal contract" with the state or local government or another public authority to construct a public building or complete some other public works project (such as work on roads) that is worth more than $200,000:[37]

- Obtain a payment bond with an authorized surety insurer equal to the contract price;[38]
- Obtain a performance bond with an authorized surety insurer;
- Execute and record both bonds "in the public records of the county where the improvement is located[;]"[39] and
- Provide a certified copy of the bonds to the public body commissioning the project before beginning work. Under Florida law, a contractor cannot be paid until the contractor has provided a certified copy of the bonds.[40]

Unlike private projects, for public projects, subcontractors and other sub-subcontractors furnishing labor, materials, and other services "may not involve the public authority," i.e., the *owner*, in any cause of action for unpaid expenses. Rather, the cause of action the subcontractors and sub-subcontractors have for unpaid expenses is against the contractor and the surety only.[41]

Notice Requirements

Once a subcontractor or sub-subcontractor has completed work on a public project, it may "elect to shorten the time within which an action to enforce any claim against a payment bond must be commenced."[42] To make this election, the subcontractor or sub-subcontractor must record a "NOTICE OF CONTEST OF CLAIM AGASINT PAYMENT BOND"[43] and file suit to enforce

[37] Section 255.05(1)(d), F.S. (providing that Department of Management Services may permit state agencies the authority to waive bond requirements for contracts worth between $100,00 and $200,000; and providing that local government and other public authorities have discretion whether to waive the bond requirements if the project is worth between $100,000 and $200,000). *See also* s. 255.05(1)(f), F.S. (requiring Department of Management Services to adopt rules regarding all contracts worth $200,000 or less when there is no bond and the state may be directly liable for payment).
[38] Section 255.05(1)(g)1., F.S. (noting exception when contract price is over $250 million and bond not reasonably available, requiring that bond must be set at largest price available but not less than $250 million).
[39] Section 255.05(1), F.S.
[40] Section 255.05(1)(b), F.S.
[41] Section 255.05(1)(c), F.S.
[42] Section 255.05(2)(a)1., F.S.
[43] Section 255.05(2)(a)1., F.S. provides the following statutory form:

NOTICE OF CONTEST OF CLAIM AGAINST PAYMENT BOND

To: (Name and address of claimant)

You are notified that the undersigned contests your notice of nonpayment, dated_____, ___, and served on the undersigned on_____, ___, and that the time within which you may file suit to enforce your claim is limited to 60 days after the date of service of this notice.

DATED ON _____, ___.

Signed: (Contractor or Attorney)

the claim within 60 days after serving the notice.[44] If suit is not filed within 60 days, the notice is automatically extinguished.[45]

To maintain a claim against the bond, sub-subcontractors and materialmen (except laborers) who were not directly hired by the contractor must:

- Provide the contractor with "a written notice that he or she intends to look to the bond for protection" within 45 days of commencing work.[46]
- Deliver a written notice of nonpayment to the contractor and surety which must:
  - Specify the "performance of the labor or delivery of the materials or supplies and of the nonpayment[;]"[47]
  - Specify any portion of any amount claimed for retainage;[48]
  - Serve notice no earlier than 45 days after beginning to furnish labor, services, or materials; and
  - Serve notice no later than 90 days after concluding to furnish labor, services, or materials.[49]

If a sub-subcontractor must file a lawsuit to enforce a claim against a payment bond, the party is entitled to attorney's fees.[50]

Attorney's Fees Under the Insurance Code

Surety insurers[51] that issue construction bonds are governed by the Insurance Code.[52] Under the Code, owners, subcontractors, laborers, or materialmen are deemed insureds or beneficiaries of a construction bond.[53] If an insured or beneficiary must bring a lawsuit against a surety insurer to force payment under the construction bond and prevails, the insured or beneficiary is entitled to attorney's fees under the Code.[54]

III. Effect of Proposed Changes:

Sections 1 and 4: The bill amends s. 255.05(2)(a)., F.S., governing public construction projects, and s. 713.23, F.S., governing payment bonds in materially the same manner. The bill amends each section to require that a claimant serve a *verified* written notice of nonpayment. A verified

[44] *Id.*
[45] *Id.*
[46] Section 255.05(2)(a)2., F.S. (notice may be provided either before or after commencing work so long as it is provided within 45 days).
[47] *Id.*
[48] *Id.*
[49] *Id.* The time periods for filing a notice of nonpayment and filing a lawsuit are "measured from the last day of furnishing labor, services, or materials by the claimant[.]" *Id.*
[50] *Id.*
[51] Section 624.606(1)(a), F.S.
[52] Section 624.01, F.S. (defining that the "Insurance Code," which includes chapter 627, F.S.).
[53] Section 627.756(1), F.S.
[54] *Id.* ("Section 627.428 applies to suits brought by owners, subcontractors, laborers, and materialmen against a surety insurer under payment or performance bonds written by the insurer under the laws of this state to indemnify against pecuniary loss by breach of a building or construction contract. Owners, subcontractors, laborers, and materialmen shall be deemed to be insureds or beneficiaries for the purposes of this section."); s. 627.428(1), F.S. (permitting attorney's fees to a prevailing insured or beneficiary).

document is one that is signed under oath or affirmation that the facts stated are true "under penalties of perjury."[55]

The bill also requires that the notice of nonpayment provide a detailed explanation of the services performed or materials furnished, the amount paid to date, and the amount to become due. Additionally, the bill creates a new "notice of nonpayment" form in section 1 and amends an existing form in section 4 to incorporate the new requirements.

The bill also addresses fraud in the notice of nonpayment, providing as follows:

- A claimant who serves a fraudulent notice of nonpayment loses any rights to payment under the bond.
- A notice is fraudulent if the claimant:
  - Willfully exaggerates the amount due;
  - Willfully includes a claim for work not performed; or
  - Is so grossly negligent in preparing the notice of nonpayment that it amounts to willful exaggeration.
- However, a notice is not fraudulent if it contains minor mistakes or good faith disputes as to the unpaid amount.
- The prevailing party is entitled to attorney's fees if the claimant's claim is challenged as fraudulent.

In section 4, the bill also adds to s. 713.23, F.S., that a lienor cannot serve a notice of nonpayment any earlier than 45 days after beginning work on a construction project. The 45-day requirement may prevent confusion and delay caused by a subcontractor that serves a notice of nonpayment on a property owner before the contractor has received or had a chance to pay the subcontractor's invoice.

The overall effect of the foregoing changes is to bring consistency between ss. 255.05(2)(a) and 713.23, F.S., the requirements for making a claim against a bond for public and private construction contracts.

Section 2: The bill amends s. 627.756(1), F.S. of the Insurance Code to extend the ability to collect attorney's fees against an insurer under s. 627.428(1), F.S., to contractors by also deeming them an insured or beneficiary. This change will apply when a contractor successfully enforces a claim against the bond of a subcontractor that has breached a contract with the contractor.

Section 3: The bill reenacts s. 627.428(1), F.S., which provides that insureds and beneficiaries who are forced to bring suit against an insurer and prevail are entitled to attorney's fees.

Section 5: The bill amends s. 713.245, F.S., governing conditional payment bonds to permit a contractor to record a notice identifying the bond as a conditional bond and attaching the bond *before* filing a notice of commencement. The bill clarifies that the conditional payment bond will not be transformed into either a common law bond or a regular payment bond.

[55] Section 92.525, F.S.

Section 6: The bill provides that it will apply only to payment bonds issued on or after October 1, 2018.

Section 7: The effective date of the bill is October 1, 2018.

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:

By requiring that notices of nonpayment be made under oath and contain more specificity, payment disputes and litigation may be reduced. However, making a surety liable for attorney fees and costs in an action by a contractor against a subcontractor may result in additional litigation.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

The bill substantially amends ss. 255.05, 627.756, 713.23, and 713.245, F.S.
The bill reenacts section 627.428, Florida Statutes.

IX. Additional Information:

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

CS by Judiciary on January 25, 2018:
The Committee Substitute removes the requirement that documentation be attached to a notice of nonpayment to be served upon a contractor and surety. Removing this requirement likely does not eliminate the need for documentation by subcontractors, sub-subcontractors, and others, because such documentation may be required in the event any of these parties must file a lawsuit to enforce payment under the bond.

B. Amendments:

None.

880242

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
01/25/2018	.	
	.	
	.	
	.	

The Committee on Judiciary (Steube) recommended the following:

Senate Amendment (with title amendment)

Delete lines 99 - 107
and insert:
amount claimed for retainage. An action for the labor,

================ T I T L E A M E N D M E N T ================
And the title is amended as follows:
Delete lines 5 - 6
and insert:
statements; providing that a

957880

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
01/25/2018	.	
	.	
	.	
	.	

The Committee on Judiciary (Steube) recommended the following:

Senate Amendment (with title amendment)

Delete lines 219 - 227

and insert:

retainage. The required~~. A written~~ notice satisfies this

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

And the title is amended as follows:

Delete lines 19 - 20

and insert:

providing that a lienor who

By Senator Steube

23-00879-18 2018908__

A bill to be entitled

An act relating to construction bonds; amending s. 255.05, F.S.; requiring a notice of nonpayment to be verified; requiring the notice to contain certain statements; requiring a claimant to attach certain documents to a notice of nonpayment; providing that a claimant who serves a fraudulent notice of nonpayment shall be deprived of his or her rights under a bond; requiring a notice of nonpayment to be in a prescribed form; amending s. 627.756, F.S.; providing that a provision relating to attorney fees applies to certain suits brought by contractors; deeming contractors to be insureds or beneficiaries for certain purposes; reenacting s. 627.428, F.S., relating to attorney fees; amending s. 713.23, F.S.; requiring a lienor to serve a verified notice of nonpayment to specified entities during a certain period of time; requiring a notice of nonpayment to contain certain statements; requiring a lienor to attach certain documents to a notice of nonpayment; providing that a lienor who serves a fraudulent notice of nonpayment is deprived of his or her rights under the bond; requiring a notice of nonpayment to be in a prescribed form; amending s. 713.245, F.S.; providing that a contractor may record a notice identifying a project bond as a conditional payment bond before project commencement to make the duty of a surety to pay lienors coextensive with the contractor's duty to pay; providing that failure to list or record a bond as a

23-00879-18 2018908__

conditional payment bond does not convert such a bond into a common law bond or a bond furnished under a specified provision; revising the statement that must be included on a conditional payment bond; providing applicability; providing an effective date.

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

Section 1. Paragraph (a) of subsection (2) of section 255.05, Florida Statutes, is amended to read:

255.05 Bond of contractor constructing public buildings; form; action by claimants.—

(2)(a)1. If a claimant is no longer furnishing labor, services, or materials on a project, a contractor or the contractor's agent or attorney may elect to shorten the time within which an action to enforce any claim against a payment bond must be commenced by recording in the clerk's office a notice in substantially the following form:

NOTICE OF CONTEST OF CLAIM
AGAINST PAYMENT BOND

To: ...(Name and address of claimant)...

You are notified that the undersigned contests your notice of nonpayment, dated ....., ..., and served on the undersigned on ....., ..., and that the time within which you may file suit to enforce your claim is limited to 60 days after the date of service of this notice.

DATED on ....., ...

Signed: ...(Contractor or Attorney)...

The claim of a claimant upon whom such notice is served and who fails to institute a suit to enforce his or her claim against the payment bond within 60 days after service of such notice is ~~shall be~~ extinguished automatically. The contractor or the contractor's attorney shall serve a copy of the notice of contest to the claimant at the address shown in the notice of nonpayment or most recent amendment thereto and shall certify to such service on the face of the notice and record the notice.

2. A claimant, except a laborer, who is not in privity with the contractor shall, before commencing or not later than 45 days after commencing to furnish labor, services, or materials for the prosecution of the work, serve ~~furnish~~ the contractor with a written notice that he or she intends to look to the bond for protection. A claimant who is not in privity with the contractor and who has not received payment for furnishing his or her labor, services, or materials shall serve a written notice of nonpayment on ~~deliver to~~ the contractor and on ~~to~~ the surety ~~written notice of the performance of the labor or delivery of the materials or supplies and of the nonpayment~~. The notice of nonpayment shall be verified in accordance with s. 92.525 and served during the progress of the work or thereafter but may not be served earlier than 45 days after the first furnishing of labor, services, or materials by the claimant or later than 90 days after the final furnishing of the labor,

services, or materials by the claimant or, with respect to rental equipment, ~~not~~ later than 90 days after the date that the rental equipment was last on the job site available for use. The notice of nonpayment must state, as of the date of the notice, the nature of the labor or services performed; the nature of the labor or services to be performed, if known; the materials furnished; the materials to be furnished, if known; the amount paid on account to date; the amount due; and the amount to become due, if known. Any notice of nonpayment served by a claimant who is not in privity with the contractor which includes sums for retainage must specify the portion of the amount claimed for retainage. The claimant shall also include, as attachments to the notice of nonpayment, copies of the following documents to substantiate the amount claimed as unpaid in the notice, if such documents exist: the claimant's contract or purchase order and any amendments or change orders directed thereto; invoices, pay requests, bills of lading, delivery receipts, or similar documents, as applicable; and a statement of account reflecting all payments requested and received for the labor, services, or materials. An action for the labor, materials, or supplies may not be instituted against the contractor or the surety unless the notice to the contractor and notice of nonpayment have been served, if required by this section. Notices required or permitted under this section must ~~shall~~ be served in accordance with s. 713.18. A claimant may not waive in advance his or her right to bring an action under the bond against the surety. In any action brought to enforce a claim against a payment bond under this section, the prevailing party is entitled to recover a reasonable fee for the services

of his or her attorney for trial and appeal or for arbitration, in an amount to be determined by the court, which fee must be taxed as part of the prevailing party's costs, as allowed in equitable actions. The time periods for service of a notice of nonpayment or for bringing an action against a contractor or a surety shall be measured from the last day of furnishing labor, services, or materials by the claimant and may not be measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of substantial completion. A claimant who serves a fraudulent notice of nonpayment shall be deprived of his or her rights under the bond. A notice of nonpayment is fraudulent if the claimant has willfully exaggerated the amount due, willfully included a claim for work not performed or materials not furnished for the subject improvement, or prepared the notice with such willful and gross negligence as to amount to a willful exaggeration. However, a minor mistake or error in a notice of nonpayment, or a good faith dispute as to the amount due, does not constitute a willful exaggeration that operates to defeat an otherwise valid claim against the bond. The service of a fraudulent notice of nonpayment is a complete defense to the claimant's claim against the bond, entitling the prevailing party to attorney fees under this subparagraph. The notice of nonpayment under this subparagraph must be in substantially the following form:

NOTICE OF NONPAYMENT

To: ...(name of contractor and address)...
...(name of surety and address)...

The undersigned claimant notifies you that:

1. Claimant has furnished ...(describe labor, services, or materials)... for the improvement of the real property identified as ...(property description)... The corresponding amount now due and unpaid is $ .....

2. Claimant has been paid on account to date the amount of $ .... for previously furnishing ...(describe labor, service, or materials)... for this improvement.

3. Claimant expects to furnish ...(describe labor, service, or materials)...for this improvement in the future (if known), and the corresponding amount expected to become due is $ .... (if known).

Under penalties of perjury, I declare that I have read the foregoing Notice of Nonpayment and that the facts stated in it are true.

...(signature and address of claimant)...

Section 2. Subsection (1) of section 627.756, Florida Statutes, is amended to read:

627.756 Bonds for construction contracts; attorney fees in case of suit.—

(1) Section 627.428 applies to suits brought by owners, contractors, subcontractors, laborers, and materialmen against a surety insurer under payment or performance bonds written by the insurer under the laws of this state to indemnify against pecuniary loss by breach of a building or construction contract. Owners, contractors, subcontractors, laborers, and materialmen shall be deemed to be insureds or beneficiaries for the purposes

of this section.

Section 3. Section 627.428, Florida Statutes, is reenacted to read:

627.428 Attorney's fee.—

(1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

(2) As to suits based on claims arising under life insurance policies or annuity contracts, no such attorney's fee shall be allowed if such suit was commenced prior to expiration of 60 days after proof of the claim was duly filed with the insurer.

(3) When so awarded, compensation or fees of the attorney shall be included in the judgment or decree rendered in the case.

Section 4. Paragraph (d) of subsection (1) of section 713.23, Florida Statutes, is amended to read:

713.23 Payment bond.—

(1)

(d) In addition, a lienor who has not received payment for furnishing his or her labor, services, or materials must ~~is required~~, as a condition precedent to recovery under the bond, ~~to~~ serve a written notice of nonpayment to the contractor and

the surety. The notice must be verified in accordance with s. 92.525 and must be served during the progress of the work or thereafter, but may not be served earlier than 45 days after the first furnishing of labor, services, or materials by the lienor or ~~not~~ later than 90 days after the final furnishing of labor, services, or materials by the lienor, or, with respect to rental equipment, later than 90 days after the date the rental equipment was on the job site and available for use. The notice of nonpayment must state, as of the date of the notice, the nature of the labor or services performed; the nature of the labor or services to be performed, if known; the materials furnished; the materials to be furnished, if known; the amount paid on account to date; the amount due; and the amount to become due, if known. A notice of nonpayment that includes sums for retainage must specify the portion of the amount claimed for retainage. The lienor must also include, as attachments to the notice of nonpayment, copies of the following documents to substantiate the amount claimed as unpaid in the notice, if such documents exist: the lienor's contract or purchase order and any amendments or change orders directed thereto; invoices, pay requests, bills of lading, delivery receipts, or similar documents, as applicable; and a statement of account reflecting all payments requested and received for the labor, services, or materials. The required~~. A written~~ notice satisfies this condition precedent with respect to the payment described in the notice of nonpayment, including unpaid finance charges due under the lienor's contract, and with respect to any other payments which become due to the lienor after the date of the notice of nonpayment. The time period for serving a ~~written~~ notice of

nonpayment shall be measured from the last day of furnishing labor, services, or materials by the lienor and shall not be measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of substantial completion. The failure of a lienor to receive retainage sums not in excess of 10 percent of the value of labor, services, or materials furnished by the lienor is not considered a nonpayment requiring the service of the notice provided under this paragraph. If the payment bond is not recorded before commencement of construction, the time period for the lienor to serve a notice of nonpayment may at the option of the lienor be calculated from the date specified in this section or the date the lienor is served a copy of the bond. However, the limitation period for commencement of an action on the payment bond as established in paragraph (e) may not be expanded. A lienor who serves a fraudulent notice of nonpayment shall be deprived of his or her rights under the bond. A notice of nonpayment is fraudulent if the lienor has willfully exaggerated the amount due, willfully included a claim for work not performed or materials not furnished for the subject improvement, or prepared the notice with such willful and gross negligence as to amount to a willful exaggeration. However, a minor mistake or error in a notice of nonpayment, or a good faith dispute as to the amount due, does not constitute a willful exaggeration that operates to defeat an otherwise valid claim against the bond. The service of a fraudulent notice of nonpayment is a complete defense to the lienor's claim against the bond, entitling the prevailing party to attorney fees under s. 713.29. The notice under this paragraph must ~~may~~ be in

substantially the following form:

NOTICE OF NONPAYMENT

To ...(name of contractor and address)...
...(name of surety and address)...
The undersigned lienor notifies you that:

1. The lienor ~~he or she~~ has furnished ...(describe labor, services, or materials)...for the improvement of the real property identified as ...(property description).... The corresponding amount now due and unpaid is $.....

2. The lienor has been paid on account to date the amount of $ ... for previously furnishing ...(describe labor, services, or materials)...for this improvement.

3. The lienor expects to furnish ...(describe labor, service, or materials)...for this improvement in the future (if known), and the corresponding amount expected to become due is $.... (if known).

Under penalties of perjury, I declare that I have read the foregoing Notice of Nonpayment and that the facts stated in it are true.

...(signature and address of lienor)...

Section 5. Subsection (1) of section 713.245, Florida Statutes, is amended to read:

713.245 Conditional payment bond.—

(1) Notwithstanding any provisions of ss. 713.23 and 713.24 to the contrary, if the contractor's written contractual obligation to pay lienors is expressly conditioned upon and

limited to the payments made by the owner to the contractor, the duty of the surety to pay lienors will be coextensive with the duty of the contractor to pay, if the following provisions are complied with:

(a) The bond is listed in the notice of commencement for the project as a conditional payment bond and is recorded together with the notice of commencement for the project before ~~prior to~~ commencement of the project, or the contractor records a notice identifying the bond for the project as a conditional payment bond, with the bond attached, before commencement of the project. Failure to comply with this paragraph does not convert a conditional payment bond into a common law bond or into a bond furnished under s. 713.23.

(b) The words "conditional payment bond" are contained in the title of the bond at the top of the front page.

(c) The bond contains on the front page, capitalized and in at least 10-point type, the statement: "THIS BOND ONLY COVERS CLAIMS OF SUBCONTRACTORS, SUB-SUBCONTRACTORS, SUPPLIERS, AND LABORERS TO THE EXTENT THE CONTRACTOR HAS BEEN PAID FOR THE LABOR, SERVICES, OR MATERIALS PROVIDED BY SUCH PERSONS. THIS BOND DOES NOT PRECLUDE YOU FROM SERVING A NOTICE TO OWNER OR FILING A CLAIM OF LIEN ON THIS PROJECT."

Section 6. The amendments made by this act to ss. 627.756 and 713.245, Florida Statutes, apply only to payment or performance bonds issued on or after October 1, 2018.

Section 7. This act shall take effect October 1, 2018.

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

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 Committee on Judiciary

BILL:	SB 1034
INTRODUCER:	Senator Steube
SUBJECT:	Mediation
DATE:	January 9, 2017
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	**Pre-meeting**
2.			BI	

I. Summary:

SB 1034 reduces the settlement authority that an insurance carrier representative must have at a mediation conference and authorizes a circuit court to compel the attendance of interested nonparties at a mediation conference. Additionally, the bill restricts what a mediator may disclose in its report to the court if the parties reach no agreement, but the bill expands what may be in the report if the parties reach a partial agreement.

The current Florida Statutes authorize courts to order parties to mediation conducted according to the Florida Rules of Civil Procedure. The rules currently address the attendance and settlement authority of parties and their representatives, but not the attendance of interested nonparties, such as lienholders.

Under the rules, an insurance carrier representative attending mediation must have authority to settle up to the lesser of the policy limit or the plaintiff's last demand. Under the bill, however, the insurance carrier representative attending mediation must have authority to settle only up to the insurer's reserve on the claim, which would be less than the policy limits and may be less than the plaintiff's last demand. Nonetheless, the attending representative must have immediate access to a person who has authority to settle up to the lesser of the policy limits or the plaintiff's last demand.

The bill also authorizes a circuit court, upon a party's motion, to compel lienholders or other interested nonparties to attend a mediation conference.

Finally, the bill sets forth what may be in a mediator's report to a court regarding the result of a mediation process. If no agreement is reached in mediation, the report may say only that no agreement was reached. This is more restrictive than the current rule, which permits additional information to be included if the parties consent. In the case of a partial or complete agreement, the current rules require the mediator to report the existence of the agreement, "without comment," to the court. Regarding a complete agreement, the bill is consistent with current rule,

stating that the mediator's report may state only that a complete agreement was reached. Regarding a partial agreement, the bill permits the report to state only that such an agreement was reached, unless any claims or parties were eliminated from the litigation by virtue of the partial agreement. And if a claim or party was eliminated by virtue of a partial agreement, the report may list these claims or parties.

II. Present Situation:

Mediation is a process in which a neutral third person acts to facilitate the resolution of a lawsuit or other dispute between two or more parties.[1] The statutes currently authorize courts to use mediation to aid in resolving cases, but the statutes also provide that many of the procedural aspects of mediation are to be governed by the Florida Rules of Civil Procedure.[2] Depending on the type of case, there are different circumstances under which a court would refer the matter to mediation. In a lawsuit for money damages, the court must refer the matter to mediation upon the request of a party if the party is willing and able to pay the costs of the mediation or the costs can be equitably divided between the parties.[3] However, a court need not refer such a case to mediation if it is one of medical malpractice or debt collection, is a landlord-tenant dispute not involving personal injury, is governed by the Small Claims Act, or involves one of the few other circumstances set forth in statute.[4]

Beyond these cases that a court *must* refer to mediation, the court *may*, in general, refer all or part of any other filed civil action to mediation.[5]

Rule 1.720, Florida Rules of Civil Procedure, governs the mediation process, including who exactly must attend the mediation conference and what settlement authority these persons must have.[6]

Each party must attend the mediation conference and is subject to sanctions for failure to attend without good cause.[7] And Rule 1.720, Fla. R. Civ. P., specifies that unless a special circumstance applies as described in the rule, "a party is deemed to appear at a mediation conference if the following persons are physically present:"

- The party or party representative having full authority to settle without further consultation;
- The party's counsel of record, if any; and
- A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle in an amount up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.[8]

[1] Fla. Jur. 2d, Arbitration and Award §113.
[2] Section 44.102(1), F.S.
[3] Section 44.102(2)(a), F.S.
[4] *Id.*
[5] Additionally, a court is required or authorized to refer certain family law and dependency matters to litigation, as specified in s. 44.102(2)(c)-(d), F.S.
[6] There is no Florida Statute that has similar provisions.
[7] Rule 1.720(f), Fla. R. Civ. P.
[8] Rule 1.720(b), Fla. R. Civ. P.

"Party representative having full authority to settle" is defined in the rule as "the final decision maker with respect to all issues presented by the case who has the legal capacity to execute a binding settlement agreement on behalf of the party."[9]

Moreover, each party must provide to the court and all parties a written notice, 10 days prior to the conference, which identifies who will attend the conference as a party representative or insurance carrier representative. This notice must also confirm that these persons have the required settlement authority.[10]

At the conclusion of the mediation process, the mediator must report the result of the mediation to the court.[11] If the parties do not reach an agreement, the mediator must report the lack of agreement to the court "without comment or recommendation."[12] However, if the parties consent, the mediator's report may also identify pending motions, outstanding legal issues, or other "actions" which, "if resolved or completed, would facilitate the possibility of a settlement."[13]

If the parties come to a partial or final agreement, a report of the agreement or a stipulation of dismissal shall be filed with the court.[14]

III. Effect of Proposed Changes:

Overview

The bill reduces the settlement authority that an insurance carrier representative must have at a mediation conference and authorizes a circuit court to compel the attendance of interested nonparties at a mediation conference. With respect to the report that a mediator must provide the court at the conclusion of mediation, the bill restricts what a mediator may disclose in its report to the court if the parties reach no agreement, but the bill expands what may be in the report if the parties reach a partial agreement. To the extent that these issues are addressed differently in the Florida Rules of Civil Procedure, the Supreme Court may choose to conform the rules to the provisions of the bill.

Insurance Carrier Representative's Required Settlement Authority

Under the Florida Rules of Civil Procedure, one of the persons that must be physically present at a mediation conference in order for a party to be deemed to be in appearance is an insurance representative for any insured party. Moreover, the insurance representative must have full authority to settle, without consultation, in an amount up to the lesser of the policy limits or the plaintiff's last demand. However, this requirement may be modified by court order or stipulation of the parties.[15]

[9] Rule 1.720(c), Fla. R. Civ. P.
[10] Rule 1.720(e), Fla. R. Civ. P.
[11] However, if the agreement is not transcribed or signed, a stipulation of dismissal may be filed with the court instead of a report of the agreement. Rule 1.730(b), Fla. R. Civ. P.
[12] Rule 1.730(a), Fla. R. Civ. P.
[13] *Id.*
[14] Rule 1.730(b), Fla. R. Civ. P.
[15] Rule 1.720(b)(3), Fla. R. Civ. P.

Under the bill, an insurance carrier representative attending a mediation conference must have authority to settlement up to the amount of the insurance carrier's "reserve on the claims." The reserve on a claim, though not defined in the bill or the Florida Statutes, appears to be the amount of money set aside by an insurance carrier to pay a claim that has not yet been settled.[16] However, the representative must have the ability to immediately consult during the mediation conference with the person having authority to settle above the reserve, up to the lesser of the policy limit or the plaintiff's last demand. As such, the bill requires less settlement authority than does the current rule for the insurance representative who attends the mediation conference.

Failure to comply with these requirements subjects an insurance carrier representative to sanctions in the same manner as a party who fails to appear while having the required settlement authority. These sanctions, which may be imposed upon motion by the court, include mediation fees, attorneys' fees, and costs. The current rules, on the other hand, do not include the threat of sanctions for the insurance carrier itself, but instead for a party whose insurance representative does not show at all or shows up without proper settlement authority.

Compelling Interested Third Parties to Attend a Mediation Conference

Currently, there appears to be no law or rule authorizing circuit courts to compel interested third parties, such as lienholders, to attend a mediation conference.[17]

Under the bill, the court may, upon motion of any party, order a third to attend and participate in a mediation conference if:

- The third party claims a lien or other asserted interest on proceeds that a party may receive as part of a mediated settlement agreement;
- "The presence of the third party can be compelled by service of an order to appear for mediation served in the same manner as service of process according to law [;]" and
- The third party's presence will facilitate the mediation process.

The designated representative of the third party that was compelled to attend must have the ability to settle its entire claim or have the ability to immediately consult with a person who has this authority.[18]

Finally, a third party ordered to attend a mediation conference who fails to do so is subject to sanctions in the same manner as a party who fails to appear.

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[16] *See* INTERNATIONAL RISK MANAGEMENT INSTITUTE, INC., *claims reserve*, *Glossary of Insurance & Risk management Terms*, https://www.irmi.com/online/insurance-glossary/terms/c/claims-reserve.aspx (last visited Jan. 9, 2018); INVESTOPEDIA, *Claims Reserve*, https://www.investopedia.com/terms/c/claims-reserve.asp (last visited Jan. 9, 2018).

[17] An example of an interested nonparty would be the Agency for Health Care Administration, which administers the Medicaid program in Florida. Assuming the plaintiff was a Medicaid recipient and that the agency paid to treat the plaintiff for the injuries that were allegedly caused by the defendant, the agency would likely have a reimbursement claim (often referred to as a "lien") on any recovery resulting from a mediated settlement.

[18] The person consulted by the third-party representative must be available to teleconference with the mediator at the mediator's request.

Mediator's Report

The bill modifies what may be in a mediator's report to the court regarding the result of a mediation process. If no agreement is reached at mediation, the report may say only that no agreement was reached. Current rule permits the parties to consent to the report's containing additional information, such as pending motions or issues in discovery.[19]

If a complete agreement is reached in mediation, the mediator's report may state only this. And this appears consistent with current rule, which requires the mediator to report "the existence" of the agreement to the court "without comment" within 10 days of the agreement being signed or transcribed.[20]

If a partial agreement is reached, the report may in general state only this. However, the report may also list any claims or parties that were eliminated from the litigation by virtue of the partial agreement. Beyond this, "no additional information may be disclosed." Current rule, on the other hand, appears more restrictive, as it permits the reporting only of the existence of the agreement, "without comment."[21]

Effective Date

The bill takes effect July 1, 2018.

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:

Section 2 of the bill authorizes a court, upon a party's motion, to compel a lienholder or other interested nonparty to attend a circuit court mediation conference. This raises the issue of whether a circuit court could constitutionally exercise this power over a nonparty to a lawsuit, even with a purported statutory grant of such power. There appears to be no case law on point. However, circuit courts have long exercised power over persons who are not parties to cases, such as over persons compelled to attend jury duty and nonparties subpoenaed to appear as witnesses in criminal or civil cases. Moreover, courts have

[19] Rule 1.730(a), Fla. R. Civ. P.
[20] Further, Rule 1.730(b), Fla. R. Civ. P., prohibits the reporting of any agreement to the court except as provided in the rule.
[21] *Id*.

authority "to do all things that are reasonably necessary for the administration of justice within the scope of [their] jurisdiction, subject to valid existing laws and constitutional provisions."[22] Accordingly, assuming a circuit court has jurisdiction over a given case, the court would appear to have the authority to compel interested nonparties to attend mediation based on the court's inherent powers and those granted to the court under the bill.

Another constitutional issue is whether any of the statutes created by the bill constitute impermissible rules of "practice and procedure," which generally are regarded as the province of only the judiciary.[23] The Legislature's authority, on the other hand, includes the enactment "substantive" law.[24] The Florida Supreme Court has stated that where it "has promulgated rules that relate to practice procedure, and a statute provides a contrary practice or procedure, the statute is unconstitutional to the extent of the conflict."[25] As such, where the statutes created by the bill modify current Florida Rules of Civil Procedure these statutes may be unconstitutional. However, were a court to invalidate procedural provisions of the statutes created by the bill, the court may nonetheless permit any substantive provisions of these statutes to remain in effect if these provisions are "severable" from the invalid portions.[26] Moreover, the Florida Supreme Court has previously acknowledged that procedural statutes, though invalid, are helpful expressions of the will of the Legislature and the Supreme Court has adopted the statutory provisions as rules.[27]

If the constitutionality of the bill is challenged, the Court will likely recognize that the Legislature enacted statues authorizing and in some cases requiring the courts to use mediation before the courts enacted rules of procedure regulating mediation in more detail. Additionally, the differences between the bill and the procedural rules are subtle

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[22] *Rose v. Palm Beach County*, 361 So. 2d 135, 137 (Fla.1978).

[23] Article V, section 2(a) of the Florida Constitution provides the Supreme Court of Florida with exclusive authority to "adopt rules for the practice and procedure in all courts."

[24] The Florida Supreme Court explained the basic distinction between substantive and procedural laws in *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991):

> *Substantive law* has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. *It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property.* On the other hand, *practice and procedure* "encompass the *course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights* or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof." It is the method of conducting litigation involving rights and corresponding defenses.

(emphasis in the original) (quoting *In re Fla. Rules of Crim. Pro.*, 272 So. 2d 65, 66 (1972))

[25] *Massey v. David*, 979 So.2d 931, 937 (Fla. 1998)

[26] *See Allen v. Butterworth*, 756 So. 2d 52, 57 (Fla. 2000) ("An unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining provisions, i.e., if the expressed legislative purpose can be accomplished independently of those provisions which are void, if the valid and invalid provisions are not inseparable, if the Legislature would have passed one without the other, and if an act complete in itself remains after the invalid provisions are stricken.")

[27] *See, e.g., In re Rules of Civil Procedure*, 281 So. 2d 204 (Fla. 1973) (stating that the "Supreme Court has considered [laws enacted by the Legislature relating to practice and procedure] as expressing the intent of the Legislature and has formulated rules of practice and procedure that attempts [sic] to conform with the intent of the Legislature and at the same time further the orderly procedure in the judicial branch.").

and consistent with the purposes of mediation. As such, one might argue that the bill's requirements for the settlement authority of those at a mediation conference and the final reports of mediators are substantive in that they further define what mediation is. Finally, the Court often adopts rules in response to legislation.[28]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may make it more difficult to schedule a mediation conference and thus to settle a given case. This could arise where, whether or not in good faith, a party moves the court to require each of a large number of lienholders to attend mediation, thus causing a scheduling problem. On the other hand, the bill could reduce the overall costs of fully resolving a case by bringing all interested persons to the mediation table, perhaps to fully resolve not only the claims raised in the complaint but also ancillary matters such as reimbursement claims, subrogation claims, and liens.

C. Government Sector Impact:

The bill may reduce court costs by fostering settlements of not only the claims contained in a lawsuit but of liens or other claims to the proceeds of a mediated settlement. However, the Office of the State Courts Administrator has not provided an analysis of the impact on the bill on judicial workloads.

VI. Technical Deficiencies:

The bill repeatedly refers to "mediation" where it seems to be referring to just one aspect of mediation—a mediation conference. The Legislature may wish to amend the bill accordingly.

Also, "reserve on the claims" is an important term in the bill, but is not defined in the bill and does not appear to be defined in the Florida Statutes. Accordingly, the Legislature may wish to amend the bill to define this term.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: 44.407, 44.408, and 44.409.

[28] *See generally, id.*; *Perez v. Bell South Telecommunications, Inc.*, 138 So. 3d 492, 498 n. 12 ("We take comfort here in the fact that the Florida Supreme Court periodically adopts all legislative changes to the Florida Evidence Code to the extent they are procedural.") (citing *In re Amendments to the Florida Evidence Code*, 825 So. 2d 339, 341 (Fla. 2002)); *In re Amendments to the Florida Family Law Rules of Procedure*, 987 So. 2d 65 (Fla. 2008).

IX. Additional Information:

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

None.

B. Amendments:

None.

738538

LEGISLATIVE ACTION

Senate . House

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. .

. .

. .

The Committee on Judiciary (Steube) recommended the following:

Senate Amendment

Delete lines 77 - 82

and insert:

(4) A third party or the designated representative of a third party ordered to attend a mediation may participate via telephone or videoconference unless the order expressly requires personal attendance. If participating via telephone or videoconference, a third party or the designated representative may complete and submit necessary documentation via electronic means during the mediation.

738538

(5) Any person or persons consulted by the third-party representative must be available to teleconference with the mediator at the mediator's request.

(6) A third party ordered to attend a mediation conference who fails to appear is subject to sanctions in the same manner as a party who fails to appear.

By Senator Steube

23-01254-18 20181034__

A bill to be entitled

An act relating to mediation; creating s. 44.407, F.S.; requiring that insurance carrier representatives who attend circuit court mediation have specified settlement authority and the ability to immediately consult by specified means with persons having certain additional settlement authority; requiring certain persons to be available to teleconference with the mediator under certain circumstances; providing sanctions for insurance carriers that fail to comply in good faith; creating s. 44.408, F.S.; providing that certain third parties may be compelled to attend mediation in circuit court under certain circumstances; providing that such third parties may not be compelled to pay any portion of the mediator's fees or costs; requiring that the designated representatives of such third parties have full authority to settle certain amounts or interests or be able to immediately consult by specified means with the person having such authority; requiring that certain persons be available to teleconference with the mediator upon the request of the mediator; providing sanctions for certain third parties who fail to appear; creating s. 44.409, F.S.; limiting the information that may be included in the mediator's report to the court; providing an effective date.

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

23-01254-18 20181034__

Section 1. Section 44.407, Florida Statutes, is created to read:

44.407 Insurance carrier representative's settlement authority at circuit court mediation.—

(1) An insurance carrier representative attending a circuit court mediation must have:

(a) Full authority to settle up to the amount of the insurance carrier's reserve on the claims subject to mediation; and

(b) The ability to immediately consult during the mediation by electronic or telephonic means with the person having authority to settle above the amount of the insurance carrier's reserve on the claims subject to mediation, up to the applicable insurance policy limit or the amount of the plaintiff's last demand, whichever is less.

(2) The person or persons consulted by the insurance carrier representative in attendance must be available to teleconference with the mediator at the mediator's request.

(3) An insurance carrier appearing for mediation which does not comply in good faith with this section is subject to sanctions in the same manner as a party that fails to appear with the required settlement authority.

Section 2. Section 44.408, Florida Statutes, is created to read:

44.408 Compelling interested third parties to attend circuit court mediation.—

(1) Upon motion of any party, a court may order a third party to attend a circuit court mediation and participate in good faith in the mediation process if all of the following

apply:

(a) The third party claims a lien or other asserted interest in the proceeds of any funds that a party may receive as part of a mediated settlement agreement.

(b) The presence of the third party can be compelled by service of an order to appear for mediation served in the same manner as service of process according to law.

(c) The presence of the third party at the mediation will facilitate the mediation process.

(2) A third party ordered to attend a mediation who appears and participates in good faith may not be compelled to pay any portion of the mediator's fees or costs.

(3) The designated representative of a third party ordered to attend a mediation who appears on behalf of the third party must have full authority to settle the amount of the third-party's lien or other asserted interest or have the ability to immediately consult with the person having such authority by electronic or telephonic means during the mediation conference.

(4) The person or persons consulted by the third-party representative in attendance must be available to teleconference with the mediator at the mediator's request.

(5) A third party ordered to attend a mediation conference who fails to appear is subject to sanctions in the same manner as a party who fails to appear.

Section 3. Section 44.409, Florida Statutes, is created to read:

44.409 Mediator's report.—

(1) Except as provided in subsection (2), the mediator's report to the court may only state one of the following:

(a) A complete agreement was reached.

(b) A partial agreement was reached.

(c) No agreement was reached.

(2) If a partial agreement was reached which eliminates claims or parties from the litigation, a list of such claims and parties may be provided, but no additional information may be disclosed.

Section 4. This act shall take effect July 1, 2018.

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 Committee on Judiciary

BILL:	CS/SB 1396
INTRODUCER:	Judiciary Committee and Senator Steube
SUBJECT:	Judgeships
DATE:	January 25, 2018 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Cibula	JU	**Fav/CS**
2.			ACJ	
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1396 substantially conforms the number of trial court judgeships authorized by statute to the Florida Supreme Court's latest certification of need for additional judges. Specifically, the bill adds two circuit court judgeships to the Ninth Judicial Circuit Court, which includes Orange and Osceola Counties, and two county court judgeships to Hillsborough County. The bill also decreases the number of county court judgeships by 12 judgeships as follows: one from Escambia County, two from Pasco County, one from Putnam County, one from Alachua County, one from Polk County, three from Brevard County, one from Charlotte County, and one from Collier County. Although the Court decertified the need for one county court judge in Monroe County, the number of county court judges is not changed by the bill.

The costs to fund the addition of the two circuit court judgeships and two county court judgeships created by the bill are $1,446,924. The annual savings associated with decreasing the number of county court judgeships by 12 judgeships will be $3,407,503 once the bill is fully implemented after several years.

II. Present Situation:

Certification of Need for Additional Judges

Article V, section 9 of the Florida Constitution requires the Florida Supreme Court to submit recommendations to the Legislature when there is a need to increase or decrease the number of

judges.[1] The constitutional provision further directs the Court to base its recommendations on uniform criteria adopted by court rule.

The Court's rule setting forth criteria for assessing judicial need at the trial court level is based primarily upon the application of case weights to circuit and county court caseload statistics.[2] These weights are a quantified measure of judicial time spent on case-related activity. The judicial workload is then based on judicial caseloads adjusted in the relative complexity of various case types.

In addition to the statistical information, the Court, in weighing the need for trial court judges, will also consider the factors below which primarily relate to the resources available to a judicial circuit:

(i) The availability and use of county court judges in circuit court.
(ii) The availability and use of senior judges to serve on a particular court.
(iii) The availability and use of magistrates and hearing officers.
(iv) The extent of use of alternative dispute resolution.
(v) The number of jury trials.
(vi) Foreign language interpretations.
(vii) The geographic size of a circuit, including travel times between courthouses in a particular jurisdiction.
(viii) Law enforcement activities in the court's jurisdiction, including any substantial commitment of additional resources for state attorneys, public defenders, and local law enforcement.
(ix) The availability and use of case-related support staff and case management policies and practices.
(x) Caseload trends.[3]

In addition to the weighted caseload statistics, the Court will also consider the time to perform other judicial activities, such as reviewing appellate decisions, reviewing petitions and motions for post-conviction relief, hearing and disposing motions, and participating in meetings with

[1] Article V, section 9 of the Florida Constitution states:

> **Determination of number of judges.**—The supreme court shall establish by rule uniform criteria for the determination of the need for additional judges except supreme court justices, the necessity for decreasing the number of judges and for increasing, decreasing or redefining appellate districts and judicial circuits. If the supreme court finds that a need exists for increasing or decreasing the number of judges or increasing, decreasing or redefining appellate districts and judicial circuits, it shall, prior to the next regular session of the legislature, certify to the legislature its findings and recommendations concerning such need. Upon receipt of such certificate, the legislature, at the next regular session, shall consider the findings and recommendations and may reject the recommendations or by law implement the recommendations in whole or in part; provided the legislature may create more judicial offices than are recommended by the supreme court or may decrease the number of judicial offices by a greater number than recommended by the court only upon a finding of two-thirds of the membership of both houses of the legislature, that such a need exists. A decrease in the number of judges shall be effective only after the expiration of a term. If the supreme court fails to make findings as provided above when need exists, the legislature may by concurrent resolution request the court to certify its findings and recommendations and upon the failure of the court to certify its findings for nine consecutive months, the legislature may, upon a finding of two-thirds of the membership of both houses of the legislature that a need exists, increase or decrease the number of judges or increase, decrease or redefine appellate districts and judicial circuits.

[2] Fla. R. Jud. Adm. 2.240(b)(1)(A).

[3] Fla. R. Jud. Admin. 2.240(b)(1)(B).

those involved in the justice system.[4] Finally, the Court will consider any request for an increase or decrease in the number of judges that the chief judge of the circuit "feels are required."[5]

Certification of Need for Additional Judges for FY 2018-2019

Following its criteria for determining the need for judges, the Florida Supreme Court recently issued an order certifying the need for additional judges for the 2018-2018 fiscal year.[6] In the order, the Court requested two additional judgeships for the Ninth Judicial Circuit, which encompasses Orange and Osceola Counties, and two additional county court judgeships in Hillsborough County.[7] The Court also decertified the need for 13 county court judgeships as follows: one from Escambia County, two from Pasco County, one from Putnam County, one from Alachua County, one from Polk County, one from Monroe County, three from Brevard County, one from Charlotte County, and one from Collier County.[8]

Judicial Nominating Commissions

Unless otherwise provided by law, the Governor fills a newly created judgeship by appointing a judge from among three to six persons nominated by a judicial nominating commission.[9] Once a vacancy occurs, a judicial nominating commission must submit its nominations to the Governor within 30 days, but the Governor may grant an extension to the commission of up to 30 days.[10] Within 60 days after receiving the nominations, the Governor must make an appointment to fill the vacancy.[11]

The appointee's term will end "on the first Tuesday after the first Monday in January of the year following the next primary and general election occurring at least one year after the date of appointment." Thus, the initial term of a judgeship created during the 2018 Session will end on January 12, 2021. At the end of the appointed term, the judicial offices will be filled by election.[12]

III. Effect of Proposed Changes:

This bill substantially conforms the number of trial court judgeships authorized by statute to the Florida Supreme Court's latest certification of need for additional judges. Specifically, the bill adds two circuit court judgeships to the Ninth Judicial Circuit Court, which includes Orange and Osceola Counties, and two county court judgeships to Hillsborough County. The bill also removes 12 county court judgeships as follows: one from Escambia County, two from Pasco

[4] Fla. R. Jud. Admin. 2.240(c).
[5] Fla. R. Jud. Admin. 2.240(d).
[6] *In Re: Certification of Need for Additional Judges*, 2017 WL 5623576 (Fla. 2017).
[7] *Id.* at *3.
[8] *Id.* at *4.
[9] FLA. CONST. art. V, s. 11; *Hoy v. Firestone*, 453 So. 2d 814 (Fla. 1984) (recognizing that the Legislature may provide for newly created judgeships to be filled by election or appointment).
[10] Fla. Const. art. V, s. 11(c). The judicial vacancies created by the bill do not occur until its effective date of July 1, 2018. However, "nothing in the Florida Constitution prevents the relevant judicial nominating commission ("JNC") from beginning the process of nominating … before the vacancy actually occurs." *Advisory Opinion to the Governor re Judicial Vacancy Due to Mandatory Retirement*, 940 So. 2d 1090, 1095 (Fla. 2006) (Cantero, J., concurring).
[11] *Id.*
[12] FLA. CONST. art V, s. 11(b).

County, one from Putnam County, one from Alachua County, one from Polk County, three from Brevard County, one from Charlotte County, and one from Collier County. Although the Court decertified the need for one county court judge in Monroe County, the number of county court judges is not changed by the bill.

The newly created judgeships will be filled by the Governor from among nominees by the appropriate judicial nominating commission. The decrease in judgeships will apply only upon the expiration of a judicial term.

The bill takes effect July 1, 2018.

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:

In the jurisdictions where the bill creates new judgeships, litigants may have their cases resolved more quickly.

C. Government Sector Impact:

State Government
New Circuit Court Judgeships
When circuit court judgeships are created, other costs must be incurred in addition to the salary and benefits for each new judge. The largest of these costs are for the salary and benefits of a judicial assistant and a law clerk for each judge. According to the Office of the State Courts Administrator, the total costs to fund the addition of the two circuit court judgeships created by the bill are $815,862, of which $14,394 are non-recurring costs.[13]

[13] Office of the State Courts Administrator, *Judicial Impact Statement* (Nov. 22, 2017) (on file with the Senate Committee on Judiciary).

New County Court Judgeships
When county court judgeships are created, the state must incur other costs in addition to the salary and benefits of each new judge. The largest of these costs are for the salary and benefits for a judicial assistant for each judge. According to the Office of the State Courts Administrator, the total costs to fund the addition of the two county court judgeships created by the bill are $627,612, of which $9,596 are non-recurring costs.

Decrease in County Court Judgeships
By decreasing the number of county court judgeships by 12, the state will eliminate the need to pay the salaries and benefits of 12 judges and 12 judicial assistants. However, the reduction in funding needs will occur over several years because decrease in the number of judges is effective only at the end of judicial terms. Once fully implemented, based on the methodology used by the Office of the State Courts Administrator, the bill will result in the reduction of the costs for salaries and benefits in the amount of $3,407,503.[14]

Local Government
Under article V section 14(c) of the Florida Constitution and s. 29.008, F.S., counties are required to provide the court system, including the state attorney and the public defender, with facilities, security, and communication services, including information technology. Under the bill, the counties would incur an indeterminate amount of costs associated with providing those services to the new judges and judicial staff. Clerk of the Courts would also be required to provide additional services to the new judges. However, counties having fewer county court judges as a result of the bill may have a reduction in costs.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 26.031 and 34.022.

IX. Additional Information:

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

CS by Judiciary on January 25, 2018:
The committee substitute no longer includes a provision that would have reduced the number of county court judges in Monroe County.

[14] *Id.* OSCA's judicial impact statement, based on the decertification of 13 county court judges, indicated reduction in salaries and benefits of $3,691,462.

B. Amendments:

None.

262208

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
01/25/2018	.	
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The Committee on Judiciary (Flores) recommended the following:

Senate Amendment (with directory amendment)

Delete line 32.

====== D I R E C T O R Y C L A U S E A M E N D M E N T ======
And the directory clause is amended as follows:
Delete line 18
and insert:
(36), (51), (53), and (54) of section 34.022, Florida

By Senator Steube

23-01397B-18 20181396__

A bill to be entitled

An act relating to judgeships; amending s. 26.031, F.S.; adding judges to the Ninth Judicial Circuit Court; amending s. 34.022, F.S.; adding and removing judges from certain county courts; providing an effective date.

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

Section 1. Subsection (9) of section 26.031, Florida Statutes, is amended to read:

26.031 Judicial circuits; number of judges.—The number of circuit judges in each circuit shall be as follows:

JUDICIAL CIRCUIT	TOTAL
(9) Ninth	45 ~~43~~

Section 2. Subsections (1), (5), (8), (11), (16), (28), (36), (44), (51), (53), and (54) of section 34.022, Florida Statutes, are amended to read:

34.022 Number of county court judges for each county.—The number of county court judges in each county shall be as follows:

COUNTY	TOTAL
(1) Alachua	4 ~~5~~
(5) Brevard	8 ~~11~~
(8) Charlotte	2 ~~3~~
(11) Collier	5 ~~6~~
(16) Escambia	4 ~~5~~

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(28) Hillsborough	19 ~~17~~
(36) Leon	4 ~~5~~
(44) Monroe	3 ~~4~~
(51) Pasco	5 ~~7~~
(53) Polk	9 ~~10~~
(54) Putnam	1 ~~2~~

Section 3. This act shall take effect July 1, 2018.

CourtSmart Tag Report

Room: EL 110 **Case No.:** **Type:**
Caption: Senate Judiciary Committee **Judge:**

Started: 1/25/2018 10:02:44 AM
Ends: 1/25/2018 11:20:32 AM Length: 01:17:49

10:02:45 AM	Meeting called to order by Chair Steube
10:02:48 AM	Roll call by Administrative Assistant Joyce Butler
10:03:13 AM	Quorom present
10:04:00 AM	Amendment Barcode 160384 presented by Senator Baxley
10:04:51 AM	Question by Senator Flores
10:05:09 AM	Response by Senator Baxley
10:06:21 AM	Speaker Kate Kile
10:07:01 AM	Amendment adopted
10:07:17 AM	Speaker Stephanie Owens
10:08:46 AM	Kathryn Prant waives in opposition
10:08:54 AM	Bill Bunkley waives in support
10:08:58 AM	Speaker Marion Hammer
10:12:19 AM	Senator Baxley closes
10:13:02 AM	Question by Senator Garcia
10:13:35 AM	Response by Senator Baxley
10:14:51 AM	Question by Senator Garcia
10:15:06 AM	Response by Senator Baxley
10:15:21 AM	Question by Senator Flores
10:17:12 AM	Response by Senator Baxley
10:18:23 AM	CS/SB 1048 Reported Favorably
10:18:41 AM	SB 42 presented by Senator Rodriguez
10:19:17 AM	Speaker Jonathon Gilbert
10:22:21 AM	Senator Rodriguez closes
10:24:05 AM	SB 42 Reported Favorably
10:24:15 AM	SB 44 presented by Senator Rodriguez
10:25:04 AM	Vanessa Brice waives in support
10:25:12 AM	Senator Rodriguez waives close
10:25:33 AM	SB 44 Reported Favorably
10:25:42 AM	SB 18 presented by Senator Braynon
10:27:01 AM	Senator Braynon waives close
10:27:22 AM	SB 18 Reported Favorably
10:27:42 AM	CS/SB 298 presented by Senator Bracy
10:28:25 AM	Barney Bishop waives in support
10:28:31 AM	Andy Thomas waives in support
10:28:59 AM	CS/SB 298 Reported Favorably

10:29:11 AM	SB 866 presented by Senator Bracy
10:30:04 AM	Question by Senator Garcia
10:30:06 AM	Response by Senator Bracy
10:30:32 AM	Follow-up by Senator Garcia
10:30:43 AM	Response by Senator Bracy
10:31:39 AM	Barney Bishop waives in support
10:31:45 AM	Andy Thomas waives in support
10:31:51 AM	Daphne Sainvil waives in support
10:31:58 AM	Senator Bracy closes
10:32:48 AM	SB 866 Reported Favorably
10:32:58 AM	CS/SB 928 presented by Senator Bracy
10:34:02 AM	Barney Bishop waives in opposition
10:34:04 AM	Andy Thomas waives in support
10:34:10 AM	Amy Bisceglia waives in support
10:34:21 AM	Sal Nuzzo waives in support
10:34:27 AM	Chelsea Murphy waives in support
10:34:34 AM	Speaker Melissa Ramba
10:35:43 AM	Question by Senator Gibson
10:35:56 AM	Response by Speaker Melissa Ramba
10:36:11 AM	Question by Senator Thurston
10:36:25 AM	Response by Speaker Melissa Ramba
10:36:47 AM	Question by Senator Garcia
10:37:05 AM	Response by Speaker Melissa Ramba
10:37:59 AM	Follow-up by Senator Garcia
10:38:28 AM	Response by Speaker Melissa Ramba
10:39:11 AM	Speaker Nancy Stephens
10:39:58 AM	Question by Senator Bracy
10:40:05 AM	Response by Speaker Nancy Stephens
10:40:35 AM	Debate by Senator Garcia
10:42:22 AM	Debate by Senator Gibson
10:43:42 AM	Senator Bracy closese
10:45:31 AM	CS/SB 928 Reported Favorably
10:45:47 AM	SB 536 presented by Senator Passidomo
10:46:57 AM	Amendment Barcode 758426 presented by Senator Steube
10:47:29 AM	Amendment Barcode 38518 withdrawn
10:47:36 AM	Chris Carmody waives in support
10:47:58 AM	Amendment adopted
10:48:19 AM	Kari Hebrank waives in support
10:48:26 AM	Warren Husbandwaives in support
10:48:31 AM	GC Murray waives in support
10:48:36 AM	Senator Passidomo waives close
10:48:58 AM	CS/SB 536 Reported Favorably
10:49:08 AM	SB 1598 presented by Senator Passidomo
10:49:50 AM	Amendment Barcode 323296 presented

10:50:05 AM	Amendment adopted
10:50:17 AM	Senator Passidomo waives close
10:50:39 AM	CS/SB 1598 Reported Favorably
10:51:10 AM	CS/SB 970 presented by Senator Brandes
10:52:40 AM	Amendment Barcode 572144 presented
10:52:56 AM	Amendment adopted
10:53:07 AM	Barney Bishop waives in support
10:53:13 AM	Daphnee Sainvil waives in support
10:53:18 AM	Bill Bunkley waives in support
10:53:24 AM	Jill Gran waives in support
10:53:28 AM	Andy Thomas waives in support
10:53:35 AM	Senator Brandes waives close
10:53:59 AM	favorably
10:54:11 AM	SB 1412 presented by Senator Simmons
10:55:03 AM	Amendment Barcode 783328 adopted
10:55:18 AM	Gary Guzzo waives in support
10:55:25 AM	Carolyn Jonhson waives in suport
10:55:28 AM	David Langham waives in support
10:55:32 AM	Claudia Davant waives in support
10:55:35 AM	Robert Cohen waives in support
10:55:40 AM	Donovan Brown waives in support
10:55:55 AM	Senator Simmons closes
10:56:46 AM	SB 1412 Reported Favorably
10:56:59 AM	SB 14 presented by Senator Gibson
10:57:49 AM	Senator Gibson waives close
10:58:14 AM	SB 14 Reported Favorably
10:58:21 AM	SB 36 presented by Senator Gibson
10:59:02 AM	Senator Gibson waives close
10:59:25 AM	SB 36 Reported Favorably
10:59:36 AM	SB 1424 presented by Senator Gainer
11:01:50 AM	Question by Senator Gibson
11:02:55 AM	Response by Senator Gainer
11:03:16 AM	Follow-up by Senator Gibson
11:04:10 AM	Response by Senator Gainer
11:04:40 AM	Speaker Augustus Aikens
11:05:24 AM	Andy Thomas waives in support
11:05:29 AM	Jill Gran waives in support
11:05:34 AM	Senator Gainer waives close
11:05:57 AM	SB 1424 Reported Favorably
11:06:06 AM	SB 40 presented by Senator Thurston
11:06:40 AM	Senator Thurston waives close
11:07:02 AM	SB 40 Reported Favorably
11:07:18 AM	Senator Benacquisto moves that SB 1034 be temporarily postponed
11:07:33 AM	SB 908 presented by Senator Steube

11:08:39 AM	Amendment Barcode 880242 presented
11:08:58 AM	Chris Dawson waives in support
11:09:06 AM	Warren Husband waives in support
11:09:13 AM	Amendment adopted
11:09:17 AM	Amendment Barcode 957880 presented
11:09:31 AM	Chris Dawson waives in support
11:09:39 AM	William Stander waives in support
11:09:45 AM	Amendment adopted
11:09:50 AM	Amendment adopted
11:09:57 AM	Question by Senator Thurston
11:10:03 AM	Response by Senator Steube
11:10:37 AM	Senator Steube waives close
11:11:01 AM	CS/SB 908 Reported Favorably
11:11:24 AM	SB 1396 presented by Senator Steube
11:12:37 AM	Amendment Barcode 262208 presented by Senator Flores
11:13:20 AM	Jason Unger waives in support
11:13:26 AM	Wayne LaRue Smith waives in support
11:13:32 AM	Ashley Sybesma waives in support
11:13:38 AM	Amendment adopted
11:13:50 AM	Question by Senator Thurston
11:14:31 AM	Response by Senator Steube
11:15:30 AM	Question by Senator Gibson
11:16:03 AM	Response by Senator Steube
11:17:34 AM	Debate by Senator Mayfield
11:18:05 AM	Response by Senator Steube
11:18:38 AM	Debate by Senator Gibson
11:19:25 AM	Senator Steube closes
11:19:55 AM	CS/SB 1396 Reported Favorably
11:20:16 AM	Senator Garcia votes affirmative in SB 44
11:20:24 AM	Meeting adjourned