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HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME AND PUNISHMENT
BILL RESEARCH & ECONOMIC IMPACT STATEMENT

BILL #: HB 1371

RELATING TO: Prison Release

SPONSOR(S): Representative Putnam and Representative Crist

STATUTE(S) AFFECTED: s. 775.086, F.S.

COMPANION BILL(S): None

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) CRIME AND PUNISHMENT
(2)
(3)
(4)
(5)

I. SUMMARY:

HB 1371 provides that any offender who was released from prison between October 1, 1996, and September 30, 1998, without serving at least 85% of his/her sentence, and who commits a qualifying offense, is subject to the penalties prescribed in the bill. This bill imposes as minimum mandatory sentences, the maximum periods of incarceration under s. 775.082, F.S., with no mechanism for early release of any kind. In addition, the bill contains a provision which calls for the forfeiture of gain time, or other early release credits, previously accumulated by the offender.

Because HB 1371 singles out offenders that are released from custody between October 1, 1996 to September 30, 1998, who did not serve at least 85% of their sentence, and treats them differently from all other offenders released from prison, equal protection issues are raised (See *Comments*).

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

1. Creation and Repeal of Early Release Statutes

From 1987 to 1990, the legislature enacted a series of early release statutes:

- Administrative gain-time (s. 944.276, F.S.)
- Provisional release credits (s. 944.277, F.S.)
- Control release (s. 947.146, F.S.)

authorizing the Department of Corrections or the Parole Commission to award early release credits or gain-time to state inmates when the population of the state prison system exceeded predetermined levels. Inmates who were statutorily eligible to receive administrative gain-time or provisional release credits automatically received them and did not need to work or earn the early release credits. The early release statutes were designed to alleviate prison overcrowding and to maintain the prison population within its lawfully prescribed level established in the federal court settlement agreement under Costello and Celestineo v. Wainwright.

From 1987 to 1993, the early release statutes were repeatedly activated and resulted in the early release of over 200,000 inmates which reduced the average time served to about one-third of the court imposed sentence. The use of early release mechanisms generated public safety concerns. The Legislature later repealed administrative gain-time and provisional release credits (Chapters 88-122 and 93-406, Laws of Florida), and created s. 944.278, F.S., which retroactively canceled those awards for all inmates serving a sentence in the custody of the Department of Corrections.

Control release, although inactive since December of 1994, is the sole early release mechanism which is statutorily authorized when the state prison system exceeds 99% of total capacity. In 1996, the legislature amended the control release statute and voided all control release dates established prior to July 1, 1996. This amendment in 1996 substantially postponed the date of release for several thousand inmates.

2. Keeping Prison Populations Below Thresholds for Early Release

To halt the early release of inmates, the legislature began in 1988 and continued over the next eight years, an aggressive prison expansion program of appropriating and constructing over 49,000 prison beds. However, it was not until December of 1994, that the new prison beds coupled with the decline in prison admissions permitted the legislature to stop the early release of inmates.

With the elimination of early release in December of 1994, inmates immediately began serving a substantially larger percentage of their sentence. Inmates released from prison in June of 1989, for example, served an average of only 34% of their sentence, whereas inmates today serve an average of 64% of their sentence.

3. The Cancellation of Administrative Gain-time and Provisional Release Credits

In 1989, the legislature amended the provisional credits statute to render those convicted of certain murder and attempted murder offenses, ineligible for provisional credits. An opinion by the Attorney General concluded that amendments to the provisional release credit law applied retroactively. 92-96, Op. Fla. Att'y Gen. (1992). As a result, in 1992, the Department of Corrections retroactively canceled provisional release credits for certain classes of inmates. Approximately 2,800 inmates had provisional release credits canceled and arrest warrants were issued for 164 offenders who had been released early.

The following year, the legislature created s. 944.278, F.S., which retroactively canceled all administrative gain-time and provisional release credits substantially postponing the date of release for several thousand inmates.

On February, 19, 1997, the U.S. Supreme Court held in Lynce v. Mathis that the 1992 and 1993 statutes canceling administrative gain-time and provisional release credits violated the Ex Post Facto Clause finding that it disadvantaged the affected inmates by increasing their punishment. Lynce v. Mathis, 65 U.S.L.W. 4131 (U.S. Feb. 19, 1997) (No. 95-7452)

As a result of Lynce, approximately 2,700 inmates will have their sentence reduced from 30 days up to 7 years. Of those affected, approximately 500 either have been or will be immediately released during the first two weeks of March, 1997. The remaining inmates will be released on an average of 10 to 12 inmates per month for several years to come. Of those 2,700 inmates, the Department of Corrections estimates that 1,800 or almost 68% will be under some type of supervision or placed under the custody of another law enforcement agency.

In adhering to the Lynce decision, the Department of Corrections has identified two unique classes of inmates who will not have administrative gain-time or provisional release credits restored: inmates sentenced to offenses committed on or after June 15, 1983, when an emergency release statutes was not in existence, and those inmates serving an offense during portions of 1986 and 1987 when the threshold for the early release mechanisms were never triggered.

4. Gain Time

Gain-time is a behavioral management tool used by prison officials to encourage satisfactory behavior while inmates are serving their sentences.

Section 944.275, F.S., provides for four types of gain-time to encourage satisfactory behavior and provide incentives for inmates to work and use their time constructively: basic gain-time, incentive gain-time, educational gain-time and meritorious gain-time.

This section was amended in 1993 and 1995 to repeal basic gain-time and reduce the amount of incentive gain-time the Department of Corrections is authorized to award. Specifically, the 1995 legislature prospectively reduced the amount of incentive gain-time an inmate may earn from up to 20 days per month, to a maximum of 10 days per month. It also required all inmates sentenced to state prison for crimes committed on or after October 1, 1995, to serve no less than 85% of their sentence.

Based on an Attorney General opinion issued March 20, 1996, the Department of Corrections amended Rule 33-11.0065 of the Florida Administrative Code, and denied future incentive gain-time awards to inmates who had 85% or less of any sentence remaining to be served. The rule was effective April 21, 1996. The amended rule affected over 18,000 inmates and was projected on average to lengthen the time served in prison by several years. A small number of inmates (153) were projected to serve more than 20 years longer as a result of the amended rule.

On October 10, 1996, the Florida Supreme Court ruled in Gwong v. Singletary that the department could not change the manner in which incentive gain time was previously awarded, and that such a retrospective change violated the ex post facto clause of the U.S. Constitution. The Court further stated that the department cannot do by rule what the Legislature cannot do by law. Gwong v. Singletary, 683 So. 2d 109 (Fla. 1996), reh'g denied, No. 87,824, 1996 WL 673978 (Nov. 22, 1996), *cert denied*, 65 U.S.L.W. 3564 (U.S. Fla., Feb. 18, 1997) (No. 96-958).

As a result of Gwong, approximately 500 inmates were immediately released in November and December of 1996. By August 1997, about 1,800 additional inmates are projected to be released. Inmates affected by Gwong, mostly convicted of murder and sexual battery, were scheduled to be released by these dates prior to the department's adoption of the amended rule and the Florida Supreme Court decision.

B. EFFECT OF PROPOSED CHANGES:

1. Qualifying Offenses

Under this bill, any offender who was released from prison between October 1, 1996, and September 30, 1998, without serving at least 85% of his/her sentence, and who commits a qualifying offense, is subject to the penalties prescribed in this bill. Those qualifying offenses which trigger the application of this section are:

- Under s. 776.08, F.S., - treason; murder; manslaughter; sexual battery; car jacking; home-invasion robbery; robbery; burglary; arson; kidnaping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing; placing or discharging of a destructive device or bomb; and any felony which involves the use or threat of physical force or violence against an individual.

- Under s. 790.07, F.S., - any person who while committing, or attempting to commit, any felony or while under indictment, displays, uses or threatens to use a weapon, electric weapon, firearm, concealed weapon, or concealed firearm (excluding some non-violent felonies).

- Under s. 800.04, F.S., - lewd, lascivious, or indecent assault or act upon or in the presence of a child.

- Under s. 827.03, F.S., - felony child abuse, aggravated child abuse, felony child neglect.

2. Penalties

Offenders who fall within the scope of this bill will be sentenced to the maximum periods of incarceration for the applicable felony offense as provided under s. 775.082, F.S., as minimum mandatory sentences. Persons sentenced under the bill will serve their entire sentence with no mechanism for early release, probation, or parole.

HB 1371 also contains a provision which requires the forfeiture of gain time credits of any offenders that fall within its scope. The effect of this language could be interpreted two ways. First, that any previously accumulated gain time that accelerated the defendant's release would be added to the minimum mandatory term of years imposed on the new offense. Second, it could be interpreted to mean that any accumulated gain time would be taken back for offenses that result in conditional release violations. Under these circumstances, the defendant would be made to serve the time he was credited with on the conditional release violation, independent of the sentence imposed on the new charge.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

A new responsibility will arise out of the need for law enforcement agencies and prosecutors to check and obtain inmate release records for arrests or prosecutions under the bill.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

Not applicable.

(2) what is the cost of such responsibility at the new level/agency?

Not applicable.

(3) how is the new agency accountable to the people governed?

Not applicable.

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

Not applicable.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

Not applicable.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

Not applicable.

(2) Who makes the decisions?

Not applicable.

(3) Are private alternatives permitted?

Not applicable.

(4) Are families required to participate in a program?

Not applicable.

(5) Are families penalized for not participating in a program?

Not applicable.

b. Does the bill directly affect the legal rights and obligations between family members?

Not applicable.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

Not applicable.

(2) service providers?

Not applicable.

(3) government employees/agencies?

Not applicable.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. - Title section.

Section 2. - Amends s. 775.082, F.S., as discussed in section II, B.

Section 3. - Amends s. 944.705, F.S., to create a provision requiring the Department of Corrections to provide notice to all inmates who will qualify for sentencing under the provisions of this bill.

Section 4. - Provides an effective date upon becoming law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

Indeterminate, see *Fiscal Comments.*

2. Recurring Effects:

Indeterminate, see *Fiscal Comments.*

3. Long Run Effects Other Than Normal Growth:

Indeterminate, see *Fiscal Comments.*

4. Total Revenues and Expenditures:

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

Indeterminate, see *Fiscal Comments.*

2. Recurring Effects:

Indeterminate, see *Fiscal Comments.*

3. Long Run Effects Other Than Normal Growth:

Indeterminate, see *Fiscal Comments.*

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Not applicable.

2. Direct Private Sector Benefits:

Not applicable.

3. Effects on Competition, Private Enterprise and Employment Markets:

Not applicable.

D. FISCAL COMMENTS:

The fiscal impact of this bill is indeterminate at the time of this writing. The Criminal Justice Estimating Conference has scheduled a hearing for March 17, 1997.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

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

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

1. The Equal Protection Clause

Any law which targets a particular group of offenders and treats them differently than others is subject to scrutiny under the equal protection clause of the state and federal constitution. Fundamentally, the equal protection clause guarantees that people similarly situated will be treated similarly. The Equal Protection Clause, Art. I, Sec. 2, of the Florida Constitution provides in part that: "All natural persons are equal under the law. . . " The Fourteenth Amendment to the United States Constitution provides that no state may "deny to any person within its jurisdiction the equal protection of the laws. . " The Equal Protection Clause, however, does not deny to states the power to treat different classes of persons in different ways as long as such classes are reasonably related to a legitimate state interest. Stall v. State, 570 So.2d 257, 262 n7. (Fla. 1990). Therefore, the test to be used in examining a statutory classification on equal protection grounds is whether the classification rests on a difference bearing a reasonable relation to the object of the legislation. Soverino v. State, 356 So.2d 269, 271 (Fla. 1978).

It has long been recognized that the state has a legitimate interest in deterring crime and protecting society from violent offenders. See, Todd v. State, 643 So.2d 625 (Fla. 1st. DCA. 1994) (holding that imposition of enhanced penalties did not violate the equal protection clause). There have also been three Florida Supreme cases where the court has upheld the habitual offender statute, s. 775.084, F.S., against constitutional challenges based on due process and equal protection grounds. See, Seabrook v. State, 629 So.2d 129 (Fla. 1993); Reeves v. State, 612 So.2d 560 (Fla. 1992); Ross v. State, 601 So.2d 1190 (Fla. 1992).

The language in the 'Whereas" clauses of the bill clearly states the objective of this legislation is to protect the public from violent felony offenders who despite being sentenced to prison, continue to prey on society by committing a new violent crime. Further, the "Whereas" clauses indicate greater need for such legislation based on recent court decisions (discussed previously) mandating early release of violent felony offenders.

To accomplish this objective, the bill singles out offenders that are released from custody between October 1, 1996 to September 30, 1998, who did not serve at least 85% of their sentence. In reviewing the bill against an equal protection challenge, the court would have to determine whether the class of offenders defined by the legislation is reasonably related to its legitimate objective. This would involve a two step process. First, it would be necessary to ascertain if the window period from October 1, 1996 to September 30, 1998 effectively captures the violent felony offenders that are expected to be released under the recent court decisions, or notwithstanding court decisions, how effectively it captures **all** violent felony offenders who have committed a new crime after release from prison. Second, it would be necessary to examine the 85% provision and relate that to the objective of the bill. While it is not necessary for a classification to be made with mathematical precision to survive an equal protection challenge, a reviewing court must determine whether the class

created by the legislation was arbitrary. This determination is part of the process in analyzing whether the law is rationally related to a legitimate interest. See, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337 (1910); Hamilton v. State, 366 So.2d 8 (Fla. 1979).

After the window period provided in the bill expires, there will still be inmates, who did not serve 85% of their sentence, being released at a rate of 10 to 12 per month, as a result of the Lynce decision, for several years. These offenders will not be subject to the same penalties as those released within the window period provided in the bill. A solution to this problem would be an amendment which makes the penalties under the bill apply based on a time frame that is determined by an inmate's individual release date. By triggering application of the bill based on an inmate's date of release, all inmates would be subject to its penalties equally. An example of such language could be stated as follows:

> "A person who commits, or attempts to commit, a forcible felony as described in s. 776.08 or any violation of s. 790.07 or s. 800.04, or any felony violation of chapter 827 within 5 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor, is ineligible for sentencing under the sentencing guidelines and must at a minimum be sentenced as follows: "

For equal protection purposes, the more effectively a law defines the class that requires special treatment (IE. those the state has a legitimate interest in classifying), the stronger the case can be made that the law is rationally related to that legitimate objective.

2. Prison Management

Because the penalties involved under the bill are minimum mandatory sentences, the Department of Corrections may face some disciplinary problems with those offenders serving sentences with no prospect for gain time awarded for good behavior.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

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