SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: April 14, 1998 Revised: _____ _____ _____ _____

Subject: Marriages

	Analyst	Staff Director	Reference	Action
1.	Harkins	Moody	JU	Favorable/CS
2.				
3.				
4.				
5.				

I. Summary:

The bill prohibits persons from marrying when one of the parties to the marriage has been convicted of a capital felony and sentenced to death. However, if the Department of Corrections approves the marriage, a county judge of any county in the state may choose to issue a marriage license to a couple who would otherwise be prohibited from marrying. If a capital felon's death sentence is overturned or commuted to a life sentence, or if clemency is granted, the provisions of the bill would not apply.

The bill creates section 741.2105 of the Florida Statutes.

II. Present Situation:

Currently, under Rule 33-3.031, Florida Administrative Code, all inmates, including capital felons sentenced to death, are allowed to marry under certain circumstances. An inmate is required to submit a request to the superintendent in writing by both parties to the marriage.

The written request to marry must include the following:

- A statement of desire to marry from both parties;
- A statement of approval of the parent or guardian of any party under the age of eighteen; and
- A statement from the Chaplin or other staff member stating that the parties have been apprised of the parameters placed on marriage within an institutional setting.

In addition to the written letter from both parties, the following procedures must be followed:

- A psychological and security evaluation must be conducted to assure that the inmate marriage does not pose a threat to the security of the inmate, the institution, or the public;

- A written recommendation must be submitted by the staff psychologist and chief correctional officer to the superintendent;
- The written request of the parties and the recommendations of the staff psychologist and chief correctional officer are then forwarded to the chaplaincy administrator for review;
- The chaplaincy administrator reviews the material to assure compliance with procedures, makes his finding, then forwards them to the secretary;
- The secretary makes the ultimate decision of whether the marriage should be approved in light of the penological interest of the institution; and
- The secretary must, in writing, advise the couple wishing to marry of his decision and the basis for that decision must be stated.

Since 1993, 17 of 380 death row inmates have requested to marry. Five inmates have married while on death row. Four inmates have been approved but have not married. Six were approved, but did not complete the post approval procedures necessary to marry. One is approved and in process and another is pending approval.

III. Effect of Proposed Changes:

This bill would require that an inmate's marriage be approved not only by the Department of Corrections, but also by a county court judge of this state. As a consequence of this bill, capital felons' requests to marry will be subjected to additional scrutiny, under the assumption that the marriage shall remain prohibited unless the requirements provided for in this bill have been met.

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:

The bill poses constitutional issues arising under the Federal Constitution and the Constitution of the State of Florida. The decision to marry is a fundamental right. *Zabloki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978). Prison inmates retain those constitutional rights which are not inconsistent with the status of being a prisoner or with the

legitimate penological objectives of the corrections system. *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974).

In *Turner v. Safely*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1978), the court stated that inmate marriages can be: 1) expressions of emotional support and public commitment, 2) religious expressions, or 3) formed in the expectation that they might someday be consummated. *Id.* at 2265. The court noted that marital status is also often a precondition to the receipt of government benefits and property and inheritance rights (incidents of marriage which are unaffected by confinement or the pursuit of legitimate corrections goals). *Id.* Therefore, the marital relationship is protected even in the prison context. *Id.*

The *Turner* court was considering a Missouri *regulation* promulgated by the Missouri Department of Corrections which prohibited inmates from marrying unless the prison superintendent determined there was a compelling reason for allowing the marriage. *Id.* at 2266. The Department of Corrections argued that the regulation was justified on the basis of security and rehabilitation concerns. *Id.* The court stated that an "almost complete ban on the decision to marry is not reasonably related to a legitimate penological interest. *Id.* at 2267. The court also noted, without reaching the issue, that the Missouri regulation may entail a consequential restriction on the constitutional rights of those who are not prisoners, i.e., people desiring to marry prisoners, thus requiring application consideration of the chilling effect on non-prisoners' rights. *Id.* at 2266. This seems to imply that the court could have applied a strict scrutiny test to the regulation to the extent the regulation touches upon a non-prisoner's fundamental right to marry.

The *Turner* court noted that in the case of *Butler v. Wilson*, 415 U.S. 953, 94 S.Ct. 1479, 39 L.Ed.2d 569 (1974), it had summarily affirmed a holding of the court of appeals for the Southern District of New York, in which the district court *upheld* the constitutionality of a state statute prohibiting marriage only for inmates sentenced to life imprisonment. *Turner* at 2255. The *Turner* court noted that the New York law was part of the punishment for crime and that punishing crime was legitimate basis for denying a right.

The bill requires both the Department of Corrections and a county court judge of this state to approve the marriage of a capital felon. The Department of Corrections' decision is apparently bound to its legitimate penological interests. On the other hand, a county court judge, who must also approve the marriage, may do so at his or her untied discretion. The bill does not limit a judge's consideration to penological concerns such as prison safety or rehabilitation. Therefore, it would potentially be within a judge's discretion to refuse a marriage license for a reason completely unrelated to the prisoner's status or any legitimate penological interests.

The bill, while limited to capital felons sentenced to death, does not indicate whether it is directed at punishing crime. Therefore, it is uncertain whether it would fall under the reasoning set forth in *Butler v. Wilson*, 415 U.S. 953, 94 S.Ct. 1479, 39 L.Ed.2d 569

(1974)[1]. If the bill is intended to be a punishment for crime, it may be subject to challenge as an ex post facto law violative of the Constitution of the State of Florida and the United States Constitution. In *Calamia v. Singletary v. Singletary*, 686 So.2d 1337 (Fla. 1996), the court stated that the focus of the ex post facto inquiry is on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable. *Id.*

V. Economic Impact and Fiscal Note:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

[1] In *Butler*, the court summarily affirmed the holding of a federal district court in the case of *Johnson v. Rochefellow*, 365 F.Supp. 377, (SDNY 1973). The court in Turner v. Safely, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1978), made note of *Butler's* summary affirmance of *Johnson*, but, also, remarked that a summary affirmance is an affirmance of the judgment only and is not necessarily solely based upon the lower court's rationale.