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: January 29, 1998 Revised: 2/3/98

Subject: Jails

	Analyst	Staff Director	Reference	Action
1.	Barrow	Miller	CJ	Fav/1 amendment
2.				
3.				
4.				
5.				

I. Summary:

Senate Bill 404 creates a second degree misdemeanor for any local jail inmate who repeatedly, knowingly, and willfully refuses to obey any administrative rule governing the conduct of jail inmates as provided in the Florida Model Jail Standards. The bill would take effect upon becoming law.

This bill substantially amends the following section of the Florida Statutes: 951.23.

II. Present Situation:

Former State Regulation and Oversight of Local Jails

During the 1996 Regular Session, after years of attempts to do so, the Legislature eliminated the Florida Department of Corrections' oversight of Florida's local detention facilities, or jails. *See*, §31, House Bill 1411 (1996); *see also*, CS/SB 2796 (1996). Prior to the effective date of this legislation, the Department of Corrections set minimum standards for the operation and maintenance of county and municipal detention facilities. More specifically, these minimum standards promulgated by the Department included requirements and procedures regarding the care, custody, treatment, housing, and general handling of jail inmates. *See*, Chapter 33-8, *Fla. Admin. Code Ann*. (1995). In order to ensure jails' compliance with the standards and regulations established by the Department, the Department inspected jails at least two times per year as required by rule. *See*, Rule 33-8.002, Fla. Admin. Code Ann. (1995). If non-compliances were found, the jails could be cited for violations. Rule 33-8.005, *Fla. Admin. Code Ann*.(1995).

The United States Federal District Court has been overseeing jails and jail conditions in Florida for nearly two decades. See, *Arias v. Wainwright*, TCA 79-0792 (N.D. Fla.). Similar to federal

court oversight in the *Costello v. Wainwright* case, there have been consent orders entered into over the course of time pursuant to *Arias* federal class action lawsuit. *See*, 397 F. Supp. 20 (M.D. Fla. 1975), *aff'd* 525 F.2d 1239 (5th Cir. 1976) *and* 553 F.2d 506 (5th Cir. 1977); *see also* 489 F. Supp. 1100 (M.D. Fla. 1980); *compare*, *Costello v. Singletary*, Case Nos. 72-109-CIV-J-14, 72-94-CIV-J14 (M.D. Fla.) (March 30, 1993)(final order to close class action suit). The *Arias* case is still an "open" and pending lawsuit in federal court; thus, providing the federal courts the long-term oversight of Florida's jails regarding jail conditions.

In 1981, a consent agreement was reached in the *Arias* case relating to jail conditions. Arias Consent Agreement of June 12, 1981, TCA 79-0792 (N.D. Fla.). The scope of that consent agreement resolved the disputes between the parties regarding the duty of the state to conduct jail inspections to maintain the standards set for the operation and maintenance of jails by rules promulgated by the Department of Corrections and the duty of the state to take effective action to enforce such rules and standards. The dispute had alleged several deficiencies in the state jail inspection program and how such deficiencies should be addressed and corrected. Among other things, the agreement required the Department of Corrections to employ a sufficient number of inspectors to fully carry out the terms of the Consent Agreement.

Leading up to the 1996 changes that eliminated state oversight of local jails, the 1995 Legislature passed SB 2050, an appropriations bill, which amended some statutory language relating to local jail inspections; it amended §§944.31 and 944.32, *Florida Statutes*. As a result, all funding to the Department of Corrections related to the inspections of county and municipal detention facilities was deleted from the Department's FY 1995-96 budget. Although the bill was passed by the Legislature, it did not amend or repeal other statutory language that pertained to county and municipal detention facility inspections conducted by the Department of Corrections. Therefore, the Department had to continue to conduct jail inspections, pursuant to state law, without the state funding previously obtained.

1996 Changes to the Regulation of Local Jails

As discussed above, prior to the 1996 changes to §951.23, *Florida Statutes*, the State of Florida was responsible for the regulation and oversight of local jails through the Department of Corrections. Although the state promulgated rules for the minimum standards that must be maintained by the jails, local governments could and did implement their own rules regarding the day-to-day operations of jails, gain-time awards, and discipline of inmates as long as there was no infringement upon the minimum standards established by the state.

Pursuant to the changes in 1996, state regulations and inspections would no longer be in effect and were required to be replaced, at a minimum, by a set of model regulations by October 1, 1996. The model jail standards were developed by a five-member working group that consisted of three persons appointed by the Florida Sheriffs Association and two persons appointed by the Florida Association of Counties. The 1996 legislation set out in detail the areas that would be required to be addressed by the working group to be incorporated into the model jail standards. These areas are essentially the same areas that the Department of Corrections' administrative rules

addressed in Chapter 33-8, *Fla. Admin. Code Ann.* (1995), and can be found in subsections (4), (5), (6), (7), and (9) of §951.023, *Florida Statutes*. In accordance with the mandates of the 1996 legislation, the five-member working group crafted the Florida Model Jail Standards for local jails to adopt *in toto* and to build upon if the sheriffs or chief correctional officers needed to clarify items or add requirements or other regulations.

As for order and discipline, Chapter 13 of the Model Jail Standards sets out a list of acts that shall be prohibited acts, at a minimum, by each jail. The list is quite extensive and includes acts such as: assaulting or fighting with another person, engaging in sexual acts, escaping, setting a fire, tampering with any locking device, destroying or altering any governmental property, possession of any weapon, rioting, refusing to work, refusing to obey an order of any staff member, lying to a staff member, feigning illness or injury, smoking where prohibited, failure to follow sanitary standards, being in an unauthorized area, gambling, and using abusive or obscene language.

Disciplinary action by the disciplinary committee within the jail is authorized and a general procedure is also provided. Disciplinary reports are written for infractions of the rules, notification is provided to the jail inmate within 24 hours, and a disciplinary hearing is scheduled. The model standards also provide minimum authority of the disciplinary committee and hearing officer as well as the inmate facing the rule violation. The disciplinary committee or hearing officer decides on the disciplinary penalties against the inmate if he or she is found in violation of a rule. Corporal punishment is expressly prohibited. However, the rules do not specify punishment to be rendered upon an inmate; only that discipline must not be arbitrary, capricious, nor in the nature of retaliation or revenge. Discipline may consist of many "punishments" or remedial measures. Discipline may include disciplinary or administrative confinement (separation), loss of gain-time, work assignments, among other options. The forfeiture of gain-time for inmates who commit disciplinary infractions is authorized by §951.21 (4), *Florida Statutes*.

As part of the 1996 revisions, however, the legislation repealed §951.07, *Florida Statutes*, which stated:

> The flogging or whipping of prisoners in this state is prohibited, but the Department of Corrections may make and enforce suitable and reasonable rules and regulations for the government of such prisoners while serving sentences in prison camps or jails and enforce the same by solitary confinement, restriction of privileges, or any other humane and reasonable method of punishment. Any prisoner in any jail or prison camp of this state who shall repeatedly, knowingly, and willfully refuse to obey any such reasonable rule or regulation while being subject thereto shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, and such punishment shall upon his conviction be in addition to the sentence he is then serving. *See,* §34, House Bill 1411 (1996); *see also,* Ch. 96-312, §34, 1996 *Fla. Laws* 1413, 1443.

In an effort to "clean up" Chapter 951, Florida Statutes, by deleting obsolete language and to delete language that could be construed as providing for state regulation or oversight of local jails, the entire statutory section was repealed. *Id.; see also,* §951.07, *Florida Statutes* (1995).

The Florida Sheriffs Association has noted that the deletion of the authority to charge a repeated rule violator with a second degree misdemeanor was inadvertent.

Chronic Jail Rule Violators

According to the Florida Sheriffs Association, repeated or chronic violations of jail rules is a problem that local jails have to deal with on an on-going basis. The Association sees this issue as a correctional officer safety and job environment issue. There is somewhat of a stepping stone progression in tools that jails use to entice jail-rule compliance of inmates. It is the position of the Association that gain-time available to inmates has not been an effective "carrot" for some inmates to provide an incentive for inmates to obey jail rules and comply with jail staff. In addition, the forfeiture of gain-time and other punishments imposed or remedial measures taken by disciplinary committees or hearing officers have not been a significant "hammer" over the heads of some inmates to gain rule compliance of jail inmates because the problem of chronic jail rule violators still exists.

An example was provided to Senate staff by the Duval County Sheriffs Office. According to representatives of Duval County, there are approximately 10 to 15 inmates that are chronic offenders who would qualify and would have been prosecuted if the second degree misdemeanor provision of §951.07, *Florida Statutes*, was still in effect. A specific example in Duval County highlighted a 19-year old inmate who had violated jail rules 9 times within a three-month period of incarceration. His violations included disobeying verbal orders, misuse of city property, lying to jail staff, failure to maintain personal hygiene and dress, possession of tobacco, disorderly conduct, insufficient work, and attempt to manipulate jail staff.

For those inmates who continue to be a problem, the Association believes that the threat of criminal prosecution for repeatedly violating jail rules would force jail-rule compliance by most of those inmates. The Association, with the particular interest of certain sheriffs, wants the law restored so repeat rule-violators could be prosecuted for a second degree misdemeanor.

Second Degree Misdemeanors

Second degree misdemeanors are punishable under §§775.082 (4) (b) and 775.083 (1) (e), *Florida Statutes.* A person who commits a second degree misdemeanors could be punished by incarceration of to up to 60 days in jail and the imposition of a fine of up to $500.

III. Effect of Proposed Changes:

Local jails would be able to again prosecute repeat jail-rule offenders for a second degree misdemeanor. The authorizing language would be similar to the statutory language that previously existed under §951.07, *Florida Statutes* (1995).

In order to prosecute a person for violating this subsection, a prosecutor would have to prove that an offender "repeatedly" violated any jail rule pertaining to the conduct of inmates, which is the

same language under the previous law. It would also need to be proven that the offender repeatedly violated any rule "knowingly" and "willfully," which would be the same requirements as existed under the previous law.

Specific reference would be made to the Florida Model Jail Standards that was required to be developed and adopted (at a minimum) by every jail in Florida by October 1, 1996, pursuant to the requirements of subsection (4) of §951.23, *Florida Statutes*. Thus, violating any rule pertaining to the conduct of inmates for prosecution would be those rules adopted as authorized in the Florida Model Jail Standards.

The bill would be effective upon becoming law. In order to avoid any *ex post facto* violation, a jail inmate could only be prosecuted under the offense created in this bill for "repeated" disciplinary infractions committed by the inmate on or after the effective date of this bill.

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:

There is some concern on behalf of the staff with utilizing the term "repeatedly" violating any rule. The term "repeatedly" may be found void for being too vague. Although this bill utilizes former statutory language, staff would suggest *quantifying* the term repeated to a certain number of times violating the same or different rules governing the conduct of inmates as provided in the Florida Model Jail Standards (i.e., three violations). If the term is too vague, it may lead to unequal enforcement of the statute by local law enforcement in the jails and the state in its prosecution because the vagueness amounts to an equal protection denial. *See, Kolender v. Lawson,* 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983).

The term would also not adequately inform the average person as to what behavior would be prohibited so as to subject a person to this second degree misdemeanor. *See,* L.B. v. State, 681 So. 2d 1179 (2nd DCA 1996) (a law is void on its face if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application); *Whitaker v. Department of Insurance and Treasurer*, 680 So. 2d 528 (1st DCA 1996)

(statute that is too vague to provide notice of what acts it purports to prohibit is void for vagueness under due process clause; test for vagueness is whether statutory language is sufficiently explicit to inform those subject to its provisions what conduct will render them liable to its penalties and whether statutes convey sufficiently definite warning of proscribed conduct when measured by common understanding and practice); *Bertens v. Stewart*, 453 So. 2d 92 (2nd DCA 1984) (a vague statute violates due process requirements when it fails to give adequate notice of conduct it prohibits and which, because of its imprecision, may also invite arbitrary and discriminatory enforcement).

Unlawful delegation of power may also be an issue to examine in the analysis of this bill. Although it does not appear that there was any previous challenge to §951.07, *Florida Statutes*, on the grounds that it was an unlawful delegation of legislative power, there is possibly such an issue in the language of the bill. If a misdemeanor is committed by repeatedly violating "any rule or regulation governing the conduct of inmates as provided in the Florida Model Jail Standards," but the Florida Model Jail Standards authorize local jails to expand upon the minimum standards provided in the Florida Model Jail Standards, the language allows a jail to create rules that could be a misdemeanor upon repeated violation.

A case which could be analogized to the present situation is *State v. Mitchell*. 652 So. 2d 473 (2nd DCA 1995). In the *Mitchell* case, the court found that the Legislature unlawfully delegated open-ended authority to an administrative agency to determine the definition of a destructive device for criminal prosecution for possession of a destructive device. The *Mitchell* Court held that the statutory language could be applied to make criminal the possession or detonation of a device determined in the future by the Federal Bureau of Alcohol, Tobacco, and Firearms to be a destructive device. Thus, the *Mitchell* court struck the portion of §790.001(4), *Florida Statutes*, that provided "any device declared a destructive device by the Bureau of Alcohol, Tobacco, and Firearms" as invalid as an unconstitutional delegation of legislative authority.

Similarly, the Florida Supreme Court had previously held in *B.H. vs. State* that Florida's courts enforce the *Florida Constitution's* plain language on the subject of separation of powers and if a statute purports to give one branch powers textually assigned to another by the *Florida Constitution*, then the statute is unconstitutional. 645 So. 2d 987 (Fla. 1994). In the *B.H.* case, the Court found that §39.061, *Florida Statutes* (Supp. 1990), relating to escape from a commitment facility of level IV or higher, read together with the statute's definition of "restrictiveness level" as being established by the Department of Health and Rehabilitative Services (HRS) by rule, was an improper delegation of legislative authority to HRS. *Id.* at 990-991.

The ability to prosecute an inmate for criminal offenses and discipline an inmate for the same act has been a long-standing practice in Florida and is not found to be in violation of double jeopardy. Many instances exist where an inmate commits a disciplinary infraction for which administrative action is taken against the inmate and the inmate is also prosecuted for the criminal offense for which he is sentenced by a court of law for the same activity. In analyzing

whether there is double jeopardy, there are several factors that will be examined by the courts that may distinguish the facts from instances where double jeopardy was found. In its analyses, courts look at whether there are different sovereignties involved in the two procedures, differences in the standards of proof, the type of "tribunal" that imposes the penalty, whether the result upon the defendant is remedial or punishment, whether the liberty interest of the individual is involved, and whether the processes are civil or criminal.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Because misdemeanors are punishable by up to 60 days in jail, there would be an indeterminate impact upon jails because there is a likelihood that prosecution for repeated violations of rules would increase the number of inmate days (beyond what increase may already exist because of administrative loss of gain-time for violations). The impact upon jail beds would basically be what existed prior to the similar law being repealed in 1996.

There would also be an indeterminate impact upon the court system because this bill creates a prosecutable offense for acts that may not otherwise independently rise to the level of being a criminal offense, such as escape, battery, arson, theft, carrying a concealed weapon, and extortion. The impact upon courts would basically be what existed prior to the similar law being repealed in 1996.

Jail personnel would also be impacted, possibly resulting in over-time for appearing in court to testify to the repeated violations of jail rules or over-time for other jail personnel who must cover jail duties while other personnel are in court. This practical and fiscal impact upon jail personnel is indeterminate but would essentially be what existed prior to the similar law being repealed in 1996.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Criminal Justice:
Changes the term “repeatedly” to “three or more occasions” to quantify the number of jail-rule violations that qualify an inmate to be prosecuted for a second degree misdemeanor.