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HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE COMMITTEE ON
CRIMINAL JUSTICE APPROPRIATIONS
ANALYSIS

BILL #: CS/HB 121

RELATING TO: Three Strike Violent Felony Offender

SPONSOR(S): Corrections and Rep. Crist

COMPANION BILL(S):

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

(1) CRIME AND PUNISHMENT YEAS 6 NAYS 1
(2) CORRECTIONS YEAS 5 NAYS 2
(3) CRIMINAL JUSTICE APPROPRIATIONS
(4)
(5)

I. SUMMARY:

CS/HB 121 amends s. 775.084 F.S., to create a new “three time violent felony offender” enhanced penalty in addition to habitual felony offender, habitual violent felony offender, and career criminal enhanced penalties currently provided for within that section. Under the provisions of the bill, a judge must impose maximum sentences for “three-time violent felony offenders" who qualify by having at least two prior felonies with at least two prior felonies being an enumerated violent felony. The “three time violent felony offender” falls between a habitual violent felony offender and a violent career criminal category. An offender that has one felony from the enumerated list may qualify as an habitual violent felony offender. A violent career felon has at least three prior felonies with a prior prison incarceration. A “three time violent offender" sentenced under the bill must serve 100 percent of the sentence imposed.

Section 775.084(5) F.S., currently provides that prior felonies are counted only if they were sentenced on separate occasions. The bill amends this method of counting prior felonies and allows cases, or even all counts, sentenced on the same day to be counted towards the number necessary to authorize the imposition of habitual felony offender, habitual violent felony offender, career criminal, or the three-strikes penalties.

The bill provides that any person convicted of aggravated assault or aggravated battery upon a law enforcement officer must be sentenced to a minimum mandatory prison term of three years or five years respectively. The bill provides for a three year minimum mandatory penalty for aggravated assault or aggravated battery against a person 65 years of age or older. The bill requires a minimum mandatory prison sentence of 10 years for a defendant charged with and has a previous conviction for sexual battery or an attempt to commit a sexual battery.

The bill provides for a three year minimum mandatory prison sentence for the possession or sale of either more than 25 lbs of cannabis, between four and 14 grams of controlled substances, or between 28 and 200 grams of cocaine. The bill provides for a seven year prison sentence for the possession or sale of between 2000 and 10,000 cannabis plants or of 200 grams of cocaine. And, the bill requires a 15 year prison sentence for possession or sale of 14 to 28 grams of cocaine.

The bill also requires Clerks of the Court to notify Immigration and Naturalization Services whenever an alien is convicted of or enters a plea for a felony or misdemeanor offense.

The fiscal impact of this bill as projected by the Criminal Justice Estimating Conference is a cumulative impact of 441 additional prison beds at a total cost of $31.6 million through FY 2003-04.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Introduction

In recent years lawmakers at both the State and Federal levels have passed legislation increasing penalties for criminal offenses, particularly violent crimes.[1] These laws came in response to public concern about crime and the belief that many serious offenders are released from prison too soon. Id. Twenty four states and the federal government, led by Washington[2] and California[3] have enacted new laws using the "three strikes" nomenclature. Id.

The Current Law

The Florida Punishment Code

The Florida Punishment Code came into effect for crimes committed after October 1, 1998. The Code establishes a lowest permissible sentence for felony offenses by establishing a method of scoring the severity of the offense and the severity of an offender's criminal history. A judge may not sentence a person below the lowest permissible sentence without a mitigating reason which is authorized by statute or case law. An example of a mitigating reason to impose a sentence below the lowest permissible sentence is the young age of the offender. Under the Code, a judge has complete discretion to sentence an offender to any sentence that is above the lowest permissible sentence and below the statutory maximum. Thus, the Code sets a floor to a judge's sentencing options, but not a ceiling, and even a first offender could receive the statutory maximum. The statutory periods of incarceration established in s. 775.082 F.S., are as follows:

Felony Degree	Length of Prison Penalty
Life	Up to Life
1st	Up to 30 years
2nd	Up to 15 years
3rd	Up to 5 years

The Florida Punishment Code does not apply to the sentencing of an offender for a misdemeanor, and a judge may impose any sentence for a misdemeanor up to the statutory maximum. These are described below.

Misdemeanor Degree	Length of Jail Time
1st	Up to one year
2nd	Up to 60 days

Section 775.087(2), F.S., requires a judge to impose a minimum term of imprisonment of **3** years for any person who possessed a firearm at any time during the course of one of the violent felonies listed in the statute.

Reclassification of Crimes Committed Against Law Enforcement Officers and Others

Section 784.07, F.S., provides for the reclassification of certain violent crimes to the next higher degree if committed against any of the following:

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[1]National Institute of Justice, "Three Strikes and You're Out": A Review of State Legislation, by John Clark, James Austin and D. Alan Henry, September 1997.

[2]The Washington law took effect in December 1993 following a voter initiative that passed by a three to one margin. National Institute of Justice.

[3]In March 1994, the Governor signed the California law which voters later ratified in a State referendum. National Institute of Justice.

law enforcement officers, firefighters, emergency medical care providers, traffic accident investigation officers, traffic infraction enforcement officers, traffic infraction enforcement officers, parking enforcement specialist, and certain security officers.

The offenses are reclassified as follows:

(a) In the case of assault, from a misdemeanor of the second degree to a misdemeanor of the first degree.

(b) In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.

(c) In the case of aggravated assault, from a felony of the third degree to a felony of the second degree.

(d) In the case of aggravated battery, from a felony of the second degree to a felony of the first degree.

Assault is a threat by word or act to do violence to another coupled with the ability to do so, which creates a well-founded fear that the violence is imminent. Aggravated assault is an assault with a deadly weapon.

Battery is a touch or a striking of another against that person's will. Aggravated battery is either a battery committed with a deadly weapon, or a battery causing serious bodily harm.

Other Enhanced Penalty Provisions

Current law provides for a variety of habitual sentencing provisions for repeat offenders. Such provisions include.

Violent Career Criminal
Habitual Felony Offender
Habitual Violent Felony Offender
Prison Releasee Re-offender

Violent Career Criminal

A judge must sentence a person as a violent career criminal if the offender meets the following criteria.

1. The offender has been previously been convicted three or more times of any of the following offenses.

- burglary
- aggravated assault
- aggravated battery
- aggravated stalking
- aggravated child abuse
- aggravated abuse of an elderly person or disabled adult
- lewd lascivious or indecent conduct
- escape
- possession of a concealed firearm
- possession of a firearm by a convicted felon
- possession of a short-barrel shotgun
- robbery car jacking sexual battery
- manslaughter
- murder
- treason
- home invasion robbery

- any other felony which involves the use or threat of physical force or violence against any individual

2. The offense for which the offender is to be sentenced is for one of the crimes enumerated above.

3. The prior convictions were sentenced on separate occasions.

4. The crime for which the offender is being sentenced was committed within 5 years of the date of the conviction for the offender's last prior felony, or within 5 years of the defendant's release from prison whichever was later.

5. The offender has previously been incarcerated in state or federal prison.

If a judge elects to designate an offender as a violent career criminal, then the court must sentence the violent career criminal as follows:

Habitual Felony Offender

A judge has the complete discretion under s. 775.084 F.S., to sentence a person as a habitual felony offender if the following criteria are met:

1. The offender has been convicted of two prior felonies. [A withhold of adjudication counts as a conviction for the purposes of enhanced penalties.]

2. The prior convictions were sentenced on separate occasions.

3. The charge for which the offender is being sentenced is a felony.

4. The crime for which the offender is being sentenced was committed within 5 years of the date of the conviction for the offender's last prior felony, or within 5 years of the defendant's release from prison whichever was later.

5. The pending offense and one of the priors were not third degree felonies for possession of controlled substances such as cocaine. [Possession with intent to sell or trafficking are qualifying offenses.]

If a judge designates a qualifying person as a habitual felony offender, the judge may impose a sentence which is double the statutory maximum. For example, a habitual offender being sentenced for a third degree felony such as auto theft may be sentenced to ten years in prison. A habitual offender may be sentenced for a maximum of thirty years in prison for a second degree felony such as burglary of a dwelling or possession of cocaine with intent to sell. A habitual offender may receive a life sentence for committing a first degree felony.

Habitual Violent Felony Offender

A judge has the complete discretion under 775.084 F.S., to sentence a person as a habitual violent felony offender if the following criteria are met.

1. A person has previously been convicted for one of the following crimes or for an attempt to commit one of the following crimes.

- arson
- sexual battery
- robbery
- kidnaping
- aggravated child abuse

- aggravated abuse of an elderly person or disabled adult
- aggravated assault
- murder
- manslaughter
- aggravated manslaughter of an elderly person or disabled adult
- aggravated manslaughter of a child
- unlawful throwing, placing, or discharging of a destructive device or bomb
- armed burglary
- aggravated battery
- aggravated stalking

2. The crime for which the offender is being sentenced is any felony that was committed within 5 years of the date of the conviction for the offender's last prior felony, or within 5 years of the defendant's release from prison whichever was later.

If a judge designates a qualifying person as a habitual violent felony offender, the judge may impose a sentence that is double the statutory maximum. The enhanced penalty authorized by the habitual violent felony offender statute is the same as the enhanced penalty authorized by the habitual felony offender law. *State v. Hudson*, 698 So.2d 831 (Fla.1997).

Section 775.084(3)(a)(6)., F.S., provides that a judge must sentence a qualifying person as habitual felony offender or habitual violent felony offender unless the judge finds that such a sentence is not necessary for the protection of the public. The statute further requires that if the court finds that it is not necessary for the protection of the public to sentence the defendant as a habitual felony offender or a habitual violent felony offender, the court shall provide the written reasons or transcripts to the Office of Economic and Demographic Research of the Legislature. Crime and Punishment Committee Staff stated that the State Court Administrator's Office indicated that these reporting requirements were rarely complied with.

Section 775.084(4)(d) F.S., gives judges discretion to decide whether a person should be designated as a habitual offender, habitual violent offender, or violent career criminal:

> (d) If the court finds ... that it is not necessary for the protection of the public to sentence a defendant who meets the criteria for sentencing as a habitual felony offender, a habitual violent felony offender, or a violent career criminal, with respect to an offense committed on or after October 1, 1995, sentence shall be imposed without regard to this section.

<u>Prison Releasee Reoffender</u>

A judge must sentence a person as a Prison Releasee Reoffender to the statutory maximum if the following are met.

1. A state attorney decides to seek to have a person sentenced as a prison releasee reoffender.

2. The offender has committed or attempted to commit one of the following crimes:

- treason
- murder
- manslaughter
- sexual battery
- car jacking
- home-invasion robbery
- robbery arson
- kidnaping
- aggravated assault
- aggravated battery
- aggravated stalking

- aircraft piracy
- unlawful throwing; placing; or discharging of a destructive device or bomb
- any felony that involves the use or threat of physical force or violence against an individual
- armed burglary
- burglary of an occupied structure or dwelling
- any felony violation of s. 790. 07 (relating to felonies committed with firearms), s. 800.04 (Lewd, lascivious, or indecent assault)
  s. 827.03 (aggravated abuse of a child or the disabled) or s. 827.071(sexual performance by a child), F.S.

3. The offender committed one of the enumerated offenses within 3 years of being released from prison.

Section 775.082(8)(d), F.S. requires that in every case where the offender meets the above criteria and does not receive the minimum mandatory sentence, the state attorney must explain in writing and place the explanation in a case file maintained by the state attorney and supplied on a quarterly basis to the president of the Florida Prosecuting Attorneys Association explaining the sentence for every case in which a qualifying offender did not receive the statutory maximum sentence.

Trafficking in Controlled Substances

Section 893.135, F.S., provides for penalties for the possession or sale of controlled substances. Subsection (1) (a) provides that a person who sells, purchases, or who is in possession of in excess of 50 lbs of cannabis commits a first degree felony (trafficking in cannabis). If the amount is in excess of 50 lbs but less than 10,000 lbs, the defendant must be sentenced pursuant to the Criminal Punishment Code. If the amount is 10,000 lbs or more, the defendant must receive a minimum prison sentence of 15 years. Subsection (b) provides that person who sells, purchases, or is in possession of between 25 and 150 grams of cocaine commits a first degree felony (trafficking in cocaine). If the quantity is 28 grams but less than 400 grams, the person is sentenced pursuant to the Criminal Punishment Code. If the amount is 400 grams or more, the person must be sentenced to a prison term of 15 years.

Subsection (c)1 provides that a person who sells, purchases, or possesses between 4 and 28 grams of controlled substances (including heroin), must be sentenced pursuant to the Criminal Punishment Code. The prison sentence is 25 years for the sale or possession of 28 grams and 30 kilograms.

Aliens and Criminal Records

Section 943.0535, F.S., provides that upon the request of a United State Immigration officer of the federal Immigration and Naturalization Services (INS), a clerk of the court in the jurisdiction of the INS officer must furnish a certified copy of a complaint, information, or indictment and the judgement and sentence of an alien convicted of a felony or misdemeanor.

According to staff of the Criminal Alien Program of the INS in Miami, efforts to identify criminal aliens have focused on identifying those offenders who are incarcerated in the Department of Corrections and in county correctional facilities. Such efforts are based upon a memorandum of understanding between the INS and the DOC which outlines a program where DOC assists the INS in the identification process.

According to DOC, as of February 19,1999, there were 4,555 suspected aliens in the state prison system of which 4,226 have been confirmed. The alien identification program currently applies to the incarcerated population in DOC. No data currently exist on the number of aliens on DOC community supervision (probation, community control, or post-prison release). In November 1998, there were 145,979 offenders on community supervision (active community supervision population).

DOC collects and reports monthly data from county correctional facilities on the number and characteristics of offenders housed in county jails. One type of information collected is the number of undocumented aliens housed in county jails. Since the collection of these data are

voluntary and not all facilities report, DOC believes that these data are underestimates. In addition, DOC staff report that county facility staff may not be accurately reporting the number of undocumented aliens in the facility. In spite of these limitations, DOC reports that for 1998, the average daily population of undocumented aliens in county jails was 425 offenders (395 males and 30 females).

B. EFFECT OF PROPOSED CHANGES:

Three-Time Felony Offender

The bill amends 775.084 F.S.(1998 Supp.) to create a new enhanced penalty in addition to habitual felony offender, habitual violent felony offender, and career criminal enhanced penalties that are already provided for by that section. The enhanced penalty created by the bill requires a judge to impose a mandatory minimum term of imprisonment for a third violent felony. The title of the bill, "Three-Strike Violent Felony Offender Act," is derived from this portion of the bill.

The mandatory term of imprisonment is the same as the statutory maximum except that the offender must serve 100% of his or her sentence. The mandatory sentences depend on the degree of the offense for which the person is being sentenced and are as follows.

- life felony — mandatory life sentence
- first degree felony — mandatory 30 year sentence
- second degree felony — mandatory 15 year sentence
- third degree felony — mandatory 5 year sentence

For a person to be sentenced as a three-time violent felony offender, the two prior offenses and the offense for which the person is being sentenced as a three-time violent felony offender all must be one of the following crimes or an attempt to commit one of the following crimes.

- arson
- sexual battery
- robbery
- kidnaping
- aggravated child abuse
- aggravated abuse of an elderly person or disabled adult
- aggravated assault
- murder
- manslaughter
- aggravated manslaughter of an elderly person or disabled adult
- aggravated manslaughter of a child
- unlawful throwing, placing, or discharging of a destructive device or bomb
- armed burglary
- aggravated battery
- aggravated stalking

Section 775.084(5) F.S., currently provides that prior felonies are counted only if they were sentenced on separate occasions. The bill removes this method of counting prior felonies, thus allowing cases or even all counts sentenced on the same day to be counted towards the number necessary to authorize the imposition of habitual felony offender, habitual violent felony offender, career criminal, or the three-strikes penalties.

The bill provides that the mandatory penalties authorized by the three-strikes provision do not prevent a court from imposing a greater sentence as authorized by law. Thus, the greater penalties authorized by the habitual felony offender, habitual violent felony offender, and the career criminal enhancements are not thwarted by the mandatory minimum penalties imposed by the three-strikes enhanced penalty.

Habitual Felony Offender and Habitual Violent Felony Offender

Enhanced penalties are currently authorized under the habitual felony offender, the habitual violent felony offender, and the career criminal provisions in section 775.084 F.S., if the crime for which the offender is to be sentenced occurred while the offender was serving a sentence,

or within 5 years of the date of the conviction of the defendant's last qualifying felony, or within 5 years of the defendant's release from a prison sentence or other commitment imposed as a result of a conviction for a qualifying felony. The bill amends the underlined language to read:

> "within 5 years of the defendant's release from a prison sentence, probation, community control, or other sentence imposed..."

This change was made in response to a court decision which held that the phrase "other commitment" did not include release from probation. *Bacon v. State*, 620 So.2d 1084, (Fla. 1st DCA 1993).

Minimum Mandatory for Violent Crimes Committed Against Law Enforcement Officers and Persons Over 65 Years of Age

The bill provides that any person convicted of aggravated assault upon a law enforcement officer must be sentenced to a minimum mandatory prison term of three years, and any person convicted of aggravated battery upon a law enforcement officer must receive a minimum sentence of 5 years in prison. The bill also provides for a three year minimum mandatory penalty that a judge must impose on a person convicted of aggravated assault or aggravated battery against a person over 65 years of age.

Enhanced Penalties for Repeat Sexual Batterers

The bill creates a new enhanced penalty that requires a judge to impose a mandatory minimum prison term of 10 years if a person is charged with and has a previous conviction for any of the following offenses or an attempt to commit any of the following.

1. Sexual battery by a person less than 18 years of age committed against a person less than 12.

2. Sexual battery committed against a person over 12 years of age if the offender uses or threatens to use physical force likely to cause serious personal injury.

3. Sexual battery committed against a person over 12 if one of the following applies.

   (a) When the victim is physically helpless to resist.

   (b) When the offender coerces the victim to submit by threatening to use force or violence likely to cause serious personal injury on the victim, and the victim reasonably believes that the offender has the present ability to execute the threat.

   (c) When the offender coerces the victim to submit by threatening to retaliate against the victim, or any other person, and the victim reasonably believes that the offender has the ability to execute the threat in the future.

   (d) When the offender, without the prior knowledge or consent of the victim, administers or has knowledge of someone else administering to the victim any narcotic, anesthetic, or other intoxicating substance which mentally or physically incapacitates the victim.

   (e) When the victim is mentally defective and the offender has reason to believe this or has actual knowledge of this fact.

   (f) When the victim is physically incapacitated.

   (g) When the offender is a law enforcement officer, correctional officer, or correctional probation officer as defined by s. 943.10(1), (2), (3), (6), (7), (8), or (9), who is certified under the provisions of s. 943.1395 or is an elected official exempt from such certification by virtue of s. 943.253, or any other person in a position of control or authority in a probation, community control, controlled release, detention, custodial, or similar setting, and such officer, official, or person is acting in such a manner as to lead the victim to reasonably believe that the offender is in a position of control or authority as an agent or employee of government.

4. Sexual battery upon a person less than 12 without that persons consent, and no physical force or violence likely to cause serious injury is used. [This is the standard rape charge that only requires a lack of consent by a victim over 12.]

The offense for which the repeat sexual batterer is to be sentenced must have occurred while the offender is serving a prison sentence or within 10 years of the offender's last sexual battery, or within 10 years of the offenders release from prison or supervision.

Certain related offenses were excluded from the list of qualifying crimes. The qualifying crimes do not include:

1. Lewd, lascivious, or indecent assault upon a child in violation of section 800.04 F.S.

2. A violation of s. 794.011(8)(a), F.S., relating to the solicitation of sexual acts by a person in custodial authority committed against a person under 18 years of age.

Other related offenses in s. 794.011 are not listed as well, however, these offenses are capital crimes and are punishable by a mandatory life sentence.

Enhanced Penalties for Drug Offenses

The bill amends s. 893.135, F.S., related to the penalties for the sale and possession of controlled substances. The bill provides for:

- a three year mandatory minimum prison sentence for the possession or sale of more than 25 pounds of cannabis;
- a seven year mandatory minimum prison sentence for the possession or sale of between 2,000 and 10,000 cannabis plants;
- a three year mandatory prison sentence for the possession or sale of between four and 14 grams of various controlled substances including morphine, opium, and heroin;
- a 15 mandatory minimum prison sentence for the possession or sale of 14 to 28 grams of various controlled substances, including morphine, opium, and heroin;
- a three year mandatory minimum prison sentence for the possession or sale of between 28 and 200 grams of cocaine; and
- a seven year mandatory minimum prison sentence for the possession or sale of more than 200 grams of cocaine.

Other Provisions of CS/HB 121

The bill amends s. 943.0535, F.S., related to notifying the federal Office of Immigration and Naturalization Services (INS) of any alien who has been convicted of or pleas nolo contendere to a misdemeanor or felony charge. Rather than placing the burden upon the INS to request this information from a Clerk of the Court, the bill requires a Clerk of the Court, with the assistance of the State Attorney, to furnish this information to the INS in every case in which an alien is convicted of or enters a plea to any felony or misdemeanor. Information to be provided includes the judgement, sentence, and any other record pertaining to the case.

The bill also requires the Office of the Governor to place public service announcements in visible local media throughout the state explaining the penalties provided in the bill.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

    1. 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?

        No.

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

        No.

    2. 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?

        N/A

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

        N/A

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

        N/A

2. Lower Taxes:

    1. Does the bill increase anyone's taxes?

    No.

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

    No.

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

    No.

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

    No.

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

    No.

3. Personal Responsibility:

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

        No.

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

        No.

4. Individual Freedom:

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

        No.

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

        N/A

5. Family Empowerment:

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

        (1) Who evaluates the family's needs?

            N/A

        (2) Who makes the decisions?

            N/A

        (3) Are private alternatives permitted?

            N/A

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

            N/A

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

            N/A

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

        N/A

3. 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?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

(D) STATUTE(S) AFFECTED:

ss. 775.082, 775.084, 921.002, 784.07, 784.08, 790.235, 794.0115, 794.011, 397.451(7), 782.04(4), 893.135, 893.1351(1), 903.133, 907.041(4)(b), 921.0022(3)(g), 921.0024(1)(b), 921.142(2), 943.0535, 943.0585, 943.059, Florida Statutes.

(E) SECTION-BY-SECTION
See Effect of Proposed Changes (Section B).

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

The primary impact is expected to be on the Department of Corrections due to projected increases in the inmate population. The following estimated capital costs would be incurred only if new prisons beds are constructed for inmates added to the prison population as a result of the passage of this bill.

FY 1999-2000 7 beds	$1,125,840
FY 2000-2001 45 beds	$3,261,445
FY 2001-2002 127 beds	$3,852,373
FY 2002-2003 146 beds	$3,146,522
FY 2003-2004 116 beds	$3,739,893
Cumulative Costs	$15,126,074

There is currently a surplus of between 4,000 to 5,000 prison beds. This surplus will likely negate the need to construct additional prison beds in the short term.

For further information, see Fiscal Comments.

2. Recurring Effects:

The primary effect of this bill is expected to be on the Department of Corrections due to projected increases in the prison population.

Operating costs resulting from this bill causing an increase in additional prison beds is as follows.

FY 1999-2000 7 beds	$67,402
FY 2000-2001 45 beds	$582,942

FY 2001-2002 127 beds	$2,342,758
FY 2002-2003 146 beds	$5,251,884
FY 2003-2004 116 beds	$8,205,607
Cumulative Costs	$16,450,593

Additional costs may be incurred by the court system including state attorneys, public defenders, local law enforcement and county jails. These cost increases are indeterminate.

For further information, see Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

Indeterminate.

4. Total Revenues and Expenditures:

See non-recurring and recurring effects above.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See Fiscal Comments.

2. Recurring Effects:

See Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment

None.

D. FISCAL COMMENTS:

Department of Corrections cost estimates presented above are derived from multiplying the prison bed impact projected by the Criminal Justice Estimating Conference by standard average per bed costs for construction and operation. Costs per prison bed are adjusted to take in account anticipated effects of inflation.

The projected prison bed impact of this bill as estimated by the Criminal Justice Estimating Conference is as follows.

Fiscal Year	# Beds	Cum. # Beds
1999-2000	7	7
2000-2001	45	52

2001-2002	127	179
2002-2003	146	325
2003-2004	116	441

The following assumptions were made in developing the projected impact of the three time violent felony offender provisions of this bill.

- Offenders eligible for the three time violent felony offender provisions of this bill who currently are not receiving a prison sentence would not receive a prison sentence.

- Only those offenders who are currently sentenced as habitual felony offenders and habitual violent felony offenders who are eligible for the three strike violent felony offender provision of this bill are affected.

The following assumptions were made in developing the projected impact of the assault and battery on a law enforcement officer (LEO) provision of this bill.

- No offenders eligible for the law enforcement mandatory provisions of this bill who currently receive a non-prison sentence will receive a prison sentence.

- The number of prison admissions affected by this provision is based on the percentage of sentencing guidelines cases in FY 1997-98 sentenced to prison for these offenses who received the LEO multiplier in the guidelines.

The following assumptions were made in developing the projected impact of the trafficking in cocaine and heroin provisions of this bill.

- No offenders eligible for these drug trafficking provisions of this bill who currently are receiving a non-prison sentence will receive a prison sentence.

- The percentage of offenders who received drug trafficking mandatories for these sentences in FY 1993-94 when mandatory provisions existed in law were applied to prison admissions in FY 1997-98 to derive the number of future drug trafficking admissions affected by provisions of this bill.

The following assumptions were made in developing the projected impact of the provision of the bill related to prior offenses of habitual offenders based on the actual number of counts.

- No offenders eligible for the new definition of habitual offenders' priors provision in the bill who are currently receiving a non-prison sentence will receive a prison sentence under the bill.

- It was determined that 23% of offenders who were statutorily eligible to be habitualized for prison admissions from July 1, 1998 to November 30, 1998 were habituatized. This rate is applied to those offenders who would become eligible under this bill to determine the number of additional habituals sentenced to prison.

The issue of the extent to which offenders currently receiving non-prison sentences who meet the three-time violent offender provisions of this bill would be sentenced to prison instead of probation or community control was discussed by the Criminal Justice Estimating Conference. It was agreed that any such impact is indeterminate.

According to the State Court's Administrator's office, the bill will have an indeterminate impact on the judicial system and entities such as the state attorneys, public defenders and units of local government.

There may be a deterrent effect from this bill and should offenders spend longer prison sentences, there will be an incapacitation effect of reducing the number of offenses

committed due to the incarceration of offenders. These factors could result in significant cost savings. However, the extent of such saving is indeterminate.

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 have to raise revenues in the aggravate.

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:

Prior Felony Definition

Section 775.084(5) F.S.(1998 Supp.) provides:

> "In order to be counted as a prior felony for purposes of sentencing under this section, the felony must have resulted in a conviction sentenced separately prior to the current offense and sentenced separately from any other felony conviction that is to be counted as a prior felony.

CS/HB 121 amends this section in the following manner:

> "In order to be counted as a prior felony for purposes of sentencing under this section, the felony must have resulted in a conviction sentenced ~~separately~~ prior to the current offense ~~and sentenced separately from any other felony conviction that is to be counted as a prior felony."~~

The bill attempts to negate the requirement for sequential convictions that Florida courts require within s. 775.084(4) F.S. Accordingly, the deletion of the language in s. 775.084(5) may be ambiguous as the meaning of the phrase "sentenced prior to the current offense" may lead to multiple judicial interpretations. The bill may allow an offender to satisfy the criteria for prior offenses on the same day.

Defining prior offenses as in CS/HB 121 may also raise constitutional questions. Litigation interpreting s. 775.084(5), F.S., was decided by the First District Court of Appeals on April 6, 1995 under *Ford v. State*, 652 So.2d 1236, Ford v. State, (Fla. 1st DCA 1995).

Ford was convicted in the Circuit Court, Columbia County, of robbery, and was sentenced as an habitual offender. Ford appealed. The First District Court of Appeal held that the habitual offender sentence could not be based on prior convictions that were all entered on the same date. The court explained that sequential convictions were required to support habitual offender status finding that the sentence was imposed in violation of section 775.084(5), Florida Statutes (1993).

. In *Ford*, the issue presented was whether the trial court erred in finding Ford to be a habitual offender where all of his prior convictions were entered on the same date. Ford was convicted by a jury of a robbery which occurred on September 2, 1993. Before trial, the state filed a notice of its intent to seek habitual offender status. At sentencing the state introduced, without

objection, three prior convictions which were all entered on September 8, 1992. [4] No other convictions were presented. The prosecution stated that although the defendant had other felony convictions, they had occurred more than five years ago. The appellant was sentenced as a habitual offender to 20 years in prison followed by five years probation.

Ford argued on appeal that prior to the date of the crime for which he was convicted, the Legislature altered the habitual offender statute to require prior convictions to be entered on different days. Ford argued that he did not qualify as a habitual offender since the prior convictions presented to the court to support his habitual offender status were all entered on the same date. In response, the state relied on *State v. Barnes*, 595 So.2d 22 (Fla.1992), and argued that the habitual offender statute does not require sequential convictions to support habitual offender status.

In *State v. Barnes*, 595 So.2d 22 (Fla.1992), the Supreme Court held that the habitual offender statute did not require sequential convictions. In *Barnes*, however, the court wrote that the requirement of sequential convictions had formerly served as an important justification for a habitual sentence, and the court suggested that the Legislature reexamine the statute. In response (presumably in reaction to *Barnes*), the habitual offender statute was amended in 1993 to make it clear that sequential convictions are necessary. *See id.* Ch. 93-406, Sec. 2, Laws of Fla, effective June 17, 1993, added subsection (5) to 775.084. F.S. The language below has remained unchanged since 1993.

> "In order to be counted as a prior felony for purposes of sentencing under this section, the felony must have resulted in a conviction sentenced separately prior to the current offense and sentenced separately from any other felony conviction that is to be counted as a prior felony."

More recently in *Prince v. State*, 684 So.2d 850,(Fla. 2nd DCA 1996) the Second District Court of Appeals, following *Ford v. State*, 652 So.2d 1236 (Fla. 1st DCA 1995), found that section 775.084(5) F.S., required sequential convictions to qualify for habitual offender sentencing.

"Prior sentence" as defined under s. 775.084(5) F.S., would not be limited to habitual offender sentencing, which the above referenced courts discussed, but apply across the board to all of the enhanced sentencing categories discussed within s. 775.084 F.S., i.e., violent career criminals, habitual felony offenders, habitual violent felony offenders, and the new three-time violent felony offender category under this bill.

Questions Raised by Three Strike Laws

Throughout the country, legislative actions intending to increase prison sentences have raised questions and concerns from a wide spectrum of the population. Questions have been raised about the financial as well as social cost of instituting lengthy incarceration. Other questions have been raised about an aging prison population with its accompanying problems. In addition, questions have been raised on proposals similar to this bill which may have a disproportionate effect upon minority offenders, since a majority of those facing

[4]Case no. 92-93-CF for aggravated assault with a deadly weapon; case no. 92-153-CF for burglary of a structure; case no. 88-189-CF for two counts of possession of a controlled substance. Certified copies of those convictions were submitted to the court and marked as state exhibits

increased incarceration under these laws would most likely be African American males[5]. Lastly, questions have been raised about the constitutionality of such legislative actions.[6]

Constitutionality - Practice and Procedure v. Substantive Law

Sections 774.084(3)(a), and (3)(b), F.S., sets out procedures to determine whether an offender meets the criteria for an enhanced sentencing. A court may find that these types of procedural guidelines invade the province of the judiciary and violate the separation of powers doctrine of Article II, Section 3 of the Florida Constitution.

The Florida Constitution provides within Article V. s.2(a).[7],that the Legislature can repeal any rule of the Supreme Court by their own 2/3 vote. However the Legislature has no constitutional authority to enact any law relating to practice and procedure. Fla. Const., art. V, § 3, F.S.A.

In *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, (Fla. 1972), the Florida Supreme Court in considering whether a rule related to substantive law or practice distinguished substantive law from procedural law. In the Court's per curiam decision, the justices concluded that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respect to their persons and their property. As to the term "procedure," they conceived it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" included all the rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution The Court quoted their decision in *State v. Garcia*, 229 So.2d 236 (Fla. 1969), where they said:

> "As related to criminal law and procedure, substantive law is that which declares what acts are crimes and prescribes the punishment therefor, while procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished. See *State v. Augustine*, 197 Kan. 207, 416 P.2d 281 (1966)." (p. 238)

Justice Atkins in his concurrence stated that 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. *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, (Fla. 1972)

Justice Atkins noted that similar definitions were used in other states. *Gaspin v. State*, 76 Ga.App. 375, 45 S.E.2d 785 (Ga.App.1947); *State v. Rodosta*, 173 La. 623, 138 So. 124 (1931); *Roberts v. Love*, 231 Ark. 886, 333 S.W.2d 897 (1960); *State v. Augustine*, 197 Kan. 207, 416 P.2d 281 (1966); *State v. Capaci*, 179 La. 462, 154 So. 419 (1934).

Additionally, Justice Atkins found ample authority to confirm that practice and procedure pertains to the legal machinery by which substantive law is made effective. *Herberle v. P.R.O. Liquidating Co.*, 186 So.2d 280 (Fla.App. 1st, 1966); *State v. Birmingham*, 96 Ariz. 109, 392 P.2d 775 (1964); *Woodward v. Southern Pac. Co.*, 35 Cal.App.2d 130, 94 P.2d 1028 (1939); *Allen v. Bailey*, 91 Colo. 260, 14 P.2d 1087 (1932); *Ogdon v. Gianakos*, 415

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[5]3 Strikes and They're Out, "The Effects of California's Recidivist Law on Minorities, Taxpayers, and the Community, A Research Project by Katherine L. Zucca, Scripps College, September 3, 1997

[6]"Three Strikes and You're Out" - Is it Constitutional?; CNN U.S. News "California court strikes blow at 'three strikes' law, June 20, 1996 (CNN legal analyst Roger Cossack, "Because of the way this law was written, it was an over broad use of the word 'violent', ending up with a tremendous crush in the courtrooms". Roger Cossack responding to California's highest court ruling that California's "three strikes and you're out" law is not mandatory and that judges can disregard a defendants prior felonies if they believe the penalty would otherwise be too harsh.

[7]These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature. Art. V s.2(a).

Ill. 591, 114 N.E.2d 686 (1953); *Jones v. Erie Railroad Co.*, 106 Ohio St. 408, 140 N.E. 366 (1922); *Jones v. Garrett*, 192 Kan. 109, 386 P.2d 194 (1963); *King v. Schumacher*, 32 Cal.App.2d 172, 89 P.2d 466 (1939); and Heron v. Gaylor, 53 N.M. 44, 201 P.2d 366 (1948). It has also been said that substantive law creates, defines, adopts and regulates rights, while procedural law prescribes the method of enforcing those rights. *Meagher v. Kavli*, 251 Minn. 477, 88 N.W.2d 871 (1958); *Metropolitan Life Ins. Co. v. McSwain*, 149 Miss. 455, 115 So. 555 (1928); Barker v. St. Louis County, 340 Mo. 986, 104 S.W.2d 371 (1937); *State v. District Court*, 399 P.2d 583 (Wyo.1965).

While House Corrections Staff are unaware of any current constitutional challenge to the aforementioned procedures, based on the above mentioned Florida Supreme Court decision, the procedures stated within sections 774.084(3)(a), and (3)(b), F.S., may constitute "practice and procedure" as opposed to substantive law which is within the purview of the legislature.

Multiple Definitions of Aggravated Assault

House Committee on Corrections staff obtained statistics from the Florida Department on Law Enforcement on violent crimes committed in Florida. There were 68,542 violent crimes reported in 1998 with 44,244 of these reports listed as aggravated assaults. Due to the large numbers of assaults and the absence of batteries in the FDLE records, committee staff inquired as to how FDLE defined aggravated assaults.

FDLE staff reported that they use the federal Uniform Crime Report definitions in describing crimes. Aggravated assault is defined by the Uniform Crime Reports program as follows:

> "An unlawful attack by one person upon another where the offender displays a weapon or the victim suffers obvious severe or aggravated bodily injury involving apparent broken bones, loss of teeth, possible internal injury severe lacerations or loss of consciousness."

The Uniform Crime Report program instructs their reporting agencies to include all felonious and aggravated assaults within the category of aggravated assault. The reporting agencies are not to include assaults with intent to rob or rape. Assault or threat of an assault with any weapon or item used as a weapon other than hands, fists and feet are classified as an aggravated assault. It is not necessary that injury be inflicted to be included under these facts. However, when hands, fists, and feet are used the victim must be seriously injured in order for the offense to be classified as an aggravated assault. Serious injury is defined as the type of injury so severe that the victim should be admitted to a hospital beyond mere emergency room treatment.

The Uniform Crime Report program's definition of aggravated assault differs from the Common Law definition on which Florida statutes are based. Section 7.14(a) of the La Fave and Scott Handbook on Criminal Law (page 684) states that:

> "Although the word "assault" is sometimes used loosely to include a battery, and the whole expression "Assault and Battery" to mean battery, it is more accurate to distinguish between the two separate crimes, assault and battery, on the basis of the existence or non existence of physical injury or offensive touching. Battery requires such an injury or touching. Assault, on the other hand, needs no such physical contact; it might almost be said that it affirmatively requires an absence of contact."

Section 7.14(b) of the Handbook states that:

> "Although the common law created the twin crimes of assault and battery, in modern times legislatures have added more serious crimes (felonies) of aggravated assaults and batteries (e.g., assault, battery with intent to kill, rob, rape, assault, battery with a dangerous weapon).....the common law crime of robbery (the unlawful taking of another's property by violence amounting to a battery or by threat amounting to an assault) might be considered an aggravated type of assault and battery."

There is a substantive difference between how the Florida Department of Law Enforcement defines aggravated assault within their statistics and how aggravated assault is defined statutorially. Aggravated assault as defined in Florida statute does not require physical contact, unlike the Uniform Crime Report's definition which requires serious injury.

CS/HB 121 adds aggravated assault to the enumerated offenses. This addition may result in a greater impact due to estimates based on multiple definitions of aggravated assault. In other words, more offenders may be affected by the provisions of this bill than is estimated should a narrower definition of aggravated assault be used in estimating the impact of this bill.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The sponsor of the bill offered a strike-everything amendment in the Crime and Punishment Committee on 2/3/99 that makes a number of technical clarifying changes and adds to the bill minimum mandatory penalties for drug trafficking. The minimum mandatory penalties for drug trafficking are substantially the same minimum mandatory penalties that were a part of Florida law prior to their removal in 1994."

Amendment Highlights

- The amendment provides for a 3 year minimum mandatory for possession or sale of more than 25 pounds of cannabis, (marijuana). [Prior to 1994 the minimum mandatory was for 100 to 2,000 pounds.]

- The amendment adds a seven year minimum mandatory prison sentence for the possession or sale of between 2,000 and 10,000 cannabis plants. [Prior to 1994 the minimum mandatory for this offense was 5 years.]

- The amendment provides for a 3 year minimum mandatory for the possession or sale of between four and 14 grams of various controlled substances including morphine, opium, and heroin. The amendment makes it a 15 year minimum mandatory to sell or possess 14 to 28 grams of these controlled substances [Prior to 1994, the law provided for a 10 year minimum mandatory for sale or possession of between 14 and 28 grams of these illegal drugs.]

- The amendment provides for a 3 year minimum mandatory prison sentence for possession or sale of between 28 and 200 grams of cocaine. More than 200 grams of cocaine is punishable by a minimum mandatory sentence of seven years in prison. [Prior law provided for a five year minimum mandatory sentence for possession of more than 200 grams of cocaine.]

On 2/17/99, the Corrections Committee heard HB 121 which came to the committee with the strike-all amendment discussed above. In addition to this amendment, the committee heard three amendments to the strike-all amendment. Amendment #1 clarified that victims of crime would have input to the state attorney in terms of charging decisions. Amendment #2 requires Clerks of the Court to provide the federal Immigration and Naturalization Services documents on aliens who are convicted in court for a felony or misdemeanor. Amendment #3 requires the Office of the Governor to issue public service announcements informing the citizens of Florida of the provisions of the three-strikes provisions of the bill. All amendments were adopted by the committee and HB 121 was made into a committee substitute.

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:
Prepared by:

J. Willis Renuart

J. Willis Renuart

AS REVISED BY THE COMMITTEE ON CORRECTIONS:

Prepared by:	Staff Director:
Leslie A. Sweet	Ken Winker

AS FURTHER REVISED BY THE COMMITTEE ON CRIMINAL JUSTICE APPROPRIATIONS:

Prepared by:	Staff Director:
James P. DeBeaugrine	James P. DeBeaugrine