

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 7027 PCB CRJS 14-07 Sexual Offenses

**SPONSOR(S):** Criminal Justice Subcommittee, Gaetz

**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Criminal Justice Subcommittee	12 Y, 1 N	Cunningham	Cunningham
1) Appropriations Committee	25 Y, 0 N	McAuliffe	Leznoff
2) Judiciary Committee			

### SUMMARY ANALYSIS

The bill contains a variety of provisions relating to sexual offenses. Specifically, the bill:

- Eliminates the statute of limitations for violations of s. 800.04, F.S., involving a victim under the age of 16 and an offender 18 years of age or older at the time of the offense;
- Increases the penalties for specified sexual battery and lewd or lascivious offenses against children;
- Increases the minimum mandatory sentence for dangerous sexual felony offenders to 50 years;
- Broadens the definition of the term "sexual activity" for purposes of s. 794.05, F.S., (prohibiting a person 24 years of age or older from engaging in sexual activity with a person 16 or 17 years of age);
- Makes second or subsequent violations of s. 800.03, F.S. (exposure of sexual organs), a third degree felony;
- Authorizes a law enforcement officer to arrest a person without a warrant if the officer has probable cause to believe the person violated s. 800.03, F.S. (exposure of sexual organs);
- Broadens the voyeurism statute to specify that voyeurism may occur when a person, with lewd or lascivious intent, secretly observes another person's intimate areas in which the person has a reasonable expectation of privacy, when the other person is located a public or private dwelling, structure, or conveyance;
- Creates a new sentencing multiplier for specified adult-on-minor sexual offenses;
- Prohibits the Department of Corrections (DOC) from granting incentive gain-time to inmates sentenced for specified sexual offenses;
- Requires the court to impose a split sentence in which an offender convicted of specified sexual offenses is sentenced to 2 years of community supervision after serving his or her term of imprisonment; and
- Prohibits persons subject to sex offender supervision from possessing obscene, pornographic or sexually stimulating material, regardless of the material's content.

The Criminal Justice Impact Conference (CJIC) met January 30, 2014 to determine the prison bed and community corrections impact of this bill. CJIC determined the quantifiable impact of this bill for Fiscal Year 2014-2015 through Fiscal Year 2015-2016 will be \$173,082. However, the significant fiscal impact of this bill will occur in later years since this bill increases maximum sentences that affect offenders with typically high incarceration rates and substantial sentences. The cumulative impact is projected to be \$41.7 million fixed capital outlay cost (514 beds) and a cumulative \$21.9 million operating cost after seven years for the incentive gain-time prohibition and the sentence point multiplier. Total costs (FY 2014-15 to FY 2020-21): \$63.7 million. Further, there are several provisions of the bill that have an indeterminate or indeterminate but expected insignificant impact. See fiscal section.

The bill is effective October 1, 2014.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Lewd and Lascivious Offenses – Penalties**

Section 800.04, F.S., provides criminal penalties for the following lewd and lascivious offenses committed upon or in the presence of a person less than 16 years of age.<sup>1</sup>

#### *Lewd or Lascivious Battery*

Lewd or lascivious battery, a second degree felony,<sup>2</sup> occurs when a person:

- Engages in sexual activity<sup>3</sup> with a person 12 years of age or older but less than 16; or
- Encourages, forces, or entices any person less than 16 years of age to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity.<sup>4</sup>

#### *Lewd or Lascivious Molestation*

A person who intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person less than 16 years of age, or forces or entices a person under 16 years of age to so touch the perpetrator, commits lewd or lascivious molestation.<sup>5</sup>

The penalties for lewd or lascivious molestation are as follows:

- An offender 18 years of age or older who commits lewd or lascivious molestation against a victim less than 12 years of age commits a life felony.<sup>6</sup>
- An offender less than 18 years of age who commits lewd or lascivious molestation against a victim less than 12 years of age commits a second degree felony.
- An offender 18 years of age or older who commits lewd or lascivious molestation against a victim 12 years of age or older but less than 16 years of age commits a second degree felony.
- An offender less than 18 years of age who commits lewd or lascivious molestation against a victim 12 years of age or older but less than 16 years of age commits a third degree felony.<sup>7</sup>

#### *Lewd or Lascivious Conduct*

Lewd or lascivious conduct occurs when a person:

- Intentionally touches a person under 16 years of age in a lewd or lascivious manner; or
- Solicits a person under 16 years of age to commit a lewd or lascivious act.<sup>8</sup>

An offender 18 years of age or older who commits lewd or lascivious conduct commits a second degree felony. An offender less than 18 years of age who commits lewd or lascivious conduct commits a third degree felony.

#### *Lewd or Lascivious Exhibition*

A person who commits any of the following acts in the presence of a victim who is less than 16 years of age, commits lewd or lascivious exhibition:

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<sup>1</sup> Neither the victim's lack of chastity nor the victim's consent is a defense. Section 800.04(2), F.S.

<sup>2</sup> A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

<sup>3</sup> Section 800.04(1)(a), F.S., defines the term "sexual activity" as the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose.

<sup>4</sup> Section 800.04(4), F.S.

<sup>5</sup> Section 800.04(5), F.S.

<sup>6</sup> A life felony committed on or after September 1, 2005, which is a violation of s. 800.04(5)(b), F.S., is punishable by a term of imprisonment for life; or a split sentence that is a term of not less than 25 years' imprisonment and not exceeding life imprisonment, followed by probation or community control for the remainder of the person's natural life, as provided in s. 948.012(4), F.S. For a life felony committed on or after July 1, 2008, which is a person's second or subsequent violation of s. 800.04(5)(b), F.S., by a term of imprisonment for life. Section 775.082(3)(a)4., F.S.

<sup>7</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

<sup>8</sup> Section 800.04(6), F.S.

- Intentionally masturbates;
- Intentionally exposes the genitals in a lewd or lascivious manner; or
- Intentionally commits any other sexual act that does not involve actual physical or sexual contact with the victim, including, but not limited to, sadomasochistic abuse, sexual bestiality, or the simulation of any act involving sexual activity.<sup>9</sup>

An offender 18 years of age or older who commits a lewd or lascivious exhibition commits a second degree felony. An offender less than 18 years of age who commits a lewd or lascivious exhibition commits a third degree felony.

#### Effect of the Bill

The bill increases the penalty for lewd or lascivious battery to a first degree felony<sup>10</sup> if the offender is 18 years of age or older and has previously been convicted of a violation of:

- Section 787.01(2), F.S.,<sup>11</sup> if the violation involved a victim who was a minor and, in the course of committing the violation, the defendant committed a sexual battery under ch. 794, F.S., or a lewd act under ss. 800.04 or 847.0135(5), F.S., against the minor;
- Section 787.02(2), F.S.,<sup>12</sup> if the violation involved a victim who was a minor and, in the course of committing the violation, the defendant committed a sexual battery under ch. 794, F.S., or a lewd act under ss. 800.04 or 847.0135(5), F.S., against the minor;
- Section 787.01(3)(a)2. or 3., F.S.;
- Section 787.02(3)(a)2. or 3., F.S.;
- Chapter 794, F.S.<sup>13</sup> (excluding s. 794.011(10), F.S.);
- Section 800.04, F.S.;
- Section 825.1025, F.S.;<sup>14</sup> or
- Section 847.0135(5),<sup>15</sup> F.S.

The bill increases the penalty for lewd or lascivious molestation to a first degree felony if the offender is 18 years of age or older, the victim is 12 years of age or older but less than 16, and the offender has previously been convicted of one of the above-listed offenses.

The bill amends the offense severity ranking chart<sup>16</sup> to modify statutory references and descriptive language.

### **Lewd and Lascivious Offenses – Statute of Limitations**

#### *Criminal Cases*

Section 775.15, F.S., sets forth time limitations for commencing criminal prosecutions, or “statutes of limitations.” For example:

- For a capital felony, a life felony, or a felony resulting in death, there is no time limitation;
- For a first degree felony, there is a four-year limitation; and
- For any other felony, there is a three-year limitation.

The general time limitations described above currently apply to the lewd and lascivious offenses in s. 800.04, F.S. However, in addition to these general time limitations, s. 775.15, F.S., establishes the following specific time limitations for violations of s. 800.04, F.S.:

- A prosecution for a lewd or lascivious offense under s. 800.04, F.S., committed between July 1, 2004 and June 30, 2006, may be commenced within 1 year after the date on which the identity of the accused is established, or should have been established by the exercise of due diligence,

<sup>9</sup> Section 800.04(7), F.S.

<sup>10</sup> A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

<sup>11</sup> Relating to kidnapping.

<sup>12</sup> Relating to false imprisonment.

<sup>13</sup> Relating to sexual battery.

<sup>14</sup> Relating to lewd or lascivious offenses committed upon or in the presence of an elderly person or disabled person.

<sup>15</sup> Relating to lewd or lascivious exhibition using a computer.

<sup>16</sup> Criminal offenses are ranked in the “offense severity ranking chart” from level one (least severe) to level ten (most severe) and are assigned points based on the severity of the offense as determined by the legislature. Section 921.0022, F.S.

through the analysis of DNA evidence, if a sufficient portion of the evidence collected at the time of the original investigation and tested for DNA is preserved and available for testing by the accused.<sup>17</sup>

- A prosecution for a lewd or lascivious offense under s. 800.04, F.S., committed on or after July 1, 2006, may be commenced at any time after the date on which the identity of the accused is established, or should have been established by the exercise of due diligence, through the analysis of DNA evidence, if a sufficient portion of the evidence collected at the time of the original investigation and tested for DNA is preserved and available for testing by the accused.<sup>18</sup>

It should also be noted that for violations of s. 800.04, F.S., the applicable period of limitation does not begin to run until the victim has reached the age of 18 or the violation is reported to a law enforcement agency or other governmental agency, whichever occurs earlier (generally, the time for prosecution of a criminal case starts to run on the day after the offense is committed).<sup>19</sup>

#### *Civil Cases*

Section 95.11, F.S., sets forth time limitations for commencing civil actions in Florida, which range from 30 days to 20 years. The time for commencing civil actions starts to run from the time the cause of action accrues, which occurs when the last element constituting the cause of action occurs.<sup>20</sup>

Currently, a civil claim for a violation of s. 800.04, F.S., must commence within four years from the date when the cause of action accrues.<sup>21</sup>

#### Effect of the Bill

The bill amends s. 775.15, F.S., to provide there is no time limitation for the criminal prosecution of a violation of s. 800.04, F.S., involving a victim under the age of 16 and an offender 18 years of age or older at the time of the offense. The bill applies to all offenses except those offenses barred by prosecution on or before October 1, 2014.

The bill amends s. 95.11, F.S., to provide that there is no time limitation for a civil cause of action of a violation of s. 800.04, F.S., involving a victim under the age of 16 and an offender 18 years of age or older at the time of the offense. The bill applies to all actions except those which would have been time barred on or before October 1, 2014.

#### **Sexual Battery**

It is currently a first degree felony ranked in Level 9 of the offense severity ranking chart<sup>22</sup> for a person to commit sexual battery upon a person 12 years of age or older without that person's consent under any of the following circumstances:

- The victim is physically helpless to resist;
- 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;
- 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;

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<sup>17</sup> Section 775.15(15), F.S.

<sup>18</sup> Section 775.15(16), F.S.

<sup>19</sup> Section 775.15(13)(a), F.S.

<sup>20</sup> Section 95.031(1), F.S.

<sup>21</sup> Section 95.11(3)(n), F.S.

<sup>22</sup> The Criminal Punishment Code applies to sentencing for felony offenses committed on or after October 1, 1998. Criminal offenses are ranked in the "offense severity ranking chart" from level one (least severe) to level ten (most severe) and are assigned points based on the severity of the offense as determined by the legislature. If an offense is not listed in the ranking chart, it defaults to a ranking based on the degree of the felony. A defendant's sentence is calculated based on points assigned for factors including: the offense for which the defendant is being sentenced; injury to the victim; additional offenses that the defendant committed at the time of the primary offense; the defendant's prior record; and other aggravating factors. The points are added in order to determine the "lowest permissible sentence" for the offense.

- 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 that mentally or physically incapacitates the victim;
- The victim is mentally defective, and the offender has reason to believe this or has actual knowledge of this fact;
- The victim is physically incapacitated; or
- The offender is a certified law enforcement officer, correctional officer, or correctional probation officer or is an elected official exempt from such certification by virtue of s. 943.253, F.S., or any other person in a position of control or authority in a probation, community control, controlled release, detention, custodial, or similar setting, and the 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.<sup>23</sup>

It is also a first degree felony ranked in Level 9 for a person who is in a position of familial or custodial authority to a person less than 18 years of age to engage in any act with that person while the person is 12 years of age or older but less than 18 years of age which constitutes sexual battery.<sup>24</sup>

It is a second degree felony ranked in Level 8 for a person to commit sexual battery upon a person 12 years of age or older, without that person's consent if, in the process of committing the sexual battery, the offender does not use physical force and violence likely to cause serious personal injury.<sup>25</sup>

### Effect of the Bill

The bill increases the felony degree of several sexual battery offenses. Specifically, the bill increases from a first degree felony (up to 30 years imprisonment) to a first degree felony punishable by up to life imprisonment the following offenses:

- Sexual battery of a minor by a person who has familial or custodial authority over the minor;
- Sexual battery by an adult on a person 12-17 years of age, without consent, when the sexual battery involves one of the specified circumstances described above (such as the victim being physically helpless to resist); and
- Sexual battery on a person 12 years of age or older, without consent, when the sexual battery involves one of the specified circumstances described above and the offender has previously been convicted of a specified sexual battery or lewd felony.<sup>26</sup>

The bill further amends s. 794.011, F.S., to increase the following offenses from a second degree felony (up to 15 years imprisonment) to a first degree felony (up to 30 years imprisonment):

- Sexual battery by an adult on a person 12–17 years of age, without consent, when the sexual battery does not involve violence likely to cause serious physical injury; and
- Sexual battery on a person 12 years of age or older, without consent, when the sexual battery does not involve violence likely to cause serious physical injury and the offender has previously been convicted of a specified sexual battery or lewd felony.<sup>27</sup>

The bill amends the offense severity ranking chart to modify statutory references and descriptive language.

### **Dangerous Sexual Felony Offenders**

Section 794.0115, F.S., provides that a person is a “dangerous sexual felony offender” if they are convicted of a violation of ss. 787.025(2)(c),<sup>28</sup> 794.011(2), (3), (4), (5), or (8);<sup>29</sup> 800.04(4) or (5);<sup>30</sup>

<sup>23</sup> Section 794.011(4), F.S.

<sup>24</sup> Section 794.011(8)(b), F.S.

<sup>25</sup> Section 794.011(5), F.S.

<sup>26</sup> The offenses include kidnapping and false imprisonment (ss. 787.01 and 787.02, F.S.) where the violation involved a victim who was a minor and, in the course of committing the violation, the defendant committed a sexual battery under ch. 794, F.S., or a lewd act under ss. 800.04 or 847.0135(5), F.S., against the minor; sexual battery offenses (ch. 794, F.S., excluding s. 794.011(10), F.S.); lewd acts against a child (ss. 800.04 and 847.0135(5), F.S.); and lewd acts against an elderly person or disabled person (s. 825.1025, F.S.).

<sup>27</sup> *Id.*

<sup>28</sup> Relating to luring or enticing a child.

<sup>29</sup> Relating to sexual battery.

825.1025(2) or (3);<sup>31</sup> 827.071(2), (3), or (4);<sup>32</sup> or 847.0145, F.S.;<sup>33</sup> or of any similar offense under a former designation, which offense the person committed when he or she was 18 years of age or older, and the person:

- Caused serious personal injury to the victim as a result of the commission of the offense;
- Used or threatened to use a deadly weapon during the commission of the offense;
- Victimized more than one person during the course of the criminal episode applicable to the offense;
- Committed the offense while under the jurisdiction of a court for a felony offense under the laws of this state, for an offense that is a felony in another jurisdiction, or for an offense that would be a felony if that offense were committed in this state; or
- Has previously been convicted of a violation of ss. 787.025(2)(c); 794.011(2), (3), (4), (5), or (8); 800.04(4) or (5); 825.1025(2) or (3); 827.071(2), (3), or (4); or 847.0145, F.S.; or any offense under a former statutory designation which is similar in elements to an offense described in this paragraph; or of any offense that is a felony in another jurisdiction, or would be a felony if that offense were committed in this state, and which is similar in elements to an offense described in this paragraph.

Dangerous sexual felony offenders must be sentenced to a mandatory minimum term of 25 years imprisonment up to, and including, life imprisonment.

#### Effect of the Bill

The bill increases the minimum mandatory sentence for dangerous sexual felony offenders to 50 years.

#### **Unlawful Activity with Certain Minors**

Section 794.05, F.S., makes it a second degree felony for a person 24 years of age or older to engage in sexual activity with a person 16 or 17 years of age.<sup>34</sup> The term “sexual activity” is defined as oral, anal, or vaginal penetration by, or union with, the sexual organ of another, and does not include an act done for a bona fide medical purpose.

#### Effect of the Bill

The bill amends the definition of the term “sexual activity” to include anal or vaginal penetration of another by any other object. This mirrors the definition of “sexual battery” found in s. 794.011, F.S.

#### **Exposure of Sexual Organs**

Section 800.03, F.S., makes it a first degree misdemeanor<sup>35</sup> for a person to expose or exhibit one’s sexual organs in public or on the private premises of another, or so near thereto as to be seen from such private premises, in a vulgar or indecent manner, or to be naked in public except in any place provided or set apart for that purpose.

#### Effect of the Bill

The bill amends s. 800.03, F.S., to make second or subsequent violations a third degree felony.

#### **Arrest without a Warrant**

Section 901.15, F.S., sets forth the instances in which a law enforcement officer (LEO) can arrest a person without a warrant. For misdemeanor offenses, the general rule is that LEOs must witness the occurrence of the offense in order to make an arrest without a warrant. If the officer does not witness the offense, the officer must obtain an arrest warrant.<sup>36</sup>

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<sup>30</sup> Relating to lewd or lascivious battery and lewd or lascivious molestation committed upon or in the presence of persons less than 16 years of age.

<sup>31</sup> Relating to lewd or lascivious battery and lewd or lascivious molestation committed upon or in the presence of an elderly or disabled person.

<sup>32</sup> Relating to sexual performance by a child.

<sup>33</sup> Relating to selling or buying of minors.

<sup>34</sup> The provisions of this section do not apply to a person 16 or 17 years of age who has had the disabilities of nonage removed under ch. 743, F.S.

<sup>35</sup> A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Sections 775.082 and 775.083, F.S.

<sup>36</sup> Section 901.15, F.S.

In certain instances the Legislature has deemed particular misdemeanor offenses to be of such a nature that they should be exceptions to the above rule. Those crimes include:

- Violations of injunctions for protection in domestic violence and dating violence situations as well as violations of pretrial release conditions in domestic violence cases;
- Misdemeanor luring or enticing a child and child abuse;
- Aggravated assault upon a law enforcement officer, firefighter and other listed persons;
- Battery;
- Criminal mischief or graffiti-related offenses; and
- Violations of certain naval vessel protection zones or trespass in posted areas in airports.<sup>37</sup>

For the offenses listed above, an LEO does not have to witness the crime in order to make a warrantless arrest – they only need to have probable cause to believe the person committed the crime.<sup>38</sup>

#### Effect of the Bill

The bill amends s. 901.15, F.S., to permit a law enforcement officer to arrest a person without a warrant if the officer has probable cause to believe the person violated s. 800.03, F.S. (exposure of sexual organs).

#### **Voyeurism**

A person commits the offense of voyeurism when he or she, with lewd, lascivious, or indecent intent, secretly observes another person when the other person is located in a dwelling, structure, or conveyance and such location provides a reasonable expectation of privacy.<sup>39</sup> Voyeurism is a first degree misdemeanor for a first violation, and a third degree felony for second or subsequent violations.

State attorneys have reported problems prosecuting persons under the voyeurism statute when the facts of the case involve voyeurism in arguably public places. For example, in 2007, a defendant in Escambia County successfully argued that he was not in a location that afforded a reasonable expectation of privacy when he used a mirror to look up the skirt of a patron at a bookstore.<sup>40</sup>

#### Effect of the Bill

The bill amends the voyeurism statute to specify that voyeurism occurs when a person, with lewd or lascivious intent, secretly observes another person's intimate areas in which the person has a reasonable expectation of privacy, when the other person is located a public or private dwelling, structure, or conveyance. The bill defines "intimate area" as any portion of a person's body or undergarments that is covered by clothing and intended to be protected from public view.

#### **Sentencing Multiplier**

The Criminal Punishment Code (Code)<sup>41</sup> is Florida's framework for determining permissible sentencing ranges for noncapital felonies. Noncapital felonies sentenced under the Code are ranked in the "offense severity ranking chart" from level one (least severe) to level ten (most severe) and are assigned points based on the severity of the offense.<sup>42</sup> Points are also assigned and accrue based upon any additional offenses, victim injury, sexual contact, prior offenses, legal status violations, community sanction violations, possession of a firearm, and prior serious felonies.<sup>43</sup> Points accrued for any of these factors are added to determine one's sentencing score subtotal.

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Section 810.14, F.S.

<sup>40</sup> Letter from Assistant State Attorney Adrienne Emerson, dated September 11, 2013 (on file with Criminal Justice Subcommittee).

<sup>41</sup> Sections 921.002-921.0027, F.S.

<sup>42</sup> Section 921.0022, F.S.

<sup>43</sup> Section 921.0024, F.S.

A person's sentencing score subtotal may be multiplied if authorized by statute. Sentencing multipliers essentially operate to increase one's total sentencing score, and generally result in longer sentences. Currently, s. 921.0024, F.S., authorizes sentencing "multipliers" for the following:

- Violations of the Law Enforcement Protection Act (LEPA);<sup>44</sup>
- Violations of specified drug trafficking offenses;
- Repeat motor vehicle theft;
- Criminal gang-related offenses; or
- Offenses involving domestic violence in the presence of a child.

Total sentence points are derived from the subtotal sentence points. If no multiplier applies, the subtotal sentence points are the total sentence points. If a multiplier applies, the total sentence points are the subtotal sentence points as multiplied by the multiplier.

If total sentence points are less than or equal to 44 points, the lowest permissible sentence is any non-state prison sanction (e.g., probation). The maximum penalty depends on the felony degree of the primary offense.<sup>45</sup> For example, the maximum penalty for a third degree felony is 5 years in state prison.

If total sentence points are greater than 44 points, one must subtract 28 points from the total sentence points and decrease the remaining total by 25 percent.<sup>46</sup> This resulting figure is the lowest permissible sentence in prison months.<sup>47</sup> Again, the maximum penalty depends on the felony degree of the primary offense.<sup>48</sup>

#### Effect of the Bill

The bill creates a new sentencing multiplier for adult-on-minor sexual offenses. The multiplier specifies that if the offender was 18 years of age or older and the victim was younger than 18 years of age at the time the offender committed the primary offense, and if the primary offense was an offense committed on or after October 1, 2014, and is a violation of any of the following, the subtotal sentence points are multiplied by 2.0.

- Section 787.01(2), F.S.,<sup>49</sup> if the violation involved a victim who was a minor and, in the course of committing the violation, the defendant committed a sexual battery under ch. 794, F.S., or a lewd act under ss. 800.04 or 847.0135(5), F.S., against the minor;
- Section 787.02(2), F.S.,<sup>50</sup> if the violation involved a victim who was a minor and, in the course of committing the violation, the defendant committed a sexual battery under ch. 794, F.S., or a lewd act under ss. 800.04 or 847.0135(5), F.S., against the minor;
- Section 787.01(3)(a)2. or 3., F.S.,<sup>51</sup>

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<sup>44</sup> LEPA provides increased penalties for persons convicted of a violent offense against any law enforcement officer, correctional officer, state attorney, assistant state attorney, and justice or judge of a court, which offense arises out of or in the scope of the officer's duty as a law enforcement or correctional officer, the state attorney's or assistant state attorney's duty as a prosecutor or investigator, or the justice's or judge's duty as a judicial officer, Section 775.0823, F.S.

<sup>45</sup> The maximum penalty for the felony degree is generally prescribed in s. 775.082, F.S. An exception is when the scored lowest permissible sentence exceeds the maximum penalty prescribed in s. 775.082, F.S. In this case, the scored lowest permissible sentence for the primary offense becomes both the minimum and maximum penalty for the primary offense.

<sup>46</sup> For example, if an offender's primary offense is a second degree felony and his or her total sentence points are 80 points, 28 is subtracted from 80, which equals 52 points. The 52 points are then multiplied by 0.75, which equals 39 months in prison. In this example, absent mitigation, the sentencing range is 39 months in state prison up to 15 years in state prison (the maximum penalty for a second degree felony).

<sup>47</sup> Mandatory minimum terms are an exception to general sentencing under the Code. "If the lowest permissible sentence is less than the mandatory minimum sentence, the mandatory minimum sentence takes precedence. If the lowest permissible sentence exceeds the mandatory sentence, the requirements of the ... Code and any mandatory minimum penalties apply." Rule 3.704(26), Florida Rules of Criminal Procedure.

<sup>48</sup> The maximum penalty for the felony degree is generally prescribed in s. 775.082, F.S. An exception is when the scored lowest permissible sentence exceeds the maximum penalty prescribed in s. 775.082, F.S. In this case, the scored lowest permissible sentence for the primary offense becomes both the minimum and maximum penalty for the primary offense.

<sup>49</sup> Relating to kidnapping.

<sup>50</sup> Relating to false imprisonment.

<sup>51</sup> Relating to kidnapping of a child under the age of 13 and, in the course of committing the offense, committing sexual battery or a lewd and lascivious offense.

- Section 787.02(3)(a)2. or 3., F.S.,<sup>52</sup>
- Section 794.011, F.S.<sup>53</sup> (excluding s. 794.011(10), F.S.);
- Section 800.04, F.S.,<sup>54</sup> or
- Section 847.0135(5),<sup>55</sup> F.S.

If applying the multiplier results in the lowest permissible sentence exceeding the statutory maximum sentence for the primary offense, the court may not apply the multiplier and must sentence the defendant to the statutory maximum sentence.

### **Gain Time**

Currently, the Department of Corrections (DOC) may grant inmates incentive gain-time for each month in which an inmate works diligently, participates in training, uses time constructively, or otherwise engages in positive activities.<sup>56</sup> Inmates earn incentive gain-time at the rate that was in effect on the date the inmate committed the offense which resulted in his or her incarceration.<sup>57</sup> For offenses committed on or after October 1, 1995, DOC may grant up to 10 days per month of incentive gain-time, but the total amount of incentive gain-time cannot result in release of an inmate before he or she serves a minimum of 85 percent of his or her sentence.<sup>58</sup> Inmates sentenced to life imprisonment or sentenced pursuant to certain statutes<sup>59</sup> are not entitled to gain-time.<sup>60</sup> When an inmate is found guilty of a violation of the laws of the state or DOC rules, gain-time may be forfeited.<sup>61</sup>

### Effect of the Bill

The bill prohibits DOC from granting incentive gain-time to inmates sentenced for any of the following offenses committed on or after October 1, 2014:

- Section 782.04(1)(a)2.c., F.S.,<sup>62</sup>
- Section 787.01(3)(a)2. or 3., F.S.,<sup>63</sup>
- Section 787.02(3)(a)2. or 3., F.S.,<sup>64</sup>
- Section 794.011, F.S.,<sup>65</sup> excluding s. 794.011(10), F.S.;
- Section 800.04, F.S.,<sup>66</sup>
- Section 825.1025, F.S.,<sup>67</sup> or
- Section 847.0135(5), F.S.<sup>68</sup>

### **Split Sentences**

Section 948.012, F.S., *authorizes* the court, at time of sentencing, to impose a split sentence whereby the defendant is placed on probation or community control upon completing a period of imprisonment.

### Effect of the Bill

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<sup>52</sup> Relating to false imprisonment of a child under the age of 13 and, in the course of committing the offense, committing sexual battery or a lewd and lascivious offense.

<sup>53</sup> Relating to sexual battery.

<sup>54</sup> Relating to lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age.

<sup>55</sup> Relating to lewd or lascivious exhibition using a computer.

<sup>56</sup> Section 944.275(4)(b), F.S.

<sup>57</sup> *Id.*

<sup>58</sup> Section 944.275(4)(b)3., F.S.

<sup>59</sup> For example, inmates sentenced to a mandatory minimum term of imprisonment as a dangerous sexual felony offender are not eligible to receive gain-time. Section 794.0115(7), F.S.

<sup>60</sup> Section 944.275(4)(b)3., F.S.

<sup>61</sup> Section 944.275(5), F.S.

<sup>62</sup> Relating to murder when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, sexual battery.

<sup>63</sup> Relating to kidnapping of a child under the age of 13 and, in the course of committing the offense, commits sexual battery or a lewd and lascivious offense.

<sup>64</sup> Relating to false imprisonment of a child under the age of 13 and, in the course of committing the offense, commits sexual battery or a lewd and lascivious offense.

<sup>65</sup> Relating to sexual battery.

<sup>66</sup> Relating to lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age.

<sup>67</sup> Relating to lewd or lascivious offenses committed upon or in the presence of an elderly person or disabled person.

<sup>68</sup> Relating to lewd or lascivious exhibition using a computer.

The bill amends s. 948.012, F.S., to *require* the court to impose a split sentence if the court imposes a term of years which is less than the maximum sentence for the offense, and the person is convicted of any of the following offenses that were committed on or after October 1, 2014:

- Murder while engaged in sexual battery (s. 782.04(1)(a)2.c., F.S.);
- Kidnapping a child under the age of 13 and, in the course of that offense, committing sexual battery or a lewd act against the child (s. 787.01(3)(a)2. and 3., F.S.);
- False imprisonment of a child under the age of 13 and, in the course of that offense, committing sexual battery or a lewd act against the child (s. 787.02(3)(a)2. and 3., F.S.);
- Sexual battery (s. 794.011, F.S.), excluding s. 794.011(10), F.S.;
- Lewd acts against a child (s. 800.04, F.S., or s. 847.0135(5), F.S.); or
- Lewd acts against an elderly person or disabled person (s. 825.1025, F.S.).

The probation or community control portion of the split sentence must extend for at least 2 years. However, if the term of years imposed by the court extends to within 2 years of the maximum sentence for the offense, the probation or community control portion of the split sentence must extend for the remainder of the maximum sentence.

### **Conditions of Sex Offender Probation**

#### *Probation/Conditional Release*

Probation is a form of community supervision requiring specified contacts with parole and probation officers, compliance with standard statutory terms and conditions, and compliance with any specific terms and conditions required by the sentencing court.<sup>69</sup> Community control is a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, administered by probation officers with restricted caseloads.<sup>70</sup> Conditional release, administered by the Florida Parole Commission (Commission), is a mandatory postrelease supervision required for certain violent inmates.<sup>71</sup> The Department of Corrections (DOC) supervises all probationers, community controlees, and conditional releasees sentenced in circuit court.<sup>72</sup>

Courts are required to impose the conditions of supervision found in s. 948.03, F.S., on probationers and community controlees.<sup>73</sup> Similarly, the Commission is required to impose the conditions of supervision found in s. 947.1405, F.S., on conditional releasees.<sup>74</sup> In addition to these standard conditions of supervision, the court/Commission may add special conditions of supervision that it deems proper.<sup>75</sup>

#### *Sex Offender Supervision*

In addition to the standard conditions of supervision described above, ss. 948.30 and 947.1405, F.S., require the court/Commission to impose additional conditions of supervision for probationers, community controlees, and conditional releasees convicted of specified sexual offenses. For example, these offenders are subject to a curfew, residency restrictions, employment restrictions, and sex offender treatment.

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<sup>69</sup> Section 948.001(8), F.S.

<sup>70</sup> Section 948.001(3), F.S.

<sup>71</sup> Section 947.1405, F.S., requires conditional release for an inmate who:

- Is convicted of a crime committed on or after October 1, 1988, and before January 1, 1994, and any inmate who is convicted of a crime committed on or after January 1, 1994, which crime is or was contained in category 1, category 2, category 3, or category 4 of Rule 3.701 and Rule 3.988, Florida Rules of Criminal Procedure (1993), and who has served at least one prior felony commitment at a state or federal correctional institution;
- Is sentenced as a habitual or violent habitual offender or a violent career criminal pursuant to s. 775.084, F.S.; or
- Is found to be a sexual predator under s. 775.21, F.S., or former s. 775.23, F.S.

<sup>72</sup> Sections 948.001(1) and 947.1405, F.S.

<sup>73</sup> Sections 948.001(8) and 948.03, F.S. These conditions require offenders to comply with a variety of requirements (e.g., report to probation supervisors as directed, permit probation supervisors to visit at home or elsewhere, work faithfully at suitable employment, make restitution, not associate with persons engaged in criminal activities, etc.).

<sup>74</sup> Section 947.1405(2), F.S.

<sup>75</sup> Sections 948.03(2) and 947.1405(6), F.S.

Currently, ss. 948.30(1)(g), and 947.1405(7)(a)7., F.S., require the court/Commission to impose a condition prohibiting an offender convicted of a specified sexual offense<sup>76</sup> from viewing, accessing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material<sup>77</sup> *that is relevant to the offender's deviant behavior pattern* (unless otherwise indicated in a treatment plan proscribed in the sexual offender treatment program).<sup>78</sup>

### **Effect of the Bill**

The bill amends ss. 948.30 and 947.1405, F.S., to require the court/Commission to impose a condition prohibiting probationers, community controllees, and conditional releasees from viewing, accessing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material, *regardless of its content* (unless otherwise indicated in the treatment plan provided by a qualified practitioner in the sexual offender treatment program). Visual or auditory material includes, but is not limited to, telephone, electronic media, computer programs, and computer services.

The condition applies to offenders whose crime was committed on or after October 1, 2014, and who are placed on probation, community control, or conditional release for a violation of ch. 794, F.S. (sexual battery); s. 800.04, F.S. (lewd or lascivious offenses); s. 827.071, F.S. (sexual performance by a child); s. 847.0135(5), F.S. (computer transmissions of pornography); and s. 847.0145, F.S. (buying and selling minors).

As a result, these offenders will be prohibited from possessing obscene, pornographic or sexually stimulating material, regardless of its content.

### **B. SECTION DIRECTORY:**

Section 1. Amends s. 95.11, F.S., relating to limitations other than for the recovery of real property.

Section 2. Amends s. 775.15, F.S., relating to time limitations; general time limitations; exceptions.

Section 3. Amends s. 794.011, F.S., relating to sexual battery.

Section 4. Amends s. 794.0115, F.S., relating to dangerous sexual felony offenders; mandatory sentencing.

Section 5. Amends s. 794.05, F.S., relating to unlawful sexual activity with certain minors.

Section 6. Amends s. 800.03, F.S., relating to exposure of sexual organs.

Section 7. Amends s. 800.04, F.S., relating to lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age.

Section 8. Amends s. 810.14, F.S., relating to voyeurism prohibited; penalties.

Section 9. Amends s. 901.15, F.S., relating to when arrest by officer without warrant is lawful.

Section 10. Amends s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity ranking chart.

Section 11. Amends s. 921.0024, F.S., relating to Criminal Punishment Code; worksheet computations; scoresheets.

Section 12. Amends s. 944.275, F.S., relating to gain-time.

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<sup>76</sup> These offenses include violations of ch. 794, F.S., relating to sexual battery; s. 800.04, F.S., relating to lewd or lascivious offenses; s. 827.071, F.S., relating to sexual performance by a child; s. 847.0135(5), F.S., relating to certain computer transmissions of pornography; and s. 847.0145, F.S., relating to buying and selling minors.

<sup>77</sup> This material includes telephone, electronic media, computer programs, or computer services.

<sup>78</sup> The condition applies to offenders whose crime was committed on or after October 1, 1995.

Section 13. Amends s. 948.012, F.S., relating to split sentence of probation or community control and imprisonment.

Section 14. Amends s. 947.1405, F.S., relating to conditional release program.

Section 15. Amends s. 948.30, F.S., relating to additional terms and conditions of probation or community control for certain sex offenses.

Section 16. Amends s. 943.0435, F.S., relating to sexual offenders required to register with the department; penalty.

Section 17. Amends s. 944.607, F.S., relating to notification to Department of Law Enforcement of information on sexual offenders.

Section 18. Provides an effective date of October 1, 2014.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

The bill does not appear to have any impact on state revenues.

#### **2. Expenditures:**

The Criminal Justice Impact Conference (CJIC) provides the final, official estimate of the prison bed impact, if any, of criminal legislation. CJIC projects the operational costs as well as the fixed capital costs to house the projected increase (or decrease) in prison admissions. CJIC met January 30, 2014 to determine the prison bed and community corrections impact of this bill.

#### Sentencing Multiplier

The bill increases minimum sentence length of adult-on-minor sex offenses sentenced under the Criminal Punishment Code by creating a new sentence point multiplier. Since these offenders tend to have high incarceration rates and receive long sentences, the significant impact of this bill will occur in later years. CJIC projects an operational impact for Fiscal Years 2014-15 through 2015-16 to be \$154,845. The cumulative impact is projected to be \$27.4 million fixed capital outlay cost (317 beds) and a cumulative \$14.2 million operational cost after seven years. Total costs (FY 2014-15 to FY 2020-21): \$41.6 million.

a	b	c	FUNDS REQUIRED			
Fiscal Year	Projected Cumulative Prison Beds Required	Projected Additional Annual Prison Beds Required	Annual Operating Costs	Annual Fixed Capital Outlay Costs	TOTAL Annual Funds	TOTAL Cumulative Funds
2014-2015	1	1	\$8,949	\$914,865	\$923,814	\$923,814
2015-2016	15	14	\$145,896	\$2,396,432	\$2,542,328	\$3,466,142
2016-2017	53	38	\$631,822	\$3,260,400	\$3,892,222	\$7,358,364
2017-2018	103	50	\$1,478,490	\$4,093,039	\$5,571,529	\$12,929,893
2018-2019	164	61	\$2,581,089	\$4,594,592	\$7,175,681	\$20,105,574
2019-2020	231	67	\$3,894,898	\$6,015,442	\$9,910,340	\$30,015,913
2020-2021	317	86	\$5,516,990	\$6,129,736	\$11,646,726	\$41,662,639
<b>Total</b>	<b>317</b>	<b>317</b>	<b>\$14,258,133</b>	<b>\$27,404,506</b>	<b>\$41,662,639</b>	<b>\$41,662,639</b>

#### Gain-Time

The bill prohibits incentive gain-time for offenders convicted of certain sexual offenses. Since this is adding prison time to the end of a likely lengthy prison sentence, the significant impact of this bill will occur in later years. CJIC projects an operational impact for Fiscal Years 2014-15 through 2015-16 to be \$63,830. The cumulative impact is projected to be \$19.9 million fixed capital outlay cost (233 beds) and a cumulative \$9.8 million operational cost after 7 years. Total costs (FY 2014-15 to FY 2020-21): \$29.7 million.

a	b	c	FUNDS REQUIRED			
Fiscal Year	Projected Cumulative Prison Beds Required	Projected Additional Annual Prison Beds Required	Annual Operating Costs	Annual Fixed Capital Outlay Costs	TOTAL Annual Funds	TOTAL Cumulative Funds
2014-2015	0	0	\$0	\$426,937	\$426,937	\$426,937
2015-2016	7	7	\$63,830	\$1,324,344	\$1,388,174	\$1,815,111
2016-2017	28	21	\$325,203	\$2,151,864	\$2,477,067	\$4,292,177
2017-2018	61	33	\$843,498	\$3,556,247	\$4,399,745	\$8,691,922
2018-2019	114	53	\$1,691,725	\$4,114,560	\$5,806,285	\$14,498,207
2019-2020	174	60	\$2,839,824	\$4,126,873	\$6,966,697	\$21,464,904
2020-2021	233	59	\$4,097,473	\$4,205,284	\$8,302,757	\$29,767,660
<b>Total</b>	<b>233</b>	<b>233</b>	<b>\$9,861,551</b>	<b>\$19,906,109</b>	<b>\$29,767,660</b>	<b>\$29,767,660</b>

#### Combined Sentence Point Multiplier and Incentive Gain-Time Prohibition

CJIC projects an operational impact for Fiscal Years 2014-15 through 2015-16 to be \$173,082. The cumulative impact is projected to be \$41.7 million fixed capital outlay cost (514 beds) and a cumulative \$21.9 million operating cost after seven years for the incentive gain-time prohibition and the sentence point multiplier. Total costs (FY 2014-15 to FY 2020-21): \$63.7 million.

a	b	c	d	e	f	g
Fiscal Year	Projected Cumulative Prison Beds Required	Projected Additional Annual Prison Beds Required	FUNDS REQUIRED			
			Annual Operating Costs	Annual Fixed Capital Outlay Costs	TOTAL Annual Funds	TOTAL Cumulative Funds
2014-2015	1	1	\$8,949	\$1,036,847	\$1,045,796	\$1,045,796
2015-2016	17	16	\$164,133	\$3,216,264	\$3,380,397	\$4,426,193
2016-2017	68	51	\$789,778	\$5,151,432	\$5,941,210	\$10,367,402
2017-2018	147	79	\$2,037,663	\$7,045,395	\$9,083,058	\$19,450,460
2018-2019	252	105	\$3,857,133	\$8,366,272	\$12,223,405	\$31,673,865
2019-2020	374	122	\$6,172,673	\$9,792,580	\$15,965,253	\$47,639,118
2020-2021	514	140	\$8,939,940	\$7,127,600	\$16,067,540	\$63,706,658
<b>Total</b>	<b>514</b>	<b>514</b>	<b>\$21,970,268</b>	<b>\$41,736,390</b>	<b>\$63,706,658</b>	<b>\$63,706,658</b>

#### Increased Penalties – Sexual Battery

The bill increases the penalties for specified sexual battery against children. CJIC determined that this provision will have an insignificant impact on prison beds due to the low volume of offenses (43 imprisoned in FY 2012-13).

The bill also increases penalties for sexual battery when the offender does not use physical force. CJIC determined that this provision will have an indeterminate impact on prison beds since the age of the victim could not be determined.

#### Familial or Custodial Authority

The bill enhances the felony degree of sexual battery if the offender is a familial or custodial authority. CJIC determined that this provision will have an insignificant impact on prison beds since it only changes the maximum sentence and these offenders typically receive long sentences and have a high incarceration rate.

#### Increased Penalties – Lewd or Lascivious Offenses

The bill increases the penalties for specified lewd or lascivious offenses against children. CJIC determined that this provision will have an indeterminate impact on prison beds since the prior convictions could not be determined.

#### Minimum Mandatory Sentence

The bill increases the minimum mandatory sentence for dangerous sexual felony offenders to 50 years. CJIC determined that this provision will have an insignificant impact on prison beds since it only changes the maximum sentence and is a low volume sentence (14 offenders sentenced).

#### Mandatory Split Sentence

The bill requires the court to impose a split sentence in which an offender convicted of specified sexual offenses is sentenced to two years of community supervision after serving his or her term of imprisonment.

DOC states that the mandatory minimum two years of post-prison supervision will have limited impact.<sup>79</sup> In FY 2012-13, there were approximately 1,300 sex offenders released (based on

<sup>79</sup> Senate Bill Analysis of SB 526, dated January 9, 2014 (citing an e-mail from Will Kendrick, Legislative Affairs Director for DOC (January 8, 2014) (on file with the Criminal Justice Subcommittee).

offenses specified in the bill). Of those inmates, 900 had supervision to follow (either a split sentence or conditional release). The remaining 400 inmates had an average time between offense and prison release of 11 years. Therefore, since the bill would apply only to future offenses, DOC expects that the mandatory split provision would not be a significant increase in supervision population during the first years of implementation. DOC notes that the average time between offense and prison release will only increase because of the other provisions of the bill that encourage longer sentences and prohibit gain time for these inmates.<sup>80</sup>

The Office of Economic and Demographic Research estimates that the impact of this provision will be minimal. The projected increase in community supervision probationers is projected to be only 20 by Fiscal Year 2016 – 2017, and 118 by Fiscal Year 2018 – 2019.

#### Statutes of Limitation – Lewd or Lascivious Offenses

CJIC determined that the impact of this provision of the bill is indeterminate. The bill may have a negative prison bed impact in that it allows prosecutions for violations of s. 800.04, F.S., to be commenced at any time.

#### Conditions of Sex Offender Probation

The bill prohibits certain offenders from having obscene, pornographic or sexually stimulating material, regardless of whether the material is relevant to the offender’s deviant behavior pattern. CJIC determined that this provision will have an indeterminate impact on prison beds since it cannot be determined how many would violate this provision, however, this could result in more violations of supervision, which could have a negative prison bed impact.

#### Exposure of Sexual Organs

The bill increases the penalty for second or subsequent violations of s. 800.03, F.S., from a first degree misdemeanor to a third degree felony. CJIC determined that this provision will have an insignificant impact on prison (unranked third degree felony not likely to go to prison).

#### Unlawful Activity with Certain Minors

The bill broadens the definition of the term “sexual activity” for purposes of s. 794.05, F.S., (prohibiting a person 24 years of age or older from engaging in sexual activity with a person 16 or 17 years of age). Because this offense is a second degree felony, this could have a negative prison bed impact.

#### Voyeurism

The bill broadens the application of the voyeurism statute, which is a third degree felony for second or subsequent violations. While CJIC did not review this provision, though it is likely insignificant since the second or subsequent violation is an unranked third degree felony.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

#### 2. Expenditures:

##### Exposure of Sexual Organs

The bill permits an LEO to arrest a person without a warrant if the officer has probable cause to believe the person violated s. 800.03, F.S. This may result in an increase in the number of arrests for misdemeanor violations of s. 800.03, F.S., which could have a negative jail bed impact.

##### Conditions of Sex Offender Probation

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<sup>80</sup> *Id.*

The bill prohibits certain offenders from having obscene, pornographic or sexually stimulating material, regardless of whether the material is relevant to the offender's deviant behavior pattern. This could result in more violations of supervision, which could have a negative jail bed impact.

Voyeurism

The bill broadens the application of the voyeurism statute, which is a first degree misdemeanor for first offenses. This could have a negative jail bed impact.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

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

##### 2. Other:

None.

#### B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

##### Conditions of Sex Offender Probation

###### *Vagueness*

A statute or ordinance is void for vagueness when, because of its imprecision, it fails to give an adequate notice of what conduct is prohibited. Thus, it invites arbitrary and discriminatory enforcement.<sup>81</sup>

Courts throughout the country are split as to whether a general ban on pornographic materials is unconstitutionally vague. For example, in *McVey v. State*, the court found that the condition prohibiting possession of pornographic or sexually explicit materials was unconstitutionally vague because it failed to clearly inform the offender what conduct was prohibited.<sup>82</sup> Whereas in *Wilfong v. Commonwealth*, the court determined that a commonsense reading of “sexually arousing materials” does not render the phrase unconstitutionally vague.<sup>83</sup>

The bill prohibits persons subject to sex offender supervision from possessing obscene, pornographic or sexually stimulating material, regardless of its content. This language could be challenged as being unconstitutionally vague.

###### *Probationer Rights*

The Florida Supreme Court has found that “constitutional rights of probationers are limited by conditions of probation which are desirable for purposes of rehabilitation.”<sup>84</sup> In other words, trial courts have broad discretion to impose various conditions of probation, but cannot impose a condition of probation that is not reasonably related to rehabilitation.<sup>85</sup> In determining whether a condition of probation is reasonably related to rehabilitation, courts look to whether the condition:

- Has a relationship to the crime of which the offender was convicted;
- Relates to conduct which is not in itself criminal; and
- Requires or forbids conduct which is not reasonably related to future criminality.<sup>86</sup>

The bill prohibits persons subject to sex offender supervision from possessing obscene, pornographic or sexually stimulating material, regardless of its content. This could be challenged as not being reasonably related to rehabilitation.

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<sup>81</sup> *Sult v. State*, 906 So.2d 1013 (Fla. 2005).

<sup>82</sup> *McVey v. State*, 863 N.E.2d 434, 447 (Ind.Ct.App. 2007). Also see *State v. Bahl*, 193 P.3d 678, 688 (Wash. 2008).

<sup>83</sup> *Wilfong v. Commonwealth*, 175 S.W.3d 84, 99 (Ky.Ct.App. 2004). See also *Belt v. State*, 127 S.W.3d 277, 281–82 (Tex.Ct.App.2004) (condition prohibiting possession of “sexually stimulating” or “sexually oriented” material was not unconstitutionally vague); *Commonwealth v. Perreault*, 930 A.2d 553, 560 (Pa.Super.Ct. 2007) (a condition is not unconstitutionally vague when statutes provide definitions of the terms).

<sup>84</sup> *Biller v. State*, 618 So.2d 734 (Fla. 1993).

<sup>85</sup> *Nank v. State*, 646 So.2d 762 (Fla.2d DCA 1994).

<sup>86</sup> *Biller v. State*, 618 So.2d 734 (Fla.1993).

### *First Amendment*

The First Amendment to the United States Constitution and Article I, Section 4, of the Florida Constitution protect the rights of individuals to express themselves in a variety of ways. The constitutions protect not only speech and the written word, but also conduct intended to communicate. When lawmakers attempt to restrict or burden fundamental and basic rights such as these, the laws must not only be directed toward a legitimate public purpose, but they must be drawn as narrowly as possible. As the United States Supreme Court has noted, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."<sup>87</sup>

In *Miller v. California*, the Supreme Court of the United States found that obscene materials are not protected by the First Amendment.<sup>88</sup> However, materials not considered to be obscene do receive First Amendment protections.

The bill prohibits persons subject to sex offender supervision from possessing pornographic or sexually stimulating material. While offenders have diminished constitutional rights by virtue of being on supervision, this provision could be challenged as violating an offender's First Amendment rights.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On January 16, 2014, the Criminal Justice Subcommittee adopted seven amendments to the PCB and reported the PCB favorably. Amendments #1-#5 corrected statutory references; amendment #6 clarified that voyeurism can occur when someone secretly observes another's intimate areas whether in a public or private structure, and defined "intimate area;" and amendment #7 applied the provision relating to conditions of supervision to only those persons whose crimes were committed on or after October 1, 2014.

This analysis is drafted to the PCB as amended and passed by the Criminal Justice Subcommittee.

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<sup>87</sup> *NAACP v. Button*, 371 U.S. 415, 433 (1963).

<sup>88</sup> 413 U.S. 15 (1973).