

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: CS/SB 628

INTRODUCER: Criminal Justice Committee and Senators Garcia and Campbell

SUBJECT: Transmission of Disease Through Bodily Fluids

DATE: March 22, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Hrdlicka	CJ	Fav/CS
2.			HP	
3.			JU	
4.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 628 makes numerous changes in the criminal law and public health law related to the transmission or potential transmission of disease through the exchange of bodily fluids. For example, the bill:

- Reclassifies felony offenses to misdemeanor offenses for crimes involving:
 - Donating blood, plasma, organs, skin, or other human tissue by a person who knows he or she is infected with human immunodeficiency virus (HIV); and
 - Malicious dissemination of any false information or report concerning the existence of a sexually transmissible disease.
- Creates a new misdemeanor crime for engaging in sexual conduct, without a partner's informed consent, when a person knows he or she is infected with HIV and may communicate HIV through sexual conduct with intent to transmit the disease, and actually transmits the disease.
- Includes human papilloma virus, hepatitis, and human immunodeficiency virus to the list of diseases it is unlawful to transmit with the intent to transmit (new misdemeanor).
- Eliminates repeat offenses, changes a felony to a misdemeanor, and requires screening and treatment services relating to prostitution.
- Amends s. 960.003, F.S., relating to hepatitis and HIV testing of persons charged with or alleged by petition for delinquency to have committed certain sexual and nonsexual crimes:
 - Requires the Department of Health to refer any person who alleges he or she has been the victim of sexual assault for treatment services, including postexposure prophylaxis; and

- Limits the out-of-pocket cost for the postexposure prophylaxis.

The bill was estimated by the Criminal Justice Impact Conference to likely result in a decrease of ten or fewer prison beds. The bill will have a fiscal impact on the Department of Health, but the extent of such costs is indeterminate. See Section V. Fiscal Impact Statement.

II. Present Situation:

Chapter 384, F.S., the “Control of Sexually Transmissible Disease Act,” was created in 1986, during the time the general population was becoming increasingly aware of the existence of acquired immune deficiency syndrome (AIDS)/human immunodeficiency virus (HIV).¹

In the early 1990’s, reacting to concerns that victims of crimes involving the exchange of bodily fluids might become infected with HIV, the Florida Legislature enacted laws to require HIV testing of persons accused of these crimes and providing for test result reporting to the victims.²

Current law and the amendments made to current law by the bill are discussed below in the “Effect of Proposed Changes” section of this bill analysis.

III. Effect of Proposed Changes:

Section 1 – Testing of Human Tissue

Section 381.0041, F.S., sets forth requirements for the testing of every donation of blood, plasma, organs, skin, or other human tissue for HIV and other communicable diseases, prior to transfusion or transplantation.

Subsection (11) of s. 381.0041, F.S., prohibits a person who is HIV-positive, who knows he or she is infected with HIV, and who has been informed that the virus may be communicated by donating blood, plasma, organs, skin, or other human tissue from making such a donation.

Currently, violating the prohibition subjects the person who commits this crime to 3rd degree felony penalties.³ The bill amends this provision to make the crime a 1st degree misdemeanor offense and permits such a donation if it is deemed medically necessary by a licensed physician.⁴

Section 2 – Definitions in ch. 384, F.S., the “Control of Sexually Transmissible Disease Act”

Section 324.23, F.S., currently contains three definitions:

- “Department” means the Department of Health.

¹ See U.S. Department of Health and Human Services, Aids.gov, “A Timeline of HIV/AIDS,” available at <https://www.aids.gov/hiv-aids-basics/hiv-aids-101/aids-timeline/> (last visited March 15, 2016). HIV is the Human Immunodeficiency Virus.

² These laws include s. 960.003, F.S. (1990), and s. 775.0877, F.S. (1993).

³ A 3rd degree felony is punishable by up to 5 years’ imprisonment and up to a \$5,000 fine pursuant to ss. 775.082 and 775.083, F.S. A habitual offender who commits a 3rd degree felony is punishable by up to 10 years’ imprisonment pursuant to s. 775.084, F.S.

⁴ A 1st degree misdemeanor is punishable by up to 1 year imprisonment and up to a \$1,000 fine pursuant to ss. 775.082 and 775.083, F.S.

- “County health department” means agencies and entities designated in ch. 154, F.S.
- “Sexually transmissible disease” means “a bacterial, viral, fungal, or parasitic disease determined by rule of the department to be sexually transmissible, to be a threat to the public health and welfare, and to be a disease for which a legitimate public interest will be served by providing for prevention, elimination, control, and treatment.”

The bill creates definitions for the terms “sexual conduct” and “substantial risk of transmission”:

- “Sexual conduct” means conduct between persons, regardless of gender, which is capable of transmitting a sexually transmissible disease, including, but not limited to, contact between a
 - Penis and a vulva or an anus; or
 - Mouth and a penis, a vulva, or an anus.
- “Substantial risk of transmission” means a reasonable probability of disease transmission as proven by competent medical or epidemiological evidence.

Section 3 – Unlawful Acts

This section of the bill substantially amends s. 384.24, F.S.

It replaces current law references to “sexual intercourse” in subsection (1) of s. 384.24, F.S., with the newly created term “sexual conduct.” Not limiting the application of s. 384.24, F.S., to only acts of “intercourse” could result in greater informed consent between partners who engage in other sexual activities since the term seems to include a broader range of sexual activity.⁵

The bill also adds “human papillomavirus,” “hepatitis,” and “human immunodeficiency virus” to the list of sexually transmissible diseases in subsection (1) of s. 384.24, F.S., and makes it unlawful for a person who knows he or she is infected with a listed disease and who has been informed that the disease may be transmitted through sexual conduct, to:

- Act with the intent to transmit one of the listed diseases;
- Engage in conduct that poses a substantial risk of transmission when the other person is unaware that the person is a carrier of the disease; and
- Transmit the disease to the other person.

Section 384.24(2), F.S., as amended by the bill, provides that a person does not act with the intent required under subsection (1) if he or she:

- In good faith complies with a prescribed treatment regimen or the behavioral recommendations of the person’s health care provider or public health officials; or
- Offers to comply but that offer is rejected by his or her sexual partner.

“Behavioral recommendations” includes the use of a prophylactic device to measurably limit the risk of disease transmission.

⁵ It should be noted that the Florida Supreme Court determined in *Debaun v. State*, No. SC13-2336, March 16, 2017, that the term “sexual intercourse” in s. 384.24(2), F.S., “denotes sexual conduct that includes acts of oral and anal intercourse.” Thus, it appears this definitional change by the bill may not be necessary due to the court ruling, but it does not seem to run afoul of the court’s decision.

The bill provides that evidence of the person's failure to comply with the treatment regimen or behavioral recommendations is not sufficient, without more, to establish the element of intent.

Section 4 – Penalties

Section 384.34, F.S., sets forth the penalties related to s. 384.24, F.S., which contains unlawful conduct or actions related to sexually transmissible diseases and a partner's informed consent.

Current law provides that:

- Violation of s. 384.24(1), F.S., is a 1st degree misdemeanor (not informing partner of having a list of diseases).
- The first violation of s. 384.24(2), F.S., is a 3rd degree felony, while subsequent violations are 1st degree felonies (not informing partner of having HIV).⁶

The bill eliminates the current felony penalties and the unlawful act proscribed in s. 384.24(2), F.S.

Instead, under the bill it is a 1st degree misdemeanor to commit the offense created by the bill in s. 384.24(1), F.S., (explained above in Section 3 – Unlawful Acts).

A person who maliciously disseminates any false information or report concerning the existence of a sexually transmissible disease is currently subject to prosecution for a 3rd degree felony under s. 384.34(3), F.S. The bill changes the penalty to a 1st degree misdemeanor.

Additionally, the bill deletes the current prohibition of any person violating a DOH rule relating to sexually transmissible diseases, which subjects a person to a fine of up to \$500 and any other applicable penalties found in ch. 384, F.S.

A person who obtains the identifying information of an individual who has a sexually transmissible disease and who knows or should have known the nature of the information and maliciously, or for monetary gain, disseminates the information to an unauthorized person is currently subject to prosecution for a 3rd degree felony under s. 384.34(6), F.S. The bill changes the penalty to a 1st degree misdemeanor.

Section 5 – Criminal Transmission of HIV

Section 775.0877(1), F.S., currently requires the court to order a person who has pled guilty or no contest, or who is convicted of a crime in the list of offenses or the attempt to commit one of the listed offenses, which involves the transmission of "body" fluids from one person to another, to undergo HIV testing.

⁶ A 1st degree felony is punishable by up to 30 years' imprisonment and up to a \$10,000 fine pursuant to ss. 775.082 and 775.083, F.S. A habitual offender who commits a 1st degree felony is punishable by life imprisonment pursuant to s. 775.084, F.S.

The crimes listed in s. 775.0877(1), F.S., are:

- Section 794.011, F.S., relating to sexual battery;
- Section 826.04, F.S., relating to incest;
- Section 800.04, F.S., relating to lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age;
- Sections 784.011, 784.07(2)(a), and 784.08(2)(d), F.S., relating to assault;
- Sections 784.021, 784.07(2)(c), and 784.08(2)(b), F.S., relating to aggravated assault;
- Sections 784.03, 784.07(2)(b), and 784.08(2)(c), F.S., relating to battery;
- Sections 784.045, 784.07(2)(d), and 784.08(2)(a), F.S., relating to aggravated battery;
- Section 827.03(2)(c), F.S., relating to child abuse;
- Section 827.03(2)(a), F.S., relating to aggravated child abuse;
- Section 825.102(1), F.S., relating to abuse of an elderly person or disabled adult;
- Section 825.102(2), F.S., relating to aggravated abuse of an elderly person or disabled adult;
- Section 827.071, F.S., relating to sexual performance by a person less than 18 years of age;
- Sections 796.07 and 796.08, F.S., relating to prostitution;
- Section 381.0041(11)(b), F.S., relating to donation of blood, plasma, organs, skin, or other human tissue; or
- Sections 787.06(3)(b), (d), (f), and (g), F.S., relating to human trafficking.

The court ordered HIV test is not required if the offender has been tested voluntarily or pursuant to procedures set forth in s. 381.004(2)(h)6., F.S., s. 951.27, F.S., or other applicable law.

Section 381.004(2)(h)6., F.S., provides that the person to be tested does not have the right to decline testing under the following HIV testing circumstances:

- For the performance of an HIV test upon a defendant pursuant to the victim's request in a prosecution for any type of sexual battery⁷ where a blood sample is taken from the defendant voluntarily;
- Pursuant to court order for any purpose; or
- Pursuant to ss. 775.0877, 951.27, or 960.003, F.S.

However, the results of an HIV test performed under s. 381.004(2)(h)6., F.S., shall be disclosed solely to the victim and the defendant, except as provided in ss. 775.0877, 951.27, and 960.003, F.S.

Section 951.27, F.S., currently provides for local (city or county) inmates to be tested for HIV and other infectious diseases. Test results may be divulged in accordance with ss. 775.0877 and 960.003, F.S.

Additionally, s. 951.27, F.S., specifically provides that:

...upon request of the victim or the victim's legal guardian, or the parent or legal guardian of the victim if the victim is a minor, the results of any HIV test performed on an inmate who has been arrested for any sexual offense involving

⁷ "Sexual battery" is defined in s. 794.011(1)(h), F.S., as "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 battery does not include an act done for a bona fide medical purpose."

oral, anal, or vaginal penetration by, or union with, the sexual organ of another, shall be disclosed to the victim or the victim's legal guardian, or to the parent or legal guardian of the victim if the victim is a minor. In such cases, the county or municipal detention facility shall furnish the test results to the Department of Health, which is responsible for disclosing the results to public health agencies as provided in s. 775.0877 and to the victim or the victim's legal guardian, or the parent or legal guardian of the victim if the victim is a minor, as provided in s. 960.003(3).

The bill amends s. 775.0877, F.S., by:

- Changing the term “body fluids” to “semen or vaginal secretions”;
- Eliminating court ordered HIV testing for attempts to commit the listed crimes;
- Deleting s. 381.0041(11)(b), F.S., relating to donation of blood, plasma, organs, skin, or other human tissue from the list of crimes for which a court must order HIV testing of the offender; and
- Reducing the penalty in s. 775.0877(3), F.S., for criminal transmission of HIV for a second or subsequent violation of the offenses in s. 775.0877(1), F.S., from a 3rd degree felony to a 1st degree misdemeanor and adding that HIV actually be transmitted to the victim as an element of the crime.

Section 6 – Screening for Sexually Transmissible Diseases for Prostitution

Section 796.07, F.S., prohibits prostitution and prostitution-related activities.⁸ Under s. 796.07(2), F.S., it is unlawful:

- To own, establish, maintain, or operate any place, structure, building, or conveyance for the purpose of lewdness, assignation, or prostitution;
- To offer, or to offer or agree to secure, another for the purpose of prostitution or for any other lewd or indecent act;
- To receive, or to offer or agree to receive, any person into any place, structure, building, or conveyance for the purpose of prostitution, lewdness, or assignation, or to permit any person to remain there for such purpose;
- To direct, take, or transport, or to offer or agree to direct, take, or transport, any person to any place, structure, or building, or to any other person, with knowledge or reasonable cause to believe that the purpose of such directing, taking, or transporting is prostitution, lewdness, or assignation;
- For a person 18 years of age or older to offer to commit, or to commit, or to engage in, prostitution, lewdness, or assignation;
- To solicit, induce, entice, or procure another to commit prostitution, lewdness, or assignation;
- To reside in, enter, or remain in, any place, structure, or building, or to enter or remain in any conveyance, for the purpose of prostitution, lewdness, or assignation;
- To aid, abet, or participate in any of the acts or things enumerated in s. 796.07(2), F.S.; or
- To purchase the services of any person engaged in prostitution.

⁸ “Prostitution” means the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses. s. 796.07(1)(a), F.S.

Section 796.08(2), F.S., currently provides that a person arrested under s. 796.07, F.S., may request screening for a sexually transmissible disease, as defined in s. 796.08(1), F.S., and pay any associated costs. If the person tests positive, he or she is required to submit to appropriate treatment and counseling.

The bill amends s. 796.08(2), F.S., to *require* screening for sexually transmissible diseases. The bill also requires that DOH pay costs associated with the screening and to ensure that an infected person who chooses to take a postexposure prophylaxis medication pays only up to \$30 out-of-pocket for the medication.

The bill amends or repeals the remaining provisions in s. 796.08(3), (4), and (5), F.S. These changes include:

- Repealing a 3rd degree felony of committing prostitution or procuring another to commit prostitution knowing he or she had previously tested positive for HIV, under s. 796.08(5), F.S. (now a misdemeanor crime in s. 796.08(3), F.S.); and
- Repeal of subsection (5), allowing for dissemination of test results beyond the offender, to include state attorneys and courts for the purposes of future charges and sentences under s. 796.08(5), F.S. (the repealed crime).

Section 7 – Victims

Section 960.003, F.S., requires AIDS/HIV and hepatitis testing of persons accused of committing sexual offenses proscribed in ch. 794, F.S. (sexual battery), s. 800.04, F.S. (lewd or lascivious offenses), and the crimes listed in s. 775.0877(1), F.S.⁹ This includes the testing of juvenile offenders. This section of the law also provides for disclosure of the test results to the crime victim, and includes legislative intent language.

As amended by the bill, s. 960.003, F.S., provides legislative findings related to victims of “sexual assault” having access to medical care and affordable postexposure prophylaxis, and also:

- Requires the DOH to refer for medical services any person who alleges he or she has been the victim of a “sexual assault”¹⁰ involving an exchange of bodily fluids which presents a “substantial risk of transmission” of HIV; and
- Specifies that services must include the offer of postexposure prophylaxis to prevent the acquisition of HIV, which the DOH must ensure does not cost the person more than \$30 in out-of-pocket expenses.

⁹ Chapter 90-201, L.O.F. (see also HB 1115, SB 914 (1990)). For a good historical perspective see Michael Bruyere, “Damage Control for Victims of Physical Assault – Testing the Innocent for AIDS,” 21 Fla.St.U.L.Rev. 945 (Winter 1994). See also, chs. 1993-230 and 2011-220, L.O.F.

¹⁰ “Sexual assault” is not a term used to describe sex crimes defined in the criminal statutes. “Sexual battery” or “Lewd or lascivious molestation or battery” are examples of sex crimes proscribed in the Florida Statutes. See ss. 794.011 and 800.04, F.S. (This is not an exhaustive list.) The term also appears in the Legislative findings in Section 7 of the bill.

Section 8 – Offense Severity Ranking Chart

The bill amends s. 921.0022, F.S., the Criminal Punishment Code Offense Severity Ranking Chart, to delete the 3rd degree felony, Level 5 offense, because Section 1 of the bill made the crime a misdemeanor offense.

Section 9 – Effective Date

The bill is effective July 1, 2017.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

A person arrested for prostitution and prostitution-related activities under s. 796.07, F.S., will be required to submit to screening, which will now be paid for by the DOH.

A victim of “sexual assault” may be able to get access to postexposure prophylaxis to prevent the acquisition of HIV for no more than \$30 in out-of-pocket expenses.

C. Government Sector Impact:

On March 2, 2017, the Criminal Justice Impact Conference considered the identical House bill (HB 605) and determined that the bill would have a negative insignificant impact on the number of prison beds, meaning the bill would likely result in a decrease of ten or fewer prison beds.

The bill requires the DOH to pay for any costs associated with screening for a sexually transmissible disease for anyone requesting the screening under s. 796.08, F.S. (Section 6) and to ensure that access to postexposure prophylaxis (PEP) to prevent the acquisition

of HIV is available for no more than \$30 in out-of-pocket expenses (Section 7). The DOH estimated the following fiscal impacts:¹¹

- One FTE to manage the PEP and testing program: Sr. Human Services Program Specialist for nPEP coordination \$30,000, standard DOH professional package with limited travel at a cost of \$10,841, and computed with 28 percent fringe at a cost of \$8,400.
- “Cost of PEP medication is given at the 340B price minus the maximum \$30 the [DOH] can charge a victim for the medications. Some victims may have health insurance that will pay for the treatment, or access patient assistance programs, but there is no way to estimate those numbers.”
- “The total expenditures the [DOH] would incur for providing PEP medications are unknown but potentially significant. The [US] Bureau of Justice Statistics estimates that only 35 percent of sexual assaults were reported in 2015. It is indeterminate how many individuals would report a sexual assault and also utilize this program. The cost to the [DOH] for providing PEP medications could be \$1,687 (\$30 deducted for fee paid by victim) for PEP treatment [times] the number of sexual assault victims that utilize this program who do not have insurance or an ability to pay.”

VI. Technical Deficiencies:

None.

VII. Related Issues:

The DOH noted the following issues in its bill analysis:¹²

- Because only about 35 percent of victims of sexual assault report the assault, “this behavior complicates where and when sexual assault victims are likely to seek treatment, if at all. The time sensitivity of providing PEP [(postexposure prophylaxis)] for sexual assault victims is crucial, as well as knowing which health care entities are best equipped to timely respond to the situation. In many situations, the [DOH] may not be the entity examining the person or making the referral for medical services. If the medications are not started within 72 hours, it is not effective in preventing the transmission of HIV.”
- “PEP medicine provided to children is determined by the weight of the child and is provided in liquid form. The availability of this medicine outside a licensed pharmacy environment will be extremely limited.”
- So long as the service of providing the PEP is provided at a DOH facility, the DOH will be able to ensure that the out-of-pocket costs are no more than \$30; otherwise, the DOH will not have any authority over the expense of the PEP.
- Limiting “bodily fluids” to semen and vaginal secretions in Section 5 of the bill, relating to screening for sexually transmissible diseases for prostitution, would exclude other fluids, like exposure to blood.

¹¹ Department of Health, *Agency Bill Analysis: SB 628*, March 20, 2017.

¹² *Id.*

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 381.0041, 384.23, 384.24, 384.34, 775.0877, 796.08, 960.003, and 921.0022.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on March 21, 2017:

The CS:

- Changes the definition of “sexual conduct” (Section 2).
- Substantially amends the unlawful acts set forth in s. 384.24(1), F.S., (Section 3) by adding the human papillomavirus, hepatitis, and HIV to the list of sexually transmissible diseases in s. 384.24(1), F.S., and prohibiting a person infected with a listed disease from:
 - Acting with intent to transmit the disease;
 - Engaging in conduct that poses a substantial risk of transmission when a sex partner is unaware that the person is a carrier of the disease; and
 - Transmitting the disease to another person.However, the person does not act with intent if he or she complies with a certain treatment regimen or behavioral recommendations, or offers to comply but the person’s sex-partner rejects that offer. Additionally, “failure to comply,” without more, is not sufficient to establish intent.
- Restores ss. 790.07 and 796.08, F.S., relating to prostitution, to the list of crimes for which a court must order HIV testing of the offender, in s. 775.0877, F.S. (Section 5).
- Restores the reference to s. 960.003, F.S., in s. 775.0877(2), F.S., related to disclosure of HIV test results to a crime victim or other family members (Section 5).
- Requires that a person arrested under s. 796.07, F.S., be screened for a sexually transmissible disease and restores the requirement that a person who tests positive shall submit to treatment and counseling (Section 6). Requires the Department of Health to ensure that such person pay no more than \$30 out-of-pocket for a postexposure prophylaxis, if the person elects to take the medicine (Section 6).
- Restores the 1st degree misdemeanor of committing prostitution or procuring another to commit prostitution knowing he or she had previously tested positive for a sexually transmissible disease, which is now found under s. 796.08(3), F.S. (Section 6).
- Restores current law in s. 960.003, F.S., and the amendatory language setting forth legislative findings and victim services as provided in the bill remains. Also, adds a new cross-reference to the definition of “substantial risk of transmission” (Section 7).
- Eliminates sections 8 and 10 of the bill because the cross-references deleted in those bill sections are restored by the amendment.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
