

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 599 Lewd or Lascivious Exhibition  
**SPONSOR(S):** Judiciary Committee, Criminal Justice Subcommittee, Gottlieb  
**TIED BILLS:** IDEN./SIM. **BILLS:** SB 828

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 0 N, As CS	Bruno	Hall
2) Justice Appropriations Subcommittee	10 Y, 0 N	Jones	Gusky
3) Judiciary Committee	16 Y, 0 N, As CS	Bruno	Poche

### SUMMARY ANALYSIS

The Legislature created the offense of lewd or lascivious exhibition in the presence of a prison employee in 2010, in response to several successful lawsuits against the Department of Corrections for sexually hostile work environments. The lawsuits alleged the department failed to remedy exhibitionist inmate masturbation, also known as "gunning". Gunning and other lewd or lascivious exhibitionist acts, committed in prison and in the presence of a specified employee, are third degree felonies, punishable by up to five years in prison and a \$5,000 fine. However, the crime does not apply to the same acts committed by a county detention facility inmate. A county detention facility generally houses inmates who are detained pending the resolution of a case or serving a sentence of less than one year. Recently in Miami-Dade county, female county detention facility employees filed a lawsuit alleging a sexually hostile work environment due to gunning and other inappropriate inmate behavior.

CS/CS/HB 599 extends the crime of lewd or lascivious exhibition in the presence of an employee to cover conduct committed by county detention facility inmates. The bill amends the definitions of employee and facility to include a county detention facility and its employees. As such, county detention facilities will have an additional tool to deter sexually harassing inmate behavior and improve working conditions, especially for female employees.

The Criminal Justice Impact Conference met on February 27, 2019, and determined the bill will result in a "positive insignificant" state prison bed impact (increase of 10 or fewer prison beds). The bill may also have an indeterminate positive fiscal impact on county governments by reducing liability for lawsuits related to sexually hostile work environments.

The bill provides an effective date of October 1, 2019.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background

“Gunning” is the practice of inmates openly masturbating towards female prison or jail employees.<sup>1</sup> Across the country, employees have sued over sexually hostile work environments caused by their employers’ failure to remedy gunning and other exhibitionist lewd behaviors. In Florida, a group of female nurses at the Martin Correctional Institution sued the Department of Corrections (DOC) for failing to remedy sexually offensive conduct by the inmates, including gunning, and ultimately received a verdict awarding each nurse \$45,000.<sup>2</sup> In 2007, another group of nurses at the Washington Correctional Institution received a \$990,000 verdict against DOC for failing to remedy gunning.<sup>3</sup> On similar grounds, a group of female employees at a Florida federal prison settled with the federal government for \$20 million in 2017.<sup>4</sup>

The problem of gunning extends to county detention facilities that house inmates who are generally either detained while a case is pending or serving a sentence of less than one year.<sup>5</sup> In 2016, 31 female jail employees filed a class-action lawsuit against Miami-Dade County for failing to stop inmates from regularly exposing themselves, masturbating, and making lewd comments in the employees’ presence.<sup>6</sup>

##### Florida Law

In response to lawsuits against the DOC, the Legislature criminalized lewd or lascivious exhibition in the presence of a prison employee in 2010.<sup>7</sup> A detainee in a state or private correctional facility may not commit any of the following acts in the presence of an employee:

- Intentionally masturbate;
- Intentionally expose his or her genitals in a lewd or lascivious<sup>8</sup> manner; or
- Intentionally commit any other sexual act that does not involve actual physical or sexual contact with the victim, including, but not limited to:
  - Sadomasochistic abuse;<sup>9</sup>
  - Sexual bestiality;<sup>10</sup> or
  - The simulation of any act involving sexual activity.<sup>11</sup>

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<sup>1</sup> *Beckford v. Dept. of Corr.*, 605 F.3d 951 (11th Cir. 2010).

<sup>2</sup> *Id.*

<sup>3</sup> Kate Eckman, *Nurses Win Lawsuit Against DOC*, WJHG (Jan. 28, 2007), <https://www.wjhg.com/home/headlines/5386741.html> (last visited Mar. 30, 2019).

<sup>4</sup> Michael Alison Chandler, *Women working in male prisons face harassment from inmates and coworkers*, The Washington Post (Jan. 27, 2018), [https://www.washingtonpost.com/local/social-issues/women-working-in-male-prisons-face-harassment-from-inmates-and-co-workers/2018/01/27/21552cee-01f1-11e8-9d31-d72cf78dbeee\\_story.html?noredirect=on&utm\\_term=.92e36856561d](https://www.washingtonpost.com/local/social-issues/women-working-in-male-prisons-face-harassment-from-inmates-and-co-workers/2018/01/27/21552cee-01f1-11e8-9d31-d72cf78dbeee_story.html?noredirect=on&utm_term=.92e36856561d) (last visited Mar. 30, 2019).

<sup>5</sup> S. 951.23, F.S.

<sup>6</sup> Associated Press, *Female jail officers sue Miami-Dade for inmate harassment*, South Florida Sun Sentinel (Apr. 14, 2016), <https://www.sun-sentinel.com/local/miami-dade/sfl-ap-dade-jail-harassment-suit-20160414-story.html> (last visited Mar. 30, 2019).

<sup>7</sup> Ch. 2010-64, Laws of Fla.

<sup>8</sup> As defined by the Florida Supreme Court, the words “lewd” and “lascivious” carry the same meaning, which is a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act. *Chesebrough v. State*, 255 So.2d 675, 677 (Fla. 1971).

<sup>9</sup> Sadomasochistic abuse means flagellation or torture by or upon a person or animal, or the condition of being fettered, bound, or otherwise physically restrained, for the purpose of deriving sexual satisfaction, or satisfaction brought about as a result of sadistic violence, from inflicting harm on another or receiving such harm oneself. S. 847.001(13), F.S.

<sup>10</sup> Sexual bestiality means any sexual act, actual or simulated, between a person and an animal involving the sex organ of the one and the mouth, anus, or vagina of the other. S. 847.001(15), F.S.

<sup>11</sup> S. 800.09(2)(a), F.S.

An employee protected by this law is:

- A person employed by or contracting with:
  - A state or private prison;<sup>12</sup> or
  - The corporation operating the prison industry enhancement programs or correctional work programs.<sup>13</sup>
- A parole examiner<sup>14</sup> with the Florida Commission on Offender Review.<sup>15</sup>

The crime applies to conduct in a prison, but does not address such conduct in a jail. Lewd or lascivious exhibition in the presence of an employee is a third degree felony, punishable by up to five years in prison and a \$5,000 fine.<sup>16</sup>

### *Criminal Punishment Code*

Felony offenses subject to the Criminal Punishment Code<sup>17</sup> are listed in a single offense severity ranking chart, which uses 10 offense levels to rank felonies from least severe (1) to most severe (10). Each felony offense is assigned to a level according to the severity of the offense, commensurate with the harm or potential for harm to the community that is caused by the offense, as determined by statute.<sup>18</sup> If an offense is unlisted on the offense severity ranking chart, the Criminal Punishment Code provides a ranking based on felony level.<sup>19</sup> Lewd or lascivious exhibition in the presence of an employee is an unlisted third degree felony ranked as level one.<sup>20</sup>

A person's primary offense, any other current offenses, and prior offenses are scored using the points designated for the offense severity level of each offense.<sup>21</sup> A person may also accumulate points for factors such as victim injury points, community sanction violation points, and certain sentencing multipliers.<sup>22</sup> The final calculation, following the scoresheet formula, determines the lowest permissible sentence that the trial court may impose, absent a valid reason for departure.<sup>23</sup>

If a person scores more than 44 points, the lowest permissible sentence is a specified term of months in state prison, determined by a formula.<sup>24</sup> If a person scores 44 points or fewer, the court may impose a nonprison sanction, such as a county jail sentence, probation, or community control.<sup>25</sup>

### *Other Related Crimes*

Other crimes may cover gunning behavior in a jail. Battery of a facility employee by throwing, tossing, or expelling certain fluids or materials is also a third degree felony.<sup>26</sup> Under this law, a detained person may not throw, toss, or expel blood, masticated food, regurgitated food, saliva, seminal fluid, urine, or feces at or onto a facility employee with the intent to harass, annoy or threaten the employee.<sup>27</sup> This law protects county jail and juvenile detention facility employees in addition to prison employees.<sup>28</sup> A jail

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<sup>12</sup> In Florida, a private contractor may operate a prison pursuant to s. 944.105, F.S.

<sup>13</sup> Florida law authorizes DOC to contract with a nonprofit organization to operate a correctional work program pursuant to chapter 946, F.S.

<sup>14</sup> A parole examiner conducts hearings to determine eligibility for early release on parole. S. 947.16, F.S.

<sup>15</sup> S. 800.09(1)(a), F.S.

<sup>16</sup> Ss. 775.082, 775.083, and 800.09(2)(b), F.S.

<sup>17</sup> All felony offenses, other than capital felonies, committed on or after October 1, 1998, are subject to the Criminal Punishment Code. S. 921.002, F.S.

<sup>18</sup> S. 921.0022, F.S.

<sup>19</sup> S. 921.0023, F.S.

<sup>20</sup> *Id.*

<sup>21</sup> Ss. 921.0022 and 921.0024, F.S.

<sup>22</sup> S. 921.0024(2), F.S.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> S. 784.078, F.S.

<sup>27</sup> S. 784.078(3)(a), F.S.

<sup>28</sup> S. 784.078(1), F.S.

inmate may be charged with this crime when he causes or tries to cause seminal fluid to come into contact with a jail employee while gunning.

A person who publicly exposes his or her sexual organs in a vulgar or indecent manner commits a first degree misdemeanor,<sup>29</sup> punishable by up to one year in jail and a \$1,000 fine.<sup>30</sup> This offense applies to a jail inmate who exposes his or her sexual organ to an employee. Although gunning often includes exposure of a sexual organ, an inmate may also masturbate under his clothing in such a way that the lewd nature of his behavior is obvious and harassing; but such conduct would not constitute indecent exposure. Additionally, a jail may internally discipline an inmate for masturbation, indecent exposure, or other lewd offenses with disciplinary confinement, loss of gain time, or loss of privileges, which is the most common manner of dealing with the behavior.<sup>31</sup>

### Effect of Proposed Changes

CS/CS/HB 599 extends the crime of lewd or lascivious exhibition in the presence of an employee to cover conduct in a county detention facility. The bill includes in the definition of “employee:”

- Any person employed by or performing contractual services for a public or private entity operating a state correctional institution or private correctional facility;
- Any person employed by or performing contractual services for the corporation operating prison industry enhancement programs or correctional work programs;
- Any person who is a parole examiner with the Florida Commission on Offender Review; or
- Any person employed at or performing contractual services for a county detention facility.

The bill expands the definition of “facility” to include a county detention facility. As a result, a county detention facility inmate who does any of the following in the presence of an employee may be charged with a third degree felony:

- Intentionally masturbates;
- Intentionally exposes his or her 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.

The bill gives county detention facilities an additional tool to deter sexually harassing behavior and improve working conditions, especially for female employees. The bill does not list the offense on the offense severity chart of the Criminal Punishment Code; therefore, the offense remains a level one as an unranked third degree felony.

The bill provides an effective date of October 1, 2019.

### B. SECTION DIRECTORY:

**Section 1:** Amends s. 800.09, F.S., relating to lewd or lascivious exhibition in the presence of an employee.

**Section 2:** Provides an effective date of October 1, 2019.

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<sup>29</sup> S. 800.03, F.S.

<sup>30</sup> Ss. 775.082 and 775.083, F.S.

<sup>31</sup> Tonya Alanez, *Prisoner accused of indecent act alone in jail cell*, South Florida Sun Sentinel (July 25, 2007), <http://www.sun-sentinel.com/news/fl-xpm-2007-07-25-0707240341-story.html> (last visited Mar. 30, 2019).

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference reviewed the bill February 27, 2019, and determined that the bill will have a “positive insignificant” impact on state prison beds (increase of 10 or fewer prison beds) by creating a new felony crime.<sup>32</sup>

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill may have a positive insignificant impact on the number of county detention beds by creating a new felony crime. However, the bill may also have an indeterminate positive fiscal impact on county governments by reducing liability for lawsuits alleging a sexually hostile work environment, as facilities will have an additional tool to deter sexually harassing inmate behavior.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

### B. RULE-MAKING AUTHORITY:

Not applicable.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

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<sup>32</sup> Office of Economic and Demographic Research, *CS/HB 599 – Lewd or Lascivious Exhibition*, <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/CSHB599.pdf> (last visited March 30, 2019).

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

On February 21, 2019, the Criminal Justice Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment clarified the definition of employee to include a person employed at or performing contractual services for a county detention facility.

On April 3, 2019, the Judiciary Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment corrected a reference to municipal jails in the title language and changed the bill's effective date to October 1, 2019.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.