

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: SB 528

INTRODUCER: Senator Davis

SUBJECT: Gain-time for Attempted Sexual Offenses

DATE: March 17, 2023

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Parker</u>	<u>Stokes</u>	<u>CJ</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>ACJ</u>	_____
3.	_____	_____	<u>FP</u>	_____

I. Summary:

SB 528 amends s. 944.275, F.S., eliminating the possibility of gain-time for persons convicted of attempting specified offenses on or after July 1, 2023.

The bill provides an effective date of July 1, 2023.

II. Present Situation:

Gain-Time

Section 944.275, F.S., allows the Department of Corrections (DOC) to grant deductions from sentences in the form of gain-time in order to encourage satisfactory prisoner behavior, to provide incentive for prisoners to participate in productive activities, and to reward prisoners who perform outstanding deeds or services. There are currently three types of gain-time prisoners may earn: basic, incentive, and meritorious.¹

Currently, inmates serving sentences for specified convictions committed on or after October 1, 2014 are ineligible to earn incentive gain-time, including inmates serving sentences for attempt to commit, solicitation to commit or conspiracy to commit one of these underlying offenses. There are currently 791 inmates in DOC custody who are serving a sentence that includes an attempt, conspiracy or solicitation to commit one of the underlying offenses outlined in s. 944.275(4)(e), F.S., (777 inmates for attempt, 5 inmates for conspiracy and 9 inmates for solicitation).²

¹ Section 944.275, F.S.

² Department of Corrections, *2023 Agency Legislative Bill Analysis for HB 537*, at 2 (March 13, 2023) (on file with the Senate Committee on Criminal Justice).

As discussed below, the types of gain-time that a prisoner may earn, as well as the amount of gain-time a prisoner may earn, varies according to the offense date. Gain-time earned by a prisoner may also be forfeited for violations of state law or department rules.³

Incentive Gain-Time

The DOC may grant incentive gain-time for each month during which a prisoner works diligently, participates in training, uses time constructively, or otherwise engages in positive activities. The rate of incentive gain-time in effect on the date the prisoner committed the offense that resulted in his or her incarceration is the prisoner's rate of eligibility to earn incentive gain-time throughout the period of incarceration and cannot be altered by a subsequent change in the severity level of the offense for which the prisoner was sentenced. Section 944.275(4)(b), F.S., specifies that:

- For sentences imposed for offenses committed prior to January 1, 1994, up to 20 days per month of incentive gain-time may be granted;
- For sentences imposed for offenses committed on or after January 1, 1994, and before October 1, 1995:
 - Up to 25 days per month of incentive gain-time may be granted for offenses ranked in offense severity levels 1 through 7;
 - Up to 20 days per month of incentive gain-time may be granted for offenses ranked in offense severity levels 8, 9, and 10; and
- For sentences imposed for offenses committed after October 1, 1995, up to 10 days per month of incentive gain-time may be granted.

The DOC may grant, upon a recommendation of the education program manager, a one-time award of 60 additional days of incentive gain-time to a prisoner who is otherwise eligible and who successfully completes requirements for and is awarded a high school equivalency diploma or vocational certificate. A prisoner may not receive more than 60 days for educational attainment.⁴ The DOC may grant an additional six days of incentive gain-time if a prisoner attends and actively participates in 150 hours of adult basic education to attain basic and functional literacy.⁵

The DOC may not grant incentive gain-time for sentences imposed for the following offenses committed on or after October 1, 2014:

- Homicide occurring in the perpetration of or attempted perpetration of a sexual battery;
- Kidnapping of a child under the age of 13, and in the course of committing the offense, commits sexual battery against the child or lewd or lascivious battery, lewd or lascivious molestation, lewd or lascivious conduct, or lewd or lascivious exhibition;
- False imprisonment of a child under the age of 13, and in the course of committing the offense commits sexual battery against the child or lewd or lascivious battery, lewd or lascivious molestation, lewd or lascivious conduct, or lewd or lascivious exhibition;
- Sexual battery;
- Lewd or lascivious offenses upon or in the presence of persons less than 16 years of age;

³ Section 944.275, F.S.

⁴ Section 944.275(4)(d), F.S.

⁵ Section 944.801(3)(i)5., F.S. "Active participation" means at a minimum, that the inmate is attentive, responsive, cooperative, and completes assigned work.

- Lewd or lascivious offenses upon or in the presence of an elderly person or disabled person; or
- Transmission of certain images over a computer to a person who is less than 16 years of age.⁶

Basic Gain-Time

The DOC grants basic gain-time at the rate of 10 days for each month of each sentence imposed on a prisoner to encourage satisfactory behavior, subject to the following:

- Portions of any sentences to be served concurrently are treated as a single sentence when determining basic gain-time;
- Basic gain-time for a partial month is prorated on the basis of a 30-day month; and
- When a prisoner receives a new maximum sentence expiration date because of additional sentences imposed, basic gain-time is granted for the amount of time the maximum sentence expiration date was extended.⁷

Basic gain-time is awarded as a lump sum upon receipt into the custody of the DOC. Basic gain-time only applies to sentences imposed or offenses committed on or after July 1, 1978, and before January 1, 1994.⁸

The DOC may not grant basic gain-time to prisoners who are convicted of committing a sexual battery on or after October 1, 1992.⁹

Meritorious Gain-Time

The DOC may grant meritorious gain-time to a prisoner who performs some outstanding deed, such as saving a life or assisting in recapturing an escaped prisoner, or who in some manner performs an outstanding service that would merit the granting of additional deductions from the term of his or her sentence. The grant of meritorious gain-time may be from 1 to 60 days.¹⁰

Limitations on Earning Gain-Time

For sentences imposed for offenses committed on or after October 1, 1995, a prisoner may not earn any type of gain-time in an amount that would cause a sentence to expire, end, or terminate, or that would result in a prisoner's release, prior to serving a minimum of 85 percent of the sentence imposed.¹¹ Credits awarded by the court for time physically incarcerated are credited toward satisfaction of 85 percent of the sentence imposed. Except as provided by s. 944.275, F.S., a prisoner may not accumulate further gain-time awards at any point when the tentative release date is the same as that date at which the prisoner will have served 85 percent of the sentence imposed. If a prisoner is found to have violated state law or department rules, gain-time may be forfeited according to law.¹²

⁶ Section 944.275(4)(e), F.S.

⁷ Section 944.275(4)(a), F.S.

⁸ Section 944.275(6), F.S.

⁹ Section 794.011(7), F.S.

¹⁰ Section 944.275(4)(c), F.S.

¹¹ Section 944.275(4)(f), F.S.

¹² Sections 944.275(5) and 944.28, F.S.

State prisoners sentenced to life imprisonment must be incarcerated for the rest of their natural lives, unless granted pardon or clemency.¹³ Certain offenders are statutorily prohibited from earning gain-time:

- Prison releasee reoffenders must serve 100 percent of the court-imposed sentence and may not earn gain-time to shorten the length of incarceration.¹⁴
- Certain prisoners convicted of offenses involving the fleeing or attempting to elude a law enforcement officer are ineligible for statutory gain-time.¹⁵
- Prisoners convicted of committing or attempting to commit certain felonies while possessing or using a firearm or destructive device.¹⁶
- Prisoners convicted of committing or attempting to commit certain felonies while possessing or using a semiautomatic firearm and its high-capacity box magazine or a machine gun.¹⁷
- Prisoners convicted of battery on a law enforcement officer, firefighter, emergency medical providers, public transit employees or agents, or other specified officers while possessing a firearm or semiautomatic firearm and its high-capacity box magazine.¹⁸
- Prisoners convicted under the dangerous sexual felony offender statute.¹⁹

Forfeiture of Gain-Time

Florida law allows gain-time to be forfeited or withheld if a prisoner is found guilty of an infraction of state law or department rules.²⁰ A prisoner shall, without prior notice or hearing, forfeit all earned gain-time upon:

- Conviction for an escape committed before October 1, 2013;

¹³ *Id.*

¹⁴ Under s. 775.082(9), F.S., a defendant may be designated a “prison releasee offender” if within three years of being released from incarceration commits or attempts to commit: treason, murder, manslaughter, sexual battery, carjacking, home-invasion robbery, robbery, arson, kidnaping, aggravated assault with a deadly weapon, aggravated battery, aggravated stalking, aircraft piracy, unlawful throwing, placing, or discharging of a destructive device or bomb, any felony that involves the use or threat of physical force or violence against an individual, armed burglary, burglary of a dwelling, or burglary of an occupied structure, or any felony violation of ss. 790.07, 800.04, 827.03, 827.071, or 847.0135(5), F.S. A “prison releasee offender” also means any defendant who commits or attempts to commit one of the aforementioned offenses while serving a prison sentence or on escape status from a correctional facility.

¹⁵ Section 316.1935(6), F.S.

¹⁶ Section 775.087(2), F.S.

¹⁷ Section 775.087(3), F.S.

¹⁸ Section 784.07(3), F.S.

¹⁹ Section 794.0115, F.S.

²⁰ Section 944.275(5), F.S.

- Revocation of parole,²¹ conditional release,²² control release,²³ or clemency;²⁴
- Revocation of conditional medical release,²⁵ if the revocation was for any reason other than improvement in medical condition; or
- Revocation of provisional release supervision,²⁶ or the revocation of probation²⁷ or community control²⁸ if such supervision was imposed for a crime committed on or after October 1, 1989.²⁹

To declare a forfeiture, a written charge must be prepared, which specifies each instance of misconduct and the approximate date of each instance.³⁰ The prisoner must be given a copy of the charge, along with a notice of hearing before a disciplinary committee. The prisoner must be present at the hearing.³¹ During the hearing, the prisoner:

- Will be read the charge, asked if he or she understands the charge, and explained the range of penalties that could be imposed if there is a finding of guilt;
- Will be asked if staff assistance is required or desired for the hearing;
- For minor violations, will be advised that he or she may request the charge be referred to the disciplinary team; and

²¹ Parole is the release of a prisoner, prior to the expiration of the prisoner's court-imposed sentence with a period of supervision to be successfully completed by compliance with the conditions and terms of the release agreement ordered by the Florida Commission on Offender Review. Parole is only available to prisoners whose crimes were committed prior to October 1, 1983, with exceptions. *See* Florida Commission on Offender Review, *Release Types: Parole*, available at <https://www.fcor.state.fl.us/release-types.shtml> (last visited March 14, 2023).

²² Section 947.1405, F.S., requires certain violent prisoners who have also served a prior felony commitment at a federal or state correctional institution or who are habitual offenders, violent habitual offenders, violent career criminals, or court-designated sexual offenders to be released under supervision subject to specified terms and conditions upon reaching the tentative release date or provisional release date, as established by the DOC. *See also* Florida Commission on Offender Review, *Release Types: Post Release*, available at <https://www.fcor.state.fl.us/postrelease.shtml#conditionalRelease> (last visited March 14, 2023).

²³ Control release is an administrative function to manage the state's prison population within total capacity. The program, administered by the Florida Commission on Offender Review, through the Control Release Authority, maintains the prison population between 99 and 100 percent of its total capacity. Section 947.146, F.S.

²⁴ Article IV, Section 8 of the Florida Constitution authorizes a process to provide the means through which convicted individuals may be considered for relief from punishment and seek restoration of their civil rights. The clemency function is an act of mercy that absolves an individual from all, or any part, of the punishment that the law imposes. The power to grant clemency is vested in the Governor with the agreement of two cabinet members. The Governor also has the sole power to deny clemency. Florida Commission on Offender Review, *Clemency*, available at <https://www.fcor.state.fl.us/clemencyOverview.shtml> (last visited March 14, 2023).

²⁵ Section 947.149, F.S., authorizes the Florida Commission on Offender Review to grant a conditional medical release of a prisoner if, because of an existing medical or physical condition, the prisoner is determined by the department to be permanently incapacitated or terminally ill and the prisoner does not constitute a danger to herself or himself or others.

²⁶ Under the former s. 944.277, F.S., which was repealed by ch. 93-406, s. 32, L.O.F., the Secretary of Corrections was authorized to grant certain inmates with provisional credits when the population of the correctional system reached 98 percent of lawful capacity, which advanced the release date for such inmates.

²⁷ Section 948.001(8), F.S., defines "probation" as a form of community supervision requiring specified contacts with parole and probation officers and other terms and conditions as provided in s. 948.03, F.S.

²⁸ Section 948.001(3), F.S., defines "community control" as a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, administered by officers with restricted caseloads. Community control is an individualized program in which the freedom of an offender is restricted within the community, home, or non-institutional residential placement and specific sanctions are imposed and enforced.

²⁹ Rule 33-601.104, F.A.C.

³⁰ Section 944.28(2)(c), F.S.

³¹ Rule 33-601.307(1)(b), F.A.C., provides instances in which the prisoner does not have to attend the hearing and procedures if the prisoner refuses to attend the hearing or is disruptive.

- Will be read the statement of facts and be asked to plea.³²

If the prisoner pleads guilty, no further action is needed. If the prisoner pleads not guilty, evidence, including witness statements, is to be presented. The prisoner may make only an oral closing statement concerning the infraction under consideration at the hearing. If a prisoner refuses to enter a plea, it is treated as a “not guilty” plea.³³

A prisoner may forfeit all or part of gain-time earned if after the hearing, the prisoner is found to have:

- Violated a penal law of this state, or any rule of the DOC or institution;
- Threatened or knowingly endangered the life or physical well-being of another;
- Refused in any way to carry out or obey lawful instructions;
- Neglected to perform the work, duties, and tasks assigned in a faithful, diligent, industrious, orderly, and peaceful manner; or
- Escaped on or after October 1, 2013.³⁴

The DOC has the discretion to restore all or part of any gain-time that was forfeited due to disciplinary action if the prisoner has performed positively over a period of time, and it appears that the prisoner will continue to perform positively without further violation of the DOC’s rules or state laws.³⁵

Sentence Expiration and Release Dates

The DOC must establish a maximum sentence expiration date for each prisoner who is committed to the DOC to serve a term of years. The maximum sentence expiration date is the date on which the sentence(s) imposed on the prisoner will expire. The DOC must reduce the total time to be served by any time lawfully credited.³⁶

The DOC must also establish a tentative release date for each prisoner sentenced to a term of years. The tentative release date is the date on which the prisoner is projected to be released from custody based on the amount of gain-time earned or forfeited. The initial tentative release date is established by deducting basic gain-time from the maximum sentence expiration date.³⁷ Other gain-time is applied when earned or restored, to make the tentative release date earlier and forfeited gain-time is applied to make the tentative release date later.³⁸

A prisoner who has served his or her time, as reduced by gain-time deductions, must be released and placed under further supervision and control of the DOC.³⁹

³² Rule 33-601.307(1)(c)-(f), F.A.C.

³³ Rule 33-601.307(g), F.A.C.

³⁴ *Supra* note 29.

³⁵ Rule 33-601.105, F.A.C.

³⁶ Section 944.275(2), F.S.

³⁷ Basic gain-time only applies to prisoners serving sentences imposed or for offenses committed on or after July 1, 1978, and before January 1, 1994.

³⁸ Section 944.275(3), F.S.

³⁹ Section 944.291, F.S. Prisoners serving sentences imposed for offenses committed on or after October 1, 1995, must serve at minimum 85 percent of the imposed sentence.

Fla. Dept. of Corrections v. Gould

An inmate convicted of attempted sexual battery on a child under the age of 12 filed a writ of mandamus seeking to compel the DOC, to exercise its discretion and consider him as eligible for incentive gain-time, retrospectively and for the remainder of his sentence. Gould alleged that a conviction for criminal attempt was not excluded from the award of gain-time by statute because a conviction for a criminal attempt is a separate and distinct crime than the underlying offense.⁴⁰

The First District Court of Appeal (DCA), receded from previous decisions which held that a conviction for an attempted crime was a conviction for the underlying offense modified by the attempt statute in s. 777.04, F.S., and ruled that a conviction for an attempt was a separate and distinct offense.⁴¹ Thus, a person convicted of attempting to commit a crime that would otherwise be ineligible for the award of incentive gain-time is eligible for the award of gain-time.⁴² The DOC appealed the decision of the DCA, and that matter is pending before the Florida Supreme Court in Supreme Court Case No. SC22-1207.

III. Effect of Proposed Changes:

The bill amends s. 944.275, F.S., eliminating the possibility of gain-time for persons convicted of attempting specified offenses on or after July 1, 2023. For sentences imposed for offenses committed on or after July 1, 2023, the department may not grant incentive gain-time if the offense is a violation of an attempted violation of:

- Section 782.05(1)(a)2.c. F.S., Attempted felony murder occurring when a person perpetrates or attempts to perpetrate any felony enumerated in s. 782.04(3), F.S., and who commits, aids, or abets an intentional act that is not an essential element of the felony and that could, but does not, cause the death of another.
- Section 787.01(3)(a)2. Or 3., F.S., Kidnapping of a child under the age of 13, and in the course of committing the offense, commits sexual battery against the child or lewd or lascivious battery, lewd or lascivious molestation, lewd or lascivious conduct, or lewd or lascivious exhibition.
- Section 787.02(3)(a)2. or 3., F.S., False imprisonment of a child under the age of 13, and in the course of committing the offense commits sexual battery against the child or lewd or lascivious battery, lewd or lascivious molestation, lewd or lascivious conduct, or lewd or lascivious exhibition.
- Section 794.011, F.S., excluding s. 794.011(10), F.S., Sexual battery.
- Section 800.04, F.S., Lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age occurring when 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.
- Section 825.1025, F.S., Lewd or lascivious offenses committed upon or in the presence of an elderly person or disabled person occurring when a person intentionally touches in a lewd or

⁴⁰ *Fla. Dept. of Corrections v. Gould*, 344 So.3d 496 (Fla. 1st DCA 2022).

⁴¹ *Id.*

⁴² *Id.*

lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of an elderly person or disabled person when the person knows or reasonably should know that the elderly person or disabled person either lacks the capacity to consent or fails to give consent.

- Section 847.0135(5), F.S., Transmission of certain images over a computer to a person who is less than 16 years of age.

Under this bill, the DOC would continue to be prohibited from awarding incentive gain-time to a person who is convicted of committing an offense that is currently ineligible for the award of gain-time.

The bill provides an effective date of July 1, 2023.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

There will be no impact on the DOC's inmate and supervision population. However, the Office of Information Technology anticipates minimal technology impact, with the amount being indeterminate.⁴³

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 944.275 of the Florida Statute.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.

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

⁴³ Department of Corrections, *2023 Agency Legislative Bill Analysis for HB 537*, at 2 (March 13, 2023) (on file with the Senate Committee on Criminal Justice).