

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB JDC 19-02 Public Safety
SPONSOR(S): Judiciary Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Judiciary Committee	17 Y, 0 N	Hall	Poche

SUMMARY ANALYSIS

PCB JDC 19-02 makes varied and comprehensive changes to Florida law which impact public safety. The PCB:

- Expands the availability of inmate reentry programming and services by:
 - Increasing the availability of community specific reentry referrals;
 - Requiring the Department of Corrections (DOC) to establish a registration process for nonprofit organizations to provide inmate reentry services; and
 - Authorizing DOC to increase employment assistance positions, services, and transitional employment programs, including a Prison Entrepreneurship Program.
- Reduces barriers to occupational licensing for persons with a criminal history record by:
 - Limiting the period for which an agency or board may consider an applicant's criminal history;
 - Permitting a person incarcerated or on supervision to apply for licensure and to appear by teleconference or video conference at a licensing hearing; and
 - Requiring DOC to cooperate with a licensing board or agency to facilitate an applicant's appearance.
- Expands eligibility for sealing a criminal record if a charge was dismissed, not filed, or resulted in acquittal.
- Revises probation criteria to prioritize the highest levels of supervision for the most serious offenders by:
 - Creating a statewide alternative sanctioning program to resolve technical violations of probation;
 - Requiring a court to modify or continue a probationary term for specified technical violations;
 - Authorizing a court to sentence an offender to administrative probation;
 - Requiring early termination or conversion to administrative probation in specified circumstances; and
 - Standardizing a system of graduated incentives to reward a probationer's compliance.
- Raises felony theft thresholds for specified offenses, including grand theft and retail theft, to \$1,000.
- Expands access to therapeutic treatment courts by authorizing a judicial circuit to create a community court for specified misdemeanors and expanding eligibility for pretrial drug court and veterans' treatment court.
- Repeals and reduces driver license suspensions and revocations for non-driving related reasons.
- Repeals mandatory direct file for juvenile offenders and revises youthful offender sentencing eligibility.
- Raises hydrocodone trafficking thresholds to bring them in line with similar controlled substances.
- Repeals mandatory minimum sentences and reduces offense levels for specified regulatory offenses.
- Increases penalties for introducing a cell phone and other contraband into a state correctional institution.
- Revises offenses related to county detention facilities by:
 - Adding cell phones and other portable communication devices to prohibited contraband items;
 - Prohibiting lewd and lascivious exhibition in the presence of an employee; and
 - Clarifying that if otherwise qualified, a defendant released from a county detention facility instead of a prison, may be designated a prison releasee reoffender.
- Prohibits awarding attorney fees in injunctions for repeat, dating, or sexual violence, and stalking.
- Clarifies law enforcement may apply for an arrest warrant after obtaining an initial DNA match.
- Revises offense elements for specified cybercrimes and construction contracting fraud.
- Prohibits specified offenses for possession of obscene child-like sex dolls.
- Authorizes a veterinarian to report suspected criminal violations to specified entities.
- Authorizes specified law enforcement officers to carry a concealed firearm during off-duty hours in any state.
- Extends specified filing and reporting deadlines for crime victim compensation claims.

The bill may have an indeterminate fiscal impact on state and local governments.

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

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: pcb02a.JDC

DATE: 4/11/2019

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Theft Offenses

Background

Property Theft

A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or use, the property of another with intent to, either temporarily or permanently:

- Deprive the other person of a right to the property or a benefit from the property;¹ or
- Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.²

Section 812.014, F.S., defines theft offenses and generally categorizes offense levels based on the value of the property stolen. Whether a theft is a misdemeanor or a felony may also depend on the offender's prior history of theft convictions or the type of property stolen. Offense levels for theft crimes based on property value thresholds are classified as follows:

	Property Value	Offense Level
Grand Theft	≥ \$100,000	First Degree Felony ³
	≥ \$20,000, but < \$100,000	Second Degree Felony ⁴
	≥ \$10,000, but < \$20,000	Third Degree Felony ⁵
	≥ \$5,000, but < \$10,000	Third Degree Felony
	≥ \$300, but < \$5,000	Third Degree Felony
	≥ \$100, but < \$300 if taken from a dwelling or unenclosed curtilage ⁶ of a dwelling	Third Degree Felony
Petit Theft	≥ \$100, but < \$300	First Degree Misdemeanor ⁷
	< \$100	Second Degree Misdemeanor ⁸

Theft of a utility service is prosecuted under s. 812.014, F.S., and as such, the offense level is determined by the value of the utility stolen.

Additionally, the penalty for petit theft increases if a person has one or more prior theft convictions. Petit theft committed by a person with a previous theft conviction is a first degree misdemeanor.⁹ Petit theft committed by a person with two or more previous theft convictions is a third degree felony.¹⁰

¹ S. 812.014(1)(a), F.S.

² S. 812.014(1)(b), F.S.

³ A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Ss. 775.082(3)(b)1 and 775.083(1)(b), F.S.

⁴ A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Ss. 775.082(3)(d) and 775.083(1)(b), F.S.

⁵ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Ss. 775.082(3)(e) and 775.083(1)(c), F.S.

⁶ "Unenclosed curtilage of a dwelling" means the unenclosed land or grounds, or any outbuildings, directly and intimately adjacent to and connected with the dwelling and necessary, convenient, and habitually used in connection with that dwelling. S. 810.09(1)(b), F.S.

⁷ A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Ss. 775.082(4)(a) and 775.083(1)(d), F.S.

⁸ A second degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. Ss. 775.082(4)(b) and 775.083(1)(e), F.S.

⁹ S. 812.014(3)(b), F.S.

¹⁰ S. 812.014(3)(c), F.S.

Florida last increased the minimum threshold amount for third degree felony grand theft in 1986.¹¹ Florida added the third degree felony grand theft provisions related to property taken from a dwelling or its unenclosed curtilage in 1996.¹² The petit theft threshold amounts were last amended in 1996.¹³

Retail Theft

A person commits retail theft when he or she does any of the following with the intent to deprive a merchant of the possession, use, benefit, or full retail value of property:

- Takes possession of, or carries away, merchandise, property, money or negotiable documents;
- Alters or removes a label, universal product code, or price tag;
- Transfers merchandise from one container to another; or
- Removes a shopping cart, with intent to deprive the merchant of possession, use, benefit, or full retail value.¹⁴

Retail theft is a third degree felony if the property stolen is valued at \$300 or more and the offender:

- Individually, or with other persons, coordinates the activities of other individuals in committing the offense, in which case the amount of each individual theft is aggregated to determine the value of the property stolen;
- Commits theft from more than one location within a 48-hour period, in which case the amount of each individual theft is aggregated to determine the value of the property stolen;
- Acts in concert with other individuals within one or more establishments to distract the merchant, merchant's employee, or law enforcement officer in order to carry out the offense, or acts in other ways to coordinate efforts to carry out the offense; or
- Commits the offense by purchasing merchandise in a package or box that contains merchandise other than, or in addition to, that purported to be contained in the package or box.

Retail theft is a second degree felony when a person:

- Has previously been convicted of third degree felony retail theft; or
- Individually, or in concert with other persons, coordinates the activities of other persons in committing retail theft of \$3,000 or more of stolen property.¹⁵

Florida established the current threshold amounts for third degree felony retail theft in 2001.¹⁶

Prison and Probation Admissions

In fiscal year 2017-2018, DOC admitted 1,591 inmates to prison for grand theft offenses charged under s. 812.014, F.S., and 33 inmates for retail theft offenses charged under s. 812.015, F.S.¹⁷ During the same period, DOC admitted 9,511 offenders to probation for grand theft offenses charged under s. 812.014, F.S., and 195 offenders for retail theft offenses charged under s. 812.015, F.S.¹⁸

Theft Threshold Amounts in Other States

Since 2000, at least 39 states have increased the threshold dollar amounts for felony theft crimes.¹⁹ Nine states increased the threshold dollar amounts twice during this time period.²⁰

¹¹ Ch. 86-161, Laws of Fla.

¹² Ch. 96-388, Laws of Fla.

¹³ *Id.*

¹⁴ S. 812.015(1)(d), F.S.

¹⁵ S. 812.015(9), F.S.

¹⁶ Ch. 2001-115, Laws of Fla.

¹⁷ Email from Jared Torres, Legislative Affairs Director, Florida Department of Corrections, Fwd: Information Request (Feb. 27, 2019).

¹⁸ *Id.*

¹⁹ Pew Charitable Trusts, *States Can Safely Raise Their Felony Theft Thresholds, Research Shows* (May 22, 2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/05/22/states-can-safely-raise-their-felony-theft-thresholds-research-shows> (last visited Apr. 10, 2019).

²⁰ *Id.*

Year of Change	State	Previous Threshold	Enacted Threshold
2001	Oklahoma	\$50	\$500
2002	Missouri	\$150	\$500
2003	Alabama	\$250	\$500
	Mississippi	\$250	\$500
2004	Kansas	\$500	\$1,000
	Wyoming	\$500	\$1,000
2005	South Dakota	\$500	\$1,000
2006	Arizona	\$250	\$1,000
	New Mexico	\$250	\$500
	Vermont	\$500	\$900
2007	Colorado	\$500	\$1,000
	Minnesota	\$500	\$1,000
2009	Connecticut	\$1,000	\$2,000
	Delaware	\$1,000	\$1,500
	Kentucky	\$300	\$500
	Louisiana	\$300	\$500
	Maryland	\$500	\$1,000
	Montana	\$1,000	\$1,500
	Oregon	\$750	\$1,000
	Washington	\$250	\$750
2010	California	\$400	\$950
	Illinois	\$300	\$500
	New Hampshire	\$500	\$1,000
	South Carolina	\$1,000	\$2,000
	Utah	\$1,000	\$1,500
2011	Arkansas	\$500	\$1,000
	Nevada	\$250	\$650
	Ohio	\$500	\$1,000
2012	Georgia	\$500	\$1,500
	Rhode Island	\$500	\$1,500
2013	Colorado	\$1,000	\$2,000
	Indiana	Any amount	\$750
	North Dakota	\$500	\$1,000
2014	Alaska	\$500	\$750
	Louisiana	\$500	\$750
	Mississippi	\$500	\$1,000
2015	Alabama	\$500	\$1,500
	Nebraska	\$500	\$1,500
	Texas	\$1,500	\$2,500
2016	Alaska	\$750	\$1,000
	Hawaii	\$300	\$750
	Kansas	\$1,000	\$1,500
	Maryland	\$1,000	\$1,500
	Oklahoma	\$500	\$1,000
	Tennessee	\$500	\$1,000
2017	Massachusetts	\$250	\$1,200
2018	Virginia	\$200	\$500

The majority of states (36) and the District of Columbia set a \$1,000-or-greater property value threshold for felony theft.²¹ Twelve states have thresholds between \$500 and \$950, and two states, including Florida, have thresholds below \$500.²²

Opponents argue that increasing the threshold will incentivize offenders to steal items of greater value.²³ An examination of 23 states that changed felony theft thresholds between 2001 and 2011 revealed:

- Raising the felony theft threshold had no impact on the states' overall property crime or larceny rates;
- States that increased thresholds reported roughly the same average decrease in crime as the 27 states that did not; and
- The amount of a state's felony theft threshold did not correlate with the state's property crime and larceny rates.²⁴

Theft of State Funds

A person commits theft of state funds when he or she fails to remit taxes with the intent to unlawfully deprive or defraud the state of its money or the use or benefit thereof.²⁵ If the value of the stolen revenue is less than \$300, the offense is a second degree misdemeanor.²⁶ If the value of the stolen revenue is \$300 or more, but less than \$20,000, the offense is a third degree felony.²⁷

Obtaining Food or Lodging with Intent to Defraud

A person who obtains food, lodging, or other accommodations at any public food service establishment, or at any transient establishment, with intent to defraud, commits a second degree misdemeanor if the value of the goods obtained is less than \$300,²⁸ and a third degree felony if the value of the goods is \$1,000 or more.²⁹

Removing Property Upon Which a Lien Has Accrued

When a person rents a room or apartment in a hotel, apartment house, roominghouse, boardinghouse, or tenement house in, a lien in favor of the operator of the establishment exists upon all personal property brought into or placed in the establishment by the renter and by the renter's roommates, boarders, and guests.³⁰ The lien continues until the rent due is paid in full.³¹

A person who removes property upon which such a lien has accrued commits a criminal offense if the person removes the property without making full payment of the amount owed and without the written consent of the person operating the establishment to remove the property. The offense is a second degree misdemeanor if the value of the property removed is \$50 or less,³² and a third degree felony if the value of the property removed is greater than \$50.³³

²¹ *Id.*

²² *Id.*

²³ Lauren Krisai, *Stuck in the 80s: Time for Reform of Florida's Felony Theft Threshold*, The Journal of the James Madison Institute (Spring 2017), http://reason.org/files/florida_theft_threshold_stuck_in_1980s.pdf (last visited Apr. 10, 2019).

²⁴ *Id.*

²⁵ S. 212.15(2), F.S.

²⁶ S. 225.15(2)(a), F.S.

²⁷ S. 225.15(2)(b), F.S.

²⁸ S. 509.151, F.S.

²⁹ *Id.*

³⁰ S. 713.68, F.S.

³¹ *Id.*

³² S. 713.69, F.S.

³³ *Id.*

Sale of Used Motor Vehicle Goods as New

In a transaction for which any charges will be paid from the proceeds of a motor vehicle insurance policy, and in which the purchase price of the goods exceeds \$100, it is unlawful for the seller of the motor vehicle goods to knowingly misrepresent orally, in writing, or by failure to speak, that the goods are new or original when they are used or repossessed or have been used for sales demonstration.³⁴ A violation of this section is a third degree felony.³⁵

Effect of the Proposed Changes- Theft Offenses

Property Theft

PCB JDC 19-02 increases the threshold amounts for the following theft offenses:

Offense	Current Threshold	Proposed Threshold
Second degree petit theft	< \$100	< \$500
First degree petit theft	≥ \$100, but < \$300	≥ \$500, but < \$1,000 ³⁶
Third degree grand theft	≥ \$300, but < \$20,000	≥ \$1,000, but < \$20,000 ³⁷
Third degree grand theft of property from a dwelling or its enclosed curtilage	≥ \$100, but < \$300	≥ \$1,000, but < \$5,000 ³⁸

Additionally, the PCB adds theft of a utility service to the list of items the theft of which automatically constitutes grand theft and a third degree felony.

Retail Theft

The bill increases the threshold amount for third degree felony retail theft from \$300 or more to \$1,000 or more. The bill also increases the period from 48 hours to 30 days for which the value of property taken during multiple thefts may be aggregated to determine the offense level.

Other Theft Offenses

The bill increases threshold amounts for other theft offenses as follows:

Offense	Offense Level	Current Threshold	Proposed Threshold
Theft of State Funds	Second Degree Misdemeanor	< \$300	< \$1,000
	Third Degree Felony	≥ \$300	≥ \$1,000
Obtaining Food or Lodging with Intent to Defraud	Second Degree Misdemeanor	< \$300	< \$1,000
	Third Degree Felony	≥ \$300	≥ \$1,000
Removal of Property Upon Which a Lien Has Accrued	Second Degree Misdemeanor	≤ \$50	< \$1,000
	Third Degree Felony	> \$50	≥ \$1,000
Sale of Used Motor Vehicle Goods as New	First Degree Misdemeanor	None	< \$1,000
	Third Degree Felony	> \$100	≥ \$1,000

³⁴ S. 817.413(1), F.S.

³⁵ S. 817.413(2), F.S.

³⁶ According to the CPI Inflation Calculator of the U.S. Department of Labor's Bureau of Labor Statistics, \$100 in 1996 has the same buying power as \$163.03 in 2019 dollars and \$300 in 1996 has the same buying power as \$489.08 in 2019 dollars. U.S. Department of Labor, Bureau of Labor Statistics, *CPI Inflation Calculator*, <https://data.bls.gov/cgi-bin/cpicalc.pl> (last visited Apr. 10, 2019).

³⁷ According to the CPI Inflation Calculator of the U.S. Department of Labor's Bureau of Labor Statistics, \$300 in 1986 has the same buying power as \$688.99 in 2019 dollars. *Id.*

³⁸ *Id.*

Driver Licenses

Background

Florida requires a person to hold a driver license³⁹ or be exempt from licensure to operate a motor vehicle on the state's roadways.⁴⁰ Exemptions to the licensure requirement include nonresidents who possess a valid driver license issued by their home states, federal government employees operating a government vehicle for official business, and people operating a road machine,⁴¹ tractor, or golf cart.⁴² Both licensed drivers and exempt individuals have a driving privilege in Florida.⁴³

The Department of Highway Safety and Motor Vehicles (DHSMV) can revoke or suspend a driver license or driving privilege for several driving-related and non-driving-related reasons. Revocation means a termination of the privilege to drive,⁴⁴ while suspension means the temporary withdrawal of the privilege to drive.⁴⁵ Both revocations and suspensions can be indefinite or for a defined period of time, but only revocations in certain circumstances can be permanent.⁴⁶ The base fee for driver license reinstatement after revocation is \$75; the fee for reinstatement after suspension is \$45.⁴⁷ As both revocations and suspensions functionally prohibit a person from driving, the terms are often used interchangeably in statute.

Driving-related bases for driver license or driving privilege suspension or revocation include:

- A fleeing or attempting to elude a law enforcement officer conviction;⁴⁸
- Certain noncriminal traffic infractions, such as those causing death or serious bodily injury;⁴⁹
- Driving under the influence (DUI);⁵⁰
- Habitual traffic offender⁵¹ classification;⁵²
- Refusal to submit to a lawful breath, blood, or urine test in a DUI investigation;⁵³
- Accumulation of points⁵⁴ on a driving record;⁵⁵ and
- Incompetency to drive a motor vehicle.⁵⁶

Non-driving-related bases for driver license or driving privilege suspension or revocation include:

- Failure to comply with a civil penalty, traffic court directive, or criminal financial obligation;⁵⁷
- Support delinquency;⁵⁸
- Truancy;⁵⁹
- Adjudication of guilt for misdemeanor theft;⁶⁰

³⁹ Driver license means a certificate that, subject to all other requirements of law, authorizes an individual to drive a motor vehicle. S. 322.01(17), F.S.

⁴⁰ S. 322.03(1), F.S.

⁴¹ Road machines are road construction equipment. *Marrero v. State*, 921 So.2d 748, 750 (Fla. 5th DCA 2006).

⁴² S. 322.04, F.S.

⁴³ *State v. Miller*, 227 So.3d 562, 564 (Fla. 2017) ("the Legislature's use of 'driving privilege' refers to all individuals who may *lawfully* operate vehicles on Florida's roads, even if they do not possess a Florida driver license").

⁴⁴ S. 322.01(36), F.S.

⁴⁵ S. 322.01(40), F.S.

⁴⁶ Ss. 322.26(1)(a) and 322.26(2), F.S.

⁴⁷ Department of Highway Safety and Motor Vehicles, *Fees*, <https://www.flhsmv.gov/fees/> (last visited Apr. 10, 2019).

⁴⁸ S. 316.1935(5), F.S.

⁴⁹ S. 318.14, F.S.

⁵⁰ Ss. 322.26, 322.271, and 322.28, F.S.

⁵¹ A person is designated a habitual traffic offender after accumulating three or more enumerated traffic convictions or 15 or more other moving violation convictions within a five year period. S. 322.264, F.S.

⁵² S. 322.27(5)(a), F.S.

⁵³ S. 322.2615(1)(b), F.S.

⁵⁴ There is an established point system for evaluating traffic violations to determine a person's continuing qualification to operate a motor vehicle. S. 322.27(3), F.S.

⁵⁵ S. 322.27(3) F.S.

⁵⁶ S. 322.27(1)(c), F.S.

⁵⁷ Ss. 318.15 and 322.245, F.S.

⁵⁸ S. 322.058, F.S.

⁵⁹ S. 322.091, F.S.

⁶⁰ S. 812.0155, F.S.

- Graffiti by a minor;⁶¹ and
- A drug conviction.⁶²

The penalties for driving while license suspended or revoked (DWLSR) range from a moving traffic violation⁶³ to a third degree felony.⁶⁴ Generally, a person can be charged with a felony for DWLSR if:

- He or she knows⁶⁵ of the suspension or revocation and has at least two prior convictions for DWLSR.⁶⁶
- He or she qualifies as a habitual traffic offender.⁶⁷
- His or her license has been permanently revoked.⁶⁸

However, a person whose suspension or revocation is due to financial reasons and who does not have a prior forcible felony⁶⁹ conviction only faces misdemeanor DWLSR charges.⁷⁰

Drug Offense Revocations

Federal Law

Federal law requires a state to revoke, suspend, or delay issuing or reinstating a driver license for a minimum term of six months upon a conviction for any drug offense.⁷¹ A state may allow for exceptions to the mandatory revocation, suspension, or delay requirement where compelling circumstances justify such an exception.⁷² The federal government may withhold federal highway funding from a noncompliant state.⁷³

Alternatively, a state may opt out of enacting or enforcing a six month revocation, suspension, or delay requirement and still receive federal highway funding if the governor certifies in writing that:

- The governor is opposed to such a law, and
- The legislature has adopted a resolution expressing its opposition to such a law.⁷⁴

As of January 2018, 38 states had opted out of the revocation, suspension, or delay requirement.⁷⁵

⁶¹ S. 806.13, F.S.

⁶² S. 322.055, F.S.

⁶³ S. 318.18, F.S.

⁶⁴ Ss. 322.34 and 322.341, F.S.

⁶⁵ The element of knowledge is satisfied if the person has been previously cited for driving while license suspended; or the person admits to knowledge of the cancellation, suspension, or revocation; or the person received notice of the cancellation, suspension, or revocation. There is a rebuttable presumption that the knowledge requirement is satisfied if a judgment or order appears in the department's records for any case except for one involving a suspension by the department for failure to pay a traffic fine or for a financial responsibility violation. S. 322.34(2), F.S.

⁶⁶ S. 322.34(2)(c), F.S.

⁶⁷ S. 322.34(5), F.S.

⁶⁸ S. 322.341, F.S.

⁶⁹ "Forcible felony" means treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual. S. 776.08, F.S.

⁷⁰ S. 322.34(1), F.S.

⁷¹ 23 U.S.C. § 159(a)(3)(A)(i).

⁷² 23 USC §159(a)(3)(A).

⁷³ 23 USC § 159(a) and (b).

⁷⁴ 23 USC § 159(a)(3)(B).

⁷⁵ The jurisdictions still enforcing a drug offense suspension law include: Alabama, Arkansas, the District of Columbia, Florida, Iowa, Michigan, Mississippi, New Jersey, New York, Pennsylvania, Texas, Utah, and Virginia. Joshua Aiken, *Reinstating Common Sense: How driver's license suspensions for drug offenses unrelated to driving are falling out of favor*, <https://www.prisonpolicy.org/driving/national.html> (last visited Apr. 10,2019).

Florida Law

In Florida, a person 18 or older loses his or her driver license or driving privilege for one year upon being convicted of a drug offense, including:

- Possession of a controlled substance;
- Sale of a controlled substance;
- Trafficking in a controlled substance; or
- Conspiracy to possess, sell, or traffic in a controlled substance.⁷⁶

If a person already has a driver license or driving privilege at the time of conviction, DHSMV revokes his or her license or privilege for one year from the date of conviction.⁷⁷ If the person's driver license or driving privilege is suspended or revoked at the time he or she is convicted of a drug offense, DHSMV extends the suspension or revocation by one year.⁷⁸ If the person does not have a driver license or driving privilege, DHSMV withholds the issuance of a license or privilege for one year, either from the date of conviction or the date of eligibility, whichever is later.⁷⁹

The one year revocation, extension, or delay in issuance can be shortened under the following circumstances:

- The person is evaluated for and, if necessary, completes a drug treatment and rehabilitation program approved by the Department of Children and Families.
- A court directs the department to issue a restricted license for business or employment purposes only.
- DHSMV grants a petition for restoration of a person's driving privilege. A person becomes eligible to file such a petition after six months of the revocation have expired.⁸⁰

Additionally, Florida law authorizes DHSMV to revoke a person's driver license upon conviction for felony possession of a controlled substance if, at the time of such possession, the person was driving or in actual physical control of a motor vehicle.⁸¹ A person whose license is revoked for this reason is ineligible for any form of hardship license.⁸² A revocation on these grounds lasts for one year.⁸³

A person under 18 years old who is found guilty of or delinquent for a drug offense or certain alcohol offenses⁸⁴ loses his or her driving privilege for:

- Between six months and one year for a first violation; and
- Two years for a second violation.⁸⁵

If a minor already has a driver license or driving privilege at the time of conviction, DHSMV revokes his or her license or privilege for the applicable time period, calculated from the date of conviction.⁸⁶ If a minor's driver license or driving privilege is suspended or revoked at the time of conviction, DHSMV extends the suspension or revocation by the applicable amount of time.⁸⁷ If a minor does not have a driver license or driving privilege, DHSMV withholds issuing a license or privilege for the applicable time period, calculated from the date on which he or she would have become eligible for a driver license or driving privilege.⁸⁸ Like an adult whose driver license is revoked for a drug offense, a minor receiving a

⁷⁶ S. 322.055, F.S.

⁷⁷ S. 322.055(1), F.S.

⁷⁸ S. 322.055(3), F.S.

⁷⁹ S. 322.055(4), F.S.

⁸⁰ S. 322.044(1), (2), (3) and (4), F.S.

⁸¹ S. 322.27, F.S.

⁸² *Id.*

⁸³ S. 322.28(1), F.S.

⁸⁴ Ss. 562.11(2) and 562.111, F.S.

⁸⁵ S. 322.056, F.S.

⁸⁶ S. 322.056(1)(a), F.S.

⁸⁷ S. 322.056(1)(b), F.S.

⁸⁸ S. 322.056(c), F.S.

revocation under this section may also petition DHSMV for reinstatement after completing six months of the revocation.⁸⁹

Suspensions for Offenses Committed by Minors

A minor loses his or her driver license or driving privilege when found guilty or delinquent of certain criminal offenses or to have committed certain noncriminal offenses.

Offense	Mandatory Suspension or Revocation
<ul style="list-style-type: none"> • Misrepresenting age to induce another to sell, give, serve, or deliver alcohol.⁹⁰ • Purchasing or attempting to purchase alcohol.⁹¹ • Possession of alcohol.⁹² 	<ul style="list-style-type: none"> • 6 month to 1 year suspension for a first time offense. • 2 year suspension for a second or subsequent offense.⁹³
<ul style="list-style-type: none"> • Possession of tobacco (third violation in 12 weeks).⁹⁴ • Misrepresenting age or military service to induce another to sell, give, furnish, or deliver tobacco (third violation in 12 weeks).⁹⁵ • Possession of a nicotine product or nicotine dispensing device (third violation in 12 weeks).⁹⁶ • Misrepresenting age or military service to induce another to sell, give, furnish, or deliver a nicotine product or nicotine-dispensing device (third violation in 12 weeks). 	60 day suspension. ⁹⁷
<ul style="list-style-type: none"> • Possession of a firearm.⁹⁸ • Possession or use of a firearm in the commission of any other crime.⁹⁹ • Graffiti.¹⁰⁰ 	1 year suspension. ¹⁰¹

A minor who fails to comply with certain sanctions for committing certain noncriminal offenses also loses his or her driver license or driving privilege. For a first offense in which a minor fails to comply with sanctions, a court must suspend or withhold issuance of a driver license for 30 days.¹⁰² For a second offense in which a minor fails to comply with sanctions, a court must suspend or withhold issuing a driver license for 45 days.¹⁰³ Noncriminal offenses for which a minor may lose his or her driving privilege for failing to comply with sanctions are:

⁸⁹ S. 322.055, F.S.

⁹⁰ Ss. 322.056(1) and 562.11(2), F.S.

⁹¹ *Id.*

⁹² Ss. 322.056(1) and 562.111(1), F.S.

⁹³ S. 322.056(1), F.S.

⁹⁴ Ss. 322.056(3) and 569.11(1), F.S.

⁹⁵ Ss. 322.056(3) and 569.11(2), F.S.

⁹⁶ Ss. 322.056(3) and 877.112(6), F.S.

⁹⁷ S. 322.056(3), F.S.

⁹⁸ Ss. 790.22(3) and (5), F.S.

⁹⁹ Ss. 790.22(9) and (10), F.S.

¹⁰⁰ Ss. 806.13(7) and (8), F.S.

¹⁰¹ S. 790.22(5), F.S.

¹⁰² S. 322.056(2), F.S.

¹⁰³ S. 322.056(2), F.S.

- Possession of tobacco.¹⁰⁴
- Misrepresenting age or military service to induce another to sell, give, furnish, or deliver tobacco.¹⁰⁵
- Purchase of, or attempted purchase of, tobacco.¹⁰⁶
- Possession of a nicotine product or nicotine dispensing device.¹⁰⁷
- Misrepresenting age or military service to induce another to sell, give, furnish, or deliver a nicotine product or nicotine-dispensing device.¹⁰⁸

An adult who provides alcohol to a minor also faces suspension of his or her driving privilege for three to six months for a first offense and up to one year for a second offense.¹⁰⁹

Suspension for Theft

A court may order a person's driver license suspended upon an adjudication of guilt for misdemeanor theft.¹¹⁰ A first time suspension on this basis may be for up to six months, and a second or subsequent suspension may be for up to one year.¹¹¹ A court may revoke, suspend, or withhold issuing the driver license of a person younger than 18 as an alternative to sentencing the minor under certain circumstances.¹¹²

Failure to Meet Court-Imposed Obligations

The clerk of court can notify DHSMV to suspend a license for several reasons, including failure to comply with civil penalties,¹¹³ failure to appear,¹¹⁴ and failure to pay criminal financial obligations.¹¹⁵ These suspensions last until the individual is compliant with the court's requirements for reinstatement¹¹⁶ or, in the case of criminal financial obligations, the court grants relief from the suspension.¹¹⁷ In FY 2017-18, over 1.25 million driver license suspensions were initiated by clerks of court for failure to meet court-imposed obligations.¹¹⁸

Payment Plans, Community Service Options, and Collections

The clerk of court is required to accept partial payment of court-related fees, service charges, costs, or fines in accordance with the terms of an established payment plan.¹¹⁹ The court may review the reasonableness of the payment plan. A monthly payment amount is presumed to correspond to the person's ability to pay if the amount does not exceed two percent of the person's annual net income, divided by 12.¹²⁰

The court may convert a statutory financial obligation in a criminal case or a noncriminal traffic infraction into a requirement to perform community service.¹²¹ The hourly conversion rate for community

¹⁰⁴ Ss. 322.056(2) and 569.11(1), F.S.

¹⁰⁵ Ss. 322.056(2) and 569.11(2), F.S.

¹⁰⁶ *Id.*

¹⁰⁷ Ss. 322.056(2) and 877.12(6), F.S.

¹⁰⁸ Ss. 322.056(2) and 877.12(7), F.S.

¹⁰⁹ Ss. 322.057 and 562.11(1), F.S.

¹¹⁰ S. 812.0155, F.S.

¹¹¹ S. 812.0155(1), F.S.

¹¹² S. 812.0155(2), F.S.

¹¹³ S. 318.15, F.S.

¹¹⁴ S. 318.15, F.S.

¹¹⁵ S. 322.245, F.S.

¹¹⁶ Ss. 318.15(2) and 322.245(5), F.S.

¹¹⁷ S. 322.245(5), F.S.

¹¹⁸ Department of Highway Safety and Motor Vehicles, *Sanctions Created/Effective for FY 17/18* (January 8, 2019).

¹¹⁹ S. 28.246(4), F.S.

¹²⁰ S. 28.246(4), F.S.

¹²¹ Ss. 938.30(2) and 318.18(8)(b)1.a., F.S.

service is equal to the federal minimum wage,¹²² unless the person performing the community service has a trade or profession for which there is a community service need, in which case the rate is the prevailing wage rate for that trade or profession.¹²³

The clerk of court must pursue the collection of any financial obligations that remain unpaid after 90 days by referring the account to a private attorney or collection agent.¹²⁴ The clerk must have attempted to collect the unpaid obligation through a collection court, collections docket, or any other collections process prior to referring the account for collection, find the referral to be cost-effective, and follow any applicable procurement processes.¹²⁵ A collection fee of up to 40 percent of the amount owed at the time the account is referred may be added to the outstanding balance.¹²⁶

Reinstatement Clinics

A person with a suspended or revoked license cannot drive or obtain motor vehicle insurance, which can inhibit his or her ability to work and further compound the problem of outstanding financial obligations. Several counties have held events to assist individuals whose licenses are suspended for financial reasons related to civil penalties or criminal financial obligations. In April 2015, 60 out of 67 counties participated in Operation Green Light, a short-term event during which clerks of court waived the 40 percent collections surcharge in exchange for full payment of outstanding financial obligations, resulting in reinstatement.¹²⁷ The total statewide cost for the event was \$132,707.21; the clerks collected \$5,414,069.35 and reinstated 1,851 licenses.¹²⁸ Several counties have since conducted similar events.

Effect of Proposed Changes- Driver Licenses

Revocation for Drug Offenses

The PCB changes the one year revocation for an adult drug offense conviction to a six month suspension. If a person already has a driver license or driving privilege at the time of conviction, DHSMV suspends his or her license or privilege for six months from the date of conviction. If the person's driver license or driving privilege is suspended or revoked at the time he or she is convicted of a drug offense, DHSMV extends the suspension or revocation by six months.¹²⁹ If the person does not have a driver license or driving privilege, DHSMV withholds issuing a license or privilege for:

- Six months from the date of conviction for a person otherwise eligible by reason of age for a driver license;¹³⁰ or
- Six months from the date at which the person would reach eligibility for a person ineligible by reason of age for a driver license.¹³¹

The PCB repeals the provisions of s. 322.055, F.S., that permit a person to apply to DHSMV for early reinstatement six months into the revocation. The PCB amends the language granting a court the authority to issue a hardship license to require the court to find a compelling circumstance to justify the exception, consistent with federal requirements for highway funding. The PCB retains a person's ability to have his or her license reinstated before six months upon being evaluated for and completing, if

¹²² 29 U.S.C. § 206 (2018).

¹²³ S. 318.18(8)(b)1.b., F.S.; Bureau of Labor Statistics, *May 2016 National Occupational Employment and Wage Estimates: United States*, https://www.bls.gov/oes/current/oes_nat.htm#00-0000 (last visited Apr. 10, 2019) (e.g. the mean hourly wage for an electrician is \$27.24).

¹²⁴ S. 28.246(6), F.S.

¹²⁵ S. 28.246(6), F.S.

¹²⁶ S. 28.246(6), F.S.

¹²⁷ Harrison Barrus, *Operation green light gives ticket payers a break*, NEWS 4 JAX, <https://www.news4jax.com/news/local/operation-green-light-gives-ticket-payers-a-break> (last visited Apr. 10, 2019).

¹²⁸ Florida Clerks of Court Operations Corporation, *Operation Green Light Success Story* (Summer 2015).

¹²⁹ S. 322.055(3), F.S.

¹³⁰ S. 322.055(2), F.S.

¹³¹ S. 322.055(4), F.S.

necessary, a drug treatment and rehabilitation program. The PCB also reduces the suspension, extension of suspension, or withholding of issuing a driver license for a person younger than 18 convicted of a drug offense to six months.

Suspensions for Offenses Committed by Minors

The PCB:

- Repeals all bases for suspension for minors relating to possession of, purchase of, and misrepresenting age or military service to obtain alcohol, tobacco, and nicotine.
- Converts the mandatory suspension of a driver license for possession of a firearm by a minor to a discretionary suspension.
- Converts the mandatory suspension for graffiti committed by a minor to a discretionary suspension.
- Repeals the suspension for an adult convicted of providing alcohol to a minor.

Suspension for Theft

The PCB repeals the authority of the court to suspend a driver license for an adjudication of guilt for a misdemeanor theft offense. However, the PCB retains the authority of a court to suspend a driver license as an alternative sentence for a person less than 18 years old who is adjudicated delinquent or guilty of misdemeanor theft.

Driver License Reinstatement Days

The PCB requires each clerk of court to establish a Driver License Reinstatement Days program for reinstating suspended driver licenses. The clerk may work collaboratively with DHSMV, the state attorney's office, the public defender's office, the circuit and county courts, and any interested community organization. The program must occur at least once a year, and the PCB encourages clerks to offer the event outside of regular business hours or on a weekend. Participants must pay the full license reinstatement fee; however, the clerk may compromise or waive other fees and costs to facilitate reinstatement. The clerk is required to report specified data to the Florida Clerks of the Court Operations Corporation relating to the costs and success of the program.

A person is eligible for the Driver License Reinstatement Days program if his or her driver license or driving privilege was suspended for:

- Driving without a valid license;
- Driving with a suspended license;
- Failing to make a payment on penalties in collection;
- Failing to appear in court for a traffic violation; or
- Failing to comply with directives for a traffic infraction or driver license offense.

A person is not eligible for reinstatement under the program if his or her driver license or driving privilege is suspended or revoked:

- Because the person failed to fulfill a court-ordered child support obligation;
- For DUI;
- Because the person has not completed a required driver training program, driver improvement course, or alcohol or substance abuse education or evaluation program;
- For a traffic-related felony; or
- Because the person is a habitual traffic offender.

Veteran Treatment Courts

Background

Veterans' treatment courts (VTCs) are problem-solving courts addressing the root causes of criminal behavior.¹³² Modeled after drug court treatment programs, VTCs divert eligible veterans¹³³ and servicemembers¹³⁴ into treatment programs for military-related conditions or war-related trauma, including:

- Post-traumatic stress disorder;
- Mental illness;
- Traumatic brain injury; and
- Substance abuse.

VTCs are uniquely able to leverage resources available from the U.S. Department of Veterans Affairs to provide treatment and other services to veterans and servicemembers.¹³⁵ VTCs involve not only cooperation among traditional partners found in drug courts, such as the judge, state attorney, public defender, case manager, treatment provider, probation, and law enforcement, but also cooperation with the:

- Veterans Health Administration (VHA);
- Veterans Benefit Administration;
- State Department of Veterans Affairs;
- Vet Centers;
- Veterans Service Organizations;
- Department of Labor;
- Volunteer veteran mentors; and
- Other veterans support groups.¹³⁶

According to the State Court Administrator's Office of Court Improvement, as of July 2018, there were 30 VTCs in Florida.¹³⁷ Additionally, the Office of Court Improvement reports that in 2016, Florida's VTCs admitted 1,090 participants and graduated 640.¹³⁸

Eligibility

Diversion to a VTC program may occur either before trial or at sentencing. Under current law, to be eligible to participate in the VTC, the defendant must suffer a military-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem, and be:

- An honorably discharged veteran,¹³⁹
- A generally discharged veteran,¹⁴⁰ or
- An active duty servicemember.¹⁴¹

¹³² FLA. STATE COURTS, *Problem-Solving Courts*, <http://www.flcourts.org/resources-and-services/court-improvement/problem-solving-courts/> (last visited Apr. 10, 2019).

¹³³ S. 1.01(14), F.S., defines a veteran as a person who served in active military, naval, or air service who was discharged or released under honorable conditions or who later received an upgraded discharge under honorable conditions.

¹³⁴ S. 250.01(19), F.S., defines a servicemember as a person serving as a member of the United States Armed Forces on active duty or state active duty and members of the Florida National Guard and United States Reserve Forces.

¹³⁵ *Id.*

¹³⁶ FLA. STATE COURTS, *Veterans Courts*, <https://www.flcourts.org/Resources-Services/Court-Improvement/Problem-Solving-Courts/Veterans-Courts> (last visited Apr. 10, 2019).

¹³⁷ FLA. STATE COURTS, *Veterans Courts*, <https://www.flcourts.org/Resources-Services/Court-Improvement/Problem-Solving-Courts/Veterans-Courts> (last visited Apr. 10, 2019).

¹³⁸ *Id.*

¹³⁹ S. 1.01(14), F.S.

¹⁴⁰ S. 948.21(2), F.S.

¹⁴¹ S. 250.01(19), F.S.

Pretrial Intervention Participation

After a criminal arrest, rather than being prosecuted, an eligible veteran may be diverted to a pretrial intervention program.¹⁴² Before placing a veteran in a pretrial intervention program, a veterans' treatment intervention team must develop an individualized, coordinated strategy for the veteran. The team must present the coordinated strategy to the veteran in writing before he or she agrees to enter the program. The strategy is modeled after the 10 therapeutic jurisprudence principles and key components for treatment-based drug court programs.¹⁴³

If a defendant agrees to participate in the pretrial intervention program, the court retains jurisdiction for the program term. At the end of the program, the court considers recommendations by the state attorney and the program administrator. If the veteran successfully completes the treatment program, the court must dismiss the criminal charges and the veteran may petition the court to expunge the arrest record and the plea.¹⁴⁴ If the veteran does not successfully complete the program, the court can order the veteran to continue education and treatment or authorize the state attorney to proceed with prosecution.¹⁴⁵

Postadjudicatory Participation

Veterans and servicemembers may also qualify for treatment and services as part of a criminal sentence.¹⁴⁶ For crimes committed on or after July 1, 2012, a court may order a veteran or servicemember suffering from a military-related mental illness, traumatic brain injury, or substance abuse disorder to complete a mental health or substance abuse treatment program as a condition of probation or community control.¹⁴⁷

Effect of Proposed Changes- Veteran Treatment Courts

PCB JDC 19-02 expands eligibility for VTCs to individuals who are current or former:

- U.S. Department of Defense contractors.
- Military members of a foreign allied country.

Almost 25 percent of U.S. Department of Defense workers are civilians.¹⁴⁸ A U.S. Department of Defense contractor is eligible for VTCs because such a person, while not necessarily a member of the military, may experience war-related trauma similar to that experienced by military members.

The bill does not define "foreign allied country," and a definition of such does not appear elsewhere in Florida law. Presumably, a person seeking acceptance into a VTC under this provision would have to demonstrate he or she is a current or former military member of a country allied with the United States.

¹⁴² S. 948.08(7), F.S., authorizes a court to consider veterans charged with a non-disqualifying felony for a pretrial veterans' treatment intervention program. Disqualifying felonies are listed in s. 948.06(8)(c), F.S., and include 19 disqualifying offenses of a serious nature, including kidnapping, murder, sexual battery, treason, etc. See also s. 948.16(2), F.S., establishes the misdemeanor pretrial veterans' treatment intervention program.

¹⁴³ See s. 948.08(7)(b), F.S. (requiring a coordinated strategy for veterans charged with felonies); section 948.16(2)(b), F.S. (requiring a coordinated strategy for veterans charged with misdemeanors); s. 397.334(4), F.S. (requiring treatment based court programs to include therapeutic jurisprudence principles and components recognized by the United States Department of Justice and adopted by the Florida Supreme Court Treatment-based Drug Court Steering Committee).

¹⁴⁴ Ss. 948.16(2)(b) and 948.08(7)(b), F.S.

¹⁴⁵ Ss. 948.08(7)(b)-(c), F.S.

¹⁴⁶ S. 948.21, F.S.

¹⁴⁷ S. 948.21, F.S.

¹⁴⁸ U.S. DEPARTMENT OF DEFENSE, *Ask Us*, <https://www.defense.gov/ask-us/faq/Article/1743465/is-everyone-who-works-for-the-defense-department-in-the-military/> (last visited Apr. 10, 2019).

Pretrial Drug Court

Background

A qualified person is entitled to enter a voluntary, one-year pretrial substance abuse education and treatment intervention program,¹⁴⁹ including a county treatment-based drug court program.¹⁵⁰ A drug court team develops a coordinated strategy for each participant in a drug court program.¹⁵¹ A pretrial drug court program may use sanctions for noncompliance once a participant has agreed to the program, including placement in a treatment program or short periods of incarceration.¹⁵² A court must dismiss the charges upon finding a person successfully completed a pretrial drug court program.¹⁵³ If a person does not successfully complete the program, a court may order the person into further education and treatment or order that the charges revert to the normal channels for prosecution.¹⁵⁴

Upon motion by either party or the court's own motion, a court must allow an eligible person who wishes to enter a pretrial substance abuse education and treatment intervention program court to do so,¹⁵⁵ subject to certain exceptions.¹⁵⁶ A person is eligible for a pretrial drug court program if he or she:

- Is charged with:
 - A nonviolent felony¹⁵⁷ and is identified as having a substance abuse problem; or
 - A second or third degree felony for purchase or possession of a controlled substance, prostitution, tampering with evidence, solicitation for purchase of a controlled substance, or obtaining a prescription by fraud.
- Has not been charged with a crime of violence.
- Has not previously been convicted of a felony.

However, a court may deny a person's admission to a pretrial drug court program if the person was previously offered admission to a pretrial drug court program and rejected the offer on the record.¹⁵⁸ Additionally, the state attorney may request a preadmission hearing for a person believed to be involved in dealing or selling controlled substances; if the state proves such involvement by a preponderance of the evidence, a court must deny the person admission into the pretrial substance abuse education and treatment intervention program.¹⁵⁹

Effect of Proposed Changes- Pretrial Drug Court

The PCB expands eligibility for pretrial substance abuse education and treatment intervention programs by allowing a person with up to two prior felony convictions to enter the program, provided the prior felony convictions are for nonviolent felonies only. The PCB also requires any person entering drug court to be:

- Identified as having a substance abuse problem; and
- Amenable to treatment.

The PCB grants a court discretion to deny admission to an eligible person with prior felony convictions. Admission of an eligible person with no prior felony convictions remains mandatory.

¹⁴⁹ S. 948.08(6)(a), F.S.

¹⁵⁰ S. 397.334, F.S.

¹⁵¹ Ss. 397.334(4) & 948.08(6)(b), F.S.

¹⁵² S. 948.08(6)(b), F.S.

¹⁵³ S. 948.08(6)(c), F.S.

¹⁵⁴ *Id.*

¹⁵⁵ S. 948.08(6)(a), F.S.

¹⁵⁶ Ss. 948.08(6)(a)1. & 2., F.S.

¹⁵⁷ A nonviolent felony means a third degree felony burglary or trespass offense or any other felony offense that is not a forcible felony under s. 776.08, F.S. S. 948.08(6)(a), F.S.

¹⁵⁸ S. 948.08(a)1., F.S.

¹⁵⁹ S. 948.08(a)2., F.S.

Mandatory Minimum Sentencing

Background

Horse Meat Market in Florida

Generally, horsemeat is consumed in parts of Europe, Asia and South America.¹⁶⁰ The Federal Meat Inspection Act (FMIA) requires the United States Department of Agriculture (USDA) to inspect all “amenable species” such as, cattle, sheep, goats, and horses when slaughtered for processing into products for human consumption.¹⁶¹ This act, administered by the USDA’s Food Safety and Inspection Service (FSIS), ensures that meat and meat products from these animals are safe, wholesome, and properly labeled.

Congress has banned the use of federal funds to conduct mandatory inspections at horse slaughterhouses since 2014, effectively preventing any domestic horse slaughter operation.¹⁶² The last three U.S. slaughterhouses, all exporting to foreign markets, closed in 2007.¹⁶³

Currently, a person commits a third degree felony that carries a one-year mandatory minimum sentence if he or she:

- Sells horse meat for human consumption unless the horse meat is clearly stamped, marked, and described as horse meat for human consumption; or
- Transports, distributes, sells, purchases, or possesses horsemeat for human consumption that is not clearly stamped, marked, and described as horsemeat for human consumption or horsemeat that is not acquired from a licensed slaughterhouse.¹⁶⁴

Effect of Proposed Changes- Mandatory Minimum Sentencing

The PCB abolishes the mandatory minimum sentence for the sale, purchase, or possession of horsemeat for human consumption unless clearly stamped, marked, and described as horsemeat for human consumption.

Defendants convicted for the sale of horsemeat for human consumption will be sentenced based on the Criminal Punishment Code, rather than be required to serve a mandatory minimum sentence.

Prison Releasee Reoffender

Background

A person who qualifies as a prison releasee reoffender is subject to a mandatory minimum sentence. A prison releasee reoffender is a person being sentenced for committing or attempting to commit a qualifying offense¹⁶⁵ within three years of being released from:

- A state correctional facility operated by DOC or a private vendor; or

¹⁶⁰ Jessica Sutcliffe, *Do Not Use in Horses Intended for Human Consumption: Horse Meat and Its Public Health Danger* (May 1, 2014), https://scholarship.shu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1588&context=student_scholarship (last visited Apr. 10, 2019).

¹⁶¹ National Conference of State Legislatures, *Federal Food Safety Laws* (2008), <http://www.ncsl.org/documents/agri/foodsafetylaws.pdf> (last visited Apr. 10, 2019).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ S. 500.451, F.S.

¹⁶⁵ Qualifying offenses for prison releasee reoffender status are treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; arson; kidnapping; 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; use of a weapon in the commission of a felony; lewd or lascivious offense upon or in the presence of a person less than 16 years old; abuse, aggravated abuse, or neglect of a child; sexual performance by a child; and computer pornography. S. 775.082(9)(a)3., F.S.

- A correctional institution of another jurisdiction following incarceration for which the sentence is punishable by more than one year in Florida.¹⁶⁶

A prison releasee reoffender also includes a person who commits or attempts to commit a qualifying offense while serving a prison sentence or on escape status from a state correctional facility operated by DOC or a private vendor or from a correctional institution of another jurisdiction.¹⁶⁷

A court must sentence a prison releasee reoffender to a:

- Five year mandatory minimum for a third degree felony.
- 15 year mandatory minimum for a second degree felony.
- 30 year mandatory minimum for a first degree felony.
- Life mandatory minimum for a first degree felony punishable by life or life felony.¹⁶⁸

Under certain circumstances, a court may sentence a person to a prison sentence, which is a term of imprisonment for a felony exceeding one year, but the person may ultimately be released from a county detention facility¹⁶⁹ rather than prison. For example, a court must give a defendant credit for time served in the county jail when imposing a sentence.¹⁷⁰ If a defendant stays in detention during the pendency of his or her case for two years and is sentenced to two years in prison with credit for time served, that defendant would have served the entirety of his or her “prison” sentence in county jail and would be released from the county jail. A person may also stay in a county detention facility while serving a prison sentence to resolve or testify in other pending matters, causing such person to potentially be released from county jail on a prison sentence rather than from prison.

In December 2018, the Florida Supreme Court held that a defendant released from a county jail after having been committed to the legal custody of DOC was not a prison releasee reoffender within the meaning of the current prison releasee reoffender sentencing statute.¹⁷¹

Effect of Proposed Changes- Prison Releasee Reoffender

The PCB amends the definition of prison releasee reoffender to include a person who was released from a county detention facility following incarceration for an offense for which the sentence pronounced was a prison sentence.

Drug Trafficking

Background

Drug trafficking occurs when a person knowingly sells, purchases, manufactures, delivers, or brings into the state, or is in actual or constructive possession of, a specified quantity of a controlled substance.¹⁷² Generally, drug trafficking offenses are first degree felonies,¹⁷³ punishable by up to 30 years imprisonment.¹⁷⁴ Section 893.135, F.S., outlines threshold amounts of the applicable controlled

¹⁶⁶ S. 775.082(9)(a)1., F.S.

¹⁶⁷ S. 775.082(9)(a)2., F.S.

¹⁶⁸ S. 775.082(9)(a)3., F.S.

¹⁶⁹ A county detention facility means county jail, a county stockade, a county work camp, a county residential probation center, and any other place except a municipal detention facility used by a county or county officer for the detention of persons charged with or convicted of either felony or misdemeanor. S. 951.23(1)(a), F.S.

¹⁷⁰ S. 921.161(1), F.S.

¹⁷¹ *State v. Lewars*, 259 So. 3d 793 (Fla. 2018).

¹⁷² Florida law criminalizes trafficking in cannabis; cocaine; illegal drugs, which include morphine, opium, hydromorphone, or any salt derivative, isomer, or salt of an isomer thereof, including heroin; hydrocodone, oxycodone; fentanyl; phencyclidine; methaqualone; amphetamine; flunitrazepam; gamma-hydroxybutyric (GHB); gamma-butyrolactone (GBL); 1,4-Butanediol; phenethylamines; lysergic acid diethylamide (LSD); synthetic cannabinoids; and n-benzyl phenethylamines. S. 893.135, F.S.

¹⁷³ Ss. 775.082 and 775.083, F.S.

¹⁷⁴ Trafficking in certain controlled substances can be a capital offense under specified circumstances. See, e.g., s. 893.135(1)(h)2., F.S. (Any person who knowingly manufactures or brings into this state 400 grams or more of amphetamine . . . who knows that the

substance for each trafficking offense. All drug trafficking offenses are subject to mandatory minimum sentences and heightened fines, which are determined by the threshold amounts. Absent waiver by the prosecutor, a judge may not sentence an offender below the statutory mandatory minimum sentence; however, the prosecutor may waive the mandatory minimum.¹⁷⁵

Hydrocodone and Oxycodone

A person traffics in hydrocodone when he or she knowingly sells, purchases, manufactures, delivers, or brings into the state, or is knowingly in actual or constructive possession of, 14 grams or more of hydrocodone. The following thresholds determine the applicable mandatory minimum sentence and fine:¹⁷⁶

Hydrocodone Threshold	Mandatory Minimum	Fine
≤ 14 g. but < 28 g.	3 yrs.	\$50,000
≤ 28 g. but < 50 g.	7 yrs.	\$100,000
≤ 50 g. but < 200 g.	15 yrs.	\$500,000
≤ 200 g. but < 30 kg.	25 yrs.	\$750,000
≤ 30 kg.	Life	\$500,000

A person traffics in oxycodone when he or she knowingly sells, purchases, manufactures, delivers, or brings into the state, or is knowingly in actual or constructive possession of, 7 grams or more of oxycodone.¹⁷⁷ The following thresholds determine the applicable mandatory minimum sentence and fine:¹⁷⁸

Oxycodone Threshold	Mandatory Minimum	Fine
≤ 7 g. but < 14 g.	3 yrs.	\$50,000
≤ 14 g. but < 25 g.	7 yrs.	\$100,000
≤ 25 g. but < 100 g.	15 yrs.	\$500,000
≤ 100 g. but < 30 kg.	25 yrs.	\$750,000
≤ 30 kg.	Life	\$500,000

The Legislature created the specific crimes of trafficking in hydrocodone and oxycodone in 2014.¹⁷⁹ Prior to the creation of these specific offenses, both substances were covered by the crime of “trafficking in illegal drugs,” with the following thresholds and corresponding mandatory minimums and fines:¹⁸⁰

2013 Illegal Drugs Threshold	Mandatory Minimum	Fine
≤ 4 g. but < 14 g.	3 yrs.	\$50,000
≤ 14 g. but < 28 g.	15 yrs.	\$100,000
≤ 28 g. but < 30 kg.	25 yrs.	\$500,000
≤ 30 kg.	Life	\$500,000
≤ 60 kg.	Capital Offense	\$500,000

probable result of such manufacture or importation would be the death of any person commits capital manufacture or importation of amphetamine, a capital felony).

¹⁷⁵ *Madrigal v. State*, 545 So. 2d 392 (Fla. 3d DCA 1989) (prosecutor has right to waive the mandatory minimum sentence requirement absent any rule or statutory authority).

¹⁷⁶ S. 893.135(1)(c)2., F.S.

¹⁷⁷ S. 893.135(1)(c)3., F.S.

¹⁷⁸ *Id.*

¹⁷⁹ Ch. 2014-176 § 1, Laws of Fla.

¹⁸⁰ S. 893.135(1)(c)1., F.S. (2013).

A 2012 report by the Office of Program Policy Analysis and Government Accountability (OPPAGA) addressed sentencing laws for trafficking in prescription opioids such as hydrocodone and oxycodone.¹⁸¹ For these drugs, which usually present in pill form, the weight of the entire pill – including noncontrolled substance additives – contributes to the total weight for determining the threshold. A common example is a medication that contains both hydrocodone and acetaminophen. OPPAGA cited such a pill that had a weight of 0.65 grams and contained 10 milligrams (mg.) of hydrocodone; it found that “it takes 7 pills of 10 mg. hydrocodone, which are large pills with 325 to 750 mg. of acetaminophen, to reach the [then] threshold of 4 grams for a minimum mandatory prison sentence of three years.”¹⁸² The Legislature raised the threshold such that it now requires 22 such pills to reach the threshold of 14 grams of hydrocodone for a mandatory minimum sentence of three years.

Comparing hydrocodone to oxycodone, OPPAGA examined a sample medication containing 30 mg. of oxycodone and no acetaminophen that weighed 0.13 grams. It found that:

. . . [I]t takes approximately 31 pills of 30 mg. oxycodone to reach the [then] threshold of 4 grams since this type of oxycodone is a smaller pill and does not include acetaminophen. Thus, it takes more oxycodone pills than hydrocodone pills to trigger a minimum mandatory sentence, even though oxycodone is more potent and likely to lead to adverse outcomes, such as addiction and overdose.¹⁸³

Raising the threshold from 4 grams to 7 grams in creating the crime of trafficking in oxycodone made it so that it would take 54 of the sample oxycodone pills cited in the OPPAGA report to reach the three year mandatory minimum threshold.

Effect of Proposed Changes- Drug Trafficking

The PCB raises the base threshold amount for trafficking in hydrocodone from 14 grams to 28 grams. Looking at the sample hydrocodone pill examined by OPPAGA, the new threshold requires 44 pills containing 10 mg. of hydrocodone to reach a trafficking amount. This threshold is more aligned with the pill count threshold for oxycodone, which requires 54 sample pills containing 30 mg. of oxycodone.

The PCB similarly raises the mandatory minimum penalty thresholds to:

Hydrocodone Threshold	Mandatory Minimum	Fine
≤ 14 g. but < 28 g.	3 yrs.	\$50,000
≤ 28 g. but < 50 g.	7 yrs.	\$100,000
≤ 50 g. but < 200 g.	15 yrs.	\$500,000
≤ 200 g. but < 30 kg.	25 yrs.	\$750,000
≤ 30 kg.	Life	\$500,000

Community Courts

Background

Problem-Solving Courts in Florida

Problem-solving courts are specialized, non-traditional courts addressing the underlying causes of crime to reduce recidivism and promote rehabilitation. Florida created the first drug court, a type of

¹⁸¹ OPPAGA, *Opinions Are Mixed About Sentencing Laws for Painkiller Trafficking*, Report No. 12-02, <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1202rpt.pdf> (last visited Apr. 10, 2019), at 1.

¹⁸² *Id.* at 5.

¹⁸³ *Id.*

problem-solving court, in the United States in Miami-Dade County in 1989.¹⁸⁴ Today, Florida has over 170 problem-solving courts.¹⁸⁵

Another type of problem-solving court is the community court, which typically focuses on crimes that plague a local community. These courts provide non-adversarial interactions and seek to build relationships in the community, addressing each defendant individually, with the goals of addressing the underlying causes of crime, reducing recidivism, and promoting rehabilitation. A community court may require a participant to agree to a list of possible sanctions for failure to comply with the program, including jail-based treatment programs or terms of secured detention or incarceration.¹⁸⁶

On January 9, 2019, Ft. Lauderdale launched a new community court program,¹⁸⁷ focusing particularly on minor crimes committed by the local homeless population, including loitering, panhandling, and ordinance violations. The program aims to reduce the number of people arrested and sent to jail for minor crimes. Other program goals include addressing the underlying causes of homelessness, preventing crime, and diverting participants to social services.¹⁸⁸

Effect of Proposed Changes- Community Courts

PCB JDC 19-02 allows each judicial circuit to establish a community court program for defendants charged with certain misdemeanors. The chief judge of the circuit must issue an administrative order specifying the misdemeanor offenses to be addressed by the community court. In determining which offenses to include, the chief judge must consider the needs and concerns of the communities within the circuit. This allows each judicial circuit to adapt its community court to its own particular needs. State government agencies involved in the criminal justice system are required to support community court programs, and entry into the program is voluntary for defendants.

The bill requires each community court to:

- Adopt a non-adversarial approach;
- Establish an advisory committee to make recommendations in each case;
- Consider the needs of the victim;
- Consider individualized treatment services for the defendant;
- Provide for judicial leadership and interaction; and
- Monitor each defendant's compliance with the program.

Additionally, each community court must have a resource coordinator appointed by the chief judge. The resource coordinator must:

- Coordinate the participating agencies and service providers;
- Provide case management services;
- Monitor defendants' compliance with the program; and
- Manage data collection.

Each community court must also have an advisory committee selected by the chief judge and consisting of, at a minimum:

- The chief judge or a judge designated by the chief judge (serving as chair);
- The state attorney or a designee;

¹⁸⁴ *Id.*

¹⁸⁵ FLA. STATE COURTS, *Problem-Solving Courts*, <https://www.flcourts.org/Resources-Services/Court-Improvement/Problem-Solving-Courts> (last visited Apr. 10, 2019).

¹⁸⁶ S. 397.334(5), F.S.

¹⁸⁷ Brittany Wallman, *Fort Lauderdale Launches Florida's First Homeless Community Court*, SUN SENTINEL (Jan. 9, 2019), <http://www.sun-sentinel.com/local/broward/fort-lauderdale/fl-ne-homeless-court-fort-lauderdale-20190107-story.html> (last visited Apr. 10, 2019).

¹⁸⁸ Caitie Switalski, *Social Services, Not Jail: New Community Court Seeks to Address Causes of Homelessness in Broward*, WLRN (Jan. 9, 2019), <http://www.wlrn.org/post/social-services-not-jail-new-community-court-seeks-address-causes-homelessness-broward> (last visited Apr. 10, 2019).

- The public defender or a designee; and
- The resource coordinator.

The chief judge may appoint additional committee members, including community stakeholders, treatment representatives, or any other persons the chair deems appropriate. The advisory committee reviews each case and makes recommendations to the judge for appropriate sanctions and treatment solutions, but the judge has final decision-making authority on sentencing.

The bill requires each judicial circuit to report certain data to the Office of State Courts Administrator to evaluate the community court program. A circuit choosing to establish a community court must fund the program with sources other than state funds, except for costs already assumed by the state under s. 29.004, F.S.¹⁸⁹ Funds provided by executive branch agencies for treatment and other services may also be used.

Youthful Offender Sentencing

Background

Cognitive Development in Young People

Scientific studies have revealed that the brain does not reach full maturity until a person's early 20's.¹⁹⁰ Specifically, the executive functions of impulse control, response inhibition, planning ahead, risk avoidance, emotional regulation, and foreseeing consequences are among the last to develop cognitively.¹⁹¹ Immaturity in the development of these functions suggests decreased culpability for criminal conduct. Research further indicates that youth respond more favorably to rehabilitative efforts than adults.¹⁹²

Relying on scientific research in this field, the United States Supreme Court has held the following to be unconstitutional:

- Executing a person for a crime committed prior to reaching age 18.¹⁹³
- Sentencing a person to life imprisonment without the possibility of parole for a crime committed prior to reaching age 18.¹⁹⁴

Youthful Offender Sentencing

A court may sentence a person as a youthful offender in certain circumstances. Youthful offender sentencing supersedes all other sentencing requirements under Florida law,¹⁹⁵ including:

- Sentencing guidelines.
- A minimum mandatory sentence.¹⁹⁶

¹⁸⁹ The general overhead costs of running the court system (including providing for judges, jurors, court facilities, court administrators, and other needs) are funded from state revenues appropriated by general law.

¹⁹⁰ American Bar Association Juvenile Justice Center, *Adolescence, Brain Development, and Legal Culpability* (Jan. 2004), https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf (last visited Mar. 19, 2019); Malcolm Ritter and Associated Press, *Experts link teen brains' immaturity, juvenile crime*, ABC News <https://abcnews.go.com/Technology/story?id=3943187&page=1> (last visited Apr. 10, 2019).

¹⁹¹ *Id.*; Brief of the American Medical Association and the American Academy of Child and Adolescent Psychiatry as *Amici Curiae*, at 16, *Graham v. Florida*, 560 U.S. 48 (2012).

¹⁹² Malcolm Ritter and Associated Press, *Experts link teen brains' immaturity, juvenile crime*, ABC News <https://abcnews.go.com/Technology/story?id=3943187&page=1> (last visited Apr. 10, 2019).

¹⁹³ *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (“[A]s any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”).

¹⁹⁴ *Graham v. Florida*, 560 U.S. 48, 68 (2010) (“[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of irretrievably depraved character than are the actions of adults.”); *Miller v. Alabama*, 567 U.S. 460 (2012).

¹⁹⁵ S. 958.04(2), F.S.

- The prohibition on withholding adjudication of guilt for a first degree felony.¹⁹⁷

A person is eligible for sentencing as a youthful offender if he or she:

- Is at least 18 years old or has been transferred to circuit court to be treated like an adult.
- Is found guilty of or pleas to a felony.
- Is younger than 21 years old at the time of sentencing.
- Has not been previously classified as a youthful offender.
- Has not been found guilty of a capital or life felony.¹⁹⁸

In 2008, the Legislature changed the calculation of the youthful offender age threshold from the age at the time the offense was committed to the age at the time the sentence is imposed.¹⁹⁹ In *Jackson v. State*, the Florida Supreme Court upheld this structure against an equal protection challenge, reasoning:

By requiring that a defendant be sentenced before the age of 21 in order to be eligible for youthful offender sentencing, section 958.04(1)(b) ensures that defendants entering the program are truly youthful. It also ensures that defendants eligible for the program will complete their sentence without being exposed to more experienced and sophisticated criminals during their incarceration. Because the statute bears a rational relationship to this legitimate government objective, it does not violate equal protection.²⁰⁰

A court may sentence a youthful offender to a maximum sentence of six years,²⁰¹ except that it may not exceed the statutory maximum for the offense.²⁰² The sentence may include up to six years of:

- Supervision on probation or community control, with or without an adjudication of guilt.²⁰³
- Supervision on probation or community control that includes a period of incarceration up to 364 days in a county detention facility, probation or restitution center, or community residential center as a condition of supervision.²⁰⁴
- A split sentence wherein the youthful offender is to be placed on probation or community control upon completing any specified period of incarceration.²⁰⁵ If the incarceration period is to be served in a DOC facility other than a probation and restitution center or community residential facility the term of imprisonment must be greater than one year but four years or less.²⁰⁶
- Imprisonment.²⁰⁷
- A county-operated boot camp program.²⁰⁸

A court may sentence a youthful offender who subsequently violates probation or community control up to the statutory maximum sentence for the offense if the violation is substantive,²⁰⁹ meaning that the person committed a new crime.²¹⁰ However, if the violation is technical, which is a violation of a rule of

¹⁹⁶ *Eustache v. State*, 199 So. 3d 484 (Fla. 4th DCA 2016).

¹⁹⁷ *Pacheco-Velasquez v. State*, 208 So. 3d 293 (Fla. 3d DCA 2016); s. 775.08435, F.S.

¹⁹⁸ S. 958.04(1), F.S.

¹⁹⁹ Laws 2008, c. 2008-250, § 7, eff. Oct. 1, 2008.

²⁰⁰ 191 So. 3d 423, 427-28 (Fla. 2014).

²⁰¹ S. 958.04(2), F.S.

²⁰² *Gross v. State*, 720 So. 2d 578 (Fla. 1st DCA 1998) (court could not sentence a defendant to six years as a youthful offender for a third degree felony, which is punishable by up to five years).

²⁰³ S. 958.04(2)(a), F.S.

²⁰⁴ S. 958.04(2)(b), F.S.

²⁰⁵ S. 958.04(2)(c), F.S.

²⁰⁶ *Id.*

²⁰⁷ S. 958.04(2)(d), F.S.

²⁰⁸ S. 958.046, F.S.

²⁰⁹ S. 958.14, F.S.

²¹⁰ *West v. State*, 129 So. 3d 1155, 1156 (Fla. 3d DCA 2014).

probation rather than a separate criminal act,²¹¹ a court may only sentence the person for up to six years,²¹² including any credit for time served.²¹³

Housing Requirements for Youthful Offenders

DOC must house a youthful offender²¹⁴ in specially designated institutions and programs,²¹⁵ subject to the following exceptions for a youthful offender who is 18 or older who:

- Is convicted of a new felony crime;
- Becomes a serious management or disciplinary problem due to serious violations of department rules such that his or her original assignment is detrimental to the interests of the program and other inmates;
- Needs medical treatment, health services, or other specialized treatment not available at the youthful offender facility;
- Needs to be transferred outside of the state correctional system for services not provided by DOC; or
- Is to go to a community residential facility but there is no bed space available in a community residential facility designated for youthful offenders.²¹⁶

Youthful Offender Basic Training

DOC must maintain a youthful offender basic training program, which includes marching drills, calisthenics, a rigid dress code, manual labor assignments, physical training with obstacle courses, training in decision-making and personal development, high school equivalency diploma and adult basic education courses, and drug and other rehabilitation programs.²¹⁷ The department screens youthful offenders for eligibility for the basic training program, who has:

- No physical limitation precluding participation in strenuous activity;
- No impairment; and
- Never previously been incarcerated in a state or federal correctional facility.²¹⁸

DOC must obtain approval from the sentencing court for a youthful offender to participate in the basic training program.²¹⁹ A participant in the youthful offender basic training program must serve a minimum of 120 days in the program.²²⁰ Upon a youthful offender's successful completion of the basic training program, the court must modify the sentence and place the youthful offender on probation.²²¹

Effect of Proposed Changes- Youthful Offender Sentencing

PCB JDC 19-02 authorizes a court to sentence a person meeting all other criteria as a youthful offender if he or she was 21 or younger at the time the offense was committed. The bill puts no limits on when a person must be sentenced as a youthful offender, if he or she committed the crime while 21 years old or younger.

²¹¹ *Id.*, *Swilley v. State*, 781 So.2d 458, 460 (Fla. 2d DCA 2001).

²¹² Or the statutory maximum, whichever is shorter.

²¹³ S. 958.14, F.S.

²¹⁴ Institutions specially designated to house youthful offenders are Sumter Correctional Institution, Sumter Basic Training Unit, Suwannee Correctional Institution, Lowell Correctional Institution and Basic Training Unit, and Lake City Correctional Facility. R. 33-601.223, F.A.C.

²¹⁵ S. 958.11(1), F.S.

²¹⁶ S. 958.11(3), F.S.

²¹⁷ S. 958.045(1), F.S.

²¹⁸ S. 958.045(2), F.S.

²¹⁹ *Id.*

²²⁰ S. 958.045(1), F.S.

²²¹ S. 958.04(2)(c), F.S.

Victim Compensation Claims

Background

Recognizing the need for governmental assistance to crime victims, the Legislature enacted the Florida Crimes Compensation Act (Act)²²² directing the Department of Legal Affairs (DLA) to establish a Crime Victims' Services Office (CVSO) to provide aid, care, and support to crime victims.²²³ Some services available to a crime victim include funds for property loss, relocation services, reimbursement for mental health counseling, and initial forensic physical examinations.

The Act defines "victim" as a person:²²⁴

- Suffering personal physical injury or death directly resulting from a crime;
- Under 18 years of age suffering from a psychiatric or psychological injury as a result of witnessing a crime;
- Under 18 years of age victimized by felony or misdemeanor child abuse resulting in a mental injury;²²⁵
- Victimized by a forcible felony suffering from a psychiatric or psychological injury directly resulting from the crime; or
- Employed as an emergency responder killed while responding to a call for service in the line of duty.

The Act defines "crime" as:²²⁶

- A felony or misdemeanor offense resulting in physical injury or death;
- A forcible felony²²⁷ directly resulting in psychiatric or psychological injury;
- Felony or misdemeanor child abuse resulting in mental injury to a person under 18 years old;
- A criminal act committed in Florida but falling exclusively within federal jurisdiction;
- An act resulting in physical injury or death during the operation of a motor vehicle, boat, or aircraft;²²⁸
- A violation relating to online sexual exploitation or child pornography;²²⁹
- A felony or misdemeanor resulting in an emergency responder's death; and
- A criminal act committed outside of Florida, victimizing a Florida resident, which would be compensable if it occurred within the state, and compensation is not available in that jurisdiction.

Award Eligibility

A person may receive an award pursuant to the Act if the person is:

- A victim;
- An intervenor;
- A surviving spouse, parent or guardian, sibling, or child of a deceased victim or intervenor; or

²²² Ss. 960.01–960.28, F.S.

²²³ Ss. 960.02, 960.045, and 960.05, F.S.

²²⁴ Ss. 960.03(14)(a)–(e), F.S.

²²⁵ "Mental injury" means injury to the intellectual or psychological capacity of a child as evidenced by a discernible and substantial impairment in the ability of the child to function within the normal range of performance and behavior as supported by expert testimony. S. 827.03, F.S.

²²⁶ Ss. 960.03(3)(a)–(f), F.S.

²²⁷ Forcible felonies include: treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual. S. 776.08, F.S.

²²⁸ Including leaving the scene of a crash involving death or personal injury (s. 316.027(2), F.S.); driving under the influence (s. 316.193, F.S.); fleeing or attempting to elude a law enforcement officer (s. 316.1935, F.S.); boating under the influence (s. 327.35(1), F.S.); first degree felony vehicular homicide (s. 782.071(1)(b), F.S.); and operating an aircraft under the influence (s. 860.13(1)(a), F.S.).

²²⁹ Including sexual performance by a child (s. 827.071, F.S.); child pornography, other prohibited computer usage, and traveling to meet a minor (s. 847.0135, F.S.); electronic transmission of child pornography (s. 847.0137, F.S.); and electronic transmission of harmful material to a minor (s. 847.0138, F.S.).

- Any other person who is dependent for his or her principal support upon a deceased victim or intervenor.

However, a person is not eligible to receive an award if the person:²³⁰

- Committed or aided in the commission of the crime upon which the compensation claim is based;
- Was engaged in an unlawful activity at the time of the crime upon which the compensation claim is based, unless the victim was engaged in prostitution as a result of being a victim of human trafficking;
- Was in custody or confined, regardless of conviction, in a county or municipal detention facility, a state or federal correctional facility, or a juvenile detention or commitment facility at the time of the crime upon which the compensation claim is based;
- Has been adjudicated as a habitual felony offender, habitual violent offender, or violent career criminal; or
- Has been adjudicated guilty of a forcible felony offense.

Section 960.07, F.S., establishes time frames within which a compensation claim must be filed.

A claim must be filed within one year after the:

- Date a crime occurs;
- Victim's or intervenor's death; or
- Determination that the death of the victim or intervenor is a result of a crime, and the crime occurred after June 30, 1994.

However, for good cause, the DLA may extend the time for a period not exceeding two years.

If a person is under 18 years old when victimized by a crime, a claim may be filed at any time not exceeding one year after the victim reaches 18 years old. For good cause, the DLA may extend the filing period for an additional period not exceeding one year.

A sexual violence victim²³¹ may file a claim for counseling compensation or other mental health services within one year after a petition is filed to civilly commit the offender as a sexually violent predator.²³²

To receive an award, a victim must report the crime to a proper authority within 72 hours, unless DLA finds a delay was justified.²³³ However, a human trafficking victim must report the crime and file a claim within one year, or two years with good cause, after the last date the human trafficking offense occurred. If a case exceeds the two year requirement due to an ongoing investigation, a specified authority may certify in writing the victim's need to relocate from an unsafe environment.

Effect of Proposed Changes

The PCB increases the time periods within which a claim for victim assistance may be filed, as follows:

- A claim must be filed within five years after a crime occurs, a victim or intervenor dies, or a determination that the crime caused the victim's or intervenor's death.
 - For good cause, the DLA may extend the filing deadline for a period not exceeding seven years after the crime's occurrence.
- A victim under 18 years old at the time of a crime may file a claim at any time not exceeding five years after the victim reaches 18 years old.

²³⁰ S. 960.065, F.S.

²³¹ As defined in S. 394.912, F.S.

²³² "Sexually violent predator" means any person who has been convicted of a sexually violent offense and suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. S. 394.912(10), F.S.

²³³ Ss. 960.13 and 960.195, F.S.

- For good cause, the DLA may extend the filing deadline for an additional period not exceeding two years.
- A sexual violence victim may file a claim for counseling compensation or other mental health services within five years after a petition is filed to civilly commit the offender as a sexually violent predator.
- To receive an award, a victim must report the crime to a proper authority within five days, unless DLA finds a delay was justified.
 - However, a human trafficking victim must report the crime and file a claim within five years, or seven years with good cause, after the date of the most recent human trafficking offense.
 - If a case exceeds the seven year requirement due to an ongoing investigation, a specified authority may certify in writing the victim's need to relocate from an unsafe environment.

Direct Filing of Juvenile Offenders

Background

The juvenile delinquency system focuses on treating and rehabilitating children who violate criminal laws. Children in the delinquency system may complete a civil citation or diversion program,²³⁴ probationary sentence, or be committed to one of the Department of Juvenile Justice's (DJJ) commitment programs.²³⁵ The juvenile process is less harsh than the adult court process; for example:

- A judge decides the facts in a juvenile adjudicatory hearing rather than a jury;²³⁶
- Juveniles are not subject to monetary bail;²³⁷ and
- Probation may only last until age 19, and commitment until age 21.²³⁸

A child may be transferred to adult court through one of three ways:

- Judicial waiver, in which the court transfers the child upon the state's motion after holding a waiver hearing;²³⁹
- Direct file, in which the state attorney files an information to transfer the child;²⁴⁰ or
- Indictment, in which the grand jury charges the child by indictment for a capital offense or offense punishable by life in prison.²⁴¹

²³⁴ Ss. 985.12, 985.125, 985.15, 985.155, and 985.16, F.S.

²³⁵ S. 985.433, F.S.

²³⁶ S. 985.35, F.S.

²³⁷ S. 985.245, F.S.

²³⁸ S. 985.0301, F.S.

²³⁹ S. 985.556, F.S.

²⁴⁰ S. 985.557, F.S.

²⁴¹ S. 985.56, F.S.

Direct file accounts for 98 percent of juvenile transfers to adult court.²⁴² Direct filing of an information may be mandated by law or done at the state attorney's discretion as follows:

Mandatory	Discretionary
Child was 16 or 17 when he or she committed a violent offense and has previously been adjudicated for an enumerated offense. ²⁴³	Child was 14 or 15 when he or she committed an enumerated offense. ²⁴⁴
Child was 16 or 17 when he or she committed a forcible felony ²⁴⁵ and has previously been adjudicated or had adjudication withheld for three felonies occurring at least 45 days apart, unless the state has good cause to believe exceptional circumstances exist to leave the case in juvenile court.	
Child is charged with stealing a motor vehicle, and the driver of the vehicle caused serious bodily injury or death to a person not involved in stealing the vehicle while the child was in possession of the vehicle.	Child was 16 or 17 when he or she committed: <ul style="list-style-type: none"> • A felony offense; or • A misdemeanor, if the child has two prior adjudications or withheld adjudications, one of which is a felony.
Child was 16 or 17 when he or she committed an 10/20/Life ²⁴⁶ offense, meaning the child used or possessed a firearm in the commission of a violent felony or drug trafficking.	

A child transferred to adult court is treated like an adult in most ways. With the exception of the death penalty and a life sentence without the possibility of parole,²⁴⁷ a child faces the same exposure to penalty as an adult. A court may, however, sentence a child prosecuted as an adult to juvenile sanctions.²⁴⁸ The adult court procedural rules apply, including trial by jury.

Total adult court transfers decreased 62 percent since FY 2010-11.²⁴⁹ Mandatory direct filed cases account for a larger percentage of adult transfers than in FY 2010-11, as prosecutors have used discretionary direct file less frequently.²⁵⁰

Effect of Proposed Changes- Direct Filing of Juvenile Offenders

PCB JDC 19-02 repeals all mandatory direct file provisions. Under the bill, a state attorney may direct file an information against a child who qualifies for discretionary direct file by:

²⁴² Department of Juvenile Justice, *Update on Transfer to Adult Court Trends in Florida* (Jan. 9, 2018), at 16.

²⁴³ Enumerated offenses are commission of, attempt to commit, or conspiracy to commit murder, sexual battery, armed or strong-armed robbery, carjacking, home-invasion robbery, aggravated battery, or aggravated assault. S. 985.557, F.S.

²⁴⁴ Enumerated offenses are the commission of, attempt to commit, or conspiracy to commit arson; sexual battery; robbery; kidnapping; aggravated child abuse; aggravated assault; aggravated stalking; murder; manslaughter; unlawfully throwing, placing, or discharging a destructive device or bomb; armed burglary; burglary of a dwelling with aggravating circumstances; burglary with a battery; aggravated battery; lewd or lascivious offense on a person younger than 16; carrying, displaying, using, or threatening to use a weapon or firearm during the commission of a felony; grand theft with aggravating circumstances; possessing or discharging a weapon on school property; home invasion robbery; carjacking; or grand theft of a motor vehicle under certain circumstances. S. 985.557(1)(a), F.S.

²⁴⁵ "Forcible felony" means treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual. S. 776.08, F.S.

²⁴⁶ S. 775.087, F.S.

²⁴⁷ *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012).

²⁴⁸ S. 985.565, F.S.

²⁴⁹ Department of Juvenile Justice, *supra*, at 17.

²⁵⁰ Office of Program Policy Analysis and Government Accountability, *Direct File of Children to Adult Court is Decreasing; Better Data Needed to Assess Sanctions*, Report No. 17-07 (Mar. 2017), <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1706rpt.pdf> (last visited Apr. 10, 2019).

- Committing an enumerated offense as a 14 or 15 year old;
- Committing a felony as a 16 or 17 year old; or
- Committing a misdemeanor with certain prior offenses.

The bill does not change the judicial waiver or indictment transfer methods.

Sexually Violent Predator Program Criminal History Records Access

Background

Federal Criminal History Record Information Databases

The Federal Bureau of Investigation (FBI) administers the National Crime Information Center (NCIC) database, containing information on persons subject to civil protection orders and arrest warrants, and the Interstate Identification Index (III), containing criminal history record information (CRHI). Under federal regulation, CRHI from the NCIC/III-databases is made available to criminal justice agencies for criminal justice purposes.²⁵¹ The exchange of CRHI between the federal government and states, however, is subject to cancellation if disseminated to unintended recipients.²⁵²

The National Crime Prevention and Privacy Compact defines:

- “Criminal justice agency” as:
 - A court, and
 - A governmental agency or any subunit thereof that:
 - Performs the administration of criminal justice pursuant to statute or executive order; and
 - Allocates a substantial part of its annual budget to the administration of criminal justice.
- “Criminal justice” as activities relating to detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders.²⁵³

Sexually Violent Predator Program

A sexually violent predator is a person who has been convicted of a sexually violent offense²⁵⁴ and has a mental abnormality or personality disorder that makes them likely to engage in future acts of sexual violence if not confined to a secure facility for long-term control, care, and treatment.²⁵⁵ To address the treatment needs of these offenders, Legislature enacted the Involuntary Civil Commitment of Sexually Violent Predators Act,²⁵⁶ also known as the Ryce Act, in 1998. The Ryce Act creates a civil commitment process for sexually violent predators that is similar to the Baker Act, used to involuntarily commit and treat mentally ill persons.²⁵⁷ Under the Ryce Act, offenders convicted of specified sex

²⁵¹ 28 C.F.R. § 20.33(a)(1).

²⁵² 28 C.F.R. § 20.33(b); s. 943.054, F.S.

²⁵³ 42 U.S.C. § 14616.

²⁵⁴ Section 394.912(9), F.S., defines the term “sexually violent offense” as:

- Murder of a human being while engaged in sexual battery in violation of s. 782.04(1)(a)2., F.S.;
- Kidnapping or false imprisonment of a child under the age of 13 and, in the course of that offense, committing sexual battery; or a lewd, lascivious, or indecent assault or act upon or in the presence of the child;
- Sexual battery in violation of s. 794.011, F.S.;
- Lewd, lascivious, or indecent assault or act upon or in presence of the child in violation of ss. 800.04 or 847.0135(5), F.S.;
- An attempt, criminal solicitation, or conspiracy, in violation of s. 777.04, F.S., of a sexually violent offense;
- Any conviction for a felony offense in effect at any time before October 1, 1998, which is comparable to a sexually violent offense listed above or any federal conviction or conviction in another state for a felony offense that in this state would be a sexually violent offense; or
- Any criminal act that, either at the time of sentencing for the offense or subsequently during civil commitment proceedings under this part, has been determined beyond a reasonable doubt to have been sexually motivated.

²⁵⁵ S. 394.912(10), F.S.

²⁵⁶ Ch. 394, Part V, F.S.

²⁵⁷ Ch. 394, Part I, F.S.

offenses who are nearing the end of their criminal sentence are referred to the Department of Children and Families (DCF) for assessment by a multidisciplinary team (MDT) as to whether the offender meets the clinical definition of a sexually violent predator. After assessment, DCF provides a recommendation to the state attorney.²⁵⁸

Following receipt of DCF's recommendation and supporting information, the state attorney determines whether to file a petition with the circuit court alleging that the offender is a sexually violent predator.²⁵⁹ At trial, a judge or jury must determine by clear and convincing evidence that an offender meets the definition of a sexually violent predator.²⁶⁰ A sexually violent predator must be committed to DCF's custody for:

- Control;
- Care; and
- Treatment.²⁶¹

To conduct its risk assessment and other functions, the DCF Sexually Violent Predator Program (SVPP) previously had access to the NCIC/III-databases, allowing it to review a person's full criminal history.²⁶² However, an FBI-conducted audit of a Florida sheriff's office concluded that SVPP was not a criminal justice agency and therefore not entitled to access NCIC/III CHRI.²⁶³ This prevents SVPP from accessing information about out-of-state convictions, which approximately 18 percent of committed sexually violent predators have.²⁶⁴

Effect of Proposed Changes - SVPP

The PCB adds a statutory mandate for DCF to provide rehabilitation of criminal offenders upon commitment of a sexually violent predator. This causes the SVPP to administer a criminal justice function pursuant to statute and therefore qualify as a criminal justice agency under federal law. As a criminal justice agency, SVPP may access NCIC/III CRHI.

DNA Database

Background

Deoxyribonucleic acid (DNA) is hereditary material existing in the cells of all living organisms. DNA is frequently collected at a crime scene and analyzed to assist in convicting or exonerating a suspect. DNA evidence may be collected from any biological material, such as hair, teeth, bones, skin cells, blood, semen, saliva, urine, feces, and other bodily substances.²⁶⁵ A DNA sample may be used to solve a current crime or a crime which occurred before DNA-testing technology.²⁶⁶

CODIS and NDIS

The Combined DNA Index System (CODIS)²⁶⁷ is the general term used to describe the software maintained by the Federal Bureau of Investigation (FBI) and used to compare an existing DNA profile to a DNA sample found at a crime scene to identify the source of the crime scene sample.²⁶⁸ In 1998, the National DNA Index System (NDIS) was established. NDIS contains DNA profiles contributed by

²⁵⁸ *Id.*

²⁵⁹ S. 394.914, F.S.

²⁶⁰ S. 394.917, F.S.

²⁶¹ S. 394.917, F.S.

²⁶² Department of Children and Families, *Sexually Violent Predator Program (SVPP) NCIC Issue Summary* (Mar. 8, 2019).

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ FindLaw, *How DNA Evidence Works*, <https://criminal.findlaw.com/criminal-procedure/how-dna-evidence-works.html> (last visited Apr. 10, 2019).

²⁶⁶ *Id.*; Dr. Alec Jeffreys developed the DNA profiling technique in 1984.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 1294.

federal, state, and local participating forensic laboratories,²⁶⁹ enabling a law enforcement agency to exchange and compare DNA profiles electronically, thereby linking a crime or a series of crimes to each other or to a known offender.

To submit a DNA record to NDIS, a participating laboratory must adhere to federal law regarding expungement²⁷⁰ procedures, and the DNA sample must:

- Be generated in compliance with the FBI Director's Quality Assurance Standards;
- Be generated by an accredited and approved laboratory;
- Be generated by a laboratory that undergoes an external audit every two years to demonstrate compliance with the FBI Director's Quality Assurance Standards;
- Be from an acceptable data category, such as:
 - Convicted offender;
 - Arrestee;
 - Detainee;
 - Forensic case;
 - Unidentified human remains;
 - Missing person; or
 - Relative of a missing person.
- Meet minimum CODIS requirements for the specimen category; and
- Be generated using an approved kit.

Florida's DNA Database

In 1989 the Legislature created the DNA database within the Florida Department of Law Enforcement (FDLE), requiring a blood DNA sample from a person convicted of certain sexual offenses to be entered into a statewide database maintained by FDLE as an automated personal identification system for classifying, matching, and storing DNA profiles.²⁷¹ Due to technological advancements, FDLE no longer requires a blood sample, and instead uses an oral swab, known as a buccal swab, to collect epithelial cells from a person's mouth, specifically the inner cheek.²⁷² A buccal swab is required from any person:²⁷³

- Committed to a county jail;
- Committed to or under the supervision of:
 - The Department of Corrections;
 - A private correctional institution; or
 - The Department of Juvenile Justice.
- Transferred to Florida or accepted under an interstate compact;²⁷⁴
- Convicted of a felony offense or attempted felony offense anywhere;
- Convicted of certain misdemeanor offenses;²⁷⁵ or
- Arrested for a felony offense or attempted felony offense in Florida.

²⁶⁹ All 50 states, the District of Columbia, the federal government, the U.S. Army Criminal Investigation Laboratory, and Puerto Rico participate in NDIS. FBI Services, *Laboratory Services, Frequently Asked Questions on CODIS and NDIS*, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet> (last visited Apr. 10, 2019).

²⁷⁰ See 42 U.S.C. § 14132(d)(2)(A)(ii) (requiring states to expunge a DNA record when a charge is dismissed, results in an acquittal, or when no charge is filed).

²⁷¹ Ch. 89-335, Laws of Fla.

²⁷² S. 943.325(f), F.S.

²⁷³ S. 943.325(2)(g), F.S.

²⁷⁴ S. 943.325(2)(g)1.b.-c., F.S.

²⁷⁵ Including stalking, s. 784.048, F.S.; voyeurism, s. 810.14, F.S.; certain acts connected with obscene, lewd, etc., materials, s. 847.011, F.S.; exposing minors to harmful motion pictures, exhibitions, shows, presentation, or representations, s. 847.013, F.S.; computer pornography, prohibited computer usage by an owner or operator of a computer service, s. 847.0135, F.S.; direct observation, videotaping, or visual surveillance of customers in a merchant's dressing room, etc., s. 877.26, F.S.; certain gang-related offenses committed pursuant to s. 874.04, F.S., for the purpose of benefitting, promoting, or furthering criminal gang interests.

Fourth Amendment

The Fourth Amendment to the United States Constitution guarantees:

- The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated; and
- No warrants shall issue without probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.²⁷⁶

Under Fourth Amendment jurisprudence, a search occurs whenever the government intrudes upon an area in which a person has a reasonable expectation of privacy.²⁷⁷ The Florida Constitution similarly protects a person against an unreasonable search and seizure, and that right is construed in conformity with the Fourth Amendment of the U.S. Constitution.²⁷⁸ Both the Florida and federal constitutions require a warrant to be supported by probable cause, as established by oath or affirmation, and to particularly describe the place to be searched and items or people to be seized. While governmental DNA collection is a search, the United States Supreme Court has held it is constitutional and no different than other legitimate police booking procedures such as fingerprinting or photographing.²⁷⁹

Legislative Intent

Section 943.325(1)(b), F.S., contains legislative findings providing that a match between a DNA sample in a current criminal investigation and a state or federal DNA database may be probable cause²⁸⁰ for a judge to issue a search warrant to acquire a confirming DNA sample from an individual.²⁸¹

While legislative findings are not codified law, when interpreting law is an issue, courts commonly resort to the rules of statutory construction to determine the proper application of statutory language to the facts at hand. In applying the rules of statutory construction, a court must choose an interpretation that most closely fits the Legislature's intent by examining the:

- Problem the Legislature faced when considering the bill that enacted the language in question;
- Public policy issues the problem raised;
- Drafting solutions explored during the Legislature's consideration of the bill; and
- Specific intent expressed in the statutory language.
 - Any uncertainty regarding the Legislature's intent should be resolved by an interpretation providing the most public benefit.²⁸²

DNA Search Warrant

When a law enforcement agency receives information indicating a person's DNA profile in an ongoing criminal investigation matches a DNA profile from another state or federal database, an officer typically applies for a search warrant to obtain an additional DNA sample from the individual. Once a law enforcement officer locates and serves a search warrant for a DNA sample on a person, the officer may collect the additional DNA sample for FDLE to analyze and confirm the match.²⁸³

Processing times may vary, and during the time it takes to compare the DNA samples a second time, a suspect may flee, go into hiding, or become hostile when law enforcement returns to execute an

²⁷⁶ U.S. Const. Amend. IV.

²⁷⁷ *Katz v. United States*, 389 U.S. 347 (1967).

²⁷⁸ Art. I, s. 12, Fla. Const.

²⁷⁹ *Maryland v. King*, 569 U.S. 435 (2013).

²⁸⁰ See *State v. Cortez*, 705 So.2d 676, 678 (Fla. 3d DCA 1998) ("Probable cause to arrest exists when the totality of the facts and circumstances within the officer's knowledge would cause a reasonable person to believe that an offense has been committed and that the defendant is the one who committed it").

²⁸¹ S. 943.325, F.S.

²⁸² *Devin v. City of Hollywood*, 351 So. 2d 1022 (Fla. 4th DCA 1976).

²⁸³ House Judiciary Committee staff conversations with law enforcement officer representatives (Mar. 5, 8, 21, and 22, 2019); and with FDLE and law enforcement representatives (Mar. 8, 2019).

arrest.²⁸⁴ While many law enforcement agencies follow the multi-step process, some agencies seek an arrest warrant directly after receiving DNA match information.²⁸⁵

While law enforcement agencies using the multi-step process are adhering to current legislative intent, a Florida court has held that identification by a DNA match is analogous to identification by a fingerprint match, and as such, a match between a DNA profile in the FDLE database and a DNA sample from a crime scene is sufficient probable cause to arrest an offender.²⁸⁶ Florida courts have also held that a match between latent fingerprints and known fingerprints is sufficient probable cause for a warrantless arrest.²⁸⁷ As such, a law enforcement officer may arguably arrest an individual without a warrant based on a DNA database match.²⁸⁸

Effect of Proposed Changes- DNA Database

PCB JDC 19-02 amends s. 943.325(1)(b), F.S., to include the Legislature's intent that a match between a person's DNA sample in a current criminal investigation to a state or federal DNA database may be probable cause for an arrest warrant; as such, a judge may find probable cause based on a DNA database match for an arrest warrant or a search warrant for a second DNA sample.

The bill provides law enforcement authority to seek an arrest warrant for a DNA sample, based on an initial DNA database match, without first having to seek and provide a second confirming match. A judge must still determine that the initial DNA match is sufficient probable cause for an arrest, and has the option to issue a search warrant to acquire a second sample when deemed necessary.

Occupational Licensing

Background

Department of Business and Professional Regulation

The Department of Business and Professional Regulation (DBPR) regulates and licenses businesses and professionals in Florida through the following Divisions:

- Administration;
- Alcoholic Beverages and Tobacco;
- Certified Public Accounting;
- Drugs, Devices, and Cosmetics;
- Florida Condominiums, Timeshares, and Mobile Homes;
- Hotels and Restaurants;
- Pari-mutuel Wagering;
- Professions;
- Real Estate;
- Regulation;
- Technology; and
- Service Operations.²⁸⁹

The Division of Professions (Professions) licenses and regulates more than 434,000 professionals through the following professional boards and programs:

- Board of Architecture and Interior Design;
- Asbestos Licensing Unit;

²⁸⁴ *Id.*

²⁸⁵ House Judiciary Committee staff conversations with a law enforcement officer representative (Mar. 21, 2019).

²⁸⁶ *Myles v. State*, 54 So. 3d 509 (Fla. 3rd DCA 2010).

²⁸⁷ *Id.*

²⁸⁸ *Id.* (holding that DNA evidence obtained from sample swabs performed on a victim of sexual assault are analogous to "latent prints" and a DNA sample legally acquired from a defendant equate to "known prints" on file).

²⁸⁹ S. 20.165, F.S.

- Athlete Agents;
- Board of Auctioneers;
- Barbers' Board;
- Building Code Administrators and Inspectors Board;
- Regulatory Council of Community Association Managers;
- Construction Industry Licensing Board;
- Board of Cosmetology;
- Electrical Contractors' Licensing Board;
- Board of Employee Leasing Companies;
- Home Inspectors;
- Board of Landscape Architecture;
- Mold-Related Services;
- Board of Pilot Commissioners;
- Board of Professional Geologists;
- Talent Agencies;
- Board of Veterinary Medicine; and
- Florida Board of Professional Engineers.²⁹⁰

Chapter 455, F.S., applies to the regulation of professions constituting "any activity, occupation, profession, or vocation regulated by DBPR in the Divisions of Certified Public Accounting, Professions, Real Estate, and Regulation."²⁹¹ It also provides general DBPR powers and sets forth the procedural and administrative framework for all professional DBPR boards housed.²⁹²

Licensing Determinations and Criminal History

Generally, a state agency may deny an application for professional license, permit, or certification for a prior felony or first degree misdemeanor conviction that is:

- Directly related to the profession's standards; and
- Reasonably related to the protection of the public health, safety, and welfare for the specific profession for which the license, permit, or certificate is sought.²⁹³

Notwithstanding any law to the contrary, an agency may not deny an application for a license, permit, certificate, or employment based solely on the applicant's lack of civil rights.²⁹⁴

DBPR or a licensing board may deny a license application for a person who was convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which relates to the practice of, or the ability to practice, a licensee's profession,²⁹⁵ or for any other reason in the applicable practice act.

Florida law does not prohibit an individual from applying for licensure with DBPR while they are still incarcerated or under some form of supervised release, nor is such an individual charged an additional fee.²⁹⁶

²⁹⁰ Florida Department of Business and Professional Regulation, *Division of Professions*, <http://www.myfloridalicense.com/dbpr/pro/index.html> (last visited Apr. 10, 2019).

²⁹¹ S. 455.01(6), F.S.

²⁹² The DBPR must also provide legal counsel for boards within the DBPR by contracting with the Department of Legal Affairs, by retaining private counsel, or by providing DBPR staff counsel. Ss. 455.203 and 455.221(1), F.S.

²⁹³ S. 112.011(1)(b), F.S.

²⁹⁴ S. 112.011(1)(c), F.S.

²⁹⁵ S. 455.227(1)(c), F.S.

²⁹⁶ Florida Department of Business and Professional Regulation, Agency Analysis of 2018 Senate Bill 1114, p. 2 (Jan. 8, 2018).

Septic Tank Contracting

The Department of Health (DOH) regulates master septic tank contractors and septic tank contractors. A septic tank contractor must:

- Have three years of training;
- Pass an examination; and
- Register with DOH before engaging in the occupation.²⁹⁷

A master septic tank contractor must:

- Be a registered septic tank contractor or a plumbing contractor; and
- Have provided septic tank contracting services for at least three years.

To be eligible for registration, septic tank and master septic tank contractors must be of good moral character. In determining good moral character, DOH may consider any matter, including criminal background, which has a substantial connection between an applicant's good moral character and a registered contractor's professional responsibilities.²⁹⁸ DOH is not specifically required to consider the passage of time between the disqualifying criminal offense and the time of application before denying or granting a license or registration.

Criminal Offenses

Sexual predator²⁹⁹ registration criteria are described in s. 775.21(4)1., F.S. Criminal offenses that require registration include:³⁰⁰

- A capital, life, or first degree felony for:
 - Kidnapping or false imprisonment, where the victim is a minor and there is a sexual component to the crime;
 - Sexual battery;
 - Lewd or lascivious battery or molestation;
 - Selling or buying minors to engage in sexually explicit conduct;
- An offense that would require registration as a sexual offender, other than transmission of child pornography by electronic device or transmission of material harmful to minors, by a person with a prior conviction for a sexual offense; or
- A conviction for a similar offense committed in another jurisdiction.³⁰¹

Forcible felonies include:

- Murder;
- Manslaughter;
- Sexual battery;
- Carjacking;
- Home-invasion robbery;
- Robbery;
- Burglary;
- Kidnapping;
- Aggravated assault;
- Aggravated battery; and
- Aggravated stalking.³⁰²

²⁹⁷ Ss. 489.552 and 489.553, F.S.

²⁹⁸ S. 489.553(4)(a), F.S.

²⁹⁹ A sexual predator is someone who has been convicted of a first degree felony sex crime or has been convicted of two second degree felony sex crimes within a ten-year period.

³⁰⁰ S. 775.21(4), F.S.

³⁰¹ Ss. 787.01, 787.02, 847.0145, and 800.04, F.S.

³⁰² S. 776.08, F.S.

Effect of Proposed Changes- Occupational Licensing

PCB JDC 19-02 amends the licensure application review standards for professions or occupations regulated by DBPR and septic tank contractors. The bill:

- Limits the period for which an agency may consider criminal history as an impairment to licensure to five years prior to application for applicable professions unless such history:
 - Includes a sexual predator crime or a forcible felony; and
 - Is related to a profession's practice;
- Allows the board or agency to consider an applicant's complete criminal history if it relates to good moral character and if the applicable practice act requires such a standard;
- Permits a person to apply for a license while under criminal confinement (incarceration) or supervision;
- Requires a licensing agency to permit an applicant who is incarcerated or under supervision to appear by teleconference or video conference at a board or agency license application hearing; and
- Requires DOC, or other applicable authority, to cooperate and coordinate with the board or agency to facilitate the applicant's hearing appearance in person, by teleconference, or by video conference.

The bill requires the board or agency to list on DBPR's or DOH's website the crimes that if committed by an applicant, do not impair a person's qualifications for licensure, and update the list annually. Beginning October 1, 2019, the boards must compile a list of crimes that although reported by an applicant for licensure, were not used as a basis for denial. The list must identify the crime reported for each license application the:

- Date of conviction or sentencing date, whichever is later; and
- Date the adjudication was entered.

The bill also requires each agency to identify the crimes that do impair a person's qualifications for licensure. The boards must compile a list of crimes that have been used as a basis for denial of a license in the past two years, which shall be made available on DBPR's or DOH's website. Starting October 1, 2019, and updated quarterly thereafter, the boards must compile a list indicating each crime used as a basis for a license denial. For each crime listed, the board must identify the crime reported and for each license application the:

- Date of conviction or sentencing date, whichever is later; and
- Date adjudication was entered.

Such denials must be available to the public upon request.

Contractor Fraud

Background

A contractor is a person who takes on a job or submits a bid to construct, repair, alter, remodel, add to, demolish, subtract from, or improve any building or structure for others, or for resale to others, and who has a job scope substantially similar to one or more of those described in s. 489.105(3)(a)-(q), F.S.³⁰³ The Construction Industry Contracting Board licenses and regulates contractors within the state.³⁰⁴

³⁰³ S. 489.105(3), F.S. These job scopes include a: general contractor; building contractor; residential contractor; sheet metal contractor; roofing contractor; class A air-conditioning contractor; class B air-conditioning contractor; class C air-conditioning contractor; mechanical contractor; commercial pool/spa contractor; residential pool/spa contractor; swimming pool/spa servicing contractor; plumbing contractor; underground utility and excavation contractor; solar contractor; pollutant storage systems contractor; and specialty contractor.

³⁰⁴ Florida Department of Business and Professional Regulation, *Construction Industry*, <http://www.myfloridalicense.com/DBPR/construction-industry/> (last visited Apr. 10, 2019).

A contractor who receives money totaling more than 10 percent of the contract price for repair, restoration, improvement, or construction to residential real property must, unless the buyer or homeowner agreed in writing otherwise:

- Apply for any necessary permits within 30 days after the payment is made,³⁰⁵ and
- Start the work within 90 days after the date all necessary permits are issued.³⁰⁶

A contractor who receives money for repair, restoration, addition, improvement, or construction of residential real property exceeding the value of work already performed shall not, with intent to defraud the owner,³⁰⁷ fail or refuses to perform any work for a 90-day period.³⁰⁸ A court may infer intent to defraud when a contractor:

- Received money in excess of the value of the work already performed;
- Failed to perform work during any 60-day period, and the failure was not due to the owner terminating or materially breaching the contract; and
- Failed to perform work for which he or she contracted for an additional 30-day period after the owner mailed to him or her a notice of failure to perform.³⁰⁹

Offense Levels

Contracting fraud offenses are prosecuted under s. 812.014, F.S., and as such, the offense level for a violation depends upon the value of the property taken as follows:

	Property Value	Offense Level
Grand Theft	≥ \$100,000	First Degree Felony ³¹⁰
	≥ \$20,000, but < \$100,000	Second Degree Felony ³¹¹
	≥ \$10,000, but < \$20,000	Third Degree Felony
	≥ \$5,000, but < \$10,000	Third Degree Felony
	≥ \$300, but < \$5,000	Third Degree Felony
Petit Theft	≥ \$100, but < \$300	First Degree Misdemeanor
	< \$100	Second Degree Misdemeanor ³¹²

To commit theft under Florida law a defendant must have the specific intent to commit the crime at the time of, or prior to, the taking.³¹³ However, in contractual cases it is difficult to prove that criminal intent is present at the inception of an agreement.³¹⁴ Further, courts have found that partial performance of a contract negates criminal intent.³¹⁵ It may be difficult to prove a contractor charged with construction fraud had the necessary criminal intent at the time he or she entered into the contract, making

³⁰⁵ S. 489.126(2)(a), F.S.

³⁰⁶ S. 489.126(2)(b), F.S.

³⁰⁷ Florida recognizes two basic types of intent crimes: specific intent crimes and general intent crimes. A specific intent crime requires the offender to intend to accomplish a precise, prohibited act. A general intent crime requires the offender to intend to do something unlawful, but the offender does not need to intend the precise harm or result that occurs. See Black's Law Dictionary 47, 559, and 560 (6th ed. 1995). Unless an offender confesses his or her intent, intent must be inferred. See generally, David Crump, *What Does Intent Mean*, 38 Hofstra L. R. 1059, https://law.hofstra.edu/pdf/academics/journals/lawreview/lrv_issues_v38n04_cc1_crump_final.pdf (last visited Mar. 26, 2019).

³⁰⁸ S. 489.126(3)(a), F.S.

³⁰⁹ S. 489.126(3)(b), F.S.

³¹⁰ A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

³¹¹ A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

³¹² A second degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. Ss. 775.082 and 775.083, F.S.

³¹³ See *Stramaglia v. State*, 603 So. 2d 536, 537-38 (Fla. 4th DCA 1992).

³¹⁴ See *Adams v. State*, 443 So. 2d 1003 (Fla. 2d DCA 1983).

³¹⁵ See *Yerrick v. State*, 970. So. 2d 1288 (Fla. 4th DCA 2008).

successful prosecution of construction fraud cases difficult.³¹⁶ This recently became an issue in Charlotte County, Florida, when a contractor accepted money from dozens of consumers to construct new homes.³¹⁷ These consumers lost their payments when the contractor abruptly closed its doors, leaving many homes unfinished.³¹⁸ However, because the contractor claims it merely ran out of money due to the rising cost of supplies after Hurricane Irma in September 2017, proving the requisite intent to defraud at the time of the taking is challenging.³¹⁹

Effect of Proposed Changes – Contractor Fraud

The PCB provides that a contractor who receives money totaling more than 10 percent of the contract price for repair, restoration, improvement, or construction to residential real property must, unless the payor agreed in writing to a longer period or the contractor had just cause for failing to do so:

- Apply for any necessary permits within 30 days after the payment is made; and
- Start the work within 90 days after the date all necessary permits are issued.

The PCB permits an inference that a contractor lacked just cause for his or her actions if the contractor failed to apply for the necessary permits, start the work, or refund payments within 30 days of receiving written demand to do so from the payor. Written demand must:

- Be made to the contractor in the form of a letter;
- Include a demand to apply for necessary permits, start the work, or refund payment; and
- Be mailed to the address listed in the contracting agreement or, if none, to the address listed with the DBPR for licensing purposes or the local construction industry licensing board, if applicable.

The PCB prohibits a contractor who receives payment in excess of the value of work performed from failing to perform work within 90 days; however, the bill removes the requirement that a contractor act with the specific intent to defraud. Instead, the bill requires the state to prove the:

- Contractor failed to perform any work for 90 days;
- Failure to perform the work was not related to the owner terminating or materially breaching the contract; and
- The contractor failed to perform work without just cause or terminated the contract without proper notice to the owner.

The PCB permits an inference that a contractor lacked just cause for his or her failure to perform work for 90 days if the contractor fails to perform work or refund the money in excess of the value of work performed, within 30 days after receiving a written demand to perform the work or refund the money. Written demand must:

- Be made to the contractor in the form of a letter;
- Include a demand to apply for necessary permits, start the work, or refund payment; and
- Be mailed to the address listed in the contracting agreement or, if none, to the address listed with the DBPR for licensing purposes or the local construction industry licensing board, if applicable.

The PCB also declares that proper notification of termination must be made by the contractor in the form of a letter that:

- Includes the reason for termination of the contract or for failure to perform;
- Is sent by certified mail, return receipt requested; and
- Is mailed to the last address of the owner in the written contracting agreement, or, if none, to the address where the work was to be performed or the address listed on the permit, if applicable.

³¹⁶ The Office of the State Attorney, 20th Judicial Circuit, *Proposal* (2019).

³¹⁷ Elaine Allen-Emrich, *Rep. Grant, Sen. Albritton Fighting Contractor Fraud*, https://www.yoursun.com/englewood/rep-grant-sen-albritton-fighting-contractor-fraud/article_b47d6dbc-36f0-11e9-b582-df69d65d0465.html (last visited Mar. 26, 2019).

³¹⁸ *Id.*

³¹⁹ *Id.*

The PCB provides that a construction fraud offense must be prosecuted as theft in accordance with s. 812.014(1), F.S., and that:

- The required intent to prove a criminal violation may be shown to exist at the time the contractor appropriated the money to his or her own use and is not required to be proven to exist at the time of the taking of the money or the payment from the owner.
- If the contractor fails to refund any portion of the payment within 30 days after receiving a written demand for such money from the owner, it may be inferred that the contractor:
 - Intended to deprive the owner of the right to or benefit from the money owed; or
 - Appropriated the money for his or her own use, or to a person not entitled to use of the payment.
- The fact that the person charged with construction fraud intended to return the money owed is not a defense.

The bill also sets value thresholds for the offense severity levels of a construction fraud offense:

Total Money Received	Offense Severity
< \$1,000	First Degree Misdemeanor
≥ \$1,000 but < \$20,000	Third Degree Felony
≥ \$20,000 but < \$200,000	Second Degree Felony
≥ \$200,000	First Degree Felony

Liquor and Gambling Offenses

Background

It is a third degree felony, punishable by up to five years in prison and a fine up to \$5,000.³²⁰

- To possess one gallon or more of liquor that was not made or manufactured in accordance with the law.³²¹
- To possess, make, construct, or repair any still, still piping, still apparatus, or related item designed or adapted for the manufacture of an alcoholic beverage.³²²
- To possess any container holding any mash, wort, wash, or fermented liquids capable of being distilled or manufactured into an alcoholic beverage, without authorization.³²³
- To possess any raw materials or substance intended to be used in the distillation or manufacturing of an alcoholic beverage, unless licensed.³²⁴
- To keep or permit a gambling establishment.³²⁵ A person is guilty of this offense if he or she:
 - Habitually keeps, exercises, or maintains, for the purpose of gaming or gambling:
 - A gaming table or room;
 - Gaming implements;
 - Gaming apparatus; or
 - A house, booth, tent, shelter, or other place;³²⁶
 - Habitually procures, suffers, or permits any person to play for money or other valuable thing at any game, in any place where he or she has charge, control, or management, whether directly or indirectly;³²⁷

³²⁰ See ss. 775.082, 775.083, F.S. (third degree felony punishable by five years in prison and a \$5,000 fine).

³²¹ Ss. 562.451(2); 565.01, F.S.; cf. ss. 562.451(1), 775.082, 775.083, F.S. (owning or possessing less than a gallon of liquor is a second degree felony, which is punishable by up to 60 days in jail and a \$500 fine).

³²² S. 562.27(1), (8), F.S.

³²³ *Id.*

³²⁴ S. 562.27(2), (8), F.S.

³²⁵ "Gambling" is "anything which induces risk of money or property without any other hope of return than to get for nothing any given amount from another." "Gaming" is "an agreement . . . to risk money on a contest of chance of any kind, where one must be the loser and the other gainer." *Bellamy v. State*, 347 So. 2d 419, 420 (Fla. 1977).

³²⁶ S. 849.01, F.S.; *Ferguson v. State*, 377 So. 2d 709, 711 (Fla. 1979) (requiring an element of "habitualness" for a conviction under s. 849.01, F.S.).

- Acts as servant, clerk, agent or employee of any person in violation of the gambling or gaming prohibitions above;³²⁸ or
- Knowingly rents a house, room, booth, tent, shelter, or place to another person for the purpose of gaming.³²⁹

If any apparatus or device commonly used for gambling is found in a place, it is prima facie evidence that the place is kept for the purpose of gambling.³³⁰ The crime of keeping a gambling establishment is distinct from the crime of an isolated act of gambling,³³¹ which generally is a second degree misdemeanor, punishable by up to 60 days in jail and a fine up to \$500.³³² The statutes providing for these crimes as third degree felonies were last amended in 1997.³³³

Effect of Proposed Changes- Liquor and Gambling Offenses

PCB JDC 19-02 reduces the penalty from a third degree felony to a second degree misdemeanor for possession of still equipment and related offenses and keeping or maintaining a gambling establishment. The bill reduces possession of one gallon or more of unauthorized liquor to a first degree misdemeanor.

Cyber Crimes

Background

Digital platforms, computer software, phone applications (apps), smart home systems,³³⁴ and home security systems access the most intimate details of a user's life. These technologies can monitor a person's location; log personal, health, and financial data; send, receive, and log communications; and capture and store video and photographs. While providing everyday convenience to the user, these technologies are also susceptible to unauthorized access and abusive surveillance.

Abusers harass victims using spyware and other technologies in a number of ways. For example, an abuser can weaponize private data obtained through spyware apps to embarrass or exploit a victim, or access a smart home system to unnerve and assert control over a victim by changing thermostat settings, unlocking doors, turning on lights, or playing music.³³⁵ A security expert recently demonstrated how an Amazon Echo's microphone might be hacked, permitting an abuser to eavesdrop on a victim.³³⁶

Use of these technologies can also escalate into physical violence. In a 2013 Florida case, a Deltona man installed an app called "SMS Tracker" onto his wife's phone, allowing him to see text messages and photographs she was exchanging with others.³³⁷ Upon discovering she was having an affair, he murdered her and her 8- and 9-year-old children.

³²⁷ *Id.*

³²⁸ S. 849.02, F.S.

³²⁹ S. 849.03, F.S.

³³⁰ S. 849.05, F.S.

³³¹ S. 849.08, F.S.; *see also* s. 849.085, F.S. (regarding certain "penny-ante" games as lawful).

³³² *See* ss. 775.082, 775.083, F.S.

³³³ *See* ch. 97-102, s. 1355, Laws of Fla.; ch. 97-103, ss. 865, 869, Laws of Fla.

³³⁴ Smart home devices are connected to the internet and offer services such as voice-controlled lights, thermostats, and locks.

Examples of smart home devices include the Amazon Echo, Google Home, and platforms such as Samsung SmartThings and Apple HomeKit. Eric Zeng, Shrirang Mare, and Franziska Roesner, *End User Security & Privacy Concerns with Smart Homes*, University of Washington (July 2017), <https://www.franziroesner.com/pdf/Zeng-Smarthomes-SOUPS17.pdf> (last visited Apr. 10, 2019).

³³⁵ Amanda Kippert, *Smart Home Technology Is Being Used Against Survivors* (Jan. 14, 2019),

<https://www.domesticshelters.org/articles/technology/smart-home-technology-is-being-used-against-survivors> (last visited Apr. 10, 2019).

³³⁶ Jay McGregor, *Listening-in on a Hacked Amazon Echo is Terrifying*, Forbes (Sept. 7, 2017),

<https://www.forbes.com/sites/jaymcgregor/2017/09/07/listening-in-on-a-hacked-amazon-echo-is-terrifying/#32744f415c7f> (last visited Apr. 10, 2019).

³³⁷ Frank Fernandez, *Luis Toledo gets 3 consecutive life sentences for murders of wife, her 2 children*, Daytona-Beach News Journal Online (Jan. 19, 2018), <https://www.news-journalonline.com/news/20180119/luis-toledo-gets-3-consecutive-life-sentences-for-murders-of-wife-her-2-children> (last visited Apr. 10, 2019); Jennifer Valentino-DiVries, *Hundreds of Apps Can Empower Stalkers to Track Their*

Offenses against Users of Computers

Florida law criminalizes the following acts involving a computer,³³⁸ computer system,³³⁹ computer network,³⁴⁰ or electronic device³⁴¹ when done knowingly, willfully, and without authorization:

- Accessing it with knowledge that such access is unauthorized.
 - Accessing means approaching, instructing, communicating with, storing data in, retrieving data from, or otherwise making use of any resources of a computer, computer system, or computer network.³⁴²
- Disrupting or denying its ability to transmit data to or from an authorized user under certain circumstances.
- Destroying, taking, injuring, or damaging it, its equipment, or supplies.
- Introducing a computer contaminant.
- Engaging in audio or video surveillance of an individual by accessing one of its inherent features or components, including accessing the data or information stored by a third party.³⁴³

In general, proscribed conduct against a computer user is a third degree felony,³⁴⁴ punishable by up to five years in prison and a \$5,000 fine.³⁴⁵ However, the crime may be enhanced to a second³⁴⁶ or first³⁴⁷ degree felony with aggravating factors, such as excessive damage or endangering a human life.

“Without Authorization”

In 2018, Miami-Dade County prosecutors dismissed charges against a man accused of repeatedly logging into his ex-girlfriend’s home security system to secretly watch her in her home, citing an inability to prove that he did so “without authorization” as statutorily required.³⁴⁸ In that case, the victim previously authorized the defendant to access the security system occasionally during their relationship, leading prosecutors to conclude:

[E]ven though [the victim] did not intend or allow [the defendant] to repeatedly, on various days, and after their relationship ended, access her home security cameras, this conduct could not be prosecuted because while dating, she may have authorized remote access [to the system] on an isolated occasion or for limited purposes.³⁴⁹

Victims, New York Times (May 19, 2018), <https://www.nytimes.com/2018/05/19/technology/phone-apps-stalking.html> (last visited Apr. 10, 2019).

³³⁸ “Computer” means an internally programmed, automatic device that performs data processing. S. 815.03(2), F.S.

³³⁹ “Computer system” means a device or collection of devices, including support devices, one or more of which contain computer programs, electronic instructions, or input data and output data, and which perform functions, including, but not limited to, logic, arithmetic, data storage, retrieval, communication, or control. The term does not include calculators that are not programmable and that are not capable of being used in conjunction with external files. S. 815.03(7), F.S.

³⁴⁰ “Computer network” means a system that provides a medium for communication between one or more computer systems or electronic devices, including communication with an input or output device such as a display terminal, printer, or other electronic equipment that is connected to the computer systems or electronic devices by physical or wireless telecommunication facilities. S. 815.03(4), F.S.

³⁴¹ “Electronic device” means a device or a portion of a device that is designed for and capable of communicating across a computer network with other computers or devices for the purpose of transmitting, receiving, or storing data, including, but not limited to, a cellular telephone, tablet, or other portable device designed for and capable of communicating with or across a computer network and that is actually used for such purpose. S. 815.03(9), F.S.

³⁴² S. 815.03(9), F.S.

³⁴³ S. 815.06(2), F.S.

³⁴⁴ S. 815.06(3)(a), F.S.

³⁴⁵ Ss. 775.082 and 775.083, F.S.

³⁴⁶ A second degree felony is punishable by up to 15 years in prison and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

³⁴⁷ A first degree felony is punishable by up to 30 years in prison and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

³⁴⁸ Jose Arrojo, Chief Assistant State Attorney, Office of the State Attorney: Eleventh Judicial Circuit, *Colin Knight, F17-23267, Re: Case Disposition – Chief’s Summary & Proposed Further Action* (Aug. 9, 2018).

³⁴⁹ *Id.*

Florida case law supports this conclusion. In *Rodriguez v. State*,³⁵⁰ the Fourth District Court of Appeal (Fourth DCA) held that an employee who used a computer that he was authorized to use to perform a function he was not authorized to perform had not committed an offense against a computer user under Florida law. The Fourth DCA specifically noted that the federal statutes proscribing similar conduct include the phrase “or exceeding authorized access” to address such a situation.³⁵¹ “Exceeding authorized access” in federal statute means accessing a computer with authorization and using such access to obtain or alter information in the computer that the accessor is not entitled to so obtain or alter.³⁵²

In *Umhoefer v. State*,³⁵³ the Second District Court of Appeal (Second DCA) upheld the conviction of a man who accessed his girlfriend’s social media account after she changed her password. Because the man had to use a password bypassing app to access the account, the Second DCA held that such access was “unauthorized,” as statutorily required. Whether a person is criminally liable under this statute thus may turn on whether a victim has the sophistication and foresight to change all of his or her passwords, regardless of whether the surrounding facts suggest the manner of use was unauthorized.

Stalking and Cyberstalking

Cyberstalking is a course of conduct³⁵⁴ that:

- Communicates words, images, or language by or through the use of electronic mail or electronic communication;
- Is directed at a specific person;
- Causes that person substantial emotional distress; and
- Serves no legitimate purpose.³⁵⁵

A person who willfully, maliciously, and repeatedly cyberstalks another person commits first degree misdemeanor stalking,³⁵⁶ punishable by up to one year in county jail and a \$1,000 fine.³⁵⁷ A person faces a felony charge for cyberstalking when he or she:

- Makes a credible threat against the victim;
- Is subject to a court-ordered prohibition of contact with the victim, such as an injunction;
- Cyberstalks a victim younger than 16; or
- Has a prior conviction for certain sexual offenses and cyberstalks the victim of that offense in violation of a no contact order.³⁵⁸

A person may also be charged with stalking for willfully, maliciously, and repeatedly harassing another. Harassment is a course of conduct that:

- Is directed at a specific person;
- Causes that person substantial emotional distress; and
- Serves no legitimate purpose.³⁵⁹

Conduct involving digital technologies that does not qualify specifically as cyberstalking may nonetheless qualify as harassment and also give rise to criminal liability for stalking.

³⁵⁰ 956 So.2d 1226 (Fla. 4th DCA 2007).

³⁵¹ *Id.* at 1230; 18 U.S.C. § 1030.

³⁵² 18 U.S.C. § 1030(e)(6).

³⁵³ 235 So.3d 989 (Fla. 2d DCA 2017).

³⁵⁴ “Course of conduct” means a series of acts over a period of time, however short, evidencing continuity of purpose. S. 746.048(1)(b), F.S.

³⁵⁵ S. 746.048(1)(d), F.S.

³⁵⁶ S. 784.0048(2), F.S.

³⁵⁷ Ss. 775.082 and 775.083, F.S.

³⁵⁸ Ss. 784.048(3), (4), (5), and (7), F.S.

³⁵⁹ S. 784.048(1)(a), F.S.

A first sexual cyberharassment offense is a first degree misdemeanor; a second or subsequent offense is a third degree felony.³⁶⁰ A sexual cyberharassment victim may also civilly sue an offender for injunctive relief, damages, and reasonable attorney fees and costs.³⁶¹

Effect of Proposed Changes- Cyber Crimes

PCB JDC 19-02 includes acts “exceeding authorization” as offenses against users of computers, computer systems, computer networks, or electronic devices. The bill criminalizes unauthorized acts committed by means of authorized access, such as when an offender misuses knowledge of a password. An offense against a computer user that exceeds authorization is generally a third degree felony, unless an aggravating circumstance enhances the conduct to a second or first degree felony.

The bill amends the definition of “access” for purposes of computer-related crimes to include approaching, instructing, communicating with, storing data from, or otherwise making use of any resources of an electronic device.

The bill also expands the definition of cyberstalking to include accessing, or attempting to access, the online accounts or Internet-connected home electronic systems of another person without permission. A person who willfully, maliciously, and repeatedly accesses another person’s account without his or her permission, causing substantial emotional distress and serving no legitimate purpose, commits stalking, a first degree misdemeanor, or with an aggravating factor, third degree felony.

Sexual Cyberharassment

Background

Sexual cyberharassment is nonconsensual sharing of sexually explicit images, often called “revenge porn.” Revenge porn gained international attention in 2014 when a hacker stole and published a trove of nude celebrity photographs.³⁶² According to a 2016 study, one in 25 Americans has been a victim of or threatened with revenge porn.³⁶³ Perpetrators largely target women, who comprise up to 90 percent of revenge porn victims.³⁶⁴ Certain misogynist websites exist solely to shame women by publishing revenge porn, often including a victim’s name and contact information so that a person searching for the victim’s name online – such as a current or potential employer – sees the image in search results. Many victims have suffered employment repercussions due to revenge porn.³⁶⁵ When the posted revenge porn includes contact information, a victim may receive insulting, harassing, or even threatening messages, including threats of rape or physical violence.³⁶⁶

In 2015, the Florida Legislature addressed revenge porn by criminalizing sexual cyberharassment.³⁶⁷ A person commits sexual cyberharassment by publishing a sexually explicit image:

- Depicting nudity³⁶⁸ or sexual conduct,³⁶⁹
- Containing or conveying the personal identification information (PII) of the depicted person;
- To an Internet website;
- Without the depicted person’s consent;

³⁶⁰ S. 784.049(3), F.S.

³⁶¹ S. 784.049(5), F.S.

³⁶² Abby Ohlheiser, *The shockingly simple way the nude photos of ‘Celebgate’ were stolen*, The Washington Post (May 24, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/03/16/the-shockingly-simple-way-the-nude-photos-of-celebgate-were-stolen/?utm_term=.20f7d3022f18 (last visited Apr. 10, 2019).

³⁶³ Data and Society Research Institute, *Nonconsensual Image Sharing: One in 25 Americans has Been a Victim of “Revenge Porn,”* (Dec. 13, 2016), https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf (last visited Apr. 10, 2019).

³⁶⁴ Danielle Keats Citron and Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345 (2014).

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ Ch. 2015-024, Laws of Fla.

³⁶⁸ As defined in s. 847.001, F.S.

³⁶⁹ *Id.*

- For no legitimate purpose; and
- With the intent of causing the depicted person substantial emotional distress.³⁷⁰

The sexual cyberharassment law borrows the definition of PII from another chapter³⁷¹ addressing PII-specific crimes, defining PII as a name or number that may be used, alone or in conjunction with any other information, to identify a specific person. The PII statute lists several examples of PII, including:

- A name;
- An address;
- Contact information, such as a telephone number or email address;
- A social security number;
- A date of birth;
- A mother's maiden name;
- An official state- or federally-issued driver license or identification number;
- Another identification number, such as an alien registration number, government passport number, employer or taxpayer identification number, Medicaid or food assistance account number, bank account number, or credit or debit card number;
- Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
- Unique electronic identification number, address, or routing code;
- Medical records;
- Telecommunication identifying information or access device; or
- Other number or information that can be used to access a person's financial resources.

A first sexual cyberharassment offense is a first degree misdemeanor;³⁷² a second or subsequent offense is a third degree felony.³⁷³ The statute lessens certain statutory – but not constitutional – warrant requirements related to the investigation of sexual cyberharassment. In general, an officer may only warrantlessly arrest a person for a misdemeanor offense when the crime is committed in the officer's presence;³⁷⁴ however, Florida law authorizes an officer to arrest a person on probable cause of sexual cyberharassment without a warrant, regardless of whether the conduct occurred in an officer's presence.³⁷⁵

Law enforcement may obtain a warrant to search for the means or instrumentality used to commit a misdemeanor,³⁷⁶ but a warrant for simply relevant evidence of a crime other than an instrumentality or to search a private dwelling generally requires probable cause of a felony.³⁷⁷ The sexual cyberharassment law, however, authorizes investigative search warrants for this misdemeanor-level offense, including of a private dwelling.³⁷⁸

A victim may also civilly sue an offender for all appropriate relief to prevent or remedy a sexual cyberharassment violation, including:

- Injunctive relief;
- Monetary damages up to \$5,000 or actual damages, whichever is greater; and
- Reasonable attorney fees and costs.³⁷⁹

Two limitations hinder criminal prosecution and civil remedy for sexual cyberharassment. The first is a requirement that the image be published on a website,³⁸⁰ excluding image distribution by other common

³⁷⁰ S. 784.049(2)(a)–(d), F.S.

³⁷¹ S. 817.568, F.S., regarding criminal use of personal identification information.

³⁷² A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Ss. 775.082 and 775.083, F.S.

³⁷³ A third degree felony is punishable by up to five years in prison and a \$5,000 fine. Ss. 775.082 and 775.083, F.S.

³⁷⁴ S. 901.15(1), F.S.

³⁷⁵ S. 784.049(4), F.S.

³⁷⁶ S. 933.02, F.S.

³⁷⁷ *Id.*; s. 933.18, F.S.

³⁷⁸ S. 784.049(4)(b), F.S.

³⁷⁹ S. 784.049(5), F.S.

electronic means such as text message, email, or social media messaging. Second, an identifiable photograph of a person arguably does not qualify as PII, which is defined as a “name or number.” Although the PII statute lists a “unique physical representation” as an example of PII,³⁸¹ the definition nevertheless requires PII to be a name or number.

Constitutional Challenges in Other States

Forty-three states and the District of Columbia have enacted laws banning revenge porn. Courts struck down some early iterations of these laws on First Amendment grounds, holding that the laws impermissibly restricted free speech based on content or viewpoint. However, narrowly tailored laws are more likely to withstand constitutional challenges.

The First Amendment to the United States Constitution provides that “Congress shall make no law [...] abridging the freedom of speech.”³⁸² A law that restricts speech based on content must survive strict scrutiny review, meaning:

- The law must be narrowly tailored to promote a compelling governmental interest; and
- No other less restrictive option will accomplish that interest.³⁸³

Viewpoint-based discrimination is a particularly disfavored form of content-based restriction in which content is regulated based on the ideology or opinion expressed.³⁸⁴

Because revenge porn prohibitions regulate speech based on content, courts have applied strict scrutiny review. However, First Amendment advocates agree that the laws can pass constitutional muster if drafted correctly. The American Civil Liberties Union (ACLU) has identified three essential elements to the constitutionality of a revenge porn law:

- Specific intent, such as intent to cause the depicted person substantial emotional distress.
- Actual knowledge that the victim did not consent to the distribution.
- The victim’s reasonable expectation that the image would remain private.³⁸⁵

In 2015, the Arizona Attorney General settled a lawsuit with the ACLU by agreeing not to prosecute cases under its then-existing revenge porn statute.³⁸⁶ In response, the Arizona Legislature amended its revenge porn law in 2016 to more narrowly define the crime by requiring:

- A specific intent to harm, harass, intimidate, threaten, or coerce a victim; and
- That the depicted person have a reasonable expectation of privacy in the image.³⁸⁷

In 2018, the Texas Court of Appeals held that the state’s revenge porn statute was an invalid content-based restriction on free speech.³⁸⁸ The Texas court found a compelling state interest in protecting an individual from substantial invasion of his or her privacy; however, the court determined that the state did not employ the least restrictive means of achieving that interest because the law did not require the person disclosing the image to know that the victim had a privacy interest in the image.³⁸⁹

³⁸⁰ S. 784.049(2)(c), F.S.

³⁸¹ S. 817.568(1)(f)2., F.S.

³⁸² U.S. Const. Amend. I.

³⁸³ *United States v. Playboy Ent’m’t Grp., Inc.*, 529 U.S. 803, 812 (2000).

³⁸⁴ *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

³⁸⁵ American Civil Liberties Union of Maryland, *Testimony for the House Judiciary Committee: SB 769 – Criminal Law – Sextortion and Revenge Porn* (Mar. 27, 2018), https://www.aclu-md.org/sites/default/files/field_documents/sb_769-sexortion_etc-criminal-house.pdf (last visited Apr. 10, 2019).

³⁸⁶ Miriam Wasser, *AZ Revenge Porn Law Not To Be Enforced, Says Federal Judge*, Phoenix New Times (Jul. 13, 2015), <https://www.phoenixnewtimes.com/news/az-revenge-porn-law-not-to-be-enforced-says-federal-judge-7486054> (last visited Apr. 10, 2019).

³⁸⁷ Ch. 6, § 1, Laws of Arizona (2016).

³⁸⁸ *Ex parte Jones*, 2018 WL 2228888 (Texas Ct. App. 2018).

³⁸⁹ *Id.*

Last year, the Vermont Supreme Court upheld a revenge porn law containing all three elements identified by the ACLU.³⁹⁰ After finding that preventing nonconsensual disclosure of nude or sexual images obtained in the context of a confidential relationship is a compelling governmental interest, the court considered each element in holding that the statute was narrowly tailored so as to pass constitutional muster.³⁹¹

Of the three elements identified by the ACLU and weighed by the Vermont Supreme Court in upholding a revenge porn law, Florida's sexual cyberharassment law only requires specific intent that the perpetrator intend to cause substantial emotional distress to the depicted person.³⁹²

Effect of Proposed Changes- Sexual Cyberharassment

PCB JDC 19-02 extends the prohibition on sexual cyberharassment to include disseminating a sexually explicit image of a person through electronic means. The bill criminalizes and provides a civil remedy for sending sexually explicit images by text, email, or other electronic messaging services without the victim's permission.

The bill also requires that, to qualify as sexual cyberharassment, the publication or dissemination of a sexually explicit image must be contrary to the depicted person's reasonable expectation that the image would remain private. Evidence that the depicted person sent a sexually explicit image to another person does not, on its own, remove his or her reasonable expectation of privacy in the image.

The bill makes legislative findings that:

- Protecting privacy interests of people depicted in sexually explicit images is a compelling governmental interest.
- A person may retain a reasonable expectation that an image will remain private despite sharing the image with another person, such as an intimate partner.
- The electronic dissemination of sexually explicit images:
 - Is a common practice;
 - Allows images to be easily reproduced and shared; and
 - Causes victims psychological harm.

The bill also defines PII as any information that identifies an individual, including but not limited to:

- A name;
- Address;
- Email address;
- Telephone number;
- Social security number;
- Date of birth; or
- Any unique physical representation.

The bill ensures that an identifiable photograph of a person qualifies as PII for incurring criminal or civil liability under the statute.

³⁹⁰ *State v. VanBuren*, 2018 WL 4177776 (Vt. 2018).

³⁹¹ *Id.*

³⁹² S. 784.049, F.S.

Lewd and Lascivious Exhibition

Background

Florida Law

“Gunning” is the practice of inmates openly masturbating towards female prison or jail employees.³⁹³ Across the country, employees have sued over sexually hostile work environments caused by their employers’ failure to remedy gunning and other exhibitionist lewd behaviors.³⁹⁴ In response to lawsuits against DOC, the Legislature criminalized lewd or lascivious exhibition in the presence of a prison employee in 2010.³⁹⁵ 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 lascivious³⁹⁶ 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;³⁹⁷
 - Sexual bestiality;³⁹⁸ or
 - The simulation of any act involving sexual activity.³⁹⁹

An employee protected by this law is:

- A person employed by or contracting with:
 - A state or private prison;⁴⁰⁰ or
 - The corporation operating the prison industry enhancement programs or correctional work programs.⁴⁰¹
- A parole examiner⁴⁰² with the Florida Commission on Offender Review.⁴⁰³

The crime applies to conduct in a prison, but does not address such conduct in a jail where inmates are generally either detained while a case is pending or serving a sentence of less than one year. 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.⁴⁰⁴

Effect of Proposed Changes- Lewd and Lascivious Exhibition

PCB JDC 19-02 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”:

³⁹³ *Beckford v. Dept. of Corr.*, 605 F.3d 951 (11th Cir. 2010).

³⁹⁴ *Id.* See also Kate Eckman, *Nurses Win Lawsuit Against DOC*, WJHG (Jan. 28, 2007), <https://www.wjhg.com/home/headlines/5386741.html> (last visited Apr. 10, 2019).; 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 (last visited Apr. 10, 2019).

³⁹⁵ Ch. 2010-64, Laws of Fla.

³⁹⁶ 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).

³⁹⁷ 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.

³⁹⁸ 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.

³⁹⁹ S. 800.09(2)(a), F.S.

⁴⁰⁰ In Florida, a private contractor may operate a prison pursuant to s. 944.105, F.S.

⁴⁰¹ Florida law authorizes DOC to contract with a nonprofit organization to operate a correctional work program pursuant to chapter 946, F.S.

⁴⁰² A parole examiner conducts hearings to determine eligibility for early release on parole. S. 947.16, F.S.

⁴⁰³ S. 800.09(1)(a), F.S.

⁴⁰⁴ Ss. 775.082, 775.083, and 800.09(2)(b), F.S.

- 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 jail inmate who does any of the following 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 jails an additional tool to deter sexually harassing inmate behavior, thereby improving working conditions, especially for female employees. The bill does not list the offense on the offense severity ranking chart of the Criminal Punishment Code; therefore, the offense remains a level one as an unlisted third degree felony.⁴⁰⁵

Possession of a Counterfeit Instrument

Background

As used in s. 831.28, F.S.:

- “Counterfeit” means:
 - Manufacturing or arranging to manufacture a payment instrument without permission from a financial institution, account holder, or organization whose name, routing number, or account number appears on the payment instrument; or
 - Manufacturing any payment instrument using a fake name, routing number, or account number.
- A “payment instrument”:
 - Is a check, draft, warrant, money order, travelers check, electronic instrument, or other instrument, payment of money, or monetary value whether or not negotiable; and
 - Does not include an instrument redeemable for merchandise or service, a credit card voucher, or a letter of credit.

Under current law, a person possessing a counterfeit payment instrument commits a third degree felony, punishable by up to five years in prison and a \$5,000 fine. As written, the law criminalizes even the unknowing possession of a counterfeit payment instrument; for example, a person accepting payment from another by check, without knowing the check he or she accepted is counterfeit, commits the crime of possessing a counterfeit payment instrument.

In *State v. Thomas*, the Fifth District Court of Appeal held that Florida’s statute criminalizing possession of a counterfeit instrument is facially unconstitutional because it violates due process by criminalizing mere possession rather than possession with intent to defraud.⁴⁰⁶ The Court held that the plain reading of the statute and the principles of statutory construction require the statute to be interpreted as it is written, regardless of whether the legislature may have intended to include “intent to defraud” as an element of the possession offense.

⁴⁰⁵ S. 921.0023, F.S.

⁴⁰⁶ *State v. Thomas*, 133 So. 3d 1133 (Fla. 5th 2014).

Effect of Proposed Changes- Possession of a Counterfeit Instrument

The bill adds the element of intent to defraud to the crime of possession of a counterfeit instrument.

Child-like Sex Dolls

Background

In recent years, the sex industry has developed increasingly realistic and advanced sex dolls.⁴⁰⁷ Robotic sex dolls have interactive capabilities and even programmable personalities.⁴⁰⁸ The industry largely markets dolls resembling adults; however, niche manufacturers create and sell child-like sex dolls (CLSDs).

The owner of a leading Japanese company making CLSDs is an admitted pedophile who has never acted on his urges.⁴⁰⁹ Though his company markets the dolls as an alternative to acting on pedophilic impulses, experts emphasize that using CLSDs would likely positively reinforce pedophilic ideation, at least for some people.⁴¹⁰ Additionally, research suggests that people who have actually molested children have a 10 to 50 percent recidivism rate.⁴¹¹ Already at a risk of reoffending, child molesters gaining access to CLSDs that positively reinforce their behavior poses a significant threat to children. Other commentators have expressed concerns, about child- and adult-dolls alike, that the dolls' passive nature normalizes unequal sexual power dynamics, which are particularly pronounced when an adult molests a child.⁴¹²

Great Britain and Australia have explicitly outlawed importing and distributing CLSDs, but the United States federal government and states – including Florida – have not. This year, the Kentucky Legislature introduced legislation criminalizing possession of a CLSD⁴¹³ after a judge dismissed child pornography charges against a man for possessing two CLSDs – one resembling a 6- to 8-year-old girl and the other an infant.⁴¹⁴ The court reasoned that no actual child was involved, and therefore the CLSD was not child pornography.⁴¹⁵ In Massachusetts, police tracked an online CLSD order to a registered sex offender, prompting them to discover and charge him with possession of other child pornography; he was not charged for possessing the doll.⁴¹⁶ Many online sellers and search engines, including eBay and Google, proactively block sales of and searches for CLSDs.⁴¹⁷

First Amendment

The First Amendment to the United States Constitution guarantees the right to free speech.⁴¹⁸ The government may restrict obscenity and child pornography, however, because neither qualifies as protected speech. A baseline question to the constitutionality of banning CLSDs under the First

⁴⁰⁷ Julie Beck, *A (Straight, Male) History of Sex Dolls*, The Atlantic (Aug. 6, 2014),

<https://www.theatlantic.com/health/archive/2014/08/a-straight-male-history-of-dolls/375623/> (last visited Apr. 10, 2019).

⁴⁰⁸ Marie-Helen Maras and Lauren R. Shapiro, *Child Sex Dolls and Robots: More Than Just an Uncanny Valley*, Journal of Internet Law (Dec. 2017), at 4,

https://www.researchgate.net/publication/321137227_Child_Sex_Dolls_and_Robots_More_Than_Just_an_Uncanny_Valley (last visited Apr. 10, 2019).

⁴⁰⁹ Jason Lee, *Can Child Dolls Keep Pedophiles from Offending*, The Atlantic (Jan. 11, 2016),

<https://www.theatlantic.com/health/archive/2016/01/can-child-dolls-keep-pedophiles-from-offending/423324/> (last visited Apr. 10, 2019).

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² Beck, *supra*.

⁴¹³ Kentucky S.B. 102 (2019), <https://legiscan.com/KY/bill/SB102/2019> (last visited Mar. 20, 2019).

⁴¹⁴ Associated Press, *No porn charge for Kentucky man who ordered sex dolls resembling children*, WDRB (Oct. 4, 2018),

https://www.wdrb.com/news/crime-reports/no-porn-charge-for-kentucky-man-who-ordered-sex-dolls/article_b8ecdeb6-55bb-52d0-8daf-c01776797112.html (last visited Apr. 10, 2019).

⁴¹⁵ *Id.*

⁴¹⁶ Ally Donnelly, *Child Sex Dolls: Why Aren't They Illegal?*, NECN (Jul. 23, 2018), <https://www.necn.com/news/new-england/Child-Sex-Dolls-Why-Arent-They-Illegal-488937711.html> (last visited Apr. 10, 2019).

⁴¹⁷ *Id.*

⁴¹⁸ U.S. Const. Amend. I.

Amendment is whether CLSDs or certain uses of CLSDs qualify first, as speech and second, as either obscenity or child pornography.

The United States Supreme Court (Supreme Court) developed the test for determining whether material is obscene in *United States v. Miller*.⁴¹⁹ Florida uses the Miller test to define obscenity, which refers to the status of material that:

- The average person, applying contemporary community standards, would find appeals to the prurient interest;
- Depicts or describes, in a patently offensive way, sexual conduct; and
- Taken as a whole lacks serious literary, artistic, political, or scientific value.⁴²⁰

Florida law criminalizes a variety of acts related to obscenity in ch. 847, F.S. Section 847.011, F.S., prohibits a person from knowingly committing certain acts – such as selling, transmitting, or distributing – related specified obscene materials.⁴²¹ Relevant to CLSDs, s. 847.011(1)(a), F.S., prohibits any of these acts with an article or instrument intended for obscene use. A CLSD may fall under this definition, if a prosecutor could prove obscenity.

Although child pornography is generally also obscene, the Supreme Court has articulated a different basis for exempting it from First Amendment protections, based largely on protecting children and preventing sexual exploitation.⁴²² However, pornographic materials that do not implicate actual children, such as virtual child pornography, are not protected under *Ashcroft v. Free Speech Coalition*.⁴²³ Based on *Ashcroft*, it appears unlikely that CLSDs qualify as child pornography and cannot be regulated on that ground, as they do not implicate actual children. If CLSDs are speech, the government may be able to regulate sale and distribution as obscenity; however, the First Amendment still protects private possession of obscenity in one's home,⁴²⁴ and the provision banning simple possession may not pass muster.

Fourteenth Amendment

The Fourteenth Amendment to the United States Constitution conveys substantive due process, protecting certain rights from governmental interference.⁴²⁵ In *Lawrence v. Texas*, the Supreme Court held that substantive due process under the Fourteenth Amendment protects intimate consensual sexual conduct such as sodomy, striking down Texas's criminal sodomy law.⁴²⁶ There is a circuit split between the Fifth and Eleventh Circuits on whether *Lawrence* extends to the sale and private use of sex toys.⁴²⁷ However, in Florida, the Eleventh Circuit holding is binding authority, allowing the state to regulate these devices without violating the Fourteenth Amendment.

Effect of Proposed Changes- Child-like Sex Dolls

PCB JDC 19-02 prohibits a person from knowingly possessing, selling, lending, giving away, distributing, transmitting, showing, or transmuting an obscene CLSD. Simple possession of an obscene CLSD is a first degree misdemeanor, punishable by up to one year in county jail and a \$1,000 fine, for

⁴¹⁹ 413 U.S. 15 (1973).

⁴²⁰ S. 847.001, F.S.

⁴²¹ Enumerated materials are a book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing photograph, motion picture film, figure, image, phonograph, record, wire or tape or other recording, any written, printed, or recorded matter, or sensory representations, or any article or instrument for obscene use. S. 847.011, F.S.

⁴²² *New York v. Ferber*, 458 U.S. 747 (1982).

⁴²³ 535 U.S. 234 (2002).

⁴²⁴ *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

⁴²⁵ U.S. Const. Amend. XIV.

⁴²⁶ 539 U.S. 558 (2003).

⁴²⁷ *Williams v. Alabama*, 378 F.3d 1232 (11th Cir. 2004); *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008).

a first offense, and a third degree felony, punishable by up to five years and a \$5,000 fine, for a second or subsequent offense.⁴²⁸

Selling, lending, giving away, distributing, transmitting, showing, transmuting, or possessing with intent to do any of these is a third degree felony for a first offense, and a second degree felony, punishable by up to fifteen years in prison and a \$10,000 fine, for a second or subsequent offense. The third degree felony offenses are a level one on the Criminal Punishment Code Offense Severity Ranking Chart as an unranked third degree felony, and the second degree felony offense is a level four as an unranked second degree felony.

Introduction of Contraband

Background

Cell phones in state correctional institutions are a pervasive and documented problem, with DOC confiscating more than 9,000 cell phones between 2017 and 2018.⁴²⁹ Although the introduction of contraband can often be attributed to criminal gang activity or visitors, in 2018 there were at least 19 state correctional officers and staff who were accused of misconduct relating to contraband.⁴³⁰ Four state correctional officers and a former chaplain have been arrested for introducing contraband into a correctional institution in 2019.⁴³¹

Inmates with cell phones can make unrecorded and unmonitored calls to people outside the facility, sometimes for nefarious purposes. Prison cell phone use has been linked to threats, murder, complex criminal schemes, and escapes.⁴³² Cell phone use in a county detention facility poses similar risks. Additionally, since many inmates in a county detention facility are awaiting trial, there is heightened risk that cell phones could be used to intimidate witnesses and obstruct justice.

Florida law prohibits introduction of contraband into state correctional institutions⁴³³ and county detention facilities.⁴³⁴ Introduction of contraband is either a second or third degree felony,⁴³⁵ depending on the type of contraband introduced and the facility.⁴³⁶ Contraband, which includes items that may pose a safety concern, is defined differently for each facility.

In a state correctional institution, contraband includes any:

- Written or recorded communication or any currency or coin;
- Article of food or clothing;
- Intoxicating beverage or beverage which causes or may cause an intoxicating effect;
- Controlled substance as defined in s. 893.02(4), F.S., or any drug having a hypnotic, stimulating, or depressing effect;
- Firearm, weapon, or explosive substance; and
- Cell phone or other portable communication device.⁴³⁷

⁴²⁸ Ss. 775.082 and 775.083, F.S.

⁴²⁹ Dan Sullivan, *Spice and cell phones: Florida's prisons see new wave of contraband*, Tampa Bay Times (Nov. 5, 2018), https://www.tampabay.com/news/publicsafety/crime/Spice-and-cell-phones-Florida-s-prisons-see-new-wave-of-contraband_172879515 (last visited Apr. 10, 2019).

⁴³⁰ *Id.*

⁴³¹ Florida Department of Corrections, *FDC Press Releases and Announcements*, <http://www.dc.state.fl.us/comm/press/2019/index.html> (last visited Apr. 10, 2019).

⁴³² Matt Riley, *Southern Prisons Have a Cellphone Smuggling Problem*, NBC News (Sept. 30, 2017), <https://www.nbcnews.com/news/corrections/southern-prisons-have-smuggled-cellphone-problem-n790251> (last visited Apr. 10, 2019).

⁴³³ S. 944.47, F.S.

⁴³⁴ S. 951.22, F.S.

⁴³⁵ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

⁴³⁶ Ss. 944.47(2), 951.22(2), and 985.711(2), F.S.

⁴³⁷ S. 944.47, F.S.

In a county detention facility, introduction of any of the following is a third degree felony:

- Written or recorded communication;
- Currency or coin;
- Article of food or clothing;
- Tobacco products, cigarette, or cigar;
- Intoxicating beverage or beverage which causes or may cause an intoxicating effect;
- Narcotic, hypnotic, or excitative drug or drug of any kind or nature, including nasal inhalators, sleeping pills, barbiturates, and controlled substances as defined in s. 893.02(4), F.S.;
- Firearm or instrumentality used or intended to be used as a dangerous weapon; and
- Instrumentality that may be used or is intended to be used as an escape aid.⁴³⁸

Cell phones or other portable electronic devices are only criminalized as contraband in a state correctional institution, punishable as a third degree felony.⁴³⁹ A county detention facility may prohibit cell phones by internal rule, allowing officers to confiscate phones and discipline inmates for a violation.⁴⁴⁰ However, law enforcement can neither criminally charge a person for having a cell phone in a county detention facility nor fully investigate how a cell phone enters the facility.⁴⁴¹

Effect of Proposed Changes- Introduction of Contraband

PCB JDC 19-02 reclassifies introduction of any of the following items into a county detention facility from a third degree felony to a first degree misdemeanor:

- Written or recorded communication;
- Currency or coin;
- Article of food or clothing;
- Tobacco products, cigarette, or cigar; and
- Intoxicating beverage or beverage which causes or may cause an intoxicating effect.

Introduction of an intoxicating drug, firearm or weapon, or instrumentality which can be used to aid in an escape remain a third degree felony.

The bill adds cell phones and other portable communication devices to the list of prohibited contraband items in a county detention facility. The bill makes introducing a cell phone or other portable communication device into a county detention facility a third degree felony, ranked as a level four offense on the offense severity ranking chart. The bill increases the offense level for introducing a cell phone or other portable communication device into a state correctional institution by ranking the offense as a level four offense on the offense severity ranking chart.

The bill decreases the offense level for introducing an intoxicating drug into a county detention facility from a level six offense to a level four offense. This makes the offense level for introducing an intoxicating drug into a county detention facility consistent with the offense level for introducing an intoxicating drug into a state correctional institution. The bill also ranks the previously unranked offense of introducing an instrumentality which can be used to aid in an escape into a county detention facility as a level four offense.

The bill enhances the penalty for introducing contraband committed by an employee who uses his or her position to introduce the contraband into a state correctional institution. The bill increases the

⁴³⁸ S. 951.22, F.S.

⁴³⁹ The offense is unranked and defaults to a level one offense. S. 921.0023(1), F.S.

⁴⁴⁰ See, e.g., Florida Sheriffs Association, *Florida Model Jail Standards*, standard no. 14.1, https://www.flsheriffs.org/uploads/docs/FMJS_07-01-2017.pdf (last visited Apr. 10, 2019); Orange County Corrections Department, *Administrative Order No. IO.200 re: Inmate Discipline* (August 30, 2017).

⁴⁴¹ Law enforcement may apply for a search warrant to search the contents of a cell phone when the phone constitutes evidence relevant to proving a felony has been committed. S. 933.02, F.S.; *Smallwood v. State*, 113 So. 3d 724 (Fla. 2013). As possession of a cell phone in a county detention facility is not currently a felony crime, law enforcement may not obtain a warrant to inspect the contents of a cell phone discovered in a jail unless there is probable cause to connect the phone to an independent crime.

offense level one level above the ranking specified in the offense severity ranking chart for the offense committed. The term “employee”⁴⁴² includes employees of the Department of Corrections, employees or vendors under contract with the state, volunteers, and law enforcement officers who are on the grounds of a state correctional institution in the course of their employment.⁴⁴³

Sealing and Expunction of Criminal History Records

Background

A criminal history record includes any nonjudicial record maintained by a criminal justice agency⁴⁴⁴ that contains criminal history information.⁴⁴⁵ Criminal history information is information collected by criminal justice agencies consisting of identifiable descriptions of individuals and notations of arrests, detentions, indictments, informations, other formal criminal charges, and criminal dispositions.⁴⁴⁶

Sealing

A court may order a criminal history record sealed,⁴⁴⁷ rendering it confidential and exempt from Florida’s public records laws.⁴⁴⁸ Only the following may access a sealed criminal history record:

- The subject of the record;
- His or her attorney;
- Criminal justice agencies for criminal justice purposes;
- Judges in the state courts system for assisting in their case-related decision-making responsibilities; and
- Certain enumerated entities⁴⁴⁹ for licensing, access authorization, and employment purposes.⁴⁵⁰

Upon sealing of a criminal history record, the subject of the record may lawfully deny or fail to acknowledge the arrests covered by the sealed record, with exceptions for certain state employment positions, professional licensing purposes, purchasing a firearm, applying for a concealed weapons permit, seeking expunction, or if the subject is a defendant in a criminal prosecution.⁴⁵¹

A criminal history record is not eligible for court-ordered sealing if it relates to:

- Sexual misconduct;⁴⁵²
- Illegal use of explosives;⁴⁵³
- Terrorism;⁴⁵⁴
- Murder;⁴⁵⁵
- Manslaughter or homicide;⁴⁵⁶

⁴⁴² S. 944.115(2)(b), F.S.

⁴⁴³ Law enforcement officers may be on the grounds of a correctional institution to transport inmates or conduct criminal investigations.

⁴⁴⁴ Criminal justice agencies include the court, the Department of Law Enforcement (FDLE), the Department of Juvenile Justice (DJJ), components of the Department of Children and Families (DCF), and other governmental agencies that administrate criminal justice. S. 943.045(11), F.S.

⁴⁴⁵ S. 943.045(6), F.S.

⁴⁴⁶ S. 943.045(5), F.S.

⁴⁴⁷ S. 943.059, F.S.

⁴⁴⁸ Ss. 943.059(4) and 119.07(1), F.S.; Art. I, s. 24(a), Fla. Const.

⁴⁴⁹ Enumerated entities include criminal justice agencies, the Florida Bar, the Department of Children and Families, the Division of Vocational Rehabilitation within the Department of Education, the Agency for Health Care Administration, the Agency for Persons with Disabilities, the Department of Health, the Department of Elderly Affairs, the Department of Juvenile Justice, the Department of Education, a district school board, a university laboratory school, a charter school, a private or parochial school, a local governmental entity that licenses child care facilities, the Division of Insurance Agent and Agency Services within the Department of Financial Services, and the Bureau of License Issuance of the Division of Licensing within the Department of Agriculture and Consumer Services.

⁴⁵⁰ S. 943.059(4)(a), F.S.

⁴⁵¹ *Id.*

⁴⁵² Ss. 393.135, 394.4593, and 916.1075, F.S.

⁴⁵³ Ch. 552, F.S.

⁴⁵⁴ S. 775.30, F.S.

⁴⁵⁵ Ss. 782.04, 782.065, and 782.09, F.S.

⁴⁵⁶ Ss. 782.07, 782.071, and 782.072, F.S.

- Assault⁴⁵⁷ or battery⁴⁵⁸ of one family or household member by another family or household member;⁴⁵⁹
- Aggravated assault;⁴⁶⁰
- Felony battery, domestic battery by strangulation, or aggravated battery;⁴⁶¹
- Stalking or aggravated stalking;⁴⁶²
- Luring or enticing a child;⁴⁶³
- Human trafficking;⁴⁶⁴
- Kidnapping or false imprisonment;⁴⁶⁵
- Sexual battery, unlawful sexual activity with a minor, or female genital mutilation;⁴⁶⁶
- Procuring a person under the age of 18 for prostitution;⁴⁶⁷
- Lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age;⁴⁶⁸
- Arson;⁴⁶⁹
- Burglary of a dwelling;⁴⁷⁰
- Voyeurism or video voyeurism;⁴⁷¹
- Robbery or robbery by sudden snatching;⁴⁷²
- Carjacking;⁴⁷³
- Home invasion robbery;⁴⁷⁴
- A violation of the Florida Communications Fraud Act;⁴⁷⁵
- Abuse of an elderly person or disabled adult or aggravated abuse of an elderly person or disabled adult;⁴⁷⁶
- Lewd or lascivious offenses committed upon or in the presence of an elderly or disabled person;⁴⁷⁷
- Child abuse or aggravated child abuse;⁴⁷⁸
- Sexual performance by a child;⁴⁷⁹
- Offenses by public officers and employees;⁴⁸⁰
- Certain acts in connection with obscenity;⁴⁸¹
- A violation of the Computer Pornography and Child Exploitation Prevention Act;⁴⁸²
- Selling or buying of minors;⁴⁸³
- Aircraft piracy;⁴⁸⁴

⁴⁵⁷ S. 784.011, F.S.

⁴⁵⁸ S. 784.03, F.S.

⁴⁵⁹ S. 741.28(3), F.S.

⁴⁶⁰ S. 784.021, F.S.

⁴⁶¹ Ss. 784.03, 784.041, and 784.045, F.S.

⁴⁶² S. 784.048, F.S.

⁴⁶³ S. 787.025, F.S.

⁴⁶⁴ S. 787.06, F.S.

⁴⁶⁵ Ss. 787.01 and 787.02, F.S.

⁴⁶⁶ Ch. 794, F.S.

⁴⁶⁷ S. 796.03, F.S. (2013) (repealed by ch. 2014-160, §10, Laws of Fla.).

⁴⁶⁸ S. 800.04, F.S.

⁴⁶⁹ S. 806.01, F.S.

⁴⁷⁰ S. 810.02, F.S.

⁴⁷¹ Ss. 810.14 and 810.145, F.S.

⁴⁷² Ss. 812.13 and 812.131, F.S.

⁴⁷³ S. 812.133, F.S.

⁴⁷⁴ S. 812.135, F.S.

⁴⁷⁵ S. 817.034, F.S.

⁴⁷⁶ S. 825.102, F.S.

⁴⁷⁷ S. 825.1025, F.S.

⁴⁷⁸ S. 827.03, F.S.

⁴⁷⁹ S. 827.071, F.S.

⁴⁸⁰ Ch. 839, F.S.

⁴⁸¹ S. 847.0133, F.S.

⁴⁸² S. 893.0135, F.S.

⁴⁸³ S. 847.0145, F.S.

⁴⁸⁴ S. 860.16, F.S.

- Manufacturing a controlled substance;⁴⁸⁵
- Drug trafficking;⁴⁸⁶ or
- Any violation specified as a predicate offense for registration as a sexual predator⁴⁸⁷ or sexual offender.⁴⁸⁸

To obtain a sealing, a person must first apply to FDLE for a certificate of eligibility, which FDLE must issue to a person who:

- Has submitted a certified copy of the charge disposition he or she seeks to seal;
- Is not seeking to seal a criminal history record relating to a violation of certain enumerated offenses;
- Has never, prior to filing the application for a certificate of eligibility, been either:
 - Adjudicated guilty of any criminal offense or comparable ordinance violation; or
 - Adjudicated delinquent of certain enumerated crimes as a juvenile.
- Has not been adjudicated guilty or delinquent for committing any of the acts stemming from the arrest or alleged criminal activity to which the petition to seal pertains;
- Has never secured a prior sealing or expunction; and
- Is no longer under court supervision related to the disposition of the arrest or alleged criminal activity to which the petition to seal pertains.⁴⁸⁹

Upon receiving a certificate of eligibility from FDLE, a person must petition the court to seal the record.⁴⁹⁰ A complete petition contains both a valid certificate of eligibility, issued within the previous 12 months, and a sworn statement from the petitioner attesting to his or her eligibility.⁴⁹¹ It is solely within the court's discretion to grant or deny a petition to seal.⁴⁹²

Expunction

A person may have his or her criminal history record expunged under certain circumstances.⁴⁹³ When a record is expunged, the criminal justice agencies possessing such record must physically destroy or obliterate it.⁴⁹⁴ FDLE maintains a copy of the record to evaluate subsequent requests for sealing or expunction, and to recreate the record in the event a court vacates the order to expunge.⁴⁹⁵ Once the record is expunged, a person may lawfully deny or fail to acknowledge the arrests covered by the expunged record, subject to exceptions.⁴⁹⁶

Court-Ordered Expunction

A court, in its sole discretion, may order a criminal justice agency to expunge a person's criminal history record if FDLE issues the person a certificate of eligibility for expunction.⁴⁹⁷ FDLE must issue a certificate of eligibility for court-ordered expunction to a person meeting all criteria.⁴⁹⁸ Generally, a person is eligible for expunction if:

- The person has never had a record sealed or expunged previously;⁴⁹⁹

⁴⁸⁵ Ch. 893, F.S.

⁴⁸⁶ S. 893.135, F.S.

⁴⁸⁷ S. 775.21, F.S.

⁴⁸⁸ S. 943.0535, F.S.

⁴⁸⁹ S. 943.059(2), F.S.

⁴⁹⁰ *Id.*

⁴⁹¹ S. 943.059(1), F.S.

⁴⁹² S. 943.059, F.S.

⁴⁹³ Ss. 943.0581, 943.0582, 943.0583, and 943.0585, F.S.

⁴⁹⁴ S. 943.045(16), F.S.

⁴⁹⁵ *Id.*

⁴⁹⁶ S. 943.0585(4), F.S.

⁴⁹⁷ S. 943.0585(1), F.S.

⁴⁹⁸ S. 943.0585(2), F.S.

⁴⁹⁹ *Id.*

- The person has never been adjudicated guilty as an adult for any offense or adjudicated delinquent as a juvenile for certain enumerated offenses;⁵⁰⁰ and
- The case he or she seeks to have expunged:
 - Either:
 - Was dismissed by a no action,⁵⁰¹ *nolle prosequi*,⁵⁰² or court dismissal,⁵⁰³ or
 - Resulted in a not guilty verdict or judgment of acquittal,⁵⁰⁴ and
 - Does not relate to one of several enumerated offenses, which are the same as the disqualifying offenses for sealing.⁵⁰⁵

Administrative Expunction

Administrative expunction is available to a person whose arrest was made contrary to law or by mistake.⁵⁰⁶ Either a law enforcement agency or a person seeking expunction may apply to FDLE for the remedy; however, a person seeking this form of expunction must have the endorsement of the head of the arresting agency, the state attorney, or either's designee.

An example of when administrative expunction might be appropriate is where the wrong individual was arrested on an arrest warrant, such as another person by the same name, or where the warrant named a person other than the suspect by accident.⁵⁰⁷ This relatively rare form of expunction is available to both adults and juveniles.

Other Types of Expunction

Other types of expunction include:

- Lawful self-defense expunction.⁵⁰⁸
- Human trafficking victim expunction.⁵⁰⁹
- Automatic juvenile expunction.⁵¹⁰
- Early juvenile expunction.⁵¹¹
- Juvenile diversion program expunction.⁵¹²

Processing Petitions to Seal and Expunge

Processing petitions to seal or expunge criminal history records consumes considerable FDLE resources, as FDLE must verify all petitioners' criminal histories both in and out of state. At the end of

⁵⁰⁰ *Id.*

⁵⁰¹ A no action is the dismissal of the pending charges before an information or indictment has been filed. *Genden v. Fuller*, 648 So. 2d 1183, 1183 n. 1 (Fla. 1994).

⁵⁰² A *nolle prosequi* is the dismissal of a pending information or indictment. *Id.*

⁵⁰³ The court may dismiss a case under certain circumstances, including on a defense motion to dismiss, under Rule 3.90(c)(4), Fla. R. Crim. P., upon expiration of the speedy trial period under Rule 3.191, Fla. R. Crim. P., or upon granting Stand Your Ground immunity under s. 776.032, F.S.

⁵⁰⁴ The court may acquit a defendant if, at the close of evidence, it is of the opinion that the evidence is insufficient to warrant a conviction. Fla. R. Crim. P. 3.380(a).

⁵⁰⁵ S. 943.0585(2)(a)3., F.S.

⁵⁰⁶ S. 943.0581, F.S.; R. 11C-7.008, F.A.C.

⁵⁰⁷ Aisling Swift, *Revamped Florida law allows wrongly arrested to get record cleared, but few using it*, Naples Daily News (August 13, 2014), <http://archive.naplesnews.com/news/crime/revamped-florida-law-allows-wrongly-arrested-to-get-record-cleared-but-few-using-it-ep-393319999-343144122.html> (last visited Apr. 10, 2019).

⁵⁰⁸ S. 943.0585(5), F.S.

⁵⁰⁹ S. 943.0583, F.S. Human trafficking under Florida law is the transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining of another person for the purpose of exploitation of that person. A person who is a victim of human trafficking may petition for the expunction of a criminal history record resulting from the arrest or filing of charges for an offense committed or reported to have been committed as a part of the human trafficking scheme of which he or she was a victim, regardless of the disposition of the case. This type of expunction is not available for certain violent offenses.

⁵¹⁰ S. 943.0515, F.S.

⁵¹¹ S. 943.0515(1)(b), F.S.

⁵¹² S. 943.0582, F.S.

calendar year 2018, FDLE had approximately 8,300 pending certificate of eligibility applications.⁵¹³ The average turnaround time for processing a certificate of eligibility application was:

- 144 business days in 2018.
- 107 business days in 2017.
- 96 business days in 2016.⁵¹⁴

Effect of Proposed Changes- Sealing and Expunction

Automatic Sealing

PCB JDC 19-02 directs FDLE to implement rules creating an automatic sealing process for criminal history records. FDLE must automatically seal a criminal history record when:

- Charges were not filed;
- Charges were dismissed, unless the dismissal was due to incompetency to proceed;⁵¹⁵ or
- The defendant was acquitted, by either a verdict of not guilty or a judgment of acquittal.

Unlike the court-ordered sealing process, automatic sealing is not contingent on either the nature of the charge or the person's prior criminal history. Additionally, there is no limit on the number of sealings a person may receive by this process. Eliminating the need to verify prior criminal history for sealing significantly alleviates the workload burden on FDLE.

A criminal justice agency or a court is not required to seal its records as a result of automatic sealing. Thus, prosecutors, law enforcement, and judges retain access to an automatically sealed record. Otherwise, however, the sealing has the same effect as a court-ordered sealing under s. 943.059, F.S., including that many potential employers would not see the sealed record when conducting a background check.

Reorganization

The PCB reorganizes the statutes related to sealing and expunction for clarity. Regarding court-ordered sealing and court-ordered expunction, which share a common list of ineligible offenses, the PCB creates a new statutory section listing all ineligible offenses by both name and statute number. The PCB clarifies that an ineligible criminal history record is a conviction, information, indictment, notice to appear, or arrest for any enumerated offense, as opposed to simply a record that "relates to" an enumerated offense. The PCB limits disqualifying prior convictions for court-ordered sealing and expunction to convictions in this state. Other organizational changes to both the court-ordered sealing and court-ordered expunction statute retain the substance in current law while promoting better readability.

The PCB further creates a new statutory section for lawful self-defense expunction, which is currently housed under the court-ordered expunction section, as all other forms of expunction are contained within distinct statutory sections. The substance of the law regarding lawful self-defense expunction remains the same. Finally, the PCB clarifies that administrative expunction is for mistake of law or fact by including this language in the title of the section addressing administrative expunction.

⁵¹³ Email from Ron Draa, Legislative Affairs Director, Florida Department of Law Enforcement, Re: Sealing/Expunction Timeframes/Backlog (Jan. 28, 2019).

⁵¹⁴ *Id.*

⁵¹⁵ A defendant is incompetent to proceed when he or she is unable to consult with counsel with a reasonable degree of rational understanding or does not have a rational and factual understanding of the pending proceedings. Fla. R. Crim. P. 3.211; *Dusky v. United States*, 362 U.S. 402 (1960). Section 916.145, F.S., requires a court to dismiss the charges against a defendant who has been adjudicated incompetent to proceed due to mental illness under certain circumstances. Section 985.19, F.S., requires a court to dismiss the delinquency petition of a minor under certain circumstances.

Inmate Reentry

Background

The Department of Corrections (DOC) may collaborate with public or private organizations, including faith-based service groups, to provide postrelease services to former inmates including substance abuse counseling, family counseling, and employment support programs.⁵¹⁶ DOC selects partner organizations based on the:

- Depth and scope of services provided;
- Geographic area to be served;
- Number of inmates to be served and the cost of services per inmate; and
- Individual provider's record of success in providing inmate services.

Transition Assistance

DOC provides transition assistance at each of its major prison institutions⁵¹⁷ to facilitate community reintegration by:

- Developing an inmate's postrelease plan;
- Obtaining job placement information;
- Providing a written medical discharge plan and referral to a county health department;
- Providing a 30-day supply of HIV/AIDS medication, if taken prior to release by an inmate who is known to be HIV positive;
- Facilitating placement in a private transition housing program, if an inmate is eligible and makes such a request,⁵¹⁸ and
- Providing a photo identification card.

A correctional officer⁵¹⁹ or a correctional probation officer⁵²⁰ may not serve as a transition assistance specialist.

Before release, every inmate must complete a 100-hour comprehensive training course that focuses on job readiness and life management skills.⁵²¹ In June 2017, DOC implemented statewide use of the Compass 100 program to meet this statutory training requirement. Inmates nearing release complete Compass 100, which focuses on developing life skills in conjunction with other educational courses and substance abuse treatment.⁵²² Topics include punctuality, workplace etiquette, interpersonal communication, and problem solving.⁵²³ Additionally, inmates are required to complete a cognitive behavioral curriculum called "Thinking for a Change" which is designed to foster effective

⁵¹⁶ S. 944.707, F.S.

⁵¹⁷ Major institutions, or correctional institutions, are prisons with fences, razor wire or ribbon, electronic detection systems, perimeter towers with armed correctional officers and/or officers in roving perimeter vehicles. Other types of prison facilities include work/forestry camps, community release centers, and road prisons. There are currently 50 major institutions in Florida. See Florida Department of Corrections, *Annual Report Fiscal Year 2017-2018*, pg. 33-34, http://dc.state.fl.us/pub/annual/1718/FDC_AR2017-18.pdf (last visited Apr. 10, 2019); s. 944.704, F.S.

⁵¹⁸ Placements may include contracted substance abuse transition housing or contracted faith-based substance abuse transition housing programs. S. 944.704, F.S.

⁵¹⁹ A "correctional officer" is defined as "any person who is appointed or employed full-time by the state or any political subdivision thereof, or by any private entity which has contracted with the state or county, and whose primary responsibility is the supervision, protection, care, custody, and control, or investigation, of inmates within a correction institution." The term does not include any secretarial, clerical, or professionally trained staff. S. 943.10(2), F.S.

⁵²⁰ A "correctional probation officer" is defined as "any person who is employed full-time by the state whose primary responsibility is the supervised custody, surveillance, and control of assigned inmates, probationers, parolees, or community controlees within institutions of the Department of Corrections or within the community." The term includes supervisory personnel whose duties include, in whole or in part, the supervision, training, and guidance of correctional probation officers, but excludes management and administrative personnel above, but not including, the probation and parole regional administrator level. S. 943.10(3), F.S.

⁵²¹ S. 944.7065, F.S.

⁵²² Florida Department of Corrections, *Florida Department of Corrections Launches Compass 100*, June 5, 2017, <http://www.dc.state.fl.us/comm/press/2017/06-05-Compass100.html> (last visited Apr. 10, 2019).

⁵²³ *Id.*

communication and problem solving skills.⁵²⁴ Each inmate develops a "Readiness Portfolio" that contains a resume, community resources, and program completion certificates to use as they reenter the community.⁵²⁵

DOC also employs four regional community transition specialists who collaborate with public, private, and community agencies to identify and develop employment opportunities for ex-offenders.⁵²⁶ Lastly, DOC employs an employment specialist in each judicial circuit to assist offenders on community supervision with identifying employment opportunities.⁵²⁷

A statewide reentry resource directory, available to transition specialists and ex-offenders, is a searchable database available on DOC's website containing over 6,000 state and local organizations providing reentry services to offenders returning to the community.⁵²⁸ Currently, organizations seeking to be included in the resource directory submit an application to DOC, which enters the information into the directory. The department verifies the resource directory every six months to ensure the information remains current.⁵²⁹

Spectrum

DOC uses Spectrum, an evidence-based assessment and screening system that helps DOC make informed decisions regarding an inmate's continuum of care through institutions and back to the community. Using assessments and screenings across multiple disciplines including mental health, substance abuse, academic and workforce education, Spectrum allows DOC determine and provide resources that may reduce an inmate's recidivism risk.⁵³⁰

Release Orientation Programming

DOC currently provides a standardized release orientation program to every eligible inmate.⁵³¹ The program includes instruction on:

- Employment skills;
- Money management skills;
- Personal development and planning;
- Community reentry concerns and support; and
- Any other appropriate instruction to ensure the inmate's successful reentry into the community.⁵³²

DOC must conduct a needs assessment of every inmate to determine any basic support services the inmate may need upon their release.⁵³³ In order to provide these services, DOC is authorized to contract with outside public or private entities, including faith-based service groups.⁵³⁴

⁵²⁴ *Id.*

⁵²⁵ *Id.*

⁵²⁶ Florida Department of Corrections, Agency Analysis of 2018 Senate Bill 226, p. 3 (Oct. 2, 2017), <http://abar.laspbs.state.fl.us/ABAR/Attachment.aspx?ID=25696> (last visited Apr. 10, 2019).

⁵²⁷ *Id.*

⁵²⁸ *Id.* at 2.

⁵²⁹ Email from Chris Taylor, Legislative Analyst, Florida Department of Corrections, RE: Question about Reentry Resource Directory (Feb. 25, 2019).

⁵³⁰ Email from Jared Torres, Legislative Affairs Director, Florida Department of Corrections, RE: Questions about Spectrum (Mar. 28, 2019).

⁵³¹ All inmates released from the custody of DOC are eligible to receive transition services. However, the law instructs DOC to give priority for these services to substance abuse addicted inmates. The law provides that inmates released from private correctional facilities should be informed of and provided with the same level of transition assistance services as provided by DOC for an inmate in a state correctional facility. Ss. 944.703 and 944.7031, F.S.

⁵³² S. 944.705, F.S.

⁵³³ S. 944.705(4), F.S.

⁵³⁴ S. 944.705(5), F.S.

Educational Programming

Section 944.801, F.S., authorizes DOC to establish educational services in all institutions that house inmates under its supervision. DOC is required to:

- Collect information relating to inmates' educational or vocational areas of interest, vocational skills, and education level during the intake process;
- Approve varying levels and types of institutional educational programs; and
- Establish procedures for inmate admission to the programs.⁵³⁵

DOC must enter into agreements with certain entities to ensure the educational programs meet minimum performance standards established by the Florida Department of Education.⁵³⁶ DOC may enter into agreements with public or private:

- School districts;
- Community colleges;
- Junior colleges;
- Colleges;
- Universities; or
- Other entities.⁵³⁷

Career and Technical Education Programming

DOC offers a variety of career and technical education programs throughout the state. Program offerings include:

- Culinary Arts (11 institutions);
- Masonry, Brick and Block (10 institutions);
- Carpentry (7 institutions);
- Electricity (7 institutions);
- Technology Support Services (6 institutions);
- Air Conditioning, Refrigeration and Heating Technology (5 institutions);
- Automotive Technology Career Services (5 institutions);
- Cabinetmaking (5 institutions);
- Plumbing Technology (5 institutions);
- Environmental Services (4 institutions);
- Building Construction Design (3 institutions);
- Computer Systems and Information Technology (3 institutions);
- Welding Technology (3 institutions);
- Automotive Collision Repair and Refinishing (2 institutions);
- Graphic Communications and Printing (2 institutions);
- Landscape Management (2 institutions);
- Beekeeping (1 institution);
- Canine Obedience Training (1 institution);
- Commercial Class "B" Driving (1 institution);
- Cosmetology (1 institution);
- Digital Design (1 institution);
- Drafting (1 institution);
- Equine Care Technology (1 institution);
- Fashion Design Services (1 institution);
- Janitorial Services (1 institution);
- Nursery Management/Horticulture (1 institution);

⁵³⁵ S. 944.801, F.S.

⁵³⁶ S. 944.801(3)(e), F.S.

⁵³⁷ *Id.*

- Wastewater/Water Treatment Technologies (1 institution); and
- Web Development (1 institution).⁵³⁸

In FY 2016-17, inmates earned 1,799 vocational certificates and 1,349 industry certifications. In FY 2017-18, these numbers increased to 1,937 vocational certifications and 2,063 industry certifications.⁵³⁹

Veteran Advocacy

Military veterans make up an estimated 8 percent of the national prison population.⁵⁴⁰ Many veteran reentry needs, such as medical and mental health care, housing, and legal services, are the same as for other offenders. However, navigating available veteran benefit opportunities to meet reentry needs can be difficult without assistance. Generally, veteran advocacy and legal clinics are programs that provide legal services and assist veterans in obtaining available benefits. Such programs do not currently operate in Florida prisons.

Prison Entrepreneurship Program

Though not statutorily mandated, DOC partners with the following educational institutions to offer inmates job training and readiness skills:

- Stetson University;
- Florida State University;
- University of Central Florida; and
- University of West Florida.⁵⁴¹

Other states have recognized the need for career development programs, including entrepreneurship training that begins in prison and continues to offer support following release. In 2011, the University of Virginia's Darden School of Business implemented a prison entrepreneurship program at Virginia's Dillwyn Correctional Center, a medium-security prison housing more than 1,000 inmate.⁵⁴² The program, taught by Darden students and volunteers, focuses on entrepreneurship skills, ethics, and business strategy.⁵⁴³ Students complete math testing, develop a personal business plan, and complete a final exam. Although Virginia's overall recidivism rate is about 23 percent, the recidivism rate of program participants is less than 3 percent.⁵⁴⁴

Transitional Employment Programs

DOC partners with Prison Rehabilitative Industries and Diversified Enterprises (PRIDE) to provide inmates with competency-based job training.⁵⁴⁵ PRIDE operates 41 centers providing training to inmates in 29 state correctional facilities. The program provides training in diversified market segments including agriculture, manufacturing, engineering, medical, services, printing, information technology,

⁵³⁸ Florida Department of Corrections, *Annual Report Fiscal Year 2017-2018*, *supra* note 2.

⁵³⁹ Florida Department of Corrections, Agency Analysis of 2018 SB 226-Revised, p. 2 (Oct. 25, 2017). Florida Department of Corrections, *Annual Report Fiscal Year 2017-2018*, *supra* note 2.

⁵⁴⁰ Office of the Public Defender, Ninth Judicial Circuit. *Incarcerated Veterans*. Salute Vets (2019), <http://www.salutevets.com/resources/incarcerated-veterans/> (last visited Apr. 10, 2019).

⁵⁴¹ Email from Jared Torres, Legislative Affairs Director, Department of Corrections, RE: Data request, (Feb. 9, 2018).

⁵⁴² Carlos Santos, *Second Chances: Darden's Fairchild Launches Prison Entrepreneurship Program*, UVA Today (Jan. 4, 2013), <https://news.virginia.edu/content/second-chances-darden-s-fairchild-launches-prison-entrepreneurship-program> (last visited Apr. 10, 2019).

⁵⁴³ *Id.*

⁵⁴⁴ Resilience Education, *Executive Summary*, (Mar. 2018), <https://static1.squarespace.com/static/5bc4fff016b6405451831f02/t/5bf22d0acd836636ea5b6cd0/1542597899378/1+ +2018+RE+Executive+Summary+%28March+2018%2C+UPDATED%29.pdf> (last visited Apr. 10, 2019).

⁵⁴⁵ Florida Department of Corrections, *Annual Report Fiscal Year 2017-2018*, *supra* note 2.

and office administration.⁵⁴⁶ PRIDE offers inmates vocational certifications that are recognized by, and have market value to, potential employers.⁵⁴⁷

The PRIDE program begins over a year from an inmate's release date. A PRIDE transition specialist helps the participant prepare a transition plan which covers housing and preparing for a job search after release. The PRIDE transition specialist also helps the participant create a resume and develop a training certificate portfolio. PRIDE works with community partners to ensure that clothing, food, and housing needs are met when the participant is released from prison. The transition specialist then assists the participant in an employment search and serves as a job retention coach once the inmate is hired. As of June 30, 2018, Florida's recidivism rate was 24.5 percent; the recidivism rate for former PRIDE participants is 9.89 percent.⁵⁴⁸

Effect of Proposed Changes- Inmate Reentry

PCB JDC 19-02 encourages offender reintegration into the community workforce. The bill mandates that each inmate receive a copy of a comprehensive community reentry resource directory. The directory must be organized by county and include the name, address, and telephone number of each provider, as well as a description of the services offered. The bill also requires the establishment of a toll-free hotline, which provides information to released inmates seeking to obtain post-release referrals for community based reentry services. Both the reentry resource directory and hotline reduce barriers to locating available reentry services.

The bill authorizes DOC to increase the number of transition assistance specialists in proportion to the number of inmates served at each of the major institutions and increase the number of employment specialists per judicial circuit based on the number of released inmates served under community supervision upon receiving legislative appropriations. The bill requires transition assistance staff to provide information to inmates identifying job assignment credentialing or industry certifications for which the inmate is eligible. These certifications benefit the inmate following release from incarceration, as they may be provided to potential employers as a record of skills training and employment history.

The bill also requires DOC to allow nonprofit faith-based, business and professional, civic or community organizations to apply to be registered to provide reentry services. These services include, but are not limited to, providing information on housing and job placement, money management assistance, and counseling addressing substance abuse, mental health, and co-occurring conditions. DOC must adopt policies and procedures for screening, approving, and registering an organization that applies to be registered. DOC may deny registration if the organization does not meet such policies and procedures. Collaborating with nonprofit organizations may enable DOC to expand the availability of reentry resources without requiring additional funding.

The bill requires DOC to expand the Spectrum system to provide inmates with community-specific reentry service provider referrals before release. An expanded Spectrum system reduces barriers to locating available reentry services by assisting DOC staff in identifying an inmate's needs and locating corresponding services in an inmate's county of residence.

The bill also authorizes DOC to contract with Veteran Advocacy Clinics or Veteran Legal Clinics operated by colleges, universities or other nonprofit organizations, to assist qualified veteran inmates in applying for veteran's assistance benefits upon release. Addressing veteran reentry needs through advocacy and legal clinics helps veterans navigate available veteran benefit opportunities, which may lead to more stable housing, employment, and reduced recidivism.

⁵⁴⁶ PRIDE Enterprises, *Why PRIDE?* (2017), <https://www.pride-enterprises.org/WhyPride.aspx?page=WhyPride> (last visited Apr. 10, 2019).

⁵⁴⁷ *Id.*

⁵⁴⁸ PRIDE Enterprises, *Annual Report 2017* (2017), https://www.pride-enterprises.org/Themes/PrideDefault/MediaContent/About/2017%20Annual%20Report/2017_Annual_Report.pdf (last visited Apr. 10, 2019).

The bill authorizes DOC to develop a Prison Entrepreneurship Program, to include 180 days of in prison education. If the program is implemented, the curriculum must include a component on developing a business plan, procedures for graduation and certification of successful student inmates, and at least 90 days of transitional and post-release continuing education services. The bill also encourages the use of transitional employment programs. The bill authorizes DOC to enter into agreements with public or private community colleges, junior colleges, colleges, universities, or other nonprofit entities to implement the program. Similar prison entrepreneurship programs have significantly reduced recidivism rates among participants.

Probation and Community Control

Background

At sentencing for a criminal conviction, a judge may place an offender on probation or community control in lieu of or in addition to incarceration.⁵⁴⁹ Probation is a form of community supervision requiring specified contacts with a probation officer and other terms and conditions.⁵⁵⁰ Community control is a more intensive form of supervision involving an individualized program which restricts the offender's movement within the community, home, or residential placement.⁵⁵¹ Several standard conditions of probation or community control apply automatically, including requirements to report to a probation officer as directed and to live without violating any law.⁵⁵² The court may also impose special conditions, such as community service hours, regular drug or alcohol testing, no contact orders, and treatment programs.⁵⁵³ Failure to meet any condition of supervision is a violation of probation or community control (VOP).

Court Resolutions to VOPs

A VOP may come before the court for resolution either by:

- Affidavit and issuance of a warrant or notice to appear,⁵⁵⁴ or
- A warrantless arrest by a law enforcement officer with knowledge that the offender is on supervision.⁵⁵⁵

Generally, upon a finding that an offender violated probation or community control, the court may revoke, modify, or continue supervision.⁵⁵⁶ If the court chooses to revoke, it may impose any sentence that was permissible at the offender's initial sentencing.⁵⁵⁷ Upon revocation of supervision, the court is bound by the sentencing guidelines under the Criminal Punishment Code.⁵⁵⁸ The sentencing guidelines provide a formula for computation of the lowest permissible prison sentence, based on a number of factors such as the offender's current and prior offenses. The court must make written findings, contemporaneous with sentencing for the revocation of supervision, to justify a downward departure and sentence an offender to less than the lowest permissible sentence.⁵⁵⁹

If an offender qualifies as a violent felony offender of special concern (VFOOSC), the court must revoke supervision, unless it makes written findings that the VFSOC does not pose a danger to the community.⁵⁶⁰ A VFOOSC is a person who is on felony supervision:

- Related to a qualifying offense⁵⁶¹ committed on or after March 12, 2007.

⁵⁴⁹ S. 948.01, F.S.

⁵⁵⁰ S. 948.001(8), F.S.

⁵⁵¹ S. 948.001(3), F.S.

⁵⁵² S. 948.03(1), F.S.

⁵⁵³ S. 948.03(2), F.S.

⁵⁵⁴ S. 948.06(1)(b), F.S.

⁵⁵⁵ S. 948.06(1)(a), F.S.

⁵⁵⁶ S. 948.06(2)(b), F.S.

⁵⁵⁷ *Id.*

⁵⁵⁸ S. 921.0022, F.S.

⁵⁵⁹ *State v. Roman*, 634 So.2d 291 (Fla. 1st DCA 1994).

⁵⁶⁰ S. 948.06(8)(e)2.b., F.S.

- For any offense committed on or after March 12, 2007, and has previously been convicted of a qualifying offense.
- For any offense committed on or after March 12, 2007, and is found to have violated that supervision by committing a qualifying offense.
- And has previously been found by a court to be a habitual violent felony offender,⁵⁶² three-time violent offender,⁵⁶³ or sexual predator,⁵⁶⁴ and has committed a qualifying offense on or after March 12, 2007.⁵⁶⁵

VFOSC status also increases an offender's score under the sentencing guidelines, leading to a higher minimum permissible prison sentence.⁵⁶⁶

Release Pending Disposition of a VOP

When a person is arrested for committing a crime, he or she is generally entitled to pretrial release on reasonable conditions under the Florida Constitution.⁵⁶⁷ However, a person taken into custody for a VOP does not have a constitutional right to release pending the disposition of the VOP.⁵⁶⁸ If the offender qualifies as a VFOSC, the court is prohibited from granting pretrial release.⁵⁶⁹ For other offenders, the court has discretion to grant or deny bail.⁵⁷⁰ A court must exercise this discretion on a case-by-case basis and may not adopt a policy of never granting pretrial release on a VOP; however, this discretionary power leads to many offenders being detained in county jail during the pendency of a VOP case.

Alternative Sanctioning Programs

Section 948.06(1)(h), F.S., authorizes the chief judge of each judicial circuit to establish an alternative sanctioning program (ASP), which allows DOC to enforce technical violations with court approval. A technical violation is any alleged VOP that is not a new felony offense, misdemeanor offense, or criminal traffic offense.⁵⁷¹ In fiscal year 2017-18, DOC investigated 47,693 technical violations and 25,301 substantive violations.⁵⁷² Many of these violations resulted in the offender returning to some form of supervision or serving a county jail sentence.⁵⁷³

The ASP allows for alternative resolution of technical violations, ensuring a swift and certain response without initiating the court process or arresting and booking the offender. In establishing an ASP, the

⁵⁶¹ Section 948.06(8)(c), F.S., defines qualifying offense to include any of the following: kidnapping or attempted kidnapping, s. 787.01, F.S.; false imprisonment of a child under the age of 13, s. 787.02(3), F.S.; luring or enticing a child, s. 787.025(2)(b) or (b), F.S.; murder or attempted murder, s. 782.04, F.S.; attempted felony murder, s. 782.051, F.S.; manslaughter, s. 782.07, F.S.; aggravated battery or attempt, s. 784.045, F.S.; sexual battery or attempt, s. 794.011(2), (3), (4), or (8)(b) or (c), F.S.; lewd and lascivious battery or attempt, s. 800.04(4); lewd and lascivious molestation, s. 800.04(5)(b) or (c), F.S.; lewd and lascivious conduct, s. 800.04(6)(b), F.S.; lewd and lascivious exhibition, s. 800.04(7)(b); lewd and lascivious exhibition on computer, s. 847.0135(5)(b); robbery or attempt, s. 812.13, F.S.; carjacking or attempt, s. 812.133, F.S.; home invasion robbery or attempt, s. 812.135, F.S.; lewd and lascivious offense upon or in the presence of an elderly person or attempt, s. 825.1025, F.S.; sexual performance by a child or attempt, s. 827.071, F.S.; computer pornography, s. 847.0135(2) or (3), F.S.; transmission of child pornography, s. 847.0137, F.S.; selling or buying of minors, s. 847.0145, F.S.; poisoning food or water, s. 859.01, F.S.; abuse of a dead human body, s. 872.06, F.S.; any burglary offense that is a first or second degree felony, s. 810.02(2) or (3), F.S.; arson or attempt, s. 806.01(1), F.S.; aggravated assault, s. 784.021, F.S.; aggravated stalking, s. 784.048(3), (4), (5), or (7), F.S.; aircraft piracy, s. 860.16, F.S.; throwing a deadly missile, s. 790.161(2), (3), or (4), F.S.; and treason, s. 876.32, F.S.

⁵⁶² S. 775.084(1)(b), F.S.

⁵⁶³ S. 775.084(1)(c), F.S.

⁵⁶⁴ S. 775.21, F.S.

⁵⁶⁵ S. 946.06(8)(b), F.S.

⁵⁶⁶ S. 921.0024, F.S.

⁵⁶⁷ Art. I, s. 14, Fla. Const. Exceptions include when a person is charged with a capital offense or offense punishable by life and the proof of guilt is evident or the presumption is great, or if no conditions can reasonably protect the community from risk of physical harm.

⁵⁶⁸ *Bernhardt v. State*, 288 So. 2d 490, 497 (Fla. 1974).

⁵⁶⁹ S. 903.0351, F.S.

⁵⁷⁰ S. 948.06(2)(c), F.S.; Fla. R. Crim. P. 3.790(b).

⁵⁷¹ S. 946.08(2)(h)1., F.S.

⁵⁷² Florida Department of Corrections, *Number of Violations by Type, Violation Completed FY 2017-2018*, (January 2, 2019).

⁵⁷³ *Id.*

chief judge, in consultation with the state attorney, public defender, and DOC, determines which technical violations are eligible for alternative sanctioning, offender eligibility criteria, permissible sanctions, and the process for reporting technical violations through the ASP.⁵⁷⁴ Common ASP sanctions include increased reporting requirements, imposition or modification of a curfew, drug evaluation and treatment, and classes on topics including anger management, values, and parenting.⁵⁷⁵ As of December 2018, two circuits had included short jail sentences⁵⁷⁶ as a possible ASP sanction through administrative order.⁵⁷⁷

After receiving written notice of an alleged technical violation and disclosure of the evidence supporting the violation, an offender who is eligible for the ASP may either elect to participate in the program or waive participation.⁵⁷⁸ If the offender waives participation, the violation proceeds through the court resolution process.⁵⁷⁹ If the offender elects to participate, he or she must admit to the technical violation, agree to comply with the probation officer's recommended sanction, and agree to waive the right to:

- Be represented by counsel.
- Require the state to prove his or her guilt.
- Subpoena witnesses and present evidence to a judge in his or her defense.
- Confront and cross-examine witnesses.
- Receive a written statement from a factfinder as to the evidence relied on and the reasons for the sanction imposed.⁵⁸⁰

Prior to 2016, DOC developed and implemented the ASP in 12 counties within six judicial circuits.⁵⁸¹ Section 948.06(1)(h), F.S., codified the ASP option when it was passed into law in 2016.⁵⁸² As of November 2018, 49 of 67 counties have implemented an ASP with 3,521 total participants statewide.⁵⁸³

Termination of Supervision

Termination of supervision, whether by court order or scheduled expiration of the term, releases the offender from all supervision and liability to sentence on the underlying charge or charges.⁵⁸⁴ Prior to termination, the filing of a VOP affidavit with a warrant, notice to appear, or warrantless arrest tolls the term of supervision.⁵⁸⁵ Once supervision terminates, the court is divested of jurisdiction over the offender.⁵⁸⁶

The court may discharge an offender from supervision at any time if the court is satisfied that doing so is in the best interests of justice and the welfare of society.⁵⁸⁷ DOC may recommend early termination of supervision to the court at any time before the scheduled termination date if the offender has:

⁵⁷⁴ S. 948.06(1)(h)2., F.S.

⁵⁷⁵ Eighteenth Judicial Circuit, Administrative Order No. 17-30-S (Jun. 28, 2017); Sixth Judicial Circuit, Administrative Order No. 2016-058 PA/PI-CIR (Sep. 9, 2016); Eighth Judicial Circuit, Administrative Order No. 4.16 (Jun. 10, 2016); Tenth Judicial Circuit, Administrative Order No. 2-79.0 (Jun. 27, 2016); Eighteenth Judicial Circuit, Administrative Order No. 16-17-B (Jun. 7, 2016).

⁵⁷⁶ Other states have found that brief periods of incarceration in response to VOPs are as effective at curbing new violations as longer stays, when the sentence is swiftly-imposed and certain. Scott Taylor, President of the American Probation and Parole Association, *Summit on Effective Responses to Violations of Probation and Parole*, at 13-14, (Dec. 11, 2012); National Institute of Justice, "Swift and Certain" Sanctions in Probation are Highly Effective: Evaluation of the HOPE Program, <https://www.nij.gov/topics/corrections/community/drug-offenders/pages/hawaii-hope.aspx> (last visited Apr. 10, 2019).

⁵⁷⁷ Eighth Judicial Circuit, Administrative Order No. 4.16 (Jun. 10, 2016); Tenth Judicial Circuit, Administrative Order No. 2-79.0 (Jun. 27, 2016).

⁵⁷⁸ S. 948.06(1)(h)3., F.S.

⁵⁷⁹ S. 948.06(1)(h)3.a., F.S.

⁵⁸⁰ S. 948.06(1)(h)3.b., F.S.

⁵⁸¹ Florida Department of Corrections, Agency Analysis of 2016 House Bill 1149, p. 2 (Jan. 20, 2016).

⁵⁸² Ch. 2016-100, Laws of Fla.

⁵⁸³ Email from Jared Torres, Legislative Affairs Director, Department of Corrections, re: ASP updated numbers (Dec. 28, 2018).

⁵⁸⁴ S. 948.04(2), F.S.

⁵⁸⁵ S. 948.06(1)(f), F.S.

⁵⁸⁶ S. 948.04(2), F.S.; *State v. Futch*, 979 So. 2d 1215, 1216 (Fla. 3d DCA 2008).

⁵⁸⁷ S. 948.05, F.S.

- Performed satisfactorily;
- Not been found in violation of any terms or conditions of supervision; and
- Met all financial sanctions imposed by the court.⁵⁸⁸

Administrative Probation

Administrative probation is a form of nonreporting supervision available to low-risk offenders upon successful completion of half of their probationary term.⁵⁸⁹ Only DOC has the authority to transfer a probationer to administrative probation.⁵⁹⁰ DOC may develop procedures for transferring probationers to administrative probation.⁵⁹¹ Certain offenders are ineligible for conversion to administrative probation, including those on probation for enumerated sexual offenses or offenses involving minors and those qualifying as sexual predators.⁵⁹² In *State v. Nazario*, the Fourth District Court of Appeal explicitly held that a circuit court did not have the authority to impose administrative probation as a sentence because the definition of administrative probation specifies that it is only available upon transfer by DOC.⁵⁹³

Graduated Incentives

DOC uses a system of incentives to reward offenders for positive behavior and compliance with the terms of supervision. These incentives include:

- Allowing certain eligible offenders to report by mail and phone in lieu of having to report in person to the probation office.
- Recommending reduction of supervision type to the court.
- Recommending reduced reporting to the court.
- Recommending early termination of supervision to the court.⁵⁹⁴

DOC reports successful outcomes from this strategy, motivating offenders to both comply with the terms of supervision and complete all requirements ahead of schedule.⁵⁹⁵

Effect of Proposed Changes- Probation and Community Control

Alternative Sanctioning Program

The PCB creates a statewide ASP, identifying eligible offenders, eligible violations, and permissible sanctions. Eligible violations are classified as either low- or moderate-risk.

Low-risk violations only apply to probationers, not offenders on community control, and include:

- A positive drug or alcohol test result;
- Failure to report to the probation office;
- Failure to report a change in address or other required information;
- Failure to attend a required class, treatment or counseling session, or meeting;
- Failure to submit to a drug or alcohol test;
- Violation of curfew;
- Failure to meet a monthly quota for any required probation condition, including making restitution payments, paying court costs, and completing community service hours;
- Leaving the county without permission;
- Failure to report a change in employment;

⁵⁸⁸ S. 948.04(3), F.S.

⁵⁸⁹ S. 948.01(1), F.S.

⁵⁹⁰ *Id.*; *State v. Nazario*, 100 So. 3d 1246 (Fla. 4th DCA 2012).

⁵⁹¹ S. 948.013(1), F.S.

⁵⁹² S. 948.013(2), F.S.

⁵⁹³ *Nazario*, 100 So. 3d at 1246.

⁵⁹⁴ Florida Department of Corrections, *Community Corrections Strategies To Increase Offender Success and Reduce Recidivism* (December 2017).

⁵⁹⁵ *Id.*

- Associating with people engaged in criminal activity; or
- Any other violation as determined by administrative order of the chief judge of the circuit.

Moderate-risk violations include:

- Any violation classified as low-risk when committed by an offender on community control;
- Failure to remain at an approved residence by an offender on community control;
- A third low-risk violation by a probationer; or
- Any other violation as determined by administrative order of the chief judge of the circuit.

The permissible sanctions correspond to the violation risk level. A probation officer may offer one or more of the following in response to a low-risk violation:

- Up to five days in the county jail;
- Up to 50 additional community service hours;
- Counseling or treatment;
- Support group attendance;
- Drug testing;
- Loss of travel or other privileges;
- Curfew for up to 30 days;
- House arrest for up to 30 days; or
- Any other sanction as determined by administrative order by the chief judge of the circuit.

The permissible sanctions for a moderate-risk violation include all sanctions available for a low-risk violation and:

- Up to 21 days in the county jail;
- Curfew for up to 90 days;
- House arrest for up to 90 days;
- Electronic monitoring for up to 90 days;
- Residential treatment for up to 90 days; or
- Any other sanction as determined by administrative order by the chief judge of the circuit.

The PCB disqualifies offenders from alternative sanctioning under any of the following circumstances:

- The offender is a violent felony offender of special concern;
- The violation is a felony, misdemeanor, or criminal traffic offense;
- The violation is absconding;
- The violation is of a stay-away order or no-contact order;
- The violation is not identified as low- or moderate-risk by statute or administrative order;
- The offender has a prior moderate-risk level violation during the same term of supervision;
- The offender has three prior low-risk level violations during the same term of supervision;
- The term of probation is scheduled to terminate in less than 90 days; or
- The terms of the sentence prohibit alternative sanctioning.

The PCB allows individual judicial circuits to add other eligible violations or permissible sanctions to the ASP so as to best meet local needs. A court may also disqualify a person from the ASP when initially sentencing him or her to probation.

As in current law, the PCB allows an eligible offender to participate in the ASP or waive participation and proceed to a court resolution of the VOP. If the offender elects to participate, he or she must admit to the technical violation, agree to comply with the probation officer's recommended sanction, and agree to waive the right to:

- Be represented by counsel.
- Require the state to prove his or her guilt.
- Subpoena witnesses and present evidence to a judge in his or her defense.
- Confront and cross-examine witnesses.

- Receive a written statement from a factfinder as to the evidence relied on and the reasons for the sanction imposed.

The ASP is voluntary, and the offender may withdraw from participation at any time. Successful completion of an ASP does not impact an offender's withheld adjudication. If the offender withdraws or fails to complete a sanction within either 90 days or a timeframe determined in the agreed-upon sanction, the original VOP proceeds to the court resolution process.

Mandatory Modification of Probation and Jail Cap

Unless waived by a defendant, the PCB requires a court to modify or continue, rather than revoke, a probationary term, for a first-time, low-risk technical violation. Subject to an exception for a probationer who has substantially completed his or her probationary term, the PCB requires modification of probation under the following circumstances:

- The term of supervision is probation, rather than community control.
- The probationer does not qualify as a violent felony offender of special concern.
- The violation is a low-risk technical violation.
- The court has not previously found the probationer in violation of probation during the current term of supervision.

An eligible probationer who has successfully completed a sanction through the ASP is entitled to mandatory modification or continuation of probation upon his or her first referral to the court for resolution of a filed VOP affidavit.

The PCB caps the amount of jail time that a court may order for a first-time, low-risk technical violator. If modifying probation as required by the PCB, a court may only impose a term of incarceration of up to 90 days as a special condition of probation. If, however, a first-time, low-risk technical violator has substantially completed his or her term of probation and has 90 days of supervision or fewer remaining on his or her sentence, a court may revoke rather than modify the probationary term. Upon revoking in this circumstance, a court may only sentence the probationer to a maximum of 90 days in county jail. This provision supersedes the sentencing requirements of the Criminal Punishment Code.

The bill allows a court to grant a probationer credit for only time served in the county jail since his or her most recent arrest for a violation of probation when imposing a capped jail sentence. Normally, a court must give a defendant all credit for time served in a case. The bill ensures that a probationer may receive a sentence of up to 90 days in jail upon a first-time, low-risk technical violation, in addition to any previously served credit. However, the court may not exceed the statutory maximum sentence.

Administrative Probation

The PCB amends the definition of administrative probation to allow a court to order this form of supervision. By changing the definition, the PCB allows a court to sentence a person to administrative probation initially or to convert another form of supervision to administrative probation upon an offender's motion. DOC retains its current authority to transfer a qualifying probationer to administrative probation.

Mandatory Early Termination

The PCB requires the court to either early terminate the probationary term or convert the remainder of the term to administrative probation under the following circumstances:

- The probationer successfully completes all conditions of probation;
- The probationer completes at least half of the term of probation;
- The court has not found the probationer in violation of probation at any point during the current supervisory term;
- Early termination was not excluded as part of a negotiated sentence; and

- The probationer is not a violent felony offender of special concern under s. 948.06, F.S.

The court is not required to early terminate or convert to administrative probation an otherwise eligible case if it makes written findings that continued reporting probation is necessary to protect the community or the interests of justice.

Graduated Incentives

The PCB codifies existing DOC practice by requiring DOC to implement a system of graduated incentives to promote positive compliance with the terms of supervision and prioritize the highest levels of supervision for offenders presenting the greatest risk of recidivism. The PCB specifically authorizes DOC to offer the following incentives to a compliant offender without leave of court:

- Up to 25 percent reduction of required community service hours;
- Waiver of supervision fees;
- Reduction in frequency of reporting;
- Permission to report by mail or phone; or
- Transfer of an eligible offender to administrative probation.

DOC may continue to incentivize positive behavior by offering recommendations to the court, including recommending:

- Permission to travel;
- Reduction of supervision type;
- Modification or cessation of curfew;
- Reduction or cessation of substance abuse testing; or
- Early termination of probation.

Veterinarian Reporting of Animal Cruelty

Background

The Legislature has determined that minimum requirements regarding the safe practice of veterinary medicine are necessary to protect public health and safety.⁵⁹⁶ The Board of Veterinary Medicine (Board) in the Department of Business and Professional Regulation (DBPR) implements the provisions of ch. 474, F.S., relating to veterinary medical practice.⁵⁹⁷

A veterinarian (vet) is a health care practitioner licensed by the Board to practice veterinary medicine in Florida⁵⁹⁸ and is subject to disciplinary action from the Board for a violation of the veterinary practice act.⁵⁹⁹ The practice of “veterinary medicine” involves diagnosing medical conditions of animals, prescribing or administering medicine and treatment to animals for the prevention, cure, or relief of a wound, fracture, bodily injury, or disease, or holding oneself out as performing any of these functions.⁶⁰⁰

A veterinary “patient” is an animal on which a vet practices veterinary medicine.⁶⁰¹ A “veterinarian/client/patient relationship” is one in which a vet assumes responsibility for making medical judgments about an animal’s health and its need for medical treatment.⁶⁰²

Animal Cruelty

The offense of animal cruelty is a first degree misdemeanor⁶⁰³ and includes:

⁵⁹⁶ See s. 474.201, F.S.

⁵⁹⁷ See ss. 474.204 through 474.2125, F.S., concerning the powers and duties of the board.

⁵⁹⁸ See s. 474.202(11), F.S.

⁵⁹⁹ Ss. 474.213 and 474.214, F.S.

⁶⁰⁰ See s. 474.202(9), F.S. Also included is the determination of the health, fitness, or soundness of an animal, and the performance of any manual procedure for the diagnosis or treatment of pregnancy or fertility or infertility of animals.

⁶⁰¹ S. 474.202(8), F.S.

⁶⁰² S. 474.202(12), F.S.

- Overloading, overdriving, or tormenting any animal;
- Depriving any animal of necessary sustenance or shelter;
- Unnecessarily mutilating any animal;
- Killing any animal; or
- Carrying any animal, on a vehicle or otherwise, in a cruel or inhumane manner.⁶⁰⁴

A person commits aggravated animal cruelty, a third degree felony,⁶⁰⁵ by intentionally committing an act on an animal – or failing to act if the person owns and has custody and control of the animal – and such action or omission results in:

- The cruel death of the animal, or
- The excessive or repeated infliction of unnecessary pain or suffering on an animal.⁶⁰⁶

The offense of aggravated animal cruelty requires a \$2,500 fine and psychological testing or anger management for a first conviction,⁶⁰⁷ and a \$5,000 fine and six months of incarceration for a second or subsequent conviction.⁶⁰⁸ A person convicted for a second or subsequent offense of aggravated animal cruelty is ineligible for any form of early release, including gain time.⁶⁰⁹

According to the Humane Society of the United States, animal cruelty is a serious problem in the United States, resulting in abuse to thousands of dogs and cats each year.⁶¹⁰ There are approximately 70 million pet dogs and 74.1 million pet cats in the U.S., and all 50 states have felony provisions for serious abuse of dogs and cats. The FBI tracks these crimes via the National Incident-Based Reporting System.⁶¹¹

Veterinary Reporting of Animal Cruelty

Section 474.2165(4), F.S., of the Veterinary Medical Practice Act (VMPA)⁶¹² prohibits a vet from furnishing medical records to or discussing the medical condition of a patient with any person other than a client, a client's legal representative or another vet involved in the care or treatment of the patient, except with the client's written authorization. Such records may be furnished without written authorization only as follows:

- To the entity that procured or furnished the examination or treatment, with the client's consent;
- In any civil or criminal action, upon the issuance of a subpoena only and with notice to the client; and
- For statistical and scientific research, if the identity of the client is protected.

A vet violating these provisions may be disciplined by the Board. The VMPA also prohibits a vet from reporting or discussing a patient's condition without a subpoena and notice to the client.

Section 828.12, F.S., of Florida's animal cruelty laws protect a vet for any decisions made or services rendered relating to animal cruelty. A vet is immune from criminal or civil liability for decisions made or services rendered relating to animal cruelty laws and is immune from civil liability for his or her part in an investigation of cruelty to animals.

⁶⁰³ A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Ss. 775.082 and 775.083, F.S.

⁶⁰⁴ S. 828.12(1), F.S.

⁶⁰⁵ A third degree felony is punishable by up to five years in prison and a \$5,000 fine. Ss. 775.082 and 775.083, F.S.

⁶⁰⁶ S. 828.12(2), F.S.

⁶⁰⁷ S. 828.12(2)(a), F.S.

⁶⁰⁸ S. 828.12(2)(b), F.S.

⁶⁰⁹ *Id.*

⁶¹⁰ Humane Society of the United States, Animal Cruelty Facts and Stats, <https://www.humanesociety.org/resources/animal-cruelty-facts-and-stats> (last visited Apr. 10, 2019).

⁶¹¹ Federal Bureau of Investigation, Tracking Animal Cruelty, <https://www.fbi.gov/news/stories/-tracking-animal-cruelty> (last visited Apr. 10, 2019).

⁶¹² S. 474.201, F.S.

The VMPPA and animal cruelty laws contradict each other regarding the immunity provided to vets; at least one trial court has excluded evidence obtained from a vet based on this conflict, but was overturned on appeal.⁶¹³

Vets are treated differently from other health care providers authorized to report acts of violence and abuse. Specifically, other health care providers may disclose protected health information to public health authorities or other authorized government authorities regarding child abuse or neglect. Healthcare providers may also report protected health information to specified authorities in abuse situations other than those involving child abuse and neglect.⁶¹⁴

Effect of Proposed Changes- Veterinary Reporting of Animal Cruelty

The bill authorizes a vet to report suspected criminal violations without notice to or authorization from a client, to a law enforcement officer, an animal control officer, or an approved animal cruelty investigator; however, if the suspected violation occurs on a commercial food-producing animal operation on land classified as agricultural⁶¹⁵ under s. 193.461, F.S., the vet must provide notice to a client or a client's legal representative prior to reporting the suspected violation. The bill prohibits the report from including written medical records except upon the issuance of a court order.

Attorney Fees in Injunction Proceedings

Background

Protective Injunctions

Protective injunctions are available under Florida law for victims of the following forms of violence:

- Domestic violence,⁶¹⁶
- Repeat violence;⁶¹⁷
- Sexual violence;⁶¹⁸
- Dating violence;⁶¹⁹ and
- Stalking.⁶²⁰

A protective injunction may prohibit a person from:

- Going to or being within 500 feet of the petitioner's residence, school, place of employment, or other specified place;
- Committing an act of violence against the petitioner;
- Telephoning, contacting, or otherwise communicating with the petitioner; and
- Knowingly and intentionally coming within 100 feet of the petitioner's motor vehicle.

A court may also require a respondent to surrender a firearm, vacate a shared dwelling with the petitioner, or complete a batterer's intervention program.⁶²¹ Violation of a protective injunction is a first degree misdemeanor, punishable by up to one year in jail and a \$1,000 fine.⁶²²

⁶¹³ *State v. Milewski*, 194 So. 3d 376 (Fla. 3rd DCA 2016). (Statements made by treating veterinarian and necropsy report regarding the abuse of a puppy were not unlawfully obtained because the statements were voluntarily made in a context that did not invoke the possibility of illegal police action).

⁶¹⁴ 45 C.F.R. §164.512.

⁶¹⁵ Subject to the specified restrictions, only lands that are used primarily for bona fide agricultural purposes qualify as agricultural. The term "bona fide agricultural purposes" means good faith commercial agricultural use of the land. S. 193.461(3)(b), F.S.

⁶¹⁶ S. 741.30, F.S.

⁶¹⁷ S. 784.046, F.S.

⁶¹⁸ *Id.*

⁶¹⁹ *Id.*

⁶²⁰ S. 784.0485, F.S.

⁶²¹ *Id.*; S. 741.30, F.S.

⁶²² Ss. 741.31, 775.082, 775.083, 784.047, and 784.0487, F.S.

A petitioner for a protective injunction must allege in a sworn petition that:

- He or she is a victim of domestic violence; repeat, sexual, or dating violence; or stalking; or
- In the case of a petition for a domestic violence injunction, he or she has reasonable cause to believe he or she is in imminent danger of such violence.⁶²³

As soon as possible following the filing of the petition, a court must set a hearing to determine whether an immediate and present danger of the violence alleged exists.⁶²⁴ Upon finding an immediate and present danger, the court may grant an ex parte temporary injunction for 15 days.⁶²⁵ A court must then set a hearing with notice to the respondent, and upon such hearing with notice, may grant protective injunctive relief as it deems proper.⁶²⁶

Attorney Fees

A court must award a reasonable attorney fee to be paid by the losing party and the losing party's attorney on any claim or defense during a civil proceeding or action if the court finds that the losing party or losing party's attorney knew or should have known that a claim:

- Was not supported by the material facts necessary to establish the claim or defense; or
- Would not be supported by the application of then-existing law to those material facts.⁶²⁷

Florida law prohibits attorney fee awards stemming from domestic violence injunction proceedings; however, there is no such explicit prohibition for repeat violence, sexual violence, dating violence, or stalking injunction proceedings. In *Lopez v. Hall*, the Florida Supreme Court held that an award of attorney's fees was permissible in dating, repeat, and sexual violence injunction proceedings, as they were not explicitly prohibited by statute.⁶²⁸

Effect of the Bill- Attorney Fees

The PCB prohibits the award of attorney fees in injunction proceedings for repeat violence, dating violence, sexual violence, and stalking.

Carrying a Concealed Firearm

Background

The Law Enforcement Officers Safety Act (LEOSA)⁶²⁹ allows a "qualified law enforcement officer" and a "qualified retired or separated law enforcement officer" to carry a concealed firearm in any state, subject to certain exceptions.⁶³⁰

To be a "qualified law enforcement officer," a person must:"⁶³¹

- Be authorized to engage in or supervise the prevention, detection, investigation, or prosecution of, or incarceration of any person for a violation of law;
- Possess statutory arrest powers;
- Be authorized by a law enforcement agency to carry a firearm;

⁶²³ Ss. 741.30(1)(a), 784.046, and 784.0485, F.S.

⁶²⁴ Ss. 741.30(5)(a), 784.046, and 784.0485, F.S.

⁶²⁵ *Id.*

⁶²⁶ Ss. 741.30(6)(a), 784.046, and 784.0485 F.S.

⁶²⁷ S. 57.105, F.S.

⁶²⁸ 233 So. 3d 451 (Fla. 2018).

⁶²⁹ 18 U.S.C. § 926B and 18 U.S.C. § 926C.

⁶³⁰ LEOSA does not supersede any state laws that allow a private person or entity to prohibit a firearm on private property or laws which prohibit or restrict possession of firearms on state or local government property. 18 U.S.C. § 926B(b) and 18 U.S.C. § 926C(b). LEOSA does not preempt the federal Gun-Free School Zone Act, which prohibits a person from carrying a firearm within 1,000 feet of a school unless the person is licensed by the state in which the school is located. 18 U.S.C. § 921(a)(25).

⁶³¹ 18 U.S.C. § 926B(c).

- Not be the subject of disciplinary action which could result in a suspension or revocation of his or her police powers;
- Meet standards established by the law enforcement agency to carry a firearm;
- Not be under the influence of alcohol or drugs; and
- Not be prohibited from owning a firearm by Federal law.

To be a “qualified retired or separated law enforcement officer,” a person must:⁶³²

- Be retired or separated from law enforcement service in good standing;
- Be previously authorized to engage in or supervise the prevention, detection, investigation, or prosecution of, or incarceration of any person for a violation of law;
- Have been granted statutory arrest powers;
- Have served as a law enforcement officer for 10 years;
- Have met agency firearm standards within the past 12 months;
- Not have been found mentally unfit to own a firearm;
- Not be under the influence of alcohol of drugs; and
- Not be prohibited from owning a firearm by Federal law.

Several terms are not defined in LEOSA, leading to confusion and litigation over the qualification status of different categories of employees and uncertainty over the authority of a state to determine LEOSA eligibility.⁶³³ For example, LEOSA does not define whether an “employee” means any qualified employee or just full-time qualified employees. LEOSA also does not define the extent of arrest powers necessary to trigger LEOSA privileges.

Effect of Proposed Changes- Carrying a Concealed Firearm

The bill provides any person who holds an active certification from the Criminal Justice Standards and Training Commission (CJSTC) and is employed as a full-time, part-time, or auxiliary law enforcement or correctional officer meets the definition of a qualified law enforcement officer for purposes of LEOSA. The bill provides a person who held an active certification from CJSTC while employed as a full-time, part-time, or auxiliary law enforcement or correctional officer and separated from employment consistent with the provisions in LEOSA meets the definition of a qualified retired law enforcement officer.

Criminal Punishment Code

Background

The Criminal Punishment Code (Code) applies to all felony offenses, except capital felonies, committed on or after October 1, 1998.⁶³⁴ Noncapital felonies sentenced under the Code receive an offense severity level ranking (Levels 1-10), either by being specifically listed in the offense severity ranking chart⁶³⁵ or by default.⁶³⁶ Judges must use the Criminal Punishment Code worksheet to compute a sentence score for each felony offender.⁶³⁷

⁶³² 18 U.S.C. § 926C(c).

⁶³³ *Heinrich v. Ill. Law Enforcement Training and Standards Bd.*, 306 F.Supp.3d 1049 (N.D. Ill. 2018) (LEOSA only applies to qualified or qualified retired law enforcement officers who have an agency issued identification card. States may limit identification cards to certain classes of officers); *Burban v. City of Neptune Beach*, 2018 WL 1493177 (states may limit which law enforcement officers qualify under LEOSA); *Duberry v. Dist. Of Columbia*, 824 F.3d 1046 (D.C. Cir. 2016) (corrections officers had sufficient arrest powers to qualify under LEOSA); *Thorne v. U.S.*, (private contractor with some law enforcement powers did not qualify as an employee for purposes of LEOSA).

⁶³⁴ S. 921.002, F.S.

⁶³⁵ S. 921.0022, F.S.

⁶³⁶ S. 921.0023, F.S., addresses ranking unlisted felony offenses. For example, an unlisted felony of the third degree is ranked within offense level 1.

⁶³⁷ S. 921.0024, F.S.

Sentence points are assigned and accrue based on the level ranking assigned to the primary offense, additional offenses and prior offenses.⁶³⁸ Sentence points increase as the offense severity level increases from Level 1 (least severe) to Level 10 (most severe). Sentence points are added for victim injury, and increased based on the type of injury and severity.⁶³⁹ Sentence points may also be added or multiplied for other factors including possession of a firearm or the commission of certain offenses, such as drug trafficking.⁶⁴⁰ If an offense is unlisted on the offense severity ranking chart, the Criminal Punishment Code provides a ranking based on felony level.⁶⁴¹ For example, an unranked third degree felony is a level one offense.⁶⁴²

If total sentence points equal or are less than 44 points, the lowest permissible sentence is any nonstate prison sanction, unless the court determines that a prison sentence is appropriate. If total sentence points exceed 44 points, the lowest permissible sentence in prison months is calculated by subtracting 28 points from the total sentence points and decreasing the remaining total by 25 percent.⁶⁴³ Absent mitigation,⁶⁴⁴ the permissible range under the Code is generally the lowest permissible sentence scored up to and including the maximum penalty provided under s. 775.082, F.S.⁶⁴⁵

Effect of Proposed Changes- Criminal Punishment Code

The PCB:

- Conforms the offense severity ranking chart to changes made by the bill;
- Ranks the new offense of possession or introduction of a cellular telephone or a portable communication device into a county detention facility as a level four offense.
- Reclassifies the offense of introducing an intoxicating drug into a county detention facility from a level six to a level four offense.

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

B. SECTION DIRECTORY:

Section 1: Amends s. 212.15, F.S., relating to taxes declared state funds; penalties for failure to remit taxes; due and delinquent dates; judicial review.

Section 2: Amends s. 322.055, F.S., relating to revocation or suspension of, or delay of eligibility for, driver license for persons 18 years of age or older convicted of certain drug offenses.

Section 3: Amends s. 322.056, F.S., relating to mandatory revocation or suspension of, or delay of eligibility for, driver license for persons under age 18 found guilty of certain alcohol, drug, or tobacco offenses; prohibition.

Section 4: Repeals s. 322.057, F.S., relating to discretionary revocation or suspension of driver license for certain persons who provide alcohol to persons under 21 years of age.

Section 5: Creates s. 322.75, F.S., relating to Driver License Reinstatement Days.

Section 6: Amends s. 394.47891, F.S., relating to military veterans and servicemembers court programs.

Section 7: Amends s. 394.917, F.S., relating to determination; commitment procedure; mistrials; housing; counsel and costs in indigent appellate cases.

Section 8: Amends s. 397.334, F.S., relating to treatment-based drug court programs.

Section 9: Amends s. 455.213, F.S., relating to general licensing provisions.

⁶³⁸ *Id.*

⁶³⁹ *Id.*

⁶⁴⁰ *Id.*

⁶⁴¹ S. 921.0023, F.S.

⁶⁴² *Id.*

⁶⁴³ S. 921.0022(2), F.S.

⁶⁴⁴ The court may “mitigate” or “depart downward” from the scored lowest permissible sentence if the court finds a mitigating circumstance. Section 921.0026, F.S., provides a list of mitigating circumstances.

⁶⁴⁵ S. 921.0022(2), F.S.

- Section 10:** Amends s. 474.2165, F.S., relating to ownership and control of veterinary medical patient records; report or copies of records to be furnished.
- Section 11:** Amends s. 489.126, F.S., relating to moneys received by contractors.
- Section 12:** Amends s. 489.553, F.S., relating to administration of part; registration qualifications; examination.
- Section 13:** Amends s. 500.451, F.S., relating to horsemeat; offenses.
- Section 14:** Amends s. 509.151, F.S., relating to obtaining food or lodging with intent to defraud; penalty.
- Section 15:** Amends s. 562.11, F.S., relating to selling, giving, or serving alcoholic beverages to person under age 21; providing a proper name; misrepresenting or misstating age or age of another to induce licensee to serve alcoholic beverages to person under 21; penalties.
- Section 16:** Repeals s. 562.111, F.S., relating to possession of alcoholic beverages by persons under age 21 prohibited.
- Section 17:** Amends s. 562.27, F.S., relating to seizure and forfeiture.
- Section 18:** Amends s. 562.451, F.S., relating to moonshine whiskey; ownership, possession, or control prohibited; penalties; rule of evidence.
- Section 19:** Amends s. 569.11, F.S., relating to possession, misrepresenting age or military service to purchase, and purchase of tobacco products by persons under 18 years of age prohibited; penalties; jurisdiction; disposition of fines.
- Section 20:** Amends s. 713.69, F.S., relating to unlawful to remove property upon which lien has accrued.
- Section 21:** Amends s. 775.082, F.S., relating to penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison.
- Section 22:** Amends s. 784.046, F.S., relating to action by victim of repeat violence, sexual violence, or dating violence for protective injunction; dating violence investigations, notice to victims, and reporting; pretrial release violations; public records exemption.
- Section 23:** Amends s. 784.048, F.S., relating to stalking; definitions; penalties.
- Section 24:** Amends s. 784.0485, F.S., relating to stalking; injunction; powers and duties of court and clerk; petition; notice and hearing; temporary injunction; issuance of injunction; statewide verification system; enforcement.
- Section 25:** Amends s. 784.049, F.S., relating to sexual cyberharassment.
- Section 26:** Amends s. 790.052, F.S., relating to carrying concealed firearms; off-duty law enforcement officers.
- Section 27:** Amends s. 790.22, F.S., relating to use of BB guns, air or gas-operated guns, or electric weapons or devices by minor under 16; limitation; possession of firearms by minor under 18 prohibited; penalties.
- Section 28:** Amends s. 800.09, F.S., relating to lewd or lascivious exhibition in the presence of an employee.
- Section 29:** Amends s. 806.13, F.S., relating to criminal mischief; penalties; penalty for minor.
- Section 30:** Amends s. 812.014, F.S., relating to theft.
- Section 31:** Amends s. 812.015, F.S., relating to retail and farm theft; transit fare evasion; mandatory fine; alternative punishment; detention and arrest; exemption from liability for false arrest; resisting arrest; penalties.
- Section 32:** Amends s. 812.0155, F.S., relating to suspension of driver license following an adjudication of guilt for theft.
- Section 33:** Amends s. 815.03, F.S., relating to definitions.
- Section 34:** Amends s. 815.06, F.S., relating to offenses against users of computers, computer systems, computer networks, and electronic devices.
- Section 35:** Amends s. 817.413, F.S., relating to sale of used motor vehicle goods as new; penalty.
- Section 36:** Amends s. 831.28, F.S., relating to counterfeiting a payment instrument; possessing a counterfeit payment instrument; penalties.
- Section 37:** Amends s. 847.011, F.S., relating to prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty.
- Section 38:** Amends s. 849.01, F.S., relating to keeping gambling houses, etc.

- Section 39:** Amends s. 877.112, F.S., relating to nicotine products and nicotine dispensing devices; prohibitions for minors; penalties; civil fines; signage requirements; preemption.
- Section 40:** Amends s. 893.135, F.S., relating to trafficking; mandatory sentences; suspension or reduction of sentences; conspiracy to engage in trafficking.
- Section 41:** Amends s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity ranking chart.
- Section 42:** Creates s. 943.0578, F.S., relating to lawful self-defense expunction.
- Section 43:** Amends s. 943.0581, F.S., relating to administrative expunction.
- Section 44:** Creates s. 943.0584, F.S., relating to criminal history records ineligible for court-ordered expunction or court-ordered sealing.
- Section 45:** Amends s. 943.0585, F.S., relating to court-ordered expunction of criminal history records.
- Section 46:** Amends s. 943.059, F.S., relating to court-ordered sealing of criminal history records.
- Section 47:** Creates s. 943.0595, F.S., relating to automatic sealing of criminal history records.
- Section 48:** Amends s. 943.325, F.S., relating to DNA database.
- Section 49:** Amends s. 944.47, F.S., introduction, removal, or possession of certain articles unlawful; penalty.
- Section 50:** Amends s. 944.704, F.S., relating to staff who provide transition assistance; duties.
- Section 51:** Amends s. 944.705, F.S., relating to release orientation program.
- Section 52:** Amends s. 944.801, F.S., relating to education for state prisoners.
- Section 53:** Amends s. 948.001, F.S., relating to definitions.
- Section 54:** Amends s. 948.013, F.S., relating to administrative probation.
- Section 55:** Amends s. 948.04, F.S., relating to period of probation; duty of probationer; early termination.
- Section 56:** Amends s. 948.05, F.S., relating to court to admonish or commend probationer or offender in community control.
- Section 57:** Amends s. 948.06, F.S., relating to violation of probation or community control; revocation; modification; continuance; failure to pay restitution or cost of supervision.
- Section 58:** Amends s. 948.08, F.S., relating to pretrial intervention program.
- Section 59:** Creates s. 948.081, F.S., relating to community court programs.
- Section 60:** Amends s. 948.16, F.S., relating to misdemeanor pretrial substance abuse education and treatment intervention program; misdemeanor pretrial veterans' treatment intervention program; misdemeanor pretrial mental health court program.
- Section 61:** Amends s. 948.21, F.S., relating to condition of probation or community control; military servicemembers and veterans.
- Section 62:** Amends s. 951.22, F.S., relating to county detention facilities; contraband articles.
- Section 63:** Amends s. 958.04, F.S., relating to judicial disposition of youthful offenders.
- Section 64:** Amends s. 960.07, F.S., relating to filing of claims for compensation.
- Section 65:** Amends s. 960.13, F.S., relating to awards.
- Section 66:** Amends s. 960.195, F.S., relating to awards to elderly persons or disabled adults for property loss.
- Section 67:** Amends s. 960.196, F.S., relating to relocation assistance for victims of human trafficking.
- Section 68:** Amends s. 985.557, F.S., relating to direct filing of an information; discretionary and mandatory criteria.
- Section 69:** Amends s. 985.565, F.S., relating to sentencing powers; procedures; alternatives for juveniles prosecuted as adults.
- Section 70:** Provides an effective date of October 1, 2019.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The PCB may increase state expenditures to DOC, by requiring DOC to establish a toll free hotline to refer released inmates to reentry programs and provide a comprehensive resource directory to inmates before release. Additionally the bill may increase expenditures to the Department of Juvenile Justice by resolving cases previously subject to mandatory direct file in juvenile court.

The PCB may have a negative fiscal impact by increasing theft thresholds and narrowing the scope of conduct qualifying as a felony offense; eliminating the mandatory minimum sentence for selling unlabeled horse meat; reducing the penalties related to gambling and liquor offenses; raising the trafficking threshold for hydrocodone and narrowing the scope of conduct qualifying for a minimum mandatory prison sentence; creating a statewide ASP, reducing the number of technical violators sentenced to prison; and expanding eligibility for drug court and veterans' treatment court.

However, the PCB may have a positive fiscal impact by expanding the class of people eligible for minimum mandatory sentencing under prison releasee reoffender designation; expanding the scope of criminal offenses for cyberstalking, sexual cyberharassment, lewd or lascivious exhibition in the presence of an employee, cybercrimes, possession of an obscene CLSD, and introducing contraband into a county detention facility.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The PCB may have a positive fiscal impact by repealing driver license suspensions and revocations, thereby reducing the number of arrests for driving while license suspended or revoked; creating a statewide ASP, reducing the number of technical violators incarcerated pending a court resolution to a VOP; and expanding eligibility for drug court and veterans' treatment court.

The PCB may have a negative impact by amending the crimes of cyberstalking, sexual cyberharassment, lewd or lascivious exhibition in the presence of an employee, cybercrimes, possession of a counterfeit instrument, possession of an obscene CLSD, and introducing contraband into a county detention facility to expand the scope of criminal conduct.

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.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill grants DOC and FDLE sufficient rule-making authority for implementation.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 9, 2019, the Judiciary Committee adopted five amendments and reported the PCB favorably. The amendments:

- Prohibited DBPR or a licensing board from using specified criminal convictions occurring more than 5 years before an application to deny a license or registration for any DBPR-regulated profession.
- Added other authorities who may supervise an applicant, such as a county jail or a county probation officer, to the entities required to facilitate an applicant's appearance at a licensing or registration hearing.
- Expanded authorization for a veterinarian to report a suspected criminal violation to specified authorities without notice to or authorization from a client, excluding a violation involving a food-producing animal on agricultural lands.
- Added theft of a utility service to the list of specified property the theft of which is a third degree felony, regardless of the value of the property stolen.
- Raised the offense level to a first degree misdemeanor for sale of used motor vehicle goods as new if the value of such goods is less than \$1,000.
- Increased penalties for offenses involving an obscene, child-like sex doll.
- Extended specified statutory crime victim compensation periods for:
 - Claim-filing deadlines to five years.
 - The period the Department of Legal Affairs may grant a filing extension for good cause to two additional years.
 - The crime-reporting requirement for compensation eligibility to five days.
- Made technical, non-substantive changes identified by staff and reorganized language to improve clarity and readability.

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