The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

JUDICIARY
Senator Flores, Chair
Senator Joyner, Vice Chair

MEETING DATE: Tuesday, April 12, 2011
TIME: 1:00 —6:00 p.m.
PLACE: *Toni Jennings Committee Room,* 110 Senate Office Building

MEMBERS: Senator Flores, Chair; Senator Joyner, Vice Chair; Senators Bogdanoff, Braynon, Richter, Simmons, and Thrasher

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	**CS/CS/SB 204** Health Regulation / Criminal Justice / Wise (Identical CS/CS/H 39)	Controlled Substances; Defines the term "homologue" for purposes of the Florida Comprehensive Drug Abuse Prevention and Control Act. Includes certain hallucinogenic substances on the list of controlled substances in Schedule I. Provides that it is a misdemeanor of the first degree to be in possession of not more than a specified amount of certain hallucinogenic substances. Reenacts provisions relating to prohibited acts and penalties regarding controlled substances and the offense severity chart of the Criminal Punishment Code, etc. CJ 01/11/2011 Fav/CS HR 03/14/2011 Fav/CS JU 04/04/2011 Not Considered JU 04/12/2011 BC	
2	**SB 1092** Wise (Compare H 4159)	State Attorneys; Deletes a provision that requires each state attorney to quarterly submit deviation memoranda relating to offenders who are not sentenced to the mandatory minimum prison sentence in cases involving the possession or use of a weapon. Repeals provisions relating to criteria to be used when state attorneys decide to pursue habitual felony offenders or habitual violent felony offenders. Repeals provisions relating to direct-file policies and guidelines for juveniles, etc. CJ 03/14/2011 Favorable JU 04/12/2011 BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
3	**CS/SB 926** Commerce and Tourism / Storms (Similar CS/H 405)	Liability/Employers of Developmentally Disabled; Provides that an employer, under certain circumstances, is not liable for the acts or omissions of an employee who is a person with a developmental disability. Provides that a supported employment service provider that provides or has provided supported employment services to a person with a developmental disability is not liable for the actions or conduct of the person occurring within the scope of the person's employment. Defines the terms "developmental disability" and "supported employment service provider." Provides for application of the act. CM 03/16/2011 Fav/CS CF 03/22/2011 Favorable JU 04/04/2011 Not Considered JU 04/12/2011	
4	**SB 2064** Children, Families, and Elder Affairs	Mental Health and Substance Abuse Treatment; Redefines the term "court" to include county courts in certain circumstances. Requires the Department of Children and Family Services to provide a discharged defendant with up to a 7-day supply of psychotropic medication when he or she is returning to jail from a state treatment facility. Authorizes a county court to order the conditional release of a defendant for the provision of outpatient care and treatment. Creates the Forensic Hospital Diversion Pilot Program, etc. CF 03/28/2011 Favorable JU 04/04/2011 Not Considered JU 04/12/2011 BC	
5	**SB 2062** Children, Families, and Elder Affairs (Similar H 7235)	Persons with Developmental Disabilities; Prohibits monitoring requirements that mandate pornographic materials be available in residential facilities that serve clients of the Agency for Persons with Disabilities. Requires the court to order a person involuntarily admitted to residential services to be released to the agency for appropriate residential services. Forbids the court from ordering that such person be released directly to a residential service provider. Authorizing the agency to transfer a person from one residential setting to another, etc. CF 03/28/2011 Favorable JU 04/12/2011 BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
6	**SB 1144** Margolis (Identical H 767)	Local Government; Authorizes a board of county commissioners to negotiate the lease of certain real property for a limited period. Authorizes transfers of right-of-way between local governments by deed. CA 03/14/2011 Favorable JU 04/04/2011 Not Considered JU 04/12/2011 TR	
7	**CS/CS/SB 364** Commerce and Tourism / Children, Families, and Elder Affairs / Latvala (Compare CS/H 139)	Child Care Facilities; Revises the criteria for a childcare facility, large family child care home, or family day care home to obtain and maintain a designation as a Gold Seal Quality Care provider. Provides for certain household children to be included in calculations regarding the capacity of licensed family day care homes and large family child care homes. Provides conditions for supervision of household children of operators of family day care homes and large family child care homes. Revises advertising requirements applicable to child care facilities, etc. CF 03/09/2011 Fav/CS CM 03/29/2011 Fav/CS JU 04/12/2011 BC	
8	**CS/SB 488** Criminal Justice / Fasano (Identical CS/H 251)	Sexual Offenses; Cites this act as the "Walk in Their Shoes Act." Revises offenses that are considered "child molestation" for purposes of admitting evidence of other crimes, wrongs, or acts in a criminal case involving child molestation. Requires certain property or material that is used in a criminal proceeding to remain in the care, custody, and control of the law enforcement agency, the state attorney, or the court. Requires a law enforcement officer to provide or arrange for transportation of a victim of sexual battery to an appropriate facility for medical treatment or forensic examination, etc. CJ 03/28/2011 Fav/CS JU 04/12/2011 HR BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
9	**SB 1176** Ring (Similar CS/H 831, Compare H 763)	High School Athletic Trainers; Encourages school districts to employ at least one full-time certified athletic trainer at each high school in this state. Requires athletic trainers at high schools to be certified by the Board of Certification of the National Athletic Trainers' Association. Provides a rebuttable presumption that a school district did not negligently employ an athletic trainer for purposes of a civil action for negligence by the athletic trainer if the school district made a good faith effort to comply with the certification requirements for athletic trainers, etc. ED 03/30/2011 Favorable JU 04/12/2011 BC	
10	**CS/SB 1618** Rules Subcommittee on Ethics and Elections / Diaz de la Portilla (Compare H 1355)	Elections; Allows a respondent who is alleged by the Elections Commission to have violated the election code or campaign financing laws to elect as a matter of right a formal hearing before the Division of Administrative Hearings. Authorizes an administrative law judge to assess civil penalties upon the finding of a violation. Authorizes an administrative law judge to assess civil penalties upon a finding of a violation of the election code or campaign financing laws, etc. EE 03/21/2011 Fav/CS RC 03/29/2011 Favorable JU 04/12/2011 BC	
11	**CS/SJR 658** Community Affairs / Fasano (Similar CS/CS/CS/HJR 381, Compare HJR 273, HJR 537, CS/H 1053, CS/H 1163, SJR 210, SJR 390, SJR 1578, Link S 1564, S 1722)	Homestead/Nonhomestead Property; Proposes amendments to the State Constitution to prohibit increases in the assessed value of homestead property if the just value of the property decreases, reduce the limitation on annual assessment increases applicable to nonhomestead real property, provide an additional homestead exemption for owners of homestead property who have not owned homestead property for a specified time before purchase of the current homestead property, etc. CA 03/14/2011 Fav/CS JU 04/04/2011 Not Considered JU 04/12/2011 BC RC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
12	**SB 1722** Fasano (Compare CS/CS/CS/HJR 381, CS/H 1053, CS/H 1163, Link CS/SJR 658, S 1564)	Ad Valorem Taxation; Reduces the amount that any change in the value of nonhomestead residential property resulting from an annual reassessment may exceed the assessed value of the property for the prior year. Reduces the amount that any change in the value of certain residential and nonresidential real property resulting from an annual reassessment may exceed the assessed value of the property for the prior year. Provides a first-time Florida homesteader with an additional homestead exemption, etc. CA 03/28/2011 Favorable JU 04/04/2011 Not Considered JU 04/12/2011 BC RC	
13	**SCR 1558** Benacquisto (Compare HM 1429)	Repeal of Federal Law or Regulation; Calls for the Congress of the United States to call a convention pursuant to Article V of the United States Constitution to propose a constitutional amendment permitting repeal of any federal law or regulation by vote of two-thirds of the state legislatures. JU 04/12/2011 GO RC	
14	**CS/CS/SB 432** Health Regulation / Criminal Justice / Evers (Compare CS/CS/H 155)	Privacy of Firearm Owners; Provides that a licensed medical care provider or health care facility may not record information regarding firearm ownership in a patient's medical record. Provides an exception for relevance of the information to the patient's medical care or safety. Provides that unless the information is relevant to the patient's medical care or safety, inquiries regarding firearm ownership or possession should not be made by licensed health care providers or health care facilities, etc. CJ 02/22/2011 Fav/CS HR 03/14/2011 Temporarily Postponed HR 03/22/2011 Temporarily Postponed HR 03/28/2011 Fav/CS JU 04/04/2011 Not Considered JU 04/12/2011 BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
15	**CS/SB 234** Criminal Justice / Evers (Similar CS/CS/H 517, Compare CS/H 4069, S 956)	Firearms; Provides that a person in compliance with the terms of a concealed carry license may carry openly notwithstanding specified provisions. Allows the Division of Licensing of the Department of Agriculture and Consumer Services to take fingerprints from concealed carry license applicants. Provides that concealed carry licensees shall not be prohibited from carrying or storing a firearm in a vehicle for lawful purposes. Repeals provisions relating to the purchase of rifles and shotguns in contiguous states, etc. CJ 02/22/2011 Temporarily Postponed CJ 03/09/2011 Temporarily Postponed CJ 03/14/2011 Fav/CS JU 04/12/2011 RC	
16	**SB 2170** Judiciary	Judicial Nominating Commissions; Provides for the Attorney General, rather than the Board of Governors of The Florida Bar, to submit nominees for certain positions on judicial nominating commissions. Provides for the termination of terms of all current members of judicial nominating commissions. Provides for staggered terms of newly appointed members. JU 04/12/2011 RC	
17	**SB 182** Sobel (Identical H 41)	Primary Sponsors of Legislation; Authorizes the naming of certain primary sponsors of legislation in the short title of a bill and its companion when agreed to by all primary sponsors of the bill and its companion. JU 04/12/2011 RC	
18	**CS/SB 846** Criminal Justice / Benacquisto (Similar CS/H 595)	Prevention of Child Exploitation; Prohibits controlling or intentionally viewing any photograph, motion picture, exhibition, show, image, data, computer depiction, representation, or other presentation that includes sexual conduct by a child. Provides penalties. Conforms provisions of the offense severity ranking chart of the Criminal Punishment Code to changes made by the act, etc. CJ 04/04/2011 Fav/CS JU 04/12/2011 BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
19	**CS/SB 242** Rules / Joyner (Similar H 559, Compare CS/S 2086)	Voter Information Cards; Requires that voter information cards contain the address of the polling place of the registered voter. Requires a supervisor of elections to issue a new voter information card to a voter upon a change in a voter's address of legal residence or a change in a voter's polling place address. Provides instructions for implementation by the supervisors of elections. EE 01/26/2011 Fav/1 Amendment RC 03/29/2011 Fav/CS JU 04/12/2011 BC	
20	**SB 1978** Bogdanoff	Alimony; Revises provisions relating to factors to be considered for alimony awards. Revises provisions relating to awards of permanent alimony. Provides applicability. JU 04/12/2011 CF RC	
21	**CS/SB 504** Children, Families, and Elder Affairs / Bogdanoff (Identical CS/H 387)	Child Visitation; Requires probable cause of sexual abuse in order to create a presumption of detriment. Provides that persons meeting specified criteria may not visit or have contact with a child without a hearing and court order. Revises requirements for a hearing seeking to rebut a presumption of detriment. Revises provisions relating to hearings on whether to prohibit or restrict visitation or other contact with the person who is alleged to have influenced a child's testimony, etc. CF 03/22/2011 Fav/CS JU 04/04/2011 Not Considered JU 04/12/2011 BC	
22	**SB 1398** Bogdanoff (Compare H 4067, H 4135, H 4137, CS/H 7023, H 7115, H 7117, H 7125, H 7199, S 962, S 974, S 1100)	Judiciary; Repeals provisions relating to regular terms of the Supreme Court, compensation of the marshal, census commissions for the judicial circuits, and terms of the circuit courts. Repeals provisions relating to terms of the First Judicial Circuit through the Twentieth Judicial Circuit. Repeals provisions relating to requiring a judge to attend the first day of each term of the circuit court. Repeals provisions relating to requiring a judge to state a reason for nonattendance. Repeals provisions relating to guardians of incapacitated world war veterans, etc. JU 04/04/2011 Not Considered JU 04/12/2011 BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
23	**CS/SB 416** Criminal Justice / Bogdanoff (Similar H 163, H 411)	Public Records; Provides an exemption from public records requirements for photographs and video and audio recordings that depict or record the killing of a person. Authorizes access to such photographs or video or audio recordings by specified members of the immediate family of the deceased subject of the photographs or video or audio recordings. Provides for access to such records by local governmental entities or state or federal agencies in furtherance of official duties. Provides for future legislative review and repeal of the exemption, etc. CJ 03/28/2011 Fav/CS JU 04/12/2011 GO	
24	**CS/SB 1196** Regulated Industries / Bogdanoff (Similar CS/H 941)	Construction Liens; Specifies that a lessor's interest in property is not subject to a construction lien for improvements made by a lessee if certain documents containing specific information and meeting certain criteria are recorded in the official records of the county before the recording of a notice of commencement. Authorizes certain contractors and lienors to demand that a lessor serve verified copies of a lease prohibiting liability for improvements made by a lessee, etc. RI 03/29/2011 Fav/CS JU 04/12/2011 CM	
25	**CS/SB 828** Community Affairs / Bogdanoff (Identical CS/H 667)	Public Records/Local Government Inspector General; Expands an exemption from public records requirements to include certain records relating to investigations in the custody of an inspector general of a local government. Provides for future repeal and legislative review of such revisions to the exemption under the Open Government Sunset Review Act. Provides a statement of public necessity. CA 03/21/2011 Fav/CS JU 04/04/2011 Not Considered JU 04/12/2011 GO	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
26	**SB 708** Thrasher (Compare CS/H 325, CS/S 648)	Lawyer-client Privilege; Provides that a client acts as a fiduciary when serving as a personal representative, a trustee, an administrator ad litem, a curator, a guardian or guardian ad litem, a conservator, or an attorney in fact. Provides that a communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure to the same extent as if the client were not acting as a fiduciary. Provides that the act does not affect the crime or fraud exception to the lawyer-client privilege, etc. JU 04/12/2011 CJ RC	
27	**SJR 1218** Altman (Compare HJR 1471)	Religious Freedom; Proposes an amendment to the State Constitution to provide that an individual may not be barred from participating in any public program because of choosing to use public benefits at a religious provider and to delete a prohibition against using public revenues in aid of any church, sect, or religious denomination or any sectarian institution. JU 04/04/2011 Not Considered JU 04/12/2011 CF ED BC	
28	**CS/SJR 1954** Community Affairs / Garcia (Identical CS/HJR 1321)	Home Rule Charter of Miami-Dade County; Proposes an amendment to the State Constitution to authorize amendments or revisions to the home rule charter of Miami-Dade County by special law approved by a vote of the electors. Provides requirements for a bill proposing such a special law. CA 03/28/2011 Fav/CS JU 04/12/2011 RC	
29	**CS/SB 1448** Community Affairs / Garcia (Similar CS/CS/H 619, Compare H 931, S 1940, S 2024)	Sale/Lease/County, District, or Municipal Hospital; Provides that the sale or lease of a county, district, or municipal hospital is subject to approval by the registered voters or by the circuit court. Requires the hospital governing board to determine by certain public advertisements whether there are qualified purchasers of lessees before the sale or lease of such hospital. Requires the board to file a petition for approval with the circuit court and receive approval before any transaction is finalized, etc. HR 03/22/2011 Favorable CA 04/04/2011 Fav/CS JU 04/12/2011 BC RC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
30	**SB 1676** Thrasher (Similar CS/H 1393, Compare S 1924, CS/CS/S 1972)	Sovereign Immunity; Provides that specified provisions relating to sovereign immunity for health care providers do not apply to certain affiliation agreements or contracts to provide certain comprehensive health care services. Expands the definition of the term "officer, employee, or agency" for purposes of sovereign immunity to include certain health care providers, etc. HR 04/04/2011 Favorable JU 04/12/2011 BC	
31	**SB 1010** Simmons (Identical H 781)	Neighborhood Improvement Districts; Revises the short title to become the "Neighborhoods Improvement Act." Authorizes the governing body of any municipality or county to form a neighborhood improvement district through the adoption of an ordinance rather than by a planning ordinance. Removes provisions pertaining to the creation and funding of safe neighborhood districts. Revises provisions authorizing a local governing body to create a local government neighborhood improvement district, etc. CA 04/04/2011 Favorable JU 04/12/2011 BC	

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/CS/SB 204

INTRODUCER: Health Regulation Committee, Criminal Justice Committee, and Senators Wise and Dockery

SUBJECT: Controlled Substances

DATE: April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	**Fav/CS**
2.	Fernandez/O'Callaghan	Stovall	HR	**Fav/CS**
3.	Munroe	Maclure	JU	**Pre-meeting**
4.			BC	
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS........................		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill schedules several synthetic cannabinoids or synthetic cannabinoid-mimicking compounds in Schedule I of Florida's controlled substance schedules. The U.S. Drug Enforcement Administration (DEA) temporarily placed these substances in Schedule I of the federal controlled substance schedules.[1] The effect of the federal scheduling prohibits the legal sale of these substances by retailers and the possession and sale of these substances is a federal crime. The placement of synthetic cannabinoids in the schedule of controlled substances under ch. 893, Florida Statutes, would authorize Florida law enforcement official and prosecutors to arrest and prosecute the possession and sale of these substances under Florida law. Possession of 3 grams or less of the scheduled substances, which is not in powdered form, is a misdemeanor of the first degree under Florida law.

[1] Drug Enforcement Administration (DEA), U.S. Department of Justice, Final Order, Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids Into Schedule I, 76 Fed. Reg. 11075 (Mar. 1, 2011) (to be codified at 21 C.F.R. pt. 1308), http://www.gpo.gov/fdsys/pkg/FR-2011-03-01/html/2011-4428.htm (last visited on Mar. 1, 2011). Also see the DEA's Notice of Intent, 75 Fed. Reg. 71635 (Nov. 24, 2010). Unless otherwise indicated, all information for the Present Situation section of this bill analysis is from these sources.

This bill amends sections 893.02 and 893.03, Florida Statutes. This bill reenacts ss. 893.13(1), (2), (4), and (5), 893.135(1)(l), and 921.0022(3)(b), (c), and (e), F.S., to incorporate the amendment to s. 893.03, F.S., in references thereto.

II. Present Situation:

The Drug Enforcement Administration (DEA) has provided the following information regarding synthetic cannabinoids (often referred to by the slang terms "K2" or "Spice"):

> Synthetic cannabinoids have been developed over the last 30 years for research purposes to investigate the cannabinoid system. No legitimate non-research uses have been identified for these synthetic cannabinoids. They have not been approved by the U.S. Food and Drug Administration for human consumption. These THC-like synthetic cannabinoids, 1-pentyl-3-(1-naphthoyl)indole (JWH-018), 1-butyl-3-(1- naphthoyl)indole (JWH-073), 1-[2-(4-morpholinyl)ethyl]-3-(1- naphthoyl)indole (JWH-200), 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (CP-47,497), and 5-(1,1-dimethyloctyl)-2- [(1R,3S)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol; CP-47,497 C8 homologue), are so termed for their THC-like pharmacological properties. Though they have similar properties to delta-9- tetrahydrocannabinol (THC) found in marijuana and have been found to be more potent than THC in animal studies. Numerous herbal products have been analyzed and JWH-073, JWH-018, JWH-200, CP-47,497, and cannabicyclohexanol have been identified in varying mixture profiles and amounts spiked on plant material.

The DEA found that these substances have a high potential for abuse, no currently accepted medical use in treatment in the United States, and are not safe for use under medical supervision.[2] Based on the DEA findings, these substances appear to meet the criteria for scheduling under Schedule I under both federal and Florida law.[3] On March 1, 2011, the DEA issued a final order to temporarily place these substances in Schedule I of the federal controlled substance schedules.[4]

Currently, these substances are not controlled substances under Florida law, and possession and sale offenses are not generally applicable, though it has been reported that the Polk County Sheriff's Office recently arrested several retailers for violation of Florida's imitation controlled substance statute, s. 817.564, F.S.[5] It remains to be seen whether convictions will occur under these statutes, and if they do occur, whether they will be upheld if subject to appellate challenge.

The DEA indicated that the emergence of these synthetic cannabinoids represents a recent phenomenon in the designer drug market.[6] The popularity of these THC-like synthetic

[2] *Id.*
[3] *See* s. 893.03(1), F.S.
[4] Drug Enforcement Administration, *supra* note 1.
[5] Curtis, Henry Pierson, "Imitation marijuana: More than dozen arrested in Polk County for selling 'legal weed'," *Orlando Sentinel*, Nov. 18, 2010, http://articles.orlandosentinel.com/2010-11-18/news/os-fake-pot-arrests-polk-county-20101118_1_synthetic-marijuana-small-gasoline-stations-legal-weed (last visited March 30, 2011).
[6] Drug Enforcement Administration, *supra* note 1.

cannabinoids has greatly increased in the United States and they are being abused for their psychoactive properties. The substances are primarily found laced on plant material and are also being abused alone as self-reported on Internet discussion boards. The most common route of administration of these synthetic cannabinoids is by smoking, using a pipe, water pipe, or rolling the drug-spiked plant material in cigarette papers.

The DEA stated that "products containing these THC-like synthetic cannabinoids are marketed as 'legal' alternatives to marijuana and are being sold over the Internet and in tobacco and smoke shops, drug paraphernalia shops, and convenience stores."[7] Further, "a number of the products and synthetic cannabinoids appear to originate from foreign sources and are manufactured in the absence of quality controls and devoid of regulatory oversight."[8] "The marketing of products that contain one or more of these synthetic cannabinoids is geared towards teens and young adults."[9] Despite disclaimers that the products are not intended for human consumption,[10] retailers promote that routine urinalysis tests will not typically detect the presence of these synthetic cannabinoids."[11]

The DEA further stated that abuse of these substances or products containing these substances "has been characterized by both acute and long term public health and safety problems":

- These synthetic cannabinoids alone or spiked on plant material have the potential to be extremely harmful due to their method of manufacture and high pharmacological potency. The DEA has been made aware that smoking these synthetic cannabinoids for the purpose of achieving intoxication and experiencing the psychoactive effects is identified as a reason for emergency room visits and calls to poison control centers.[12]

- "The body appears to recognize the synthetic compounds as a foreign substance and often causes a physiological rejection."[13] Health warnings have been issued by numerous state public health departments and poison control centers describing the adverse health effects associated with these synthetic cannabinoids and their related products including agitation, anxiety, vomiting, tachycardia, elevated blood pressure, seizures, hallucinations and non-responsiveness. Case reports describe psychotic episodes, withdrawal, and dependence associated with use of these synthetic cannabinoids, similar to syndromes observed in

[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* (Labeling these products as "not for human consumption" tends to keep the products out of purview of the Federal Food and Drug Administration (FDA). Additionally, not all the ingredients used in the production of the materials are listed.).
[11] *Id.*
[12] "[T]he American Association of Poison Control Centers (AAPCC) has reported receiving over 1,500 calls as of September 27, 2010, relating to products spiked with these synthetic cannabinoids from 48 states and the District of Columbia." It is unknown how many of those calls were to Florida poison control centers. There have been several media reports of persons having to go to the hospital after use of synthetic cannabinoids. *See, e.g.,* Repecki, Tiffany, "Cape teen hospitalized after smoking 'synthetic marijuana'," *Cape Coral Daily Breeze*, Mar. 31, 2010, http://www.cape-coral-daily-breeze.com/page/content.detail/id/520354.html (last visited Mar. 30, 2011), and Wyazan, Sam, "Teenagers treated after smoking 'K2 Spice' substance," *Tallahassee Democrat* (abstract), Jun. 30, 2010, http://pqasb.pqarchiver.com/tallahassee/access/2074740741.html?FMT=ABS&date=Jun+30%2C+2010 (last visited Jan. 3, 2011).
[13] Florida Fusion Center Brief: K2 or Spice, The Florida Department of Law Enforcement (Jun. 2010). A copy of this document is on file with the Senate Health Regulation Committee.

cannabis abuse. Emergency room physicians have reported admissions connected to the abuse of these synthetic cannabinoids. Additionally, when responding to incidents involving individuals who have reportedly smoked these synthetic cannabinoids, first responders report that these individuals suffer from intense hallucinations. Detailed chemical analysis by the DEA and other investigators have found these synthetic cannabinoids spiked on plant material in products marketed to the general public. The risk of adverse health effects is further increased by the fact that similar products vary in the composition and concentration of synthetic cannabinoids(s) spiked on the plant material.

According to the National Conference of State Legislatures, as of November 23, 2010, "at least 11 state legislatures and another six state agencies have taken action to outlaw the use of these drugs."[14]

III. Effect of Proposed Changes:

The bill amends s. 893.02, F.S., the definitions section of ch. 893, F.S., to define the term "homologue" as "a chemical compound in a series in which each compound differs by one or more alkyl functional groups on an alkyl side chain." The term "homologue" appears in the scheduling nomenclature of one of the substances scheduled by the bill.

The bill also amends. s. 893.03, F.S., to place the following synthetic cannabinoids or synthetic cannabinoid-mimicking compounds in Schedule I of Florida's controlled substance schedules:

- 2-[(1R, 3S) -3-hydroxycyclohexyl] -5- (2-methyloctan-2-yl) phenol, also known as CP 47, 497 and its dimethyloctyl (C8) homologue.
- (6aR, 10aR) -9- (hydroxymethyl) -6, 6-dimethyl-3- (2-methyloctan-2-yl) -6a, 7, 10, 10a-tetrahydrobenzo [c] chromen-1-ol, also known as HU-210.
- 1-Pentyl-3- (1-naphthoyl) indole, also known as JWH-018.
- 1-Butyl-3- (1-naphthoyl) indole, also known as JWH-073.
- 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl) indole, also known as JWH-200.

If a person is in actual or constructive possession of a controlled substance, unless it was lawfully obtained from a practitioner or pursuant to valid prescription, he or she is liable for a third-degree felony punishable by imprisonment up to five years and the imposition of a fine of up to $5,000.
If a person possesses 3 grams or less of the synthetic cannabinoids and it is not of a powdered form, he or she commits a first-degree misdemeanor punishable by jail time of up to one year and the imposition of a fine of up to 1,000.

The bill also reenacts ss. 893.13(1), (2), (4), and (5), 893.135(1)(l), and 921.0022(3)(b), (c), and (e), F.S., to incorporate the amendment to s. 893.03, F.S., in references thereto.

The effective date of the bill is July 1, 2011.

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[14] "Synthetic Cannabinoids (K2)," National Conference of State Legislatures, updated Mar. 21, 2011 http://www.ncsl.org/?tabid=21398 (last visited Mar. 30, 2011).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The scheduling of synthetic cannabinoids as provided in the bill should not impact retailers because the DEA has already scheduled these substances, and the federal action would require the removal of these substances and prohibit their sale.

C. Government Sector Impact:

On March 2, 2011, the Criminal Justice Impact Conference (CJIC) estimated that the CS/SB 204 will have a potentially insignificant prison bed impact (small additional number of prison beds projected).[15] Although, CS/CS/SB 204 has not been reviewed by the conference for its impact on the prison bed population, it is likely that it will have a similar impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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[15] Criminal Justice Impact Conference, Office of Economic and Demographic Research (Mar. 2, 2011), *available at* http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/index.cfm.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

CS/CS by Health Regulation on March 14, 2011:
Provides that any violator found carrying 3 grams or less of the scheduled synthetic cannabinoids or synthetic cannabinoid-mimicking compounds is subject to a first-degree misdemeanor unless the violator is found carrying it in a powdered form.

CS by Criminal Justice on January 11, 2011:
Adds an additional synthetic cannabinoid (JWH 200) to Schedule I of Florida's controlled substance schedules. This addition is consistent with proposed federal scheduling.

B. Amendments:

None.

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

COMMITTEE AMENDMENT

534428

LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Thrasher) recommended the following:

1 **Senate Amendment (with title amendment)**
2
3 Delete lines 96 - 173.
4
5 ================= T I T L E A M E N D M E N T ================
6 And the title is amended as follows:
7
8 Delete lines 20 - 24
9 and insert:
10
11 specified offenses; repealing s.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 1092

INTRODUCER: Senator Wise

SUBJECT: State Attorneys

DATE: April 11, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Favorable**
2.	Boland	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

I. Summary:

The bill eliminates the current reporting required of state attorneys in "10-20-Life" cases, prison releasee reoffender cases, habitual felony offender and habitual violent felony offender cases, and juvenile direct-file cases. The bill also eliminates the requirement that state attorneys develop certain criteria for the administration of habitual offender cases, as well as juvenile cases prosecuted in adult court.

The bill includes several changes to provisions in current law relating to costs of prosecution and investigative costs. The bill eliminates the requirement that an investigating law enforcement agency must request authorized costs of investigation. The bill also eliminates the requirement that a defendant must prove his or her financial need if a dispute over the assessment of these costs arises.

This bill substantially amends the following sections of the Florida Statutes: 27.366, 775.082, 775.0843, and 938.27. The bill also repeals the following provisions of the Florida Statutes: 775.08401, 775.087(5), and 985.557(4).

II. Present Situation:

Explanation and Reporting Requirements for State Attorneys

In certain criminal prosecutions, if mandatory or enhanced sentences are not pursued, the state attorney must document why that decision was made and, in some instances, report those decisions. For example, current law sets forth the legislative intent that defendants who are eligible for enhanced minimum mandatory sentences under subsections 775.087(2) and (3), F.S.,

commonly known as the "10-20-Life" law, receive those sentences.[1] Current law also requires that prosecutors write memoranda for each case in which a defendant qualified for the minimum mandatory sentence under the 10-20-Life law but did not receive the sentence. The memorandum must explain the sentencing deviation.[2] In addition to keeping the memorandum in the defendant's file, it is to be submitted quarterly to the Legislature and the Governor with a copy being retained for 10 years by the Florida Prosecuting Attorneys Association, Inc. (FPAA), and made available to the public upon request.[3]

The same statutory requirement for sentencing deviation memoranda to the case file and the FPAA exists in cases in which the defendant meets the criteria for being sentenced as a "prison releasee reoffender" under s. 775.082(9), F.S. In those cases, the memoranda are forwarded from the prosecutors to the FPAA on an annual basis.[4] The FPAA must also retain these records for 10 years and make these documents available to the public.

Habitual Offender Requirements

Current law requires state attorneys to adopt criteria to be used by the state attorney's office when deciding whether to pursue the enhanced sanctions provided in s. 775.084(4), F.S., for defendants who meet the statutory criteria for sentencing as "habitual felony offenders" and "habitual violent felony offenders."[5] The statute specifies that the criteria be designed to ensure fair and impartial application of those sentencing enhancements. Deviations from the criteria are to be memorialized for the case files.[6]

Juvenile Cases in Adult Court

Current law requires the state attorneys to develop policies and guidelines for filing juvenile cases in adult court.[7] It further requires that the state attorneys submit these policies and guidelines to the Legislature and the Governor no later than January 1 of each year.[8]

Costs of Prosecution and Investigative Costs

Courts are authorized to assess costs against convicted defendants.[9] In all criminal and violation-of-probation or community-control cases, convicted persons are liable for payment of the costs of prosecution, including any investigative costs incurred by the investigating law enforcement agency.[10] Costs of prosecution may be imposed at the rate of $50 in misdemeanor cases and $100 in felony cases unless the prosecutor proves that costs are higher in the particular case

[1] Section 27.366, F.S.; *see also* s. 775.087, F.S.
[2] Section 775.087(5), F.S.
[3] Section 27.366, F.S.
[4] Section 775.082(9)(d)2., F.S.
[5] Section 775.08401, F.S. The criteria for designation as a "habitual felony offender" and a "habitual violent felony offender" are set forth in s. 775.084(1)(a) and (b), F.S.
[6] Section 775.08401(3), F.S.
[7] Section 985.557(4), F.S.
[8] *Id.*
[9] Part IV of ch. 938, F.S.
[10] Section 938.27(1), F.S.

before the court.[11] Investigative costs must be separately and specifically requested by the investigating agency.[12] Ultimately the costs of prosecution and investigative costs are deposited into agency and state attorney trust funds.[13]

If a dispute arises as to the proper amount or type of the costs of prosecution or the investigative costs, the court must resolve the dispute by a preponderance of the evidence.[14] The burden of demonstrating the amount of costs incurred is on the state attorney. The defendant bears the burden of demonstrating his or her financial resources, as well as financial need.[15] The burden of demonstrating such other matters as the court deems appropriate is upon the party designated by the court as justice requires.[16]

III. Effect of Proposed Changes:

Explanation and Reporting Requirements for State Attorneys

The bill eliminates the current reporting required of state attorneys in "10-20-Life" cases, prison releasee reoffender cases, habitual felony offender and habitual violent felony offender cases, and juvenile direct-file cases.

The bill further eliminates the requirement that the state attorney submit quarterly reports to the Legislature and the Governor regarding the prosecution and sentencing of offenders under the 10-20-Life law, with a copy being retained for 10 years by the Florida Prosecuting Attorneys Association, Inc. (FPAA), and made available to the public upon request.

For those cases in which the defendant meets the criteria for being sentenced as a "prison releasee reoffender" but does not receive the mandatory minimum sentence, the bill eliminates the requirement for the state attorney to transmit these memoranda to the FPAA.

Habitual Offender Requirements

The bill repeals the statute requiring the state attorney in each judicial circuit to adopt uniform criteria for determining when to pursue habitual felony offender and habitual violent felony offender sanctions. The requirement that any deviation from the criteria must be explained in writing and placed in the court file is also eliminated in the repeal.

Juvenile Cases in Adult Court

The bill repeals the requirement that the state attorneys in each judicial circuit develop policies and guidelines for filing juvenile cases in adult court, as well as the requirement that these policies and guidelines be submitted to the Legislature and the Governor no later than January 1 of each year.

[11] Section 938.27(8), F.S.
[12] Section 938.27(1), F.S.
[13] Section 938.27(7) and (8), F.S.
[14] Section 938.27(4), F.S.
[15] *Id.*
[16] *Id.*

Costs of Prosecution and Investigative Costs

The bill eliminates the requirement that law enforcement agencies, fire departments, or the Department of Financial Services and the Office of Financial Regulation of the Financial Services Commission must specifically request the recovery of investigative costs. However, current law does not provide a "default" amount of investigative costs to be recovered as it does with costs of prosecutions. Therefore, it is unclear what amount a court would assess as investigative costs without a request from an agency for a specific amount.

The bill eliminates the requirement that the defendant prove his or her financial need and resources if costs become a disputed issue. The bill also eliminates the language in current law providing that the burden of proving other matters related to the assessment of these costs is upon the party designated by the court.

Cross-Reference to Repealed Statute

The bill deletes a cross-reference to s. 775.08401, F.S., relating to the establishment of criteria for prosecution of habitual offenders and habitual violent felony offenders, which is repealed under the bill.

Effective Date

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The public will no longer have access to certain reports by the offices of the state attorneys which are currently required by law and eliminated by the bill, because the reports will no longer be created. This action does not appear to be a deviation from the open records requirements of the Florida Constitution or statutes because the agency is not denying access to existing reports, but rather is no longer creating them. Additionally, a record will still be available to the public, upon request, in the form of the deviation memoranda that prosecutors are still required to create and place in the case file. However, because the deviation memoranda will no longer be organized quarterly into one cohesive report, the bill may limit the ease of public access to such records (detailing why a prosecutor deviated from the minimum mandatory sentences).

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The operating budgets (grants and donations trust funds) of the state attorneys offices may see an increase due to increased collection of costs of prosecution.

State attorneys may experience a decrease in workload as a result of the elimination of the requirement to document certain information related to sentence deviations and the elimination of the requirement to report this information to the Florida Prosecuting Attorneys Association, Inc, as well as, in some instances, to the Legislature and the Governor.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

None.

B. Amendments:

None.

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

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 926

INTRODUCER: Commerce and Tourism Committee and Senator Storms

SUBJECT: Liability/Employers of Developmentally Disabled

DATE: April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hrdlicka	Cooper	CM	**Fav/CS**
2.	Daniell	Walsh	CF	**Favorable**
3.	O'Connor	Maclure	JU	**Pre-meeting**
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... [X] Statement of Substantial Changes
B. AMENDMENTS........................ [ ] Technical amendments were recommended
[ ] Amendments were recommended
[ ] Significant amendments were recommended

I. Summary:

This bill creates a new section of the Florida Statutes providing an employer who employs an individual who has a developmental disability immunity from liability for negligent or intentional acts or omissions by that individual if:

- The employee receives or has received supported employment services through a supported employment service provider; and
- The employer does not have actual notice of the employee's actions that created the unsafe conditions in the workplace.

The bill also allows a supported employment service provider that has provided employment services to a person with a developmental disability to be immune from liability for the actions or conduct of the person that occur within the scope of the person's employment.

This bill creates section 768.0895, Florida Statutes.

II. Present Situation:

Section 393.063, F.S., defines "developmental disability" as "a disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely."

The Agency for Persons with Disabilities (APD or agency) has been tasked with serving the needs of Floridians with developmental disabilities.[1] The agency works in partnership with local communities and private providers to assist people who have developmental disabilities and their families. The agency also provides assistance in identifying the needs of people with developmental disabilities for support services.

Supported Employment Services

Supported employment services are services offered to help an individual gain or maintain a job. Generally services include job coaching, intensive job training, and follow-up services. The federal Department of Education State Supported Employment Services Program defines "supported employment services" as on-going support services provided by the designated state unit to achieve job stabilization.[2] Section 93.063, F.S., defines "supported employment" to mean employment located or provided in an integrated work setting, with earnings paid on a commensurate wage basis, and for which continued support is needed for job maintenance.

The Division of Vocational Rehabilitation (DVR), within the Department of Education, administers an employment program that assists individuals with disabilities, including those with the most severe disabilities, to pursue meaningful careers appropriate for their abilities and capabilities.[3] In 2009-10, DVR helped 3,874 people with severe disabilities find jobs.[4] Florida law defines "supported employment services" as "ongoing support services and other appropriate services needed to support and maintain a person who has a most significant disability in supported employment."[5] The service provided is based upon the needs of the eligible individual as specified in the person's individualized plan for employment. Generally, supported employment services are provided in such a way as to assist eligible individuals in entering or maintaining integrated, competitive employment.

[1] Section 20.197, F.S.
[2] 34 C.F.R. s. 363.6(c)(2)(iii). "Under the State Supported Employment Services Program, the Secretary [of Education] provides grants to assist States in developing and implementing collaborative programs with appropriate entities to provide programs of supported employment services for individuals with the most severe disabilities who require supported employment services to enter or retain competitive employment." 34 C.F.R. s. 363.1; *see also*, U.S. Dep't of Education, *Supported Employment State Grants*, http://www.ed.gov/programs/rsasupemp/index.html (last visited Mar. 18, 2011).
[3] *See* Division of Vocational Rehabilitation, Florida Dep't of Education, http://www.rehabworks.org/ (last visited Mar. 18, 2011).
[4] Division of Vocational Rehabilitation, *2009-10 Performance Highlights*, 2, *available at* http://www.rehabworks.org/docs/AnnualReport10.pdf (last visited Mar. 18, 2011).
[5] Section 413.20(22), F.S. "Supported employment" is also defined in ch. 413, F.S., relating to vocational rehabilitation, to mean "competitive work in integrated working settings for persons who have most significant disabilities and for whom competitive employment has not traditionally occurred or for whom competitive employment has been interrupted or is intermittent as a result of such a disability. Persons who have most significant disabilities requiring supported employment need intensive supported employment services or extended services in order to perform such work." Section 413.20(21), F.S.

Both DVR and APD provide supported employment services or connect individuals with private organizations that supply such services. There are several entities in Florida dedicated to providing these services. However, these entities do not share information about their customers with the employers that employ their customers. This is due to various reasons, including confidentiality concerns or contract agreements between the employer and the organization.

Employer Liability

Under common law principles, an employer is liable for acts of its employee that cause injury to another person if the wrongful act was done while the employee was acting within the apparent scope of employment, serving the interests of his employer.[6] An employee is not acting within the scope of his employment, and therefore the employer is not liable, if the employee is acting to accomplish his own purposes, and not serving the interests of the employer.[7] "The test for determining if the conduct complained of occurred within the scope of employment is whether the employee (1) was performing the kind of conduct he was employed to perform, (2) the conduct occurred within the time and space limits of the employment, and (3) the conduct was activated at least in part by a purpose to serve the employer."[8]

An employer may be held liable for an intentional act of an employee when that act is committed within the real or apparent scope of the employer's business.[9] An employer may be held liable for a negligent act of an employee committed within the scope of his employment even if the employer is without fault.[10] "This is based on the long-recognized public policy that victims injured by the negligence of employees acting within the scope of their employment should be compensated even though it means placing vicarious liability on an innocent employer."[11] An employer is liable for an employee's acts, intentional or negligent, if the employer had control over the employee at the time of the acts. "Absent control, there is no vicarious liability for the act of another, even for an employee. Florida courts do not use the label 'employer' to impose strict liability under a theory of respondeat superior[12] but instead look to the employer's control or right of control over the employee at the time of the negligent act."[13] Employer fault is not an element of vicarious liability claims.[14]

Employers may also be liable for the negligent hiring of an employee. Negligent hiring is defined as an "employer's lack of care in selecting an employee who the employer knew or should have known was unfit for the position, thereby creating an unreasonable risk that another person

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[6] *Gowan v. Bay County*, 744 So. 2d 1136, 1138 (Fla. 1st DCA 1999) (quoting *Stinson v. Prevatt,* 94 So. 656, 657 (Fla. 1922)).
[7] *Id.*
[8] *Gowan*, 744 So. 2d at 1138.
[9] *Garcy v. Broward Process Servers, Inc*., 583 So. 2d 714, 716 (Fla. 4th DCA 1991). The term "intentional" means done with the aim of carrying out the act. BLACK'S LAW DICTIONARY (9th ed. 2009).
[10] *Makris v. Williams*, 426 So. 2d 1186, 1189 (Fla. 4th DCA 1983). The term "negligent" is characterized by a person's failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance. BLACK'S LAW DICTIONARY (9th ed. 2009). A negligent act is one that creates an unreasonable risk of harm to another. BLACK'S LAW DICTIONARY (9th ed. 2009).
[11] *Makris*, 426 So. 2d at 1189.
[12] "Respondeat superior" means the doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency. BLACK'S LAW DICTIONARY (9th ed. 2009).
[13] *Vasquez v. United Enterprises of Southwest Florida, Inc*., 811 So. 2d 759, 761 (Fla. 3d DCA 2002).
[14] *Makris*, 426 So. 2d at 1189.

would be harmed."[15] An action for negligent hiring is based on the direct negligence of the employer.[16] However, in order to be liable for an employee's act based upon a theory of negligent hiring, the plaintiff must show that the employee committed a wrongful act that caused the injury.[17] "The reason that negligent hiring is not a form of vicarious liability is that unlike vicarious liability, which requires that the negligent act of the employee be committed within the course and scope of the employment, negligent hiring may encompass liability for negligent acts that are outside the scope of the employment."[18]

In *Williams v. Feather Sound, Inc.*, the Second District Court of Appeal discussed the responsibility of the employer to be aware of an employee's propensity to commit an act at issue:

> Many of these cases involve situations in which the employer was aware of the employee's propensity for violence prior to the time that he committed the tortious assault. The more difficult question, which this case presents, is what, if any, responsibility does the employer have to try to learn pertinent facts concerning his employee's character. Some courts hold the employer chargeable with the knowledge that he could have obtained upon reasonable investigation, while others seem to hold that an employer is only responsible for his actual prior knowledge of the employee's propensity for violence. The latter view appears to put a premium upon failing to make any inquiry whatsoever.[19]

Section 768.096, F.S., creates an employer presumption against negligent hiring if "before hiring the employee, the employer conducted a background investigation of the prospective employee and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the prospective employee for the particular work to be performed or for the employment in general."[20] There is no existing provision in Florida law that would specifically limit the liability of an employer if the employer has hired an individual with disabilities.

III. Effect of Proposed Changes:

This bill creates s. 768.0895, F.S., providing an employer who employs an individual who has a developmental disability immunity from liability for negligent or intentional acts or omissions[21] by that individual if:

- The employee receives or has received supported employment services through a supported employment service provider; and
- The employer does not have actual notice of the employee's actions that created the unsafe conditions in the workplace.

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[15] BLACK'S LAW DICTIONARY (9th ed. 2009).
[16] *Anderson Trucking Service, Inc. v. Gibson*, 884 So. 2d 1046, 1052 (Fla. 5th DCA 2004).
[17] *Id.*
[18] *Id.* at n.1.
[19] *Williams v. Feather Sound, Inc.*, 386 So. 2d 1238, 1240 (Fla. 2d DCA 1980) (internal citations omitted).
[20] Section 768.096(1), F.S. This section provides that a background investigation must include contacting references, interviewing the employee, or obtaining a criminal background check from the Florida Department of Law Enforcement. However, the election by an employer not to conduct the investigation is not a presumption that the employer failed to use reasonable care in hiring an employee.
[21] An omission is defined as the "failure to do something; esp., a neglect of duty." BLACK'S LAW DICTIONARY (9th ed. 2009).

The bill also allows a supported employment service provider that has provided employment services to a person with a developmental disability to be immune from liability for the actions or conduct of the person that occur within the scope of the person's employment.

The bill provides definitions for "developmental disability" and "supported employment service provider" within the newly created s. 768.0895, F.S. Specifically:

- "Developmental disability" has the same meaning as provided in s. 393.063, F.S.;[22] and
- "Supported employment service provider" means a not-for-profit public or private organization or agency that provides services for persons in supported employment, as defined in s. 393.063, F.S.

The bill provides an effective date of July 1, 2011, and specifies that the bill only applies to causes of action occurring on or after that date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill possibly implicates the right of access to the courts under Article I, section 21 of the Florida Constitution by eliminating or circumscribing an individual's right of action against an employer of a person with developmental disabilities. Article I, section 21 of the Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." The Florida Constitution protects "only rights that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution."[23] Constitutional limitations were placed on the Legislature's right to abolish a cause of action in the Florida Supreme Court case *Kluger v. White*, 281 So. 2d 1 (Fla. 1973). The Court held:

[22] Section 393.063, F.S., defines "developmental disability" as "a disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely."

[23] 10A FLA. JUR 2D *Constitutional Law* s. 360. When analyzing an access to courts issue, the Florida Supreme Court clarified that 1968 is the relevant year in deciding whether a common law cause of action existed. *Eller v. Shova,* 630 So. 2d 537, 542 n. 4 (Fla. 1993).

> [W]here a right of access … has been provided …, the Legislature is without power to abolish such a right without providing a reasonable alternative … unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[24]

To the extent that this bill is seen as depriving a person who is injured of the right to go to court to pursue a claim against an employer of a person with developmental disabilities, the bill may face constitutional scrutiny.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

An employer's liability in hiring individuals with disabilities through supported employment service providers may be reduced. This may help employers feel more comfortable hiring individuals with disabilities.[25] In turn, more individuals using supported employment services may find employment opportunities available to them. An individual's liability for negligent or intentional acts or omissions will not change.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

CS by Commerce and Tourism on March 16, 2011:
The committee substitute made four clarifying changes from the bill as originally filed:

- Defines "supported employment service provider;"

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[24] *Kluger,* 281 So. 2d at 4.
[25] *See* Agency for Persons with Disabilities, *2011 Bill Analysis, SB 926* (Mar. 10, 2011) (on file with the Senate Committee on Children, Families, and Elder Affairs).

- Simplifies the definition of the term "person with a developmental disability" to "developmental disability;"
- Simplifies the reference to the person/employee by using the term "person" throughout; and
- Clarifies that the bill only applies to causes of action arising on or after the effective date of the bill.

B. Amendments:

None.

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

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 2064

INTRODUCER: Children, Families, and Elder Affairs Committee

SUBJECT: Mental Health and Substance Abuse Treatment

DATE: April 1, 2011 REVISED: ___ ___ ___ ___

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Walsh	CF	**Favorable**
2.	O'Connor/Maclure	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

I. Summary:

This bill stems from an interim report of the Florida Senate Committee on Children, Families, and Elder Affairs relating to a forensic hospital diversion pilot program. The bill creates the Forensic Hospital Diversion Pilot Program which is to be implemented in Escambia, Hillsborough, and Miami-Dade counties by the Department of Children and Family Services (DCF or department), in conjunction with the First, Eleventh, and Thirteenth Judicial Circuits.

The purpose of the pilot program is to serve individuals with mental illnesses or co-occurring mental illnesses and substance use disorders and who are involved in or at risk of entering state forensic mental health treatment facilities, prisons, jails, or state civil mental health treatment facilities. Eligibility for the pilot program is limited to persons who:

- Are 18 years of age or older;
- Are charged with a felony of the second or third degree;
- Do not have a significant history of violent criminal offenses;
- Are adjudicated incompetent to proceed to trial or not guilty by reason of insanity pursuant to part II of ch. 916, F.S.;
- Meet public safety and treatment criteria established by DCF; and
- Otherwise would be admitted to a state mental health treatment facility.

The bill encourages the Florida Supreme Court to develop educational training for judges in the pilot program areas and authorizes the department to adopt rules. The bill also requires the Office of Program Policy Analysis and Government Accountability to evaluate the pilot program and

submit a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives by December 31, 2012.

The bill also amends Florida's law relating to the involuntary commitment of a defendant who is adjudicated incompetent to provide that a defendant who is being discharged from a state treatment facility shall be provided with up to a seven day supply of the psychotropic medications he or she is receiving at the time of discharge. The bill requires that the most recent formulary approved by the department be used when filling prescriptions for psychotropic medications prescribed to defendants being discharged from state treatment facilities.

Finally, the bill provides that county courts may order the conditional release of a defendant for purposes of outpatient care and treatment.

The bill makes conforming changes.

This bill substantially amends the following sections of the Florida Statutes: 916.106, 916.13, 916.17, and 951.23. The bill creates section 916.185, Florida Statutes.

II. Present Situation:[1]

Forensic Mental Health

On any given day in Florida, there are approximately 17,000 prison inmates, 15,000 local jail detainees, and 40,000 individuals under correctional supervision in the community who experience serious mental illnesses. Annually, as many as 125,000 adults with mental illnesses or substance use disorders requiring immediate treatment are placed in a Florida jail.

Over the past nine years, the population of inmates with mental illnesses or substance use disorders in Florida prisons increased from 8,000 to nearly 17, 000 individuals. In the next nine years, this number is projected to reach more than 35,000 individuals, with an average annual increase of 1,700 individuals. Forensic mental health services cost the state a quarter-billion dollars a year and are now the fastest growing segment of Florida's public mental health system.

Forensic Services

Chapter 916, F.S., called the "Forensic Client Services Act," addresses the treatment and training of individuals who have been charged with felonies and found incompetent to proceed to trial due to mental illness, mental retardation, or autism, or are acquitted by reason of insanity.

Part II of ch. 916, F.S., relates to forensic services for persons who are mentally ill and describes the criteria and procedures for the examination, involuntary commitment, and adjudication of persons who are incompetent to proceed to trial due to mental illness or who have been

[1] The information contained in the Present Situation of this bill analysis is from an interim report by the Committee on Children, Families, and Elder Affairs of the Florida Senate. See Comm. on Children, Families, and Elder Affairs, The Florida Senate, *Forensic Hospital Diversion Pilot Program* (Interim Report 2011-106) (Oct. 2010), *available at* http://archive.flsenate.gov/data/Publications/2011/Senate/reports/interim_reports/pdf/2011-106cf.pdf (last visited Mar. 17, 2011).

adjudicated not guilty by reason of insanity. Persons committed under ch. 916, F.S., are committed to the custody of the Department of Children and Family Services (DCF or department).

Under the authority of ch. 916, F.S., DCF provides mental health assessment, evaluation, and treatment of individuals committed to DCF following adjudication as incompetent to proceed or not guilty by reason of insanity. These individuals are charged with a felony offense and must be admitted to a treatment facility within 15 days of the department's receipt of the commitment packet from the court.[2] Persons committed to the custody of DCF are treated in one of three forensic mental health treatment facilities throughout the state. These facilities contain a total of 1,700 beds and serve approximately 3,000 people each year. The cost to fund these beds is more than $210 million annually.[3]

Individuals admitted to state forensic treatment facilities for competency restoration receive services primarily focused on resolving legal issues, but not necessarily targeting long-term wellness and recovery from mental illnesses. Once competency is restored, individuals are discharged from state treatment facilities and generally returned to jails, where they are rebooked and incarcerated while waiting for their cases to be resolved. A sizable number of individuals experience a worsening of symptoms while waiting in jail, and some are readmitted to state facilities for additional treatment and competency restoration services.

The majority of individuals who enter the forensic treatment system do not go on to prison,[4] but return to court, and either have their charges dismissed for lack of prosecution or the defendant takes a plea such as conviction with credit for time served or probation.[5] Most are then released to the community, often with few or no community supports and services in place.[6] Many are subsequently rearrested and return to the justice and forensic mental health systems, either as the result of committing a new offense or failing to comply with the terms of probation or community control.[7]

Diversion

"Diversion is the process of diverting individuals with severe mental illness and/or co-occurring substance abuse disorders away from the justice system and into the community mental health system, where they are more appropriately served."8 By providing more appropriate community-based services, diversion programs prevent individuals with mental illness and substance abuse

[2] *See* s. 916.107(1)(a), F.S.
[3] Comm. on Children, Families, and Elder Affairs, *supra* note 1.
[4] H. Richard Lamb et al., *Community Treatment of Severely Mentally Ill Offenders Under the Jurisdiction of the Criminal Justice System: A Review*, 50 PSYCHIATRIC SERV. 907-913 (July 1999), *available at* http://psychservices.psychiatryonline.org/cgi/content/full/50/7/907 (last visited Mar. 18, 2011).
[5] Interview with Judge Steven Leifman, Special Advisor to the Florida Supreme Court on Criminal Justice and Mental Health (Aug. 20, 2010).
[6] *Id.*
[7] *Id.*
[8] The Supreme Court, State of Florida, *Mental Health: Transforming Florida's Mental Health System*, *available at* http://www.floridasupremecourt.org/pub_info/documents/11-14-2007_Mental_Health_Report.pdf (last visited Mar. 18, 2011).

disorders from becoming unnecessarily involved in the criminal justice system.[9] There are numerous benefits to the community, criminal justice system, and the diverted individual, including:

- Enhancing public safety by making jail space available for violent offenders.
- Providing judges and prosecutors with an alternative to incarceration.
- Reducing the social costs of providing inappropriate mental health services or no services at all.
- Providing an effective linkage to community-based services, enabling people with mental illness to live successfully in their communities, thus reducing the risk of homelessness, run-ins with the criminal justice system, and institutionalization.[10]

In Florida, this approach is being tested in the Miami-Dade Forensic Alternative Center (MD-FAC), a pilot program implemented in August 2009 by DCF, the Eleventh Judicial Circuit of Florida,[11] and the Bayview Center for Mental Health. The pilot program was established to demonstrate the feasibility of diverting individuals with mental illness adjudicated incompetent to proceed to trial from state hospital placement to placement in community-based treatment and competency restoration services.[12]

"Admission to MD-FAC is limited to individuals who otherwise would be committed to DCF and admitted to state forensic hospitals."[13] In order to be eligible for MD-FAC, an individual must be charged with a less serious offense, such as a second or third degree felony. Following admission, individuals are initially placed in a locked inpatient setting where they receive crisis stabilization, short-term residential treatment, and competency restoration services.[14] As of September 2010, twenty-four individuals have been admitted to the pilot program and diverted from admission to state forensic facilities.[15] To serve these 24 people, MD-FAC operates 10 beds, with an average bed per day cost of $274.00 for a total cost of $1,000,100.[16] MD-FAC reports that increasing the bed capacity will decrease the average bed per day cost at MD-FAC to less than $230, with the possibility of further decreasing costs in the future.[17]

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[9] *Id.*
[10] Nat'l Mental Health Ass'n, TAPA Ctr. for Jail Diversion, Nat'l GAINS Ctr., *Jail Diversion for People with Mental Illness: Developing Supportive Community Coalitions*, (Oct. 2003), *available at* http://www.gainscenter.samhsa.gov/pdfs/jail_diversion/NMHA.pdf (last visited Mar. 18, 2011).
[11] MD-FAC is part of Eleventh Judicial Circuit Criminal Mental Health Project (CMHP). This CMHP runs four diversion programs (Pre-Arrest Diversion, Post-Arrest Misdemeanor Diversion, Post-Arrest Felony Diversion, and Forensic Hospital Diversion). Interview with Judge Steven Leifman, *supra* note 7. The Eleventh Judicial Circuit includes Miami-Dade County, which has one of the nation's largest percentages of mentally ill residents. Abby Goodnough, *Officials Clash Over Mentally Ill in Florida Jails,* N.Y. TIMES, Nov. 15, 2006, *available at* http://www.nytimes.com/2006/11/15/us/15inmates.html (last visited Mar. 18, 2011).
[12] Miami-Dade Forensic Alternative Ctr., *Pilot Program Status Report* (Aug. 2010) (on file with the Senate Comm. on Children, Families, and Elder Affairs).
[13] *Id.*
[14] *Id.*
[15] Additionally, three individuals who met criteria for admission to the program were subsequently admitted to a state hospital because of lack of bed availability at MD-FAC, i.e., the program was at or above capacity. On average, the program has diverted 2.2 individuals per month from admission to state forensic facilities. *Id.*
[16] *Id.*
[17] Staffing standards at MD-FAC allow for additional bed capacity without substantially increasing program staff or fixed costs. As a result, operations will become more efficient as program capacity is increased. *Id.*

As a result of the MD-FAC program:

- The average number of days to restore competency has been reduced, as compared to forensic treatment facilities.[18]
- The burden on local jails has been reduced, as individuals served by MD-FAC are not returned to jail upon restoration of competency.[19]
- Because individuals are not returned to jail, it prevents the individual's symptoms from worsening while incarcerated, possible requiring readmission to state treatment facilities.[20]
- Individuals access treatment more quickly and efficiently because of the ongoing assistance, support, and monitoring following discharge from inpatient treatment and community re-entry.
- Individuals in the program receive additional services not provided in the state treatment facilities, such as intensive services targeting competency restoration, as well as community-living and re-entry skills.
- It is standard practice at MD-FAC to provide assistance to all individuals in accessing federal entitlement benefits that pay for treatment and housing upon discharge.

County Court Authority

As described above, ch. 916, F.S., allows the circuit court to order forensic commitment proceedings for a defendant adjudicated incompetent to proceed to trial. The Florida Supreme Court, in *Onwu v. State*, ruled that only the circuit court, and not the county court, has the authority to order forensic commitment of persons found incompetent to proceed to trial (ITP)

[18]

Comparison of competency restoration services provided in forensic treatment facilities and MD-FAC (average number of days year to date, FY 2009-10):	**Forensic facilities**	**MD-FAC**	**Difference***
Average days to restore competency (admission date to date court notified as competent)	138.9	99.3	39.6 days (-29%)
Average length of stay for individuals restored to competency (this includes the time it takes for counties to pick up individuals)	157.8	139.6	18.2 days (-12%)

"The diminishing advantage of MD-FAC over forensic facilities in terms of average number of days to restore competency (39.6 day reduction) and overall average length of stay for individuals restored to competency (18.2 day reduction) relates to the fact that individuals enrolled in MD-FAC are not rebooked into the jail following restoration of competency. Instead, they remain at the treatment program where they are re-evaluated by court appointed experts while the treatment team develops a comprehensive transition plan for eventual step-down into a less restrictive community placement. When court hearings are held to determine competency and/or authorize step-down into community placements, individuals are brought directly to court by MD-FAC staff. This not only reduces burdens on the county jail, but eliminates the possibility that individuals will decompensate while incarcerated and require subsequent readmission to state treatment facilities. It also ensures that individuals remain linked to the service provider through the community re-entry and re-integration process." *Id.*

[19] MD-FAC program staff provides ongoing assistance, support and monitoring following discharge from inpatient treatment and community re-entry. Additionally, individuals are less likely to return to state hospitals, emergency rooms, and other crisis settings. *Id*

[20] Of the 44 individuals referred to MD-FAC to date, 10 (23 percent) had one or more previous admissions a state forensic hospital for competency restoration and subsequent readmission to the Miami-Dade County Jail. *Id.*

through ch. 916, F.S.[21] The Court noted that the county court may still commit misdemeanor defendants found ITP through the Baker Act.[22]

However, county court judges are without recourse when a misdemeanor defendant found ITP does not meet the criteria for Baker Act involuntary hospitalization, but may still pose a danger to himself or others in the future, and thus requires treatment. In this instance, the county court judge can conditionally release the defendant into the community, but has no authority to order any mental health treatment services. If the defendant receives mental health services while on conditional release, competency may be restored so that a plea can be entered within the year. It is reported that many misdemeanor defendant cases are dismissed by the end of the year because competency has not been restored. In other cases, by the end of the year, the individual has either disappeared or has been rearrested.[23]

Committee on Children, Families, and Elder Affairs' Review of the Forensic Hospital Diversion Pilot Program

During the 2011 interim, the Florida Senate Committee on Children, Families, and Elder Affairs studied forensic mental health in Florida and the benefits of a Forensic Hospital Diversion Pilot Program.[24] The recommendations identified by the interim report include:

- Expanding the forensic hospital diversion pilot program to other areas of the state. The department and representatives from the Office of the State Courts Administrator suggested pilots be implemented in Hillsborough and Escambia counties because they have the largest forensic need in the state.
- Providing program-specific training to judges in the pilot areas.
- Authorizing county court judges to order involuntary outpatient treatment as a condition of release.

III. Effect of Proposed Changes:

This bill stems from an interim report of the Florida Senate Committee on Children, Families, and Elder Affairs relating to a forensic hospital diversion pilot program. The bill creates the Forensic Hospital Diversion Pilot Program to be implemented in Escambia, Hillsborough, and Miami-Dade counties by the Department of Children and Family Services (DCF or department), in conjunction with the First, Eleventh, and Thirteenth Judicial Circuits. The program is to be implemented within available resources and the bill authorizes DCF to reallocate resources from forensic mental health programs or other adult mental health programs serving individuals involved in the criminal justice system. The purpose of the pilot program is to serve individuals with mental illnesses or co-occurring mental illnesses and substance use disorders and who are involved in or at risk of entering state forensic mental health treatment facilities, prisons, jails, or state civil mental health treatment facilities. In creating and implementing the program, DCF is directed to include a comprehensive continuum of care and services that use evidence-based

[21] *Onwu v. State*, 692 So.2d 881 (Fla. 1997).
[22] *Id.* Baker Act procedures are found in part I, ch. 394, F.S.
[23] Telephone interview with Judge Steven Leifman, Special Advisor to the Florida Supreme Court on Criminal Justice and Mental Health (Sep. 28, 2010).
[24] Comm. on Children, Families, and Elder Affairs, *supra* note 1.

practices and best practices to treat people who have mental health and co-occurring substance use disorders. The bill provides definitions for the terms "best practices," "community forensic system," and "evidence-based practices."

Eligibility for the pilot program is limited to persons who:

- Are 18 years of age or older;
- Are charged with a felony of the second or third degree;
- Do not have a significant history of violent criminal offenses;
- Are adjudicated incompetent to proceed to trial or not guilty by reason of insanity pursuant to part II of ch. 916, F.S.;
- Meet public safety and treatment criteria established by DCF; and
- Otherwise would be admitted to a state mental health treatment facility.

The bill encourages the Florida Supreme Court, in consultation with the Supreme Court Mental Health and Substance Abuse Committee, to develop educational training for judges in the pilot program areas. The bill authorizes DCF to adopt rules to administer the program. The bill also requires the Office of Program Policy Analysis and Government Accountability (OPPAGA) to evaluate the pilot program and submit a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives by December 31, 2012. The OPPAGA is directed to examine the efficiency and cost-effectiveness of providing forensic services in secure, outpatient, community-based settings in the report.

The bill amends s. 916.13, F.S., relating to the involuntary commitment of a defendant who is adjudicated incompetent, to provide that a defendant who is being discharged from a state treatment facility shall be provided with up to a seven day supply of the psychotropic medications he or she is receiving at the time of discharge. The defendant is to remain on the medications, to the extent it is deemed medically appropriate, in order to accommodate continuity of care and ensure the ongoing level of treatment that helped the defendant become competent. The bill requires that the most recent formulary approved by the department be used when filling prescriptions for psychotropic medications prescribed to defendants being discharged from state treatment facilities. The bill also amends s. 951.23, F.S., to require all county detention facilities, county residential probation centers, and municipal detention facilities filling prescriptions for psychotropic medications prescribed to defendants discharged from state treatment facilities to follow the formulary approved by DCF in order to conform to the changes made in s. 916.13, F.S.

Finally, the bill authorizes a county court to order the conditional release of a defendant for purposes of outpatient care and treatment only. The bill amends the definition of "court" in s. 916.106, F.S., to conform to this change.

The bill shall take effect July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill provides that the Forensic Hospital Diversion Pilot Program is to be implemented by the Department of Children and Family Services (DCF or department), in conjunction with the First, Eleventh, and Thirteenth Judicial Circuits in Escambia, Miami-Dade, and Hillsborough counties, "within available resources." The department is also authorized to reallocate resources from forensic mental health programs or other adult mental health programs serving individuals involved in the criminal justice system.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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

598234

LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Richter) recommended the following:

1 **Senate Amendment (with title amendment)**
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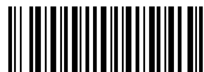
3 Between lines 34 and 35
4 insert:
5 Section 1. Subsection (9) of section 393.063, Florida
6 Statutes, is amended, present subsections (13) through (40) of
7 that section are redesignated as subsections (14) through (41),
8 respectively, and a new subsection (13) is added to that
9 section, to read:
10 393.063 Definitions.—For the purposes of this chapter, the
11 term:
12 (9) “Developmental disability” means a disorder or syndrome
13 that is attributable to retardation, cerebral palsy, autism,


598234

14 spina bifida, Down syndrome, or Prader-Willi syndrome; that
15 manifests before the age of 18; and that constitutes a
16 substantial handicap that can reasonably be expected to continue
17 indefinitely.
18 (13) "Down syndrome" means a disorder caused by the
19 presence of an extra chromosome 21.
20
21 ================= T I T L E A M E N D M E N T ================
22 And the title is amended as follows:
23 Delete line 3
24 and insert:
25 disabilities; amending s. 393.063, F.S.; redefining
26 the term "developmental disability" as used within ch.
27 393, F.S., to include Down syndrome; defining the term
28 "Down syndrome" as it relates to developmental
29 disabilities; amending s. 393.067, F.S.; prohibiting

142468

LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Richter) recommended the following:

Senate Amendment (with title amendment)

Between lines 128 and 129
insert:

Section 5. Paragraphs (f) and (g) of subsection (4) of section 1004.55, Florida Statutes, are amended to read:

1004.55 Regional autism centers.—

(4) Each center shall provide:

(f) Coordination and dissemination of local and regional information regarding available resources for services for children who have ~~with the~~ developmental disabilities ~~described in subsection (1)~~.

(g) Support to state agencies in the development of

142468

14 training for early child care providers and educators with
15 respect to ~~the~~ developmental disabilities ~~described in~~
16 ~~subsection (1)~~.
17
18 ================= T I T L E A M E N D M E N T ================
19 And the title is amended as follows:
20 Delete line 23
21 and insert:
22 services; amending s. 1004.55, F.S.; requiring each
23 regional autism center in this state to provide
24 coordination and dissemination of local and regional
25 information regarding available resources for services
26 for children who have developmental disabilities, not
27 just autism or autistic-like disabilities; revising
28 the requirements for the centers with respect to
29 supporting state agencies in developing training;
30 creating a task force to develop input for

961140

LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Richter) recommended the following:

1 **Senate Amendment**

2

3 Between lines 163 and 164

4 insert:

5 (n) A representative from an intensive behavior residential

6 habilitation provider.

7 (o) A member of the Association of Waiver Support

8 Coordinators.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 2062

INTRODUCER: Children, Families, and Elder Affairs Committee

SUBJECT: Persons with Developmental Disabilities

DATE: April 11, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Walsh	Walsh	CF	**Favorable**
2.	Boland	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

I. Summary:

Currently, the Agency for Persons with Disabilities is required to provide, through its licensing authority and by rule, requirements for monitoring foster care facilities, group home facilities, residential habilitation centers, and comprehensive transitional education programs that serve agency clients. There has been debate among scholars in this field as to whether residential service providers should, or even can, prohibit the use of pornography in residential facilities that serve clients of the Agency for Persons with Disabilities (agency or APD). A quality assurance tool now in use clarifies for inspectors that faith-based providers have the authority to establish rules that prevent residents from viewing objectionable materials. Concern exists, however, that absent specific direction, the agency's interpretation of this issue may change over time. The bill prohibits the imposition of monitoring requirements that would mandate the availability of pornographic materials in residential facilities serving clients of the agency.

The bill requires that in proceedings for involuntary placement, the court must order the person to the agency for placement in an appropriate facility, and may not release the person directly to a residential service provider. The agency is authorized to move the person from one facility to another and must notify the court and the person's counsel with 30 days after the transfer is completed.

The bill requires the agency to ensure there are a sufficient number of civil facilities providing community-based training for defendants who are charged with sex offenses. Also, if the agency determines that there are two or fewer facilities available to provide this type of training to defendants charged with sex offenses, the agency must immediately procure additional facilities.

The bill establishes a task force to provide input to APD for the creation of guidelines and procedures for providers of residential services relating to sexual activity among the residents of its facilities. The agency will provide administrative support for the task force, and the task force must issue a report to the President of the Senate and the Speaker of the House of Representatives by November 1, 2011.

This bill substantially amends ss. 393.067, 393.11, 916.1093, and 916.3025, F.S., and creates an unnumbered section of Florida law.

II. Present Situation:

Background

In December 2010, the St. Petersburg Times reported[1] on the case of Kevin Rouse, a 42-year-old mentally retarded client of the Agency for Persons with Disabilities (agency or APD) who is involuntarily committed to the Human Development Center (HDC) in Seffner, Florida. Mr. Rouse was placed at the facility for developmentally disabled men by the court after he was accused of committing a sexual offense.

Mr. Rouse's mother alleges that HDC promotes sexual activity among its residents and that her son, as part of his treatment plan, was encouraged to participate — against his and her religious convictions and desires – in such sexual activity.[2] The HDC responded that its policy respects the rights of the developmentally disabled to safely engage in consensual sexual activity.[3] Others in the field express divergent opinions on the ability of residents living in group homes housing sexual offenders to consent to sexual activity.[4]

In addition, Ms. Rouse's request to APD that her son be transferred to another facility was not honored.[5] The agency indicated that the only other available facility was located even further from Mr. Rouse's family than HDC, and that HDC is one of the few facilities in the state that is willing to provide services to sex offenders.[6]

The New Horizons Group Home in Brandon was cited during a licensure inspection in 2005 for failure to allow its residents to watch movies that were R or X-rated. The inspector felt that this house rule restricted the residents from fully exercising their rights.[7] The agency reports that the quality assurance tool now in use clarifies for inspectors that faith-based providers, such as New Horizons, have the authority to establish rules that prevent residents from viewing objectionable

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[1] Justin George, *Group home's unorthodox sex policy disquiets mother*, St. Petersburg Times, December 19, 2010, *available at* http://www.tampabay.com/news/publicsafety/crime/group-homes-unorthodox-sex-policy-disquiets-mother/1140717 (last visited April 5, 2011).
[2] *Id*.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] Testimony by Jim DeBeaugrine, Director, Agency for Persons with Disabilities, before the Senate Committee on Children, Families, and Elder Affairs, February 8, 2011.
[7] E-mail from Logan McFaddin, Legislative Affairs Director, Agency for Persons with Disabilities, March 16, 2011 (on file with the Senate Committee on Children, Families, and Elder Affairs).

materials.[8] Concern exists, however, that absent specific direction, the agency's interpretation of this issue may change over time.

The Arc[9] notes that community services for developmentally-disabled persons charged with sexual offenses are virtually nonexistent. [10] Further,

> Society is uncomfortable recognizing that people with disabilities are sexual beings and have the same needs for affection, intimacy and sexual gratification as those without disabilities. Providing good sex and relationship education and ample opportunities for sexual expression should be a high priority for parents, disability advocates, community agencies and all those who know or work with people with intellectual disabilities.[11]

The Agency for Persons with Disabilities (APD) was to have promulgated guidelines relating to sexual activity among residents of its facilities more than two years ago,[12] but has not yet done so.[13]

Monitoring Requirements

Section 393.067, F.S., requires APD to provide, through its licensing authority and by rule, requirements for monitoring foster care facilities, group home facilities, residential habilitation centers, and comprehensive transitional education programs that serve agency clients.

Involuntary Admission to Residential Services

Pursuant to ss. 393.11 and 916.3025, F.S., a person may be involuntarily admitted to a residential facility for treatment after criminal proceedings against the individual are resolved and the court finds that the person needs continuing residential services. The need for services may be because (a) the person lacks ability to consent for voluntary admission and lacks sufficient basic self-care skills to ensure he or she is not a danger to self; or (b) the person would be a danger to himself or others.

The statutes appear to allow a court to commit the person to the custody of a facility. It has been reported that this provision has made it difficult for the agency to transfer a resident to another facility should the need arise.[14]

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[8] *Id.*
[9] The Arc describes itself as "the largest national community-based organization advocating for and serving people with intellectual and developmental disabilities and their families." See the organization's website, http://www.thearc.org/page.aspx?pid=2335 (last visited April 11, 2011).
[10] The Arc, Q&A: People with Intellectual Disabilities and Sexual Offenses, August 2009, http://www.thearc.org/page.aspx?pid=2456 (last visited April 5, 2011).
[11] *Id.*
[12] *See* George, *supra* note 1.
[13] Testimony by Jim DeBeaugrine, Director, Agency for Persons with Disabilities, before the Senate Committee on Children, Families, and Elder Affairs, February 8, 2011.
[14] *Id.*

UCEDDs

University Centers for Excellence in Developmental Disabilities Education, Research, and Service (UCEDD) are funded by the federal Administration on Developmental Disabilities.[15] There are currently 67 UCEDDs throughout the country, including two in Florida.[16] The centers work with people with disabilities, members of their families, state and local government agencies, and community providers in projects that provide training, technical assistance, service, research, and information sharing, with a focus on building the capacity of communities to serve all.[17]

III. Effect of Proposed Changes:

Currently, the Agency for Persons with Disabilities (agency or APD) is required to provide, through its licensing authority and by rule, requirements for monitoring foster care facilities, group home facilities, residential habilitation centers, and comprehensive transitional education programs that serve agency clients.[18] The bill prohibits the imposition of monitoring requirements that would mandate the availability of pornographic materials in residential facilities serving clients of APD.

The bill provides that the agency shall ensure that there are a sufficient number of civil facilities providing community-based training for defendants charged with sex offenses so that alternative placement options are available. Furthermore, the bill requires that when the agency determines that there are two or fewer facilities available to provide community-based training for defendants charged with sex offenses, the agency shall immediately procure additional facilities.

The bill requires that in proceedings for involuntary admission pursuant to s. 393.11, F.S., or s. 916.3025, F.S., the court must order the person to the agency for placement in an appropriate facility, and the court may not release the person directly to a residential service provider.

The statutes appear to allow a court to commit a person to the custody of a facility. It has been reported that this provision has made it difficult for the agency to transfer a resident to another facility should the need arise.[19] The bill provides that the agency is authorized to move a person from one facility to another and must notify the court and the person's counsel of the transfer within 30 days after the transfer is completed.

The bill provides that the Legislature recognizes the rights of the developmentally disabled to lead full and rewarding lives, and its obligation to protect vulnerable adults from sexual abuse. In order to address these complexities, the bill establishes a task force to provide input to APD for

[15] The national network of UCEDDs is authorized under Public Law 106-402 (The Developmental Disabilities Assistance and Bill of Rights Act of 2000 or "DD Act").
[16] The two UCEDD facilities in Florida are at the Mailman Center for Child Development at the University of Miami Miller School of Medicine, and at the Florida Center for Inclusive Communities at the University of South Florida in Tampa. A complete listing of the centers is available at http://www.acf.hhs.gov/programs/add/adddocs/uceddstxt.pdf (last visited April 5, 2011).
[17] Association of University Centers on Disabilities, *About UCEDD, available at* http://www.aucd.org/template/page.cfm?id=667 (last visited April 5, 2011).
[18] Section 393.067, F.S.
[19] *See Supra* note 13.

the creation of guidelines and procedures for providers of residential services relating to sexual activity among the residents of its facilities. The task force is composed of the following members:

- The director of the Agency for Persons with Disabilities or his or her designee.
- The director of Adult Protective Services in the Department of Children and Family Services.
- The executive director of The Arc of Florida.
- An Arc of Florida family board member appointed by the executive director of The Arc of Florida.
- The chair of the Family Care Council Florida.
- A parent representative from the Family Care Council Florida appointed by the chair of the Family Care Council Florida.
- A representative from the Developmental Disabilities Council.
- A representative from Disability Rights Florida.
- A representative from the Florida courts.
- A representative from the Florida Prosecuting Attorneys Association.
- A representative from the Florida Public Defender Association.
- A staff member of the University Center for Excellence in Developmental Disabilities at the University of South Florida/Center for Inclusive Communities.
- A self-advocate.

The members of the task force must hear from self-advocates, family members, experts at universities and colleges, and other entities with expertise pertinent to this issue.

Members of the task force serve without compensation, but are entitled to per diem and travel as provided in s. 112.061, F.S. The agency is to provide administrative support for the task force, and the task force must report its findings to the President of the Senate and the Speaker of the House of Representatives by November 1, 2011.

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The members of the task force are entitled to per diem and travel expenses related to their service, and the agency is to provide administrative support for the task force established in the bill. The fiscal impact to APD is expected to be minimal.[20]

VI. Technical Deficiencies:

None.

VII. Related Issues:

The APD notes that as relates to the requirement that it ensure sufficient facilities for defendants charged with sexual offenses (section 3 of the bill):

> The term "sufficient" is not defined. The Agency can assist private providers to create community based placements for persons charged with sex offenses[,] but APD cannot require a private provider to admit nor provide services to any consumer that the provider does not feel would be appropriate for their residential facility.[21]

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

None.

B. Amendments:

None.

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

[20] Agency for Persons with Disabilities 2011 Bill Analysis SB 2062, March 24, 2011 (on file with the Senate Committee on Judiciary).
[21] *Id*.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 1144

INTRODUCER: Senator Margolis

SUBJECT: Local Government

DATE: April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wolfgang	Yeatman	CA	**Favorable**
2.	O'Connor	Maclure	JU	**Pre-meeting**
3.			TR	
4.				
5.				
6.				

I. Summary:

This bill authorizes the board of county commissioners to negotiate the lease of real property for a term not to exceed five years, rather than go through the competitive bidding process. The bill also allows government entities to transfer title to a road by recording a deed with the county or counties in which the right-of-way is located.

This bill substantially amends sections 125.35 and 337.29, Florida Statutes.

II. Present Situation:

County Leasing Authority

Article VIII, section 1 of the Florida Constitution provides, in part, that counties have the power to carry on local government to the extent provided by, or not inconsistent with, general or special law. This constitutional provision is codified in s. 125.01, F.S.[1] Counties are specifically authorized "to employ personnel, expend funds, enter into contractual obligations, and purchase or *lease* and sell or exchange any *real* or personal *property*."[2]

Section 125.35(1)(a), F.S., specifically authorizes the board of county commissioners (board) to "lease real property, belonging to the county."

[1] Op. Att'y Gen. Fla. 88-34 (1988) (citing *Speer v. Olson*, 367 So. 2d 207, 210 (Fla. 1978) (finding that ch. 125, F.S., implements art. VIII, section 1(f) of the Florida Constitution)).
[2] *Id*. (emphasis added).

To lease property, the board of county commissioners must determine that it is in the best interest of the county to do so and must use the competitive bidding process. The board may use its discretion when setting the terms and conditions of the lease.[3]

The board is authorized to negotiate the lease of an airport or seaport facility under such terms and conditions as negotiated by the board.[4] This provision authorizes the board of county commissioners to negotiate a lease of an airport or seaport facility without going through the competitive bidding process.[5]

Alternatively, a local government may, by ordinance, prescribe disposition standards and procedures to be used by the county in leasing real property owned by the county. The standards and procedures must:

- Establish competition and qualification standards upon which disposition will be determined.
- Provide reasonable public notice.
- Identify how an interested person may acquire county property.
- Set the types of negotiation procedures.
- Set the manner in which interested persons will be notified of the board's intent to consider final action and the time and manner for making objections.
- Adhere to the governing comprehensive plan and zoning ordinances.[6]

Competitive Bidding

The competitive bidding process is used throughout the Florida Statutes to ensure that goods and services are being procured at the lowest possible cost.[7] The First District Court of Appeal explained the public benefit of competitive bidding:

> The principal benefit flowing to the public authority is the opportunity of purchasing the goods and services required by it at the best price obtainable. Under this system, the public authority may not arbitrarily or capriciously discriminate between bidders, or make the award on the basis of personal preference. The award must be made to the one submitting the lowest and best bid, or all bids must be rejected and the proposal re-advertised.[8]

Section 125.35(1)(a), F.S., requires the board of county commissioners to use the competitive bidding process when selling and conveying real or personal property or leasing real property belonging to the county. Unlike the competitive bidding process for goods and services, where the state is trying to find the lowest and best bid, when a county is trying to sell or lease real property under s. 125.35, F.S., the board must sell or lease to the "highest and best bidder." However, the competitive bidding process is often time consuming and can result in lost

[3] Section 125.35(1)(a), F.S.
[4] Section 125.35(1)(b), F.S.
[5] See Op. Att'y Gen. Fla. 99-35 (1999).
[6] Section 125.35(3), F.S.
[7] *See, e.g.*, ss. 112.313(12)(b), 253.54, 337.02, 379.3512, and 627.64872(11), F.S.
[8] *Hotel China & Glassware Co. v. Bd. of Public Instruction,* 130 So. 2d 78, 81 (Fla. 1st DCA 1961).

revenue.[9] Temporary leases may be appropriate in certain situations, such as in the event of a natural disaster, or for short-term, revenue-generating ventures, or replacing vendors such as coffee shops in government buildings. However, currently local governments have no discretion to bypass the bidding process.[10]

Road Mapping

Mapping of Florida's roads is done at the state and local levels. "[C]ounty general highway maps are a statewide series of maps depicting the general road system of each county."[11] The Florida Department of Transportation (DOT or department) maintains an Official Transportation Map for the state as well as maps of each of the department's districts. Right-of-way maps contain maps of local and state roads with enough specificity to show how they delineate the boundaries between the public right-of-way and abutting properties.[12] Right-of-way maps are kept by DOT's surveying and mapping offices within each district[13] and by the circuit court clerk of the county.[14]

Section 337.29, F.S., states that title to all roads designated in the State Highway System or State Park Road System is in the state. Local governments must duly record a *deed or right-of-way map* when:

- Title vests for highway purposes in the state, or
- The department acquires lands.[15]

When roads are transferred between jurisdictions, the title to those roads is given to the governmental entity to which the roads were transferred. Title is transferred to the governmental entity upon the recording of a *right-of-way map* by the governmental entity in the county where the rights-of-way are located.[16] Therefore, unlike state acquisition of roadways, local government acquisition cannot be perfected by deed.

In 2010, the Legislature unanimously passed SB 1004 by Senator Gelber (identical to SB 1144). However, Governor Crist vetoed the bill. The Governor believed that competitive bidding protects the public's interest and assures the best use of taxpayer dollars. As a result, the Governor chose to withhold approval for SB 1004.[17]

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[9] Conversation with Jess McCarty, Assistant County Attorney, Miami-Dade County (Mar. 10, 2010).
[10] *See Outdoor Media of Pensacola, Inc. v. Santa Rosa County*, 554 So. 2d 613, 615 (Fla. 1st DCA 1989); *Rolling Oaks Homeowner's Ass'n, Inc. v. Dade County*, 492 So. 2d 686, 689 (Fla. 3d DCA 1986); *Randall Industries, Inc. v. Lee County*, 307 So. 2d 499, 500 (Fla. 2d DCA 1975).
[11] Florida Dep't of Transp., *Surveying & Mapping Office – Maps*, http://www.dot.state.fl.us/surveyingandmapping/maps.shtm (last visited Apr. 1, 2011).
[12] *See generally id.*
[13] *See generally* Fla. Dep't of Transp., *Surveying & Mapping Office – Right of Way Maps*, http://www.dot.state.fl.us/surveyingandmapping/rowmap.shtm (last visited Apr. 1, 2011).
[14] Section 177.131, F.S.
[15] Section 337.29(2), F.S.
[16] Section 337.29(3), F.S. (emphasis added).
[17] Veto Message by Governor Charlie Crist for CS/CS/SB 1004, republished in *Journal of the Senate* (Jul. 20, 2010).

III. Effect of Proposed Changes:

Section 1 amends s. 125.35, F.S., to authorize the board of county commissioners to negotiate the lease of real property for a term not to exceed five years, without going through the competitive bidding process.

Section 2 amends s. 337.29, F.S., to allow government entities to transfer title to a road by recording a deed with the county or counties in which the right-of-way is located. This change may decrease the length of time that the transfer-of-title process requires under current law.

Section 3 provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Currently, when a county wants to lease its property, it must obtain competitive bids and pick the "highest and best bidder."[18] This process often takes many months, especially in large counties. During the course of the bidding process, the county property often remains vacant, resulting in lost revenue and inconvenience to the county.[19] This bill will allow boards of county commissioners (boards) to negotiate leases of county property for five years or less, without going through the competitive bidding process. As a result,

[18] Section 125.35(1)(a), F.S.

[19] Conversation with and e-mail from Jess McCarty, Assistant County Attorney, Miami-Dade County, to professional staff of the Senate Committee on Judiciary (Mar. 10, 2010).

boards will have more flexibility to determine the terms and conditions of these types of leases.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

None.

B. Amendments:

None.

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

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/CS/SB 364

INTRODUCER: Commerce and Tourism Committee, Children, Families, and Elder Affairs Committee, and Senator Latvala

SUBJECT: Child Care Facilities

DATE: April 11, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Walsh	CF	**Fav/CS**
2.	Hrdlicka	Cooper	CM	**Fav/CS**
3.	O'Connor	Maclure	JU	**Pre-meeting**
4.			BC	
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS........................		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill creates a definition for "household children" in ch. 402, F.S., providing that the supervision of household children belonging to a family day care or large family child care home operator is to be left to the discretion of the operator, unless the children receive subsidized child care to be in the home. The bill also amends the definitions of "family day care home" and "large family child care home" to require that household children be included in the capacity calculation of those homes when the child is on the premises of the home or on a field trip with children enrolled in child care.

The bill expands the requirements for advertising by prohibiting a person from advertising (or publishing an advertisement) for a child care facility, family day care home, or large family child care home without including the license or registration number of the facility or home.

The bill allows a Gold Seal provider to correct any Class III violations for which it is cited within one year from the date of the violation before losing its Gold Seal designation or becoming ineligible for the designation.

The bill adds requirements for providers that meet a religious exemption to display a certificate of compliance issued by an accrediting agency, and requires the accrediting agency to meet minimum health, safety, and sanitation standards of the Department of Children and Families. An accrediting agency may not own, operate, or administer a child care program that the agency accredits, including a program owned or operated by relatives. However, these changes do not authorize the Department of Children and Families to regulate these religious-exempt providers in any other area.

This bill amends the following sections of the Florida Statutes: 402.281, 402.302, 402.316, 402.318, and 411.01.

II. Present Situation:

Child Care Facilities

Licensing of Child Care Facilities

Child care facilities in the state must meet licensing standards that are established by the Department of Children and Family Services (DCF).[1] Current law permits a county that meets or exceeds the state's minimum licensing requirements to designate a local agency to license child care facilities. If the county does not wish to administer its own child care licensing program, it can contract with DCF to delegate administration of the standards to the department.[2] Currently, DCF is responsible for administering child care licensing in 61 of Florida's 67 counties.[3] The remaining six counties (Brevard, Broward, Hillsborough, Palm Beach, Pinellas, and Sarasota) administer their own inspections and licensure of child care facilities.[4]

Family Day Care Homes

Florida law defines a family day care home as "an occupied residence in which child care is regularly provided for children from at least two unrelated families and which receives a payment, fee, or grant for any of the children receiving care, whether or not operated for profit."[5] A family day care home is allowed to provide care for one of the following groups of children:

- A maximum of four children from birth to 12 months of age.
- A maximum of three children from birth to 12 months of age, and other children, for a total of six children.
- A maximum of six preschool children if all of them are older than 12 months of age.
- A maximum of 10 children if no more than five are preschool age and, of those five, no more than two are under 12 months of age.[6]

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[1] Section 402.305(1), F.S.
[2] Section 402.306(1), F.S.
[3] Fla. Dep't of Children and Families, *Child Care Regulation, Licensing Information*, http://www.dcf.state.fl.us/programs/childcare/licensing.shtml (last visited 4/7/2011).
[4] *Id*.
[5] Section 402.302(8), F.S.
[6] *Id*.

The above groups include children under 13 years of age who are related to the caregiver. However, these numbers do not include children under the age of 13 who reside in the caregiver's home but are not related to the caregiver.

Current law requires a family day care home to either have a license or be registered. A family day care home is required to be licensed if they are presently licensed under a county license ordinance or if the board of county commissioners passes a resolution that family day care homes are to be licensed.

If a family day care home is not subject to licensure by the county, then it must register annually with DCF. In order to register, the home must submit the following information:

- The name and address of the home.
- The name of the operator.
- The number of children served.
- Proof of a written plan to provide at least one other competent adult to be available in place of the operator in an emergency.
- Proof of screening and background checks.
- Proof of successful completion of the 30-hour training course.
- Proof that immunization records are kept current.
- Proof of completion of the required continuing education units or clock hours.[7]

Large Family Child Care Homes

A large family child care home is similar in definition to a family day care home, except that a large family child care home has at least two full-time child care personnel on the premises during the hours of operation.[8] One of these persons must be the owner or occupant of the residence. In order to become a large family child care home, the home must have first operated as a licensed family day care home for two years and the operator must have a child development associate credential, or its equivalent, for one year.[9] A large family child care home may provide care for one of the following groups of children, which includes children under the age of 13 who are related to the caregiver:

- A maximum of eight children from birth to 24 months of age.
- A maximum of 12 children, with no more than four children under 24 months of age.[10]

However, these numbers do not include children under the age of 13 who reside in the caregiver's home but are not related to the caregiver.

The Department of Children and Family Services (DCF) establishes by rule minimum standards for large family child care homes, which include requirements for staffing, maintenance of

[7] Section 402.313(1)(a), F.S.
[8] Section 402.302(9), F.S.
[9] *Id.*
[10] *Id.*

immunization records, minimum health standards, minimum safety standards, minimum square footage, and enforcement of these standards.[11]

Exempt Providers – Religious Providers

Under s. 402.316, F.S., certain facilities are exempt from most of the licensing provisions of ch. 402, F.S. These facilities are those that "an integral part of church or parochial schools conducting regularly scheduled classes, courses of study, or educational programs accredited by, or by a member of, an organization which publishes and requires compliance with its standards for health, safety, and sanitation." The facilities are required to meet the minimum requirements of the applicable local governing body as to health, sanitation, and safety and the personnel screening requirements in ch. 402, F.S. Failure by the facility to meet the screening requirements could cause it to lose its exemption from licensure.

Supervision

The Department of Children and Family Services (DCF) has promulgated administrative rules related to the supervision of children and staffing requirements for family day cares and large family child care homes. These rules apply to all children in the home, including children related to the operator. Specifically, operators are responsible for the supervision of children at all times, including when the children are napping or sleeping. If the child is sleeping in a bedroom, the bedroom's door must remain open. During hours of operation, all children must have adult supervision, consisting of watching and directing their activities both indoors and outdoors. If a child is sick and placed in isolation, the child must remain within eyesight and hearing of the operator. Finally, children must be attended when being diapered or when changing clothes.[12]

Advertising

Florida law requires that any advertisement for a child care facility include within the advertisement the state or local agency license number of the facility. Failure to do so is a misdemeanor of the first degree.[13]

Gold Seal Quality Care Designation

The Gold Seal Quality Care Program was created in 1996 to acknowledge child care facilities, large family child care homes, and family day care homes that are accredited by nationally recognized agencies approved by DCF and whose standards reflect quality in the level of care and supervision provided to children.[14] Providers with a Gold Seal designation that provide early learning services receive a higher reimbursement rate per child and receive property tax incentives through the Department of Revenue or county tax appraiser.[15]

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[11] Section 402.3131(7), F.S.
[12] Rule 65C-20.009(5), F.A.C.
[13] Section 402.318, F.S. A first-degree misdemeanor is punishable by a term of imprisonment not to exceed 1 year, a $1,000 fine, or both. See ss. 775.082 and 775.083, F.S.
[14] See s. 402.281, F.S.
[15] See Fla. Dep't of Children and Families, *Gold Seal Quality Care*, http://www.dcf.state.fl.us/programs/childcare/goldseal.shtml (last visited 4/7/2011).

In order to obtain and maintain a designation as a Gold Seal provider, a child care facility, large family child care home, or family day care home must meet certain criteria, including:[16]

- The provider must not have had any Class I violations, as defined by rule, within the two years preceding its application for designation. Citation for a Class I violation is grounds for termination of the designation until the provider has not had any Class I violations for two years.
- The provider must not have had three or more Class II violations, as defined by rule, within the two years preceding its application for designation. Citation for three or more Class II violations within a two-year period is grounds for termination of the designation until the provider has not had any Class II violations for one year.
- The provider must not have been cited for the same Class III violation, as defined by rule, three or more times within the two years preceding its application for designation. Citation for the same Class III violation three or more times during a two-year period is grounds for termination of the designation until the provider has not had any Class III violations for one year.

III. Effect of Proposed Changes:

Section 1 amends s. 402.281, F.S., to allow a Gold Seal provider to correct any Class III violations for which is it cited within one year from the date of the violation before losing its Gold Seal designation or becoming ineligible for such designation.

Section 2 amends s. 402.302, F.S., to create the definition "household children" in ch. 402, F.S., to mean "children who are related by blood, marriage, or legal adoption to, or who are the legal wards of, the family day care home operator, the large family child care home operator, or an adult household member who permanently or temporarily resides in the home." In general, this definition is the current interpretation of the Department of Children and Family Services (DCF) when calculating provider capacity.

The bill also provides that the supervision of household children belonging to a family day care or large family child care home operator is to be left to the discretion of the operator, unless the children receive subsidized child care to be in the home. The DCF has indicated that this may inhibit a department inspector from correcting a situation where the inspector sees an operator's child in a hazardous position.

Current law requires that children under the age of 13 who are related to the caregiver be included in determining a provider's capacity. This bill amends the definitions of "family day care home" and "large family child care home" to provide that "household children" under the age of 13 are included in the calculations to determine the maximum number of children that an operator can supervise at one time when that child is on the premises of the home or on a field trip with children enrolled in child care at the home. In adding these provisions to the capacity

[16] Section 402.281(4), F.S.

requirements for these specified child care facilities, the bill could result in fewer non-household children being served at each of the respective residences in any county that administers its own child care licensing and does not currently meet this proposed minimum licensing standard.

Section 3 amends s. 402.316, F.S., related to providers who are exempt from the child care licensing provisions due to their religious nature. The bill adds a requirement for these providers to display a certificate of compliance issued by an accrediting agency, and requires the accrediting agency to meet minimum health, safety, and sanitation standards of DCF. An accrediting agency may not own, operate, or administer a child care program that the agency accredits, including a program owned or operated by relatives. However, these changes do not authorize DCF to regulate these religious exempt providers in any other areas, such as governance, curriculum, testing, evaluation, disciplinary practices, or hiring practices.

Section 4 amends s. 402.318, F.S., by requiring family day care homes and large family child care homes to include their license or registration number in their advertisements. Additionally, the bill provides that a person may not publish an advertisement for a child care facility, family day care home, or large family child care home without including the license or registration number.

Section 5 amends s. 411.01, F.S., to make technical and conforming changes.

Section 6 provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Current law requires a "child care facility" to include its license number in any advertisement. This bill amends current law to extend advertising requirements to family day care homes and large family child care homes as well. To the extent that these homes

are not considered child care facilities, and therefore are not currently required to place a license number in advertisements, the bill's advertising requirements will be a new requirement on these homes.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Department of Children and Family Services (DCF) has stated that creating the definition of "household children" may create confusion and leave an enforcement loophole. Specifically DCF stated, "the bill's intent appears to be that any child in the family day care home who is the provider's responsibility must count against the home's licensed child care capacity, but the definition of household children appears to exclude foster children, children unrelated to the owner/operator who may be in the home on a non-paying basis, children left in the care of the provider without legal documentation of guardianship, etc."[17]

The DCF is responsible for administering child care regulations throughout Florida, unless a county has chosen to assume this regulatory function pursuant to s. 402.306, F.S., which requires that a county meet or exceed prescribed state standards regarding state child care. Pinellas County is one of seven counties that have chosen to designate a local licensing agency to license child care facilities in that county. The Pinellas County Labor Board for Children's Centers and Family Day Care Homes is the licensing body in Pinellas County.[18] According to DCF, "[f]amily day care home providers have raised questions to the Department regarding supervision restrictions that may be placed on the children of owners and operators of child care programs operating from their homes as there have been some restrictions, specifically in Pinellas County, which has local licensing authority. Pinellas County family day care home providers have challenged their local ordinance on this issue."[19] In order for this bill to have effect in Pinellas County, the county's law that regulates children's centers and family day care homes will need to be amended.[20]

[17] Dep't of Children and Family Services, *Staff Analysis and Economic Impact, SB 364* (Jan. 7, 2011) (on file with the Senate Committee on Children, Families, and Elder Affairs).
[18] Gov't Efficiency and Accountability Council, The Florida House of Representatives, *House of Representatives Local Bill Staff Analysis, CS/HB 781* (Mar. 14, 2007), *available at* http://www.myfloridahouse.gov/Sections/Bills/bills.aspx (last visited 4/7/2011).
[19] Dep't of Children and Family Services, *supra* note 17.
[20] Special law 61-2681, Laws of Fla., as amended by section 1 of ch. 70-893, Laws of Fla.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Commerce and Tourism on March 29, 2011:
The CS amends two additional statutes:
- Section 402.281, F.S., to allow a Gold Seal provider to correct any Class III violations for which is it cited within one year from the date of the violation before losing its Gold Seal designation or becoming ineligible for such designation.
- Section 402.316, F.S., to add a requirement for providers that meet a religious exemption to display a certificate of compliance issued by an accrediting agency; and require the accrediting agency to meet minimum health, safety, and sanitation standards of the Department of Children and Families. Additionally, this statute is amended to provide that an accrediting agency may not own, operate, or administer a child care program that the agency accredits, including a program owned or operated by relatives. However, these changes do not authorize the Department of Children and Families to regulate these religious exempt providers in any other area.

CS by Children, Families, and Elder Affairs on March 10, 2011:
The CS deletes the cause of action against an unlicensed or unregistered person who violates the proposed advertising requirements.

B. Amendments:

None.

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

473310

LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Richter) recommended the following:

1 **Senate Amendment (with title amendment)**
2
3 Between lines 469 and 470
4 insert:
5 Section 14. Section 92.55, Florida Statutes, is amended to
6 read:
7 92.55 Judicial or other proceedings involving victim or
8 witness under the age of 16 or person with mental retardation;
9 special protections; use of registered service or therapy
10 animals.—
11 (1) Upon motion of any party, upon motion of a parent,
12 guardian, attorney, or guardian ad litem for a child under the
13 age of 16 or person with mental retardation, or upon its own

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14 motion, the court may enter any order necessary to protect a
15 child under the age of 16 or person with mental retardation who
16 is a victim or witness in any judicial proceeding or other
17 official proceeding from severe emotional or mental harm due to
18 the presence of the defendant if the child or person with mental
19 retardation is required to testify in open court. Such orders
20 shall relate to the taking of testimony and shall include, but
21 not be limited to:
22 (a) Interviewing or the taking of depositions as part of a
23 civil or criminal proceeding.
24 (b) Examination and cross-examination for the purpose of
25 qualifying as a witness or testifying in any proceeding.
26 (c) The use of testimony taken outside of the courtroom,
27 including proceedings under ss. 92.53 and 92.54.
28 (2) In ruling upon the motion, the court shall take into
29 consideration:
30 (a) The age of the child, the nature of the offense or act,
31 the relationship of the child to the parties in the case or to
32 the defendant in a criminal action, the degree of emotional
33 trauma that will result to the child as a consequence of the
34 defendant's presence, and any other fact that the court deems
35 relevant; or
36 (b) The age of the person with mental retardation, the
37 functional capacity of the person with mental retardation, the
38 nature of the offenses or act, the relationship of the person
39 with mental retardation to the parties in the case or to the
40 defendant in a criminal action, the degree of emotional trauma
41 that will result to the person with mental retardation as a
42 consequence of the defendant's presence, and any other fact that

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43 the court deems relevant.
44 (3) In addition to such other relief as is provided by law,
45 the court may enter orders limiting the number of times that a
46 child or person with mental retardation may be interviewed,
47 prohibiting depositions of a child or person with mental
48 retardation, requiring the submission of questions prior to
49 examination of a child or person with mental retardation,
50 setting the place and conditions for interviewing a child or
51 person with mental retardation or for conducting any other
52 proceeding, or permitting or prohibiting the attendance of any
53 person at any proceeding. The court shall enter any order
54 necessary to protect the rights of all parties, including the
55 defendant in any criminal action.
56 (4) The court may set any other conditions on the taking of
57 testimony by children which it finds just and appropriate,
58 including the use of a registered service or therapy animal.
59 When deciding whether to permit a child to testify with the
60 assistance of a registered service or therapy animal, the court
61 shall take into consideration the age of the child, the
62 interests of the child, the rights of the parties to the
63 litigation, and any other relevant factor that would aid in the
64 facilitation of testimony by the child. Each registered service
65 or therapy animal shall be evaluated and registered according to
66 national standards.
67
68 ================ T I T L E A M E N D M E N T ================
69 And the title is amended as follows:
70
71 Delete line 59

473310

72 and insert:
73 safety; amending s. 92.55, F.S.; authorizing a court
74 to use registered service or therapy animals to aid
75 children in giving testimony in legal proceedings when
76 appropriate; requiring the court to consider certain
77 factors before permitting such testimony; requiring
78 that such registered service or therapy animals be
79 evaluated and registered according to national
80 standards; providing an effective date.

620532

LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Richter) recommended the following:

1 **Senate Amendment to Amendment (473310) (with title**
2 **amendment)**
3
4 Delete line 58
5 and insert:
6 including the use of a registered service or therapy animal in
7 any proceeding involving a sexual offense.
8
9 ================= T I T L E A M E N D M E N T ================
10 And the title is amended as follows:
11 Delete line 75
12 and insert:
13 children in giving testimony in judicial or other

620532

14 proceedings involving a sexual offense when

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 488

INTRODUCER: Criminal Justice Committee and Senator Fasano

SUBJECT: Sexual Offenses

DATE: April 11, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Fav/CS**
2.	O'Connor	Maclure	JU	**Pre-meeting**
3.			HR	
4.			BC	
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS........................		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

Senate Bill 488 addresses several issues relating to victims of sexual violence and the criminal prosecution of such offenses.

The bill amends the Evidence Code to expand the admissibility of collateral crime or "similar fact" evidence in criminal prosecutions of child molestation. It creates admissibility for similar fact evidence in the Evidence Code in the prosecution of sexual offenses. The definition of child molestation is expanded and sexual offense is defined.

The bill prohibits a court from granting a request of a defendant in a criminal proceeding for permission to duplicate or copy material depicting sexual performance by a child or child pornography as long as the state attorney makes the material reasonably available to the defendant for inspection.

The bill requires licensed facilities providing emergency room services to gather forensic medical evidence from victims who have reported a sexual battery to a law enforcement agency or upon their request for purposes of filing a report in the future. It requires law enforcement to provide transportation for the victim of an alleged sexual battery to medical treatment, a forensic

examination, and a certified rape crisis center, as appropriate. The bill provides that, prior to the investigating officer filing his or her final report, the victim shall be permitted to review it and provide a statement as to the accuracy of the report.

The bill also extends the statute of limitations for video voyeurism beyond the applicable two- and three-year limits to authorize commencement of prosecutions within one year from either the date upon which the victim learns of the existence of the video recording or from the date the recording is confiscated by law enforcement, whichever occurs first.

The bill adds crimes to the list of offenses for which an additional $151 dollar surcharge will be assessed against a defendant in order to fund the Rape Crisis Program Trust Fund.

Further, the bill requires the court, upon a victim's request, to order a defendant to undergo HIV and hepatitis testing within 48 hours of the filing of an indictment or information or, if later, within 48 hours after the victim's request. The court is required to order testing pursuant to the victim's request under this provision when the defendant is charged with: 1) a specified sexual offense and the victim is a minor, or an elderly person or disabled adult, regardless of whether it involved the transmission of body fluids; or 2) a specified crime that involves the transmission of body fluids from one person to another. Follow-up testing is also required as determined by a physician.

The bill also provides that victims of sexual violence may receive monetary relocation assistance from the Department of Legal Affairs, and that public schools must include Internet safety within health education curriculum.

This bill substantially amends the following sections of the Florida Statutes: 90.404, 395.1021, 775.15, 794.052, 794.056, 938.085, 960.003, 960.198, and 1003.42. It creates an undesignated section of statute. The bill reenacts sections 20.435(21)(a) and 794.055(3)(b), F.S., to incorporate references to sections of the statutes amended by the bill.

II. Present Situation:

Evidence of Other Crimes Wrongs or Acts

Section 0.404(2)(a), F.S., is the general provision of the Evidence Code regarding the admission of "similar fact" or collateral crime evidence in criminal proceedings. It provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Under this provision, evidence of other crimes or actions (also called "collateral crime" or "similar fact" evidence) is admissible when it is relevant to a matter that is at issue in a trial.

Such evidence is not admissible, however, if it is only relevant to show a defendant's propensity to commit such crimes or other wrongful acts.

This section is a codification of the standard of admissibility announced by the Florida Supreme Court in *Williams v. State*.[1] Under this standard, "*relevant* evidence will not be excluded *merely* because it relates to similar facts which point to the commission of a separate crime. The test of admissibility is relevancy. The test of inadmissibility is a lack of relevancy."[2]

If the identity of the perpetrator is an issue at trial, then a "fingerprint" type of similarity between the other crimes or wrongs and the charged offense is necessary because without such similarity the evidence is prejudicial to the defendant, but does not necessarily prove the defendant actually committed the crime charged.[3] When identity is not disputed, finer points of similarity are not required to establish the relevance of collateral crime evidence to prove other issues such as absence of mistake, plan, opportunity, or preparation.

Additionally, all forms of relevant evidence are scrutinized under s. 90.403, F.S., which precludes the admission of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice" (also known as a "403 balancing test").

In 2001, the Legislature amended s. 90.404(2), F.S., to add a new paragraph (b) to expand the admissibility of collateral crime evidence in cases involving sexual abuse of children 16 years of age or younger.[4] Section 90.404(2)(b), F.S., provides:

> 1. In a criminal case in which the defendant is charged with a crime involving child molestation, evidence of the defendant's commission of other crimes, wrongs, or acts of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.
>
> 2. For the purposes of this paragraph, the term "child molestation" means conduct proscribed by s. 794.011, s. 800.04, or s. 847.0135(5) when committed against a person 16 years of age or younger.[5]

The types of conduct proscribed under these statutory sections are the following:

- Sexual battery under s. 794.011, F.S.,
- Lewd or lascivious battery under s. 800.04(4), F.S.,
- Lewd or lascivious molestation under s. 800.04(5), F.S.,
- Lewd or lascivious conduct under s. 800.04(6), F.S.,
- Lewd or lascivious exhibition under s. 800.04(7). F.S., and
- Lewd or lascivious exhibition via computer transmission under s. 847.0135(5), F.S.

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[1] *Williams v. State*, 110 So. 2d 654 (Fla. 1959).
[2] *Id*. at 659-60.
[3] *See State v. Savino*, 567 So.2d 892 (Fla. 1990). "When the purported relevancy of past crimes is to identify the perpetrator of the crime being tried, we have required a close similarity of facts, a unique or 'fingerprint' type of information, for the evidence to be relevant."
[4] Chapter 2001-221, Laws of Florida.
[5] Section 847.0135(5), F.S., was added to the offenses in this subparagraph in ch. 2008-172, Laws of Fla.

The 2001 addition to s. 90.404(2)(b), F.S., was challenged on due process grounds and upheld by the Florida Supreme Court in *McLean v. State*.[6] This statutory provision significantly broadened the admissibility of collateral crime evidence in prosecutions of child molestation cases.[7] The Court noted that the amendments to s. 90.404, F.S., abrogated prior cases with respect to the admission of such evidence.[8] In upholding the statute, the Court adopted standards to govern admission of such evidence designed to protect the due process rights of the accused. First, the Court required that the evidence of the collateral crime be proven by clear and convincing evidence.[9] Second, the Court required that the trial court balance the probative value of the evidence against the danger of unfair prejudice, pursuant to s. 90.403, F.S.[10] Third, the Court cautioned that the collateral crime evidence must not become a "feature" of the trial.[11] Finally, the Court required that, upon request, the jury be instructed as to the limited purpose for which the evidence may be considered.[12]

Discovery Rules in Criminal Cases

Rule 3.220, Florida Rules of Criminal Procedure, governs the discovery obligations of a prosecutor and defense attorney in criminal cases. The defendant's election to participate in the process of pretrial discovery triggers a reciprocal obligation for the defendant.

The prosecutor's discovery obligation requires disclosure of information and material within the state's possession or control. It also requires that the state allow the defendant to "inspect, copy, test, and photograph" the information and material, including "any tangible papers or objects that were obtained from or belonged to the defendant.[13]

Treatment of Sexual Assault Victims

Section 395.1021, F.S., requires medical facilities that perform emergency room services to arrange for rendering of appropriate medical attention and treatment of sexual assault victims. The statute requires that this be done in part through medical examinations conducted for the purpose of collecting physical evidence when required by law enforcement personnel.

Video Voyeurism Statute of Limitations

Section 810.145, F.S., creates the criminal offenses of video voyeurism, video voyeurism dissemination, and commercial video voyeurism dissemination. Depending on the circumstances,

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[6] *McLean v. State,* 934 So. 2d 1248 (Fla. 2006).
[7] *See Mendez v. State*, 961 So. 2d 1088, 1090 (Fla. 2007).
[8] *McLean*, 934 So. 2d at 1259.
[9] *Id.* at 1256.
[10] In upholding the statute, the Court compared the new provisions to the comparable federal rules of evidence dealing with the same issue and paralleled the federal court analysis in connection with its second requirement that such evidence be subject to the balancing test required under s. 90.403, F.S. *McLean*, at 1259-61 (comparing s. 90.404(2)(b), F.S., and s. 90.403, F.S., with Federal Rules of Evidence 413 relating to sexual assault, 414 relating to child molestation, and 403 relating to balancing probative value against prejudice to the defense).
[11] *McLean*, 934 So. 2d at 1251.
[12] *Id.*
[13] Rule 3.220(b)(1)(F), Fla. R. Crim. P.

the offenses under this section are punishable as a first-degree misdemeanor, third-degree felony or second-degree felony.[14]

A statute of limitations is an absolute bar to the filing of a legal case after a date set by law. Section 775.15, F.S., provides statutes of limitations for criminal offenses. Under this section, the time limitations period begins to run the day after an offense is committed.[15] An offense is considered committed either when every element of the crime has occurred or, if there is a legislative purpose to prohibit a continuing course of conduct, at the time the course of conduct is terminated.[16] The statute of limitations for a misdemeanor of the first-degree is two years. For second- and third-degree felonies, the statute of limitations period is generally three years.

One of the essential elements of a video voyeurism offense is that it occurs without the victim's knowledge. As a result, the statute of limitations can expire before a victim becomes aware that the crime has occurred.

Rape Crisis Program Trust Fund

The Rape Crisis Program Trust Fund is created in s. 794.056, F.S., within the Department of Health, to provide funds for rape crisis centers in the state. It is funded in part through collections of additional court assessments, which consist of a $151 surcharge added to amounts paid by persons pleading guilty or no contest to, or found guilty of, specified sex offenses listed in ss. 938.085 and 794.056, F.S.[17]

HIV Testing of Person Charged with Certain Crimes

Section 960.003(2)(a), F.S., requires a court to order a defendant to undergo HIV testing upon request of the victim in any case in which the defendant is formally charged with any of the sexual or violent offenses listed in s. 775.0877(a)-(n), F.S., that involved the transmission of body fluids from one person to another.[18]

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[14] Section 810.145(6), F.S., provides that the offense is generally a first-degree misdemeanor. If, however, the person has a prior conviction, the person is guilty of a third-degree felony. Section 810.145(7), F.S. Also, under s. 810.145(8), F.S., persons over 18 years of age responsible for a child under 16, or who are employed at a private school, and persons 24 years of age who commit the offense against a child under 16, commit a third-degree felony. If persons under subsection (8) have been previously convicted, the offense is a second-degree felony.

[15] Section 775.15(3), F.S.

[16] *Id.*

[17] The sum of $150 from these surcharges is deposited into the trust fund while $1 is paid to the clerk of court as a service charge. Section 938.085, F.S.

[18] The offenses are: s. 794.011, F.S., relating to sexual battery; s. 826.04, F.S., relating to incest; s. 800.04, F.S., relating to lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age; ss. 784.011, 784.07(2)(a), and 784.08(2)(d), F.S., relating to assault; ss. 784.021, 784.07(2)(c), and 784.08(2)(b), F.S., relating to aggravated assault; ss. 784.03, 784.07(2)(b), and 784.08(2)(c), F.S., relating to battery; ss. 784.045, 784.07(2)(d), and 784.08(2)(a), F.S., relating to aggravated battery; s. 827.03(1), F.S., relating to child abuse; s. 827.03(2), F.S., relating to aggravated child abuse; s. 825.102(1), F.S., relating to abuse of an elderly person or disabled adult; s. 825.102(2), F.S., relating to aggravated abuse of an elderly person or disabled adult; s. 827.071, F.S., relating to sexual performance by person less than 18 years of age; ss. 796.03, 796.07, and 796.08, F.S., relating to prostitution; or s. 381.0041(11)(b), F.S., relating to donation of blood, plasma, organs, skin, or other human tissue.

Section 960.003(2)(b), F.S., provides for HIV testing upon request of the victim when the crime involved is a sexual offense under ss. 775.0877(a)-(n) or 825.1025, F.S., and the victim is a minor, disabled adult, or an elderly person regardless of whether the crime involved the transmission of body fluids from one person to another.

Under both sections, the defendant must undergo testing within 48 hours after the court enters an order compelling the testing.

Relocation Assistance

Section 960.198, F.S., authorizes the Department of Legal Affairs to award a one-time payment of up to $1,500 on a single claim and a maximum lifetime limit of $3,000 to a victim of domestic violence who needs immediate relocation assistance to escape domestic violence. In order to qualify for assistance:

- There must be proof that an offense of domestic violence was committed;
- It must have been reported to law enforcement;
- The need for assistance must be certified by a domestic violence center within the state; and
- The center's certification must assert that the victim is cooperating with law enforcement officials.[19]

Required Instruction

Section 1003.42(2), F.S., requires members of the instructional staff of public schools to teach prescribed courses of study on the following topics related to health and safety:

> (n) Comprehensive health education[20] that addresses concepts of community health; consumer health; environmental health; family life, including an awareness of the benefits of sexual abstinence as the expected standard and the consequences of teenage pregnancy; mental and emotional health; injury prevention and safety; nutrition; personal health; prevention and control of disease; and substance use and abuse.

III. Effect of Proposed Changes:

The bill creates an act known as the "Walk in Their Shoes Act."

Evidence of Other Crimes Wrongs or Acts

The bill expands the admission of collateral crime evidence in cases involving child molestation by expanding the definition of criminal acts that fall within that classification for purposes of the admission of the evidence. The expansion includes:

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[19] Section 960.198(2), F.S.

[20] The health education curriculum for students in grades 7 through 12 shall include a teen dating violence and abuse component that includes, but is not limited to, the definition of dating violence and abuse, the warning signs of dating violence and abusive behavior, the characteristics of healthy relationships, measures to prevent and stop dating violence and abuse, and community resources available to victims of dating violence and abuse.

- s. 787.025(2)(c), F.S. - Luring or enticing a child;
- s. 794.011, F.S. - Sexual battery;
- s. 794.05, F.S. - Unlawful activity with certain minors;
- s. 796.03, F.S. - Procuring person under 18 for prostitution;
- s. 796.035, F.S. - Selling or buying of minors into sex trafficking or prostitution;
- s. 796.045, F.S. - Sex trafficking;
- s. 827.071, F.S. - Sexual performance by a child;
- s. 847.0145, F.S. - Selling or buying minors; and
- s. 985.701(1), F.S. - Sexual misconduct by a juvenile justice employee.

The bill creates a category of criminal activities called "sexual offenses" under which similar fact evidence may be admitted by a court. Those offenses are:

- s. 787.025(2)(c), F.S. - Luring or enticing a child;
- s. 794.011, F.S. - Sexual battery;
- s. 794.05, F.S. - Unlawful activity with certain minors;
- s. 796.03, F.S. - Procuring person under 18 for prostitution;
- s. 796.035, F.S. - Selling or buying of minors into sex trafficking or prostitution;
- s. 796.045, F.S. - Sex trafficking;
- s. 800.04, F.S. - Lewd or lascivious offenses;
- s. 825.1025(2)(b), F.S. - Lewd or lascivious battery upon an elderly or disabled person;
- s. 827.071, F.S. - Sexual performance by a child;
- s. 847.0135(5), F.S. - Lewd or lascivious exhibition using a computer;
- s. 847.0145, F.S. - Selling or buying minors; and
- s. 985.701(1), F.S. - Sexual misconduct by a juvenile justice employee.

Discovery Rules in Criminal Cases

The bill creates an undesignated section of statute to require a court to deny any request by a defendant to copy, photograph, duplicate, or otherwise reproduce any material that constitutes child pornography as defined in s. 827.071, F.S. (sexual performance by a child), or s. 847.001, F.S. (definitions as used in the chapter on obscenity). Although child pornography is not defined in s. 827.071, F.S., the definition provided in s. 847.001(3), F.S., is "any image depicting a minor engaged in sexual conduct." The prosecutor must make the material reasonably available to the defendant by providing ample opportunity for the inspection, viewing, and examination by the defendant, defense attorney, or defense expert. The evidence must be kept in a secured or locked-up manner.

Treatment of Sexual Assault Victims

Section 794.052, F.S., is amended to require that a law enforcement officer who is investigating an alleged sexual battery arrange or provide for transportation of the victim to medical treatment if needed, a forensic examination, and advocacy and crisis-intervention services from a certified rape crisis center. The bill provides that, prior to the investigating officer filing his or her final report, the victim shall be permitted to review it and provide a statement as to the accuracy of the report.

The bill amends s. 395.1021(2), F.S., to provide that the "appropriate medical attention and treatment of sexual assault victims" required under this section includes the gathering of forensic medical evidence necessary for investigation and prosecution either when a victim reports a sexual battery to a law enforcement agency, or when the victim requests the evidence to be gathered for a possible future report to law enforcement.

Video Voyeurism Statute of Limitations

The bill amends s. 775.15, F.S., to authorize prosecution for any offense of video voyeurism within one year after the date on which the victim obtained actual knowledge of the existence of the recording, or the date on which the recording is confiscated by a law enforcement agency, whichever occurs first. This is an expansion of the statute of limitations for this crime.

Rape Crisis Program Trust Fund

The bill amends ss. 794.056 and 938.085, F.S., to add new offenses to the list of crimes that will support the financing of the Rape Crisis Program Trust Fund through the additional $151 surcharge that defendants having committed certain crimes are ordered to pay. These crimes are:

- s. 775.21(6) and (10)(a), (b), and (g), F.S. - Florida Sexual Predators Act;
- s. 787.01(3), F.S. - Kidnapping and listed crimes against a child;
- s. 787.02(3), F.S. - False imprisonment and listed crimes against a child;
- s. 787.025, F.S. - Luring or enticing a child;
- s. 787.06, F.S. - Human trafficking;
- s. 787.07, F.S. - Human smuggling;
- s. 794.05, F.S. - Unlawful sexual activity with certain minors;
- s. 794.08, F.S. - Female genital mutilation;
- s. 796.03, F.S. - Procuring a person under 18 for prostitution;
- s. 796.035, F.S. - Selling or buying minors into sex trafficking;
- s. 796.04, F.S. - Forcing or compelling another to become a prostitute;
- s. 796.045, F.S. - Sex trafficking;
- s. 796.05, F.S. - Deriving support from proceeds of prostitution;
- s. 796.06, F.S. - Renting space to be used for lewdness, assignation, or prostitution;
- s. 796.07(2)(a)-(d) and (i), F.S. – Prostitution;
- s. 800.03, F.S. - Exposure of sexual organs;
- s. 800.04, F.S. - Lewd or lascivious crimes;
- s. 810.14, F.S. - Voyeurism;
- s. 810.145, F.S. - Video voyeurism;
- s. 812.135, F.S. - Home invasion robbery;
- s. 817.025, F.S. - Home or private business invasion by false impersonation;
- s. 825.102, F.S. - Abuse or aggravated abuse of an elderly or disabled person;
- s. 825.1025, F.S. - Lewd and lascivious offenses committed on an elderly or disabled person;
- s. 827.071, F.S. - Sexual performance by a child;
- s. 836.10, F.S. - Written threats to kill or do bodily injury;
- s. 847.0133, F.S. - Furnishing obscenity to a minor;

- s. 847.0135(2), F.S. - Computer pornography child exploitation;
- s. 847.0137, F.S. - Transmission of pornography by electronic device;
- s. 847.0145, F.S. - Selling or buying minors;
- s. 943.0435 , F.S. - Sexual offender registration; and
- s 985.701, F.S. - Employee sexual misconduct with a juvenile offender.

HIV and Hepatitis Testing of Person Charged with Certain Crimes

The bill amends s. 960.003, F.S., to require a court to order a defendant to undergo hepatitis testing in addition to HIV testing. Where the defendant is charged with or alleged by petition for delinquency to have committed any offense enumerated in s. 775.0877(1)(a)-(n), F.S., the victim may request that the court order testing. The testing shall be done within 48 hours of the victim's request. Follow-up HIV testing is provided for in the bill, if medically appropriate, and does not require an additional court order.

Relocation Assistance

The bill extends relocation assistance to a victim of sexual violence who reasonably fears for his or her safety. Under the bill, the need for assistance must be certified by a rape crisis center. Unlike domestic violence cases, where it is common for the victim to reside with the abuser, and relocation concerns are typical after domestic violence has been reported, offenses involving sexual violence occur in more diverse and varied surroundings and circumstances. Therefore, the extent to which acts of sexual violence occur under circumstances where the victim would seek relocation is unknown.

Required Instruction

The bill adds Internet safety to the list of topics that must be covered in school curriculum under s. 1003.42(2)(n), F.S.

Effective Date

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Criminal Proceedings in Cases Involving Child Molestation

The Florida Supreme Court has held that the authority granted to it under article V, section 2, of the Florida Constitution to adopt rules of practice and procedure is exclusively its own. Since that time, the Legislature has passed acts that the Court has declared impermissibly procedural.

In 2008, in the case of *Massey v. David*, the Supreme Court reviewed a statute that conditioned the award of expert witness fees as taxable costs upon a requirement that the expert witness furnish the opposing party with a written report within a certain number of days. In *Massey*, the Supreme Court articulated how statutes containing a mixture of substance and procedure are analyzed in order to determine their constitutional validity in view of the Supreme Court's procedural rulemaking authority. The Court explained:

> Of course, statutes at times may not appear to fall exclusively into either a procedural or substantive classification. We have held that where a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not impermissibly intrude on the practice and procedure of the courts in a constitutional sense, causing a constitutional challenge to fail. If a statute is clearly substantive and "operates in an area of legitimate legislative concern," this Court will not hold that it constitutes an unconstitutional encroachment on the judicial branch. However, where a statute does not basically convey substantive rights, the procedural aspects of the statute cannot be deemed "incidental," and that statute is unconstitutional. (emphasis added).[21]

It is unclear when a statute "impermissibly" intrudes on the practice and procedure of the courts or when legislation is within a "legitimate area of legislative concern." In *Massey*, the Court found that the statute's requirement of a report submitted to the opposing party conflicted with the lack of such a provision in the court rule, and the statute was invalidated.

Florida Rule of Criminal Procedure 3.220(b), relating to discovery in criminal cases, mandates that the state must "disclose to the defendant and permit the defendant to inspect, copy, test, and photograph . . . any tangible papers or objects that were obtained from or belong to the defendant."

The bill's provision prohibiting the court from granting a defendant's request to copy a particular type of evidence conflicts with the mandate of Rule 3.220 and could subject it to a court challenge on the basis that this provision invades the Supreme Court's exclusive authority to adopt rules of practice and procedure.

[21] 979 So. 2d 931, 937 (Fla. 2008) (citations omitted).

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Defendants whose crimes are among those newly enumerated to require the assessment of increased costs will be responsible for an additional $151 surcharge.

C. Government Sector Impact:

The addition of more crimes to include the payment of costs on the part of the defendant to be contributed to the Rape Crisis Program Trust Fund will increase funding for the trust fund. The extent of its positive fiscal impact on the trust fund is indeterminate at this time.

The expansion of financial relocation assistance to victims of sexual violence will likely have a negative fiscal impact on state government, but the amount of the impact will depend on the number of sexual violence victims who will seek and be granted relocation assistance. The frequency of that occurrence is unknown, although it is expected to be a small number of instances in comparison to the number of overall sexual offenses reported.

The Office of the State Courts Administrator reports that the bill will likely result in "a substantial increase in the number of pretrial hearings in cases where the defendant is charged with a sexually-related crime and the State has evidence that the defendant committed other sexually-related crimes."[22] The fiscal impact of such an increase is indeterminate.[23]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

CS by Criminal Justice on March 28, 2011:

[22] Office of the State Courts Administrator, *Senate Bill 488 Judicial Impact Statement* (Feb. 3, 2011) (on file with the Senate Committee on Judiciary).
[23] *Id.*

- The bill expands the definition of child molestation, for purposes of the admission of similar fact evidence, to include nine additional crimes.
- The bill deletes the crimes of stalking, kidnapping, and false imprisonment from the definition of a "sexual offense" (previously called crimes "of a sexual nature" in the bill) as crimes that may be admitted as similar fact evidence. Sexual battery, lewd or lascivious offenses, and lewd or lascivious exhibition using a computer are added to the definition of sexual offenses for this purpose.
- The law enforcement agency or state attorney holding evidence in a child pornography case must keep it in a locked, secure manner.
- The language of the bill now clarifies that the statute of limitations for the prosecution of video voyeurism is expanded by the bill.
- A law enforcement officer who is investigating an alleged sexual battery is required by the bill to provide certain transportation for the victim's treatment, the gathering of forensic evidence, or other services as needed.
- The bill amends the crimes for which a defendant must be ordered to pay a surcharge to the Rape Crisis Service Trust Fund to include: kidnapping and listed crimes against a child, false imprisonment and listed crimes against a child, furnishing obscenity to a minor, and employee sexual misconduct with a juvenile offender.
- Under the provisions of the bill, a defendant charged with certain offenses must undergo hepatitis testing. The testing for both HIV (required by current law) and hepatitis shall be done within 48 hours of the victim's request.

B. Amendments:

None.

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

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LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Braynon) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Section 1012.46, Florida Statutes, is amended to read:

1012.46 Athletic trainers.—

(1) School districts may establish and implement an athletic injuries prevention and treatment program. Central to this program should be the ~~employment and~~ availability of licensed athletic trainers who are certified by the Board of Certification of the National Athletic Trainers' Association and ~~persons~~ trained in the prevention and treatment of physical

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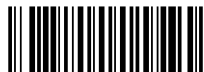
14 injuries that may occur during athletic activities. ~~The program~~
15 ~~should reflect opportunities for progressive advancement and~~
16 ~~compensation in employment as provided in subsection (2) and~~
17 ~~meet certain other minimum standards developed by the Department~~
18 ~~of Education.~~ The goal of the Legislature is to have school
19 ~~School~~ districts in the state employ or contract with ~~and have~~
20 ~~available~~ a certified ~~full-time~~ athletic trainer for ~~in~~ each
21 high school that participates in sports ~~in the state~~.
22 (2) To qualify as an athletic trainer, a person must be
23 certified by the Board of Certification and licensed as required
24 by part XIII of chapter 468 and may possess a professional,
25 temporary, part-time, adjunct, or substitute certificate
26 pursuant to s. 1012.35, s. 1012.56, or s. 1012.57.
27 (3) In a civil action against a school district for the
28 death of, or injury or damage to, an individual which was
29 allegedly caused by the negligence of an athletic trainer and
30 which relates to the treatment of a sports injury by the
31 athletic trainer, there is a rebuttable presumption that the
32 school district was not negligent in employing the athletic
33 trainer if the school district made a good faith effort to
34 comply with the provisions of this section before such
35 employment.
36 (4) It is the intent of this section to create and ensure a
37 designated standard of care for the recognition, prevention, and
38 rehabilitative treatment of high school athletic injuries in
39 this state. To ensure compliance with this standard of care, the
40 management and implementation of this program should be
41 administered by an entity that has the ability to work with
42 local facilities and school districts to coordinate the

950226

43 training, development, and placement of licensed athletic
44 trainers who are certified by the Board of Certification.
45 Section 2. This act shall take effect July 1, 2011.
46
47 ================= T I T L E A M E N D M E N T ================
48 And the title is amended as follows:
49 Delete everything before the enacting clause
50 and insert:
51 A bill to be entitled
52 An act relating to high school athletic trainers;
53 amending s. 1012.46, F.S.; encouraging school
54 districts to employ or contract with certified
55 athletic trainers at certain high schools in this
56 state; requiring athletic trainers to be certified by
57 the Board of Certification of the National Athletic
58 Trainers' Association; providing a rebuttable
59 presumption that a school district is not negligent in
60 employing an athletic trainer for purposes of a civil
61 action for negligence against the athletic trainer if
62 the school district made a good faith effort to comply
63 with the act; providing legislative intent; providing
64 an effective date.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LEGISLATIVE ACTION

Senate	.	House
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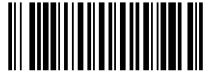
The Committee on Judiciary (Braynon) recommended the following:

1 **Senate Amendment to Amendment (950226) (with title**
2 **amendment)**
3
4 Between lines 4 and 5
5 insert:
6 Section 1. Subsections (7), (8), and (9) of section
7 468.701, Florida Statutes, are renumbered as subsections (8),
8 (9), and (10), respectively, and a new subsection (7) is added
9 to that section, to read:
10 468.701 Definitions.—As used in this part, the term:
11 (7) “Board of Certification” means the only nationally
12 accredited certifying body for athletic trainers.
13 Section 2. Subsection (2) of section 468.703, Florida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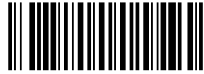
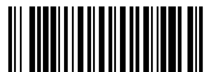
14 Statutes, is amended to read:
15 468.703 Board of Athletic Training.—
16 (2) Five members of the board must be licensed athletic
17 trainers, certified by the Board of Certification or its
18 successor agency. One member of the board must be a physician
19 licensed under chapter 458 or chapter 459. One member of the
20 board must be a physician licensed under chapter 460. Two
21 members of the board shall be consumer members, each of whom
22 must be a resident of this state who has never worked as an
23 athletic trainer, who has no financial interest in the practice
24 of athletic training, and who has never been a licensed health
25 care practitioner as defined in s. 456.001(4).
26 Section 3. Section 468.707, Florida Statutes, is amended to
27 read:
28 468.707 Licensure by examination; requirements.—
29 ~~(1)~~ Any person desiring to be licensed as an athletic
30 trainer shall apply to the department on a form approved by the
31 department. The department shall license each applicant who:
32 (1)~~(a)~~ Has completed the application form and remitted the
33 required fees.
34 (2)~~(b)~~ Is at least 21 years of age.
35 (3)~~(c)~~ Has obtained a baccalaureate degree from a college
36 or university accredited by an accrediting agency recognized and
37 approved by the United States Department of Education or the
38 Commission on Recognition of Postsecondary Accreditation, ~~or~~
39 approved by the board, or recognized by the Board of
40 Certification or its successor agency.
41 (4)~~(d)~~ If graduated after 2004, has completed an approved
42 athletic training curriculum from a college or university


781116

43 accredited by a program recognized by the Board of Certification
44 or its successor agency ~~an accrediting agency recognized and~~
45 ~~approved by the United States Department of Education or the~~
46 ~~Commission on Recognition of Postsecondary Accreditation, or~~
47 ~~approved by the board~~.
48 (5)~~(e)~~ Has current certification in cardiovascular
49 pulmonary resuscitation with an automated external defibrillator
50 (AED) from the American Red Cross or~~,~~ the American Heart
51 Association, or an equivalent certification as determined by the
52 board.
53 (6)~~(f)~~ Has passed the Board of Certification's or its
54 successor agency's ~~an~~ examination and is certified by that
55 entity ~~administered or approved by the board~~.
56 ~~(2) Pursuant to the requirements of s. 456.034, each~~
57 ~~applicant shall complete a continuing education course on human~~
58 ~~immunodeficiency virus and acquired immune deficiency syndrome~~
59 ~~as part of initial licensure.~~
60 Section 4. Section 468.711, Florida Statutes, is amended to
61 read:
62 468.711 Renewal of license; continuing education.—
63 (1) The department shall renew a license upon receipt of
64 the renewal application and fee, provided the applicant is in
65 compliance with the provisions of this section, chapter 456, and
66 rules promulgated pursuant thereto.
67 (2) The board may, by rule, prescribe continuing education
68 requirements, not to exceed 24 hours biennially. The criteria
69 for continuing education shall be approved by the board and must
70 ~~shall~~ include a current certificate in cardiovascular pulmonary
71 resuscitation with AED from the American Red Cross or the


781116

72 American Heart Association or an equivalent training as
73 determined by the board.
74 (3) Pursuant to the requirements of s. 456.034, each
75 licensee shall complete a continuing education course on human
76 immunodeficiency virus and acquired immune deficiency syndrome
77 as part of biennial relicensure.
78 (4) The licensee must be currently certified by the Board
79 of Certification or its successor agency.
80
81 ================ T I T L E A M E N D M E N T ================
82 And the title is amended as follows:
83 Between lines 52 and 53
84 insert:
85 amending s. 468.701, F.S.; providing a definition;
86 amending s. 468.703, F.S.; revising membership
87 requirements for the Board of Athletic Training;
88 amending s. 468.707, F.S.; revising requirements for
89 licensure by examination for athletic trainers;
90 amending s. 468.711, F.S.; requiring certification
91 requirements for license renewal; revising continuing
92 education requirements for licensure renewal;

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 1176

INTRODUCER: Senator Ring

SUBJECT: High School Athletic Trainers

DATE: April 11, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Matthews	ED	**Favorable**
2.	Boland	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

I. Summary:

This bill encourages the use and employment of athletic trainers by school districts for schools that participate in sports.

The bill codifies one of the current licensing requirements that athletic trainers must be certified by the Board of Certification of the National Athletic Trainers' Association.

In civil actions against a school district for negligence by an athletic trainer leading to injury or death, the bill creates a rebuttable presumption that a school district was not negligent in wrongful hiring if the school district made a good faith effort to comply with the law on athletic trainers.

This bill encourages the use of an entity that can coordinate placement of licensed, certified athletic trainers to provide a standard of care to prevent and rehabilitate high school sports-related injuries.

This bill substantially amends section 1012.46, Florida Statutes.

II. Present Situation:

Statutory Authority on Athletic Trainers

The term "athletic training' is defined as the recognition, prevention, and treatment of sports-related injuries.[1]Athletic trainers are required to be licensed and are eligible for licensure contingent upon:

- Completing the application and payment of fees;
- Having reached at least 21 years of age;
- Having passed an exam administered or approved by the Board of Athletic Training of the Department of Health;
- Holding a baccalaureate degree from an accredited college or university and current CPR certification; and
- Completing an approved athletic training curriculum and a continuing education course on HIV/AIDS.[2]

Practicing athletic training without a license constitutes a first-degree misdemeanor, punishable by up to one year in jail and up to a $1,000 fine.[3]

State law requires an athletic trainer to operate under written protocol developed between the athletic trainer and a supervising physician, including a mandate that the athletic trainer timely notify the physician of new patient injuries.[4]

The Board of Athletic Training, Department of Health, is composed of nine members who are appointed by the Governor and confirmed by the Senate. Five of the members are required to be licensed athletic trainers; one must be a physician; and two are consumer-residents who are not affiliated with the industry or licensed health-care practice.[5]

School districts are authorized to implement an athletic injuries prevention-and-treatment program, with a focus on employing and providing access to professionals trained in injury prevention and treatment.[6] It is the stated goal of the Legislature that school districts employ and have available a full time athletic trainer in each high school in the state.[7]

National Athletic Trainers' Association

The National Athletic Trainers' Association (NATA) is a professional membership association for certified athletic trainers.[8] Originating in 1950, today the NATA reports that it has more than 30,000 members internationally. The national Board of Certification (Board), established in

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[1] Section 468.701(3), F.S.
[2] Section 468.707, F.S.
[3] Section 468.717, F.S.
[4] Section 468.713, F.S.
[5] Section 468.703, F.S.
[6] Section 1012.46(1), F.S.
[7] *Id*.
[8] National Athletic Trainers Association, *About the NATA*, http://www.nata.org/aboutNATA (last visited April 7, 2011).

1989, provides a certification program for entry-level athletic trainers. The Board began as a committee of NATA and then separately incorporated in 1989.[9] Certification includes application, payment of a fee, and a passing grade on the exam. Under the Florida Department of Health application and licensure requirements for athletic trainers, applicants are required to submit a certified copy of a National Athletic Trainers Association Board of Certification certificate in order to obtain licensure in Florida.[10]

Sports-Related Injuries

According to the Centers for Disease Control and Prevention (CDC),[11] high school sports participation has increased from about 4 million student-athletes during the 1971-72 school year to approximately 7.2 million in 2005-06. An increased number of injuries have accompanied the growth in participation as follows:

> High school athletes account for an estimated 2 million injuries, 500,000 doctor visits, and 30,000 hospitalizations annually….During the 2005-06 school year, researchers at a children's hospital in Ohio used an Internet-based data-collection tool to pilot an injury surveillance system…from a representative national sample of U.S. high schools.…which indicated that participation in high school sports resulted in an estimated 1.4 million injuries at a rate of 2.4 injuries per 1,000 athlete exposures (i.e., practices or competitions).[12]

The CDC reports the highest occurrence of injuries by sport, from most injuries to least injuries, as follows: football, wrestling, boys' soccer, girls' soccer, and girls' basketball.[13]

III. Effect of Proposed Changes:

Current law provides that school districts may establish and implement an athletic injuries prevention and treatment program.[14] In connection with the program, this bill encourages school districts to employ at least one athletic trainer who is certified by the Board of Certification of the National Athletic Trainers' Association in each school that participates in sports. The bill amends current language in s. 1012.46, F.S. that simply encourages school districts to employ and have available a person trained in prevention and treatment of injuries in athletic activities, to encourage instead the use of such a person who is certified by the Board of Certification. Whereas current statutory language says that it is the goal of the Legislature to have trainers employed in each high school in the state, the bill adds language to specify that this is the goal of the Legislature only in regards to high schools that participate in sports.

[9] Board of Certification for the Athletic Trainer, *What is NATA*, http://www.bocatc.org/index.php?option=com_content&view=article&id=28&Itemid=30 (last visited April 7, 2011).
[10] Florida Dep't of Health, *Athletic Training and Licensure Requirements, available at* http://www.doh.state.fl.us/mqa/athtrain/at_lic_req.html, (last visited April 8, 2011).
[11] Center for Disease Control, *Sports-Related Injuries Among High School Athletes – United States 2005-06 School Year*, *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5538a1.htm (last visited April 7, 2011).
[12] *Id.*
[13] *Id.*
[14] Section 1012.46(1), F.S.

The bill incentivizes the employment of a certified athletic trainer by offering a rebuttable presumption in favor of the school district, in actions for negligence causing injury or death, arising out of a trainer's actions. This rebuttable presumption is only available to the school district, however, if the school district made a good faith effort to comply with, among other things, the provisions requiring certification.

This bill codifies the Department of Health's current practice of requiring a national certification from the Board of Certification of the National Athletic Trainers' Association in order to obtain licensure as an athletic trainer in Florida.

The bill sets forth a legislative intent to ensure a designated standard of care for the recognition, prevention, and rehabilitative treatment of high school athletic injuries in this state. To ensure compliance with this standard of care, the management and implementation of this program should be administered by an entity that has the ability to work with local facilities and school districts to coordinate the training, development, and placement of licensed athletic trainers who are certified by the Board of Certification.

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Encouraging greater availability of athletic trainers may result in a reduction in injuries and faster rehabilitation, therefore bringing down medical costs over the long-term.

C. Government Sector Impact:

To the extent that the availability of the rebuttable presumption may reduce lawsuits against the school districts and may increase the number of court rulings in favor of the school districts, the bill could have a positive fiscal impact on the school districts.

Conversely, school districts who choose to employ athletic trainers might incur costs related to the salary of those trainers.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

None.

B. Amendments:

None.

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

341918

LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Flores) recommended the following:

Senate Amendment

Delete lines 26 - 40
and insert:
(5) ~~Unless~~ A person alleged by the Elections Commission to have committed a violation of this chapter or chapter 104 may elect, as a matter of right ~~elects~~, within 30 days after the date of the filing of the commission’s allegations, to have a formal administrative hearing conducted by an administrative law judge in the Division of Administrative Hearings. The administrative law judge in such proceedings shall enter a final order, which may include the imposition of civil penalties, and the ~~a formal or informal hearing conducted before the~~

341918

14 ~~commission, or elects to resolve the complaint by consent order,~~
15 ~~such person shall be entitled to a formal administrative hearing~~
16 ~~conducted by an administrative law judge in the division of~~
17 ~~administrative hearings. The administrative law judge in such~~
18 ~~proceedings shall enter a~~ final order is subject to appeal as
19 provided in s. 120.68. If the person does not elect to have a
20 hearing by an administrative law judge and does not elect to
21 resolve the complaint by consent order, the person is entitled
22 to a formal or infomal hearing conducted before the commission.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 1618

INTRODUCER: Rules Subcommittee on Ethics and Elections and Senator Diaz de la Portilla

SUBJECT: Elections

DATE: April 11, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Fox/Carlton	Roberts	EE	**Fav/CS**
2.	Fox/Carlton	Phelps	RC	**Favorable**
3.	O'Connor	Maclure	JU	**Pre-meeting**
4.			BC	
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS........................		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

Committee Substitute for Senate Bill 1618 corrects an oversight in an omnibus 2007 election law that shifted final order authority, in many cases, from the Florida Elections Commission (Commission) to an administrative law judge (ALJ) at the Division of Administrative Hearings (DOAH), but neglected to statutorily authorize the ALJ to institute any civil penalties for election law violations. This bill grants the ALJ the same penalty powers as the Commission, and provides that the ALJ must consider the same aggravating and mitigating circumstances in determining the amount of penalties.

The bill also reverses the current default procedure under which alleged election law violations are transferred to DOAH *unless* the party charged with the offense elects to have a hearing before the Commission. The bill mandates that the alleged violator affirmatively request a hearing at DOAH within 30 days after the Commission's probable cause determination, or the Commission will hear the case.

The bill also specifically adds electioneering communications organizations (ECOs) to the list of entities embraced by the election law penalty provisions, to conform to 2010 changes to the ECO laws.

This bill substantially amends sections 106.25 and 106.265, Florida Statutes.

II. Present Situation:

Penalties for Election Violations

The Florida Elections Commission (Commission) has jurisdiction to investigate and determine violations of chs. 104 and 106, F.S.,[1] and to impose a civil penalty of up to $1,000 per violation, in most cases.[2]

Until 2007, when there were disputed issues of material fact, an alleged violator could elect to have a formal hearing at the Division of Administrative Hearings (DOAH), with the matter returning to the Commission for final disposition and a determination of penalties, if applicable. Otherwise, the Commission would conduct the hearing.

In 2007, the Legislature amended the procedure to have *all* cases default to an administrative law judge (ALJ) at DOAH after the Commission makes a probable cause determination, *unless* the alleged violator elects[3] to have a formal or informal hearing before the Commission or resolves the matter by consent order.[4] The 2007 changes also gave the ALJ the authority to enter a *final order* on the matter, appealable directly to Florida's appellate courts.[5] Cases forwarded to DOAH never return to the Commission for final disposition. The 2007 law, however, neglected to give the ALJ the power to impose a civil penalty in cases in which the ALJ found a violation.

This omission has been the subject of litigation.[6] In April 2006, the Commission received a sworn complaint alleging that James Davis, a candidate, had violated certain elections laws. The Commission conducted an investigation and found probable cause, charging Mr. Davis with five violations of ch. 106, F.S. Because he did not request a hearing before the Commission, or elect to resolve the matter by a consent order, the matter was referred to DOAH for a formal administrative hearing. Ultimately, the ALJ found that Mr. Davis violated the Election Code, as alleged. The ALJ declined to impose civil penalties, however, because he determined that he lacked the express authority to do so. The Commission appealed the case to the First District Court of Appeal, which affirmed the order. As a result, complaints heard by an ALJ can result in a violation without recourse to the imposition of a civil penalty for the violation.[7]

Electioneering Communications Organizations

Section 106.265, F.S., contains the specific authority for the Commission to impose a civil penalty for a violation of chs. 104 or 106, F.S. That section authorizes the Commission to impose

[1] Section 106.25(1), F.S.
[2] Section 106.265(1), F.S. In addition, ss. 104.271 and 106.19, F.S., provide for expanded and enhanced penalties for certain election law violations.
[3] Within 30 days after the probable cause determination.
[4] Chapter 2007-30, s. 48, Laws of Fla.
[5] Section 106.25(5), F.S.
[6] *Florida Elections Commission v. Davis*, 44 So. 3d 1211 (Fla. 1st DCA 2010).
[7] Because of the nature of such proceedings, it is unclear whether the Commission would have jurisdiction to impose a civil penalty based upon a final order from DOAH – or even how the Commission practically would accomplish it.

a civil penalty not to exceed $1,000 per count, with the precise amount dependent upon consideration of certain aggravating and mitigating factors. The section further provides that the Commission is responsible for collecting civil penalties when any person, political committee, committee of continuous existence, or political party fails or refuses to pay any civil penalties, and requires such penalties to be deposited into the now-defunct Election Campaign Financing Trust Fund.[8] Finally, the section permits a respondent, under certain circumstances, to seek reimbursement for attorneys' fees.

Nothing in s. 106.265, F.S., specifically addresses *electioneering communications organizations* (ECOs), which can also commit elections violations. Until last year, when they were more explicitly detailed in statute, ECOs were generally treated like political committees for most purposes under the campaign finance laws.[9] An ECO is defined as:

> any group, other than a political party, political committee, or committee of continuous existence, whose election-related activities are limited to making expenditures for electioneering communications or accepting contributions for the purpose of making electioneering communications and whose activities would not otherwise require the group to register as a political party, political committee, or committee of continuous existence under [ch. 106, F.S.][10]

III. Effect of Proposed Changes:

Committee Substitute for Senate Bill 1618 establishes a new default procedure for violations alleged by the Florida Elections Commission, providing that a hearing will be conducted by the Commission *unless* an alleged violator elects, as a matter of right, to have a formal hearing before an administrative law judge (ALJ) at the Division of Administrative Hearings (DOAH). Further, it authorizes the ALJ to impose the same civil penalties as the Commission pursuant to ss. 104.271, 106.19, and 106.265, F.S., and requires the ALJ to take into account the same mitigating and aggravating factors that the Commission must consider. As under current law, the ALJ's final order, which may now include civil penalties, is appealable directly to the District Courts of Appeal and does not return to the Commission for disposition.

The bill also integrates electioneering communications organizations (ECOs) into a statutory list of entities for the purpose of assessing election law civil penalties, and clarifies that all civil penalties collected are deposited to the General Revenue Fund of the state instead of the defunct Election Campaign Financing Trust Fund.

The bill takes effect upon becoming a law.

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[8] The Elections Campaign Financing Trust Fund expired effective November 4, 1996, by operation of law. Funding for public campaign financing in statewide races has since been handled through the General Revenue Fund.

[9] *See generally* ch. 2010-167, Laws of Fla. (detailing requirements for ECOs in sections such as s. 106.0703, F.S.); *see also* s. 106.011(1)(b)3., F.S. (2009) (for purposes of registering and reporting contributions and expenditures, ECOs are treated like political committees).

[10] Section 106.011(19), F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill could result in very modest increases to the General Revenue Fund depending on the number and extent of administrative fines collected, which is indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Ethics and Elections on March 21, 2011:
The CS differs from the original bill in that it adds a cross-reference to allow a DOAH administrative law judge to impose an additional penalty for candidates who violate the political defamation provision in s. 104.271, F.S.

B. Amendments:

None.

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

764088

LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Joyner) recommended the following:

1 **Senate Amendment (with title amendment)**
2
3 Delete everything after the resolving clause
4 and insert:
5 SECTION 4. Taxation; assessments.—By general law
6 regulations shall be prescribed which shall secure a just
7 valuation of all property for ad valorem taxation, provided:
8 (a) Agricultural land, land producing high water recharge
9 to Florida’s aquifers, or land used exclusively for
10 noncommercial recreational purposes may be classified by general
11 law and assessed solely on the basis of character or use.
12 (b) As provided by general law and subject to conditions,
13 limitations, and reasonable definitions specified therein, land

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14 used for conservation purposes shall be classified by general
15 law and assessed solely on the basis of character or use.
16 (c) Pursuant to general law tangible personal property held
17 for sale as stock in trade and livestock may be valued for
18 taxation at a specified percentage of its value, may be
19 classified for tax purposes, or may be exempted from taxation.
20 (d) All persons entitled to a homestead exemption under
21 Section 6 ~~of this Article~~ shall have their homestead assessed ~~at~~
22 ~~just value as of January 1 of the year following the effective~~
23 ~~date of this amendment. This assessment shall change only~~ as
24 provided in this subsection.
25 (1) Assessments subject to this subsection shall <u>change</u> ~~be~~
26 ~~changed~~ annually on January <u>1</u> ~~1st~~ of each year<u>.</u>~~;~~ ~~but those~~
27 ~~changes in assessments~~
28 <u>a. A change in an assessment may</u> ~~shall~~ not exceed the lower
29 of the following:
30 <u>1.</u>~~a.~~ Three percent ~~(3%)~~ of the assessment for the prior
31 year.
32 <u>2.</u>~~b.~~ The percent change in the Consumer Price Index for all
33 urban consumers, U.S. City Average, all items 1967=100, or <u>a</u>
34 successor <u>index</u> ~~reports~~ for the preceding calendar year as
35 initially reported by the United States Department of Labor,
36 Bureau of Labor Statistics.
37 <u>b. The Legislature may provide by general law that except</u>
38 <u>for changes, additions, reductions, or improvements to homestead</u>
39 <u>property assessed as provided in paragraph (d)(5), an assessment</u>
40 <u>may not increase if the just value of the property is less than</u>
41 <u>the just value of the property on the preceding January 1.</u>
42 (2) <u>An</u> ~~No~~ assessment <u>may not</u> ~~shall~~ exceed just value.

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43 (3) After a ~~any~~ change of ownership, as provided by general
44 law, homestead property shall be assessed at just value as of
45 January 1 of the following year, unless the provisions of
46 paragraph (8) apply. Thereafter, the homestead shall be assessed
47 as provided in this subsection.
48 (4) New homestead property shall be assessed at just value
49 as of January 1 ~~1st~~ of the year following the establishment of
50 the homestead, unless the provisions of paragraph (8) apply.
51 That assessment shall ~~only~~ change only as provided in this
52 subsection.
53 (5) Changes, additions, reductions, or improvements to
54 homestead property shall be assessed as provided for by general
55 law.~~; provided,~~ However, after the adjustment for any change,
56 addition, reduction, or improvement, the property shall be
57 assessed as provided in this subsection.
58 (6) In the event of a termination of homestead status, the
59 property shall be assessed as provided by general law.
60 (7) The provisions of this subsection ~~amendment~~ are
61 severable. If a provision ~~any of the provisions~~ of this
62 subsection is ~~amendment shall be~~ held unconstitutional by a ~~any~~
63 court of competent jurisdiction, the decision of the ~~such~~ court
64 does ~~shall~~ not affect or impair any remaining provisions of this
65 subsection ~~amendment~~.
66 (8)a. A person who ~~establishes a new homestead as of~~
67 ~~January 1, 2009, or January 1 of any subsequent year and who~~ has
68 received a homestead exemption pursuant to Section 6 ~~of this~~
69 ~~Article~~ as of January 1 of either of the 2 ~~two~~ years immediately
70 preceding the establishment of a ~~the~~ new homestead is entitled
71 to have the new homestead assessed at less than just value. ~~If~~

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72 ~~this revision is approved in January of 2008, a person who~~
73 ~~establishes a new homestead as of January 1, 2008, is entitled~~
74 ~~to have the new homestead assessed at less than just value only~~
75 ~~if that person received a homestead exemption on January 1,~~
76 ~~2007.~~ The assessed value of the newly established homestead
77 shall be determined as follows:
78 1. If the just value of the new homestead is greater than
79 or equal to the just value of the prior homestead as of January
80 1 of the year in which the prior homestead was abandoned, the
81 assessed value of the new homestead shall be the just value of
82 the new homestead minus an amount equal to the lesser of
83 $500,000 or the difference between the just value and the
84 assessed value of the prior homestead as of January 1 of the
85 year in which the prior homestead was abandoned. Thereafter, the
86 homestead shall be assessed as provided in this subsection.
87 2. If the just value of the new homestead is less than the
88 just value of the prior homestead as of January 1 of the year in
89 which the prior homestead was abandoned, the assessed value of
90 the new homestead shall be equal to the just value of the new
91 homestead divided by the just value of the prior homestead and
92 multiplied by the assessed value of the prior homestead.
93 However, if the difference between the just value of the new
94 homestead and the assessed value of the new homestead calculated
95 pursuant to this sub-subparagraph is greater than $500,000, the
96 assessed value of the new homestead shall be increased so that
97 the difference between the just value and the assessed value
98 equals $500,000. Thereafter, the homestead shall be assessed as
99 provided in this subsection.
100 b. By general law and subject to conditions specified

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101 therein, the legislature shall provide for application of this
102 paragraph to property owned by more than one person.
103 (e) The legislature may, by general law, for assessment
104 purposes and subject to the provisions of this subsection, allow
105 counties and municipalities to authorize by ordinance that
106 historic property may be assessed solely on the basis of
107 character or use. Such character or use assessment shall apply
108 only to the jurisdiction adopting the ordinance. The
109 requirements for eligible properties must be specified by
110 general law.
111 (f) A county may, in the manner prescribed by general law,
112 provide for a reduction in the assessed value of homestead
113 property to the extent of any increase in the assessed value of
114 that property which results from the construction or
115 reconstruction of the property for the purpose of providing
116 living quarters for one or more natural or adoptive grandparents
117 or parents of the owner of the property or of the owner’s spouse
118 if at least one of the grandparents or parents for whom the
119 living quarters are provided is 62 years of age or older. Such a
120 reduction may not exceed the lesser of the following:
121 (1) The increase in assessed value resulting from
122 construction or reconstruction of the property.
123 (2) Twenty percent of the total assessed value of the
124 property as improved.
125 (g) For all levies other than school district levies,
126 assessments of residential real property, as defined by general
127 law, which contains nine units or fewer and which is not subject
128 to the assessment limitations set forth in subsections (a)
129 through (d) shall change only as provided in this subsection.

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130 (1) Assessments subject to this subsection shall be changed
131 annually on the date of assessment provided by law. However, ~~;~~
132 ~~but~~ those changes in assessments may ~~shall~~ not exceed 3 ~~ten~~
133 percent ~~(10%)~~ of the assessment for the prior year. The
134 Legislature may provide by general law that an assessment may
135 not increase if the just value of the property is less than the
136 just value of the property on the preceding date of assessment
137 provided by law.
138 (2) An ~~No~~ assessment may not ~~shall~~ exceed just value.
139 (3) After a change of ownership or control, as defined by
140 general law, including any change of ownership of a legal entity
141 that owns the property, such property shall be assessed at just
142 value as of the next assessment date. Thereafter, such property
143 shall be assessed as provided in this subsection.
144 (4) Changes, additions, reductions, or improvements to such
145 property shall be assessed as provided for by general law. ~~;~~
146 However, after the adjustment for any change, addition,
147 reduction, or improvement, the property shall be assessed as
148 provided in this subsection.
149 (h) For all levies other than school district levies,
150 assessments of real property that is not subject to the
151 assessment limitations set forth in subsections (a) through (d)
152 and (g) shall change only as provided in this subsection.
153 (1) Assessments subject to this subsection shall be changed
154 annually on the date of assessment provided by law. However, ~~;~~
155 ~~but~~ those changes in assessments may ~~shall~~ not exceed 3 ~~ten~~
156 percent ~~(10%)~~ of the assessment for the prior year. The
157 Legislature may provide by general law that an assessment may
158 not increase if the just value of the property is less than the

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159 just value of the property on the preceding date of assessment
160 provided by law.
161 (2) An ~~No~~ assessment may not ~~shall~~ exceed just value.
162 (3) The legislature must provide that such property shall
163 be assessed at just value as of the next assessment date after a
164 qualifying improvement, as defined by general law, is made to
165 such property. Thereafter, such property shall be assessed as
166 provided in this subsection.
167 (4) The legislature may provide that such property shall be
168 assessed at just value as of the next assessment date after a
169 change of ownership or control, as defined by general law,
170 including any change of ownership of the legal entity that owns
171 the property. Thereafter, such property shall be assessed as
172 provided in this subsection.
173 (5) Changes, additions, reductions, or improvements to such
174 property shall be assessed as provided for by general law.~~;~~
175 However, after the adjustment for any change, addition,
176 reduction, or improvement, the property shall be assessed as
177 provided in this subsection.
178 (i) The legislature, by general law and subject to
179 conditions specified therein, may prohibit the consideration of
180 the following in the determination of the assessed value of real
181 property used for residential purposes:
182 (1) Any change or improvement made for the purpose of
183 improving the property's resistance to wind damage.
184 (2) The installation of a renewable energy source device.
185 (j)(1) The assessment of the following working waterfront
186 properties shall be based upon the current use of the property:
187 a. Land used predominantly for commercial fishing purposes.

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188 b. Land that is accessible to the public and used for
189 vessel launches into waters that are navigable.
190 c. Marinas and drystacks that are open to the public.
191 d. Water-dependent marine manufacturing facilities,
192 commercial fishing facilities, and marine vessel construction
193 and repair facilities and their support activities.
194 (2) The assessment benefit provided by this subsection is
195 subject to conditions and limitations and reasonable definitions
196 as specified by the legislature by general law.
197 BE IT FURTHER RESOLVED that the following statement be
198 placed on the ballot:
199 CONSTITUTIONAL AMENDMENT
200 ARTICLE VII, SECTIONS 4, 6
201 ARTICLE XII, SECTIONS 27, 32, 33
202 PROPERTY TAX LIMITATIONS; ADDITIONAL HOMESTEAD EXEMPTION.—
203 (1) In certain circumstances, the law requires the assessed
204 value of real property to increase when the just value of the
205 property decreases. This amendment authorizes the Legislature,
206 by general law, to prohibit such increases in the assessment of
207 property whose just value has declined below its just value on
208 the preceding assessment date. This amendment takes effect upon
209 approval by the voters, if approved at a special election held
210 on the date of the 2012 presidential preference primary and
211 operates retroactively to January 1, 2012, or, if approved by
212 the voters at the general election, takes effect January 1,
213 2013.
214 (2) This amendment reduces from 10 percent to 3 percent the
215 limitation on annual increases in assessments of nonhomestead
216 real property. This amendment takes effect upon approval of the

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217 voters, if approved at a special election held on the date of
218 the 2012 presidential preference primary and operates
219 retroactively to January 1, 2012, or, if approved by the voters
220 at the general election, takes effect January 1, 2013.
221 (3) This amendment also provides owners of homestead
222 property who have not owned homestead property during the 3
223 calendar years immediately preceding purchase of the current
224 homestead property with an additional homestead exemption equal
225 to 50 percent of the property’s just value in the first year for
226 all levies other than school district levies, limited to
227 $200,000; applies the additional exemption for the shorter of 5
228 years or the year of sale of the property; reduces the amount of
229 the additional exemption in each succeeding year for 5 years by
230 the greater of 20 percent of the amount of the initial
231 additional exemption or the difference between the just value
232 and the assessed value of the property; limits the additional
233 exemption to one per homestead property; limits the additional
234 exemption to properties purchased on or after January 1, 2011,
235 if approved by the voters at a special election held on the date
236 of the 2012 presidential preference primary, or on or after
237 January 1, 2012, if approved by the voters at the 2012 general
238 election; prohibits availability of the additional exemption in
239 the sixth and subsequent years after the additional exemption is
240 granted; and provides for the amendment to take effect upon
241 approval of the voters and operate retroactively to January 1,
242 2012, if approved at the special election held on the date of
243 the 2012 presidential preference primary, or on January 1, 2013,
244 if approved by the voters at the 2012 general election.
245 (4) This amendment also removes from the State Constitution a

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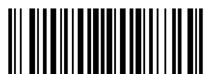
246 repeal, scheduled to take effect in 2019, of constitutional
247 amendments adopted in 2008 that limit annual assessment
248 increases for specified nonhomestead real property.
249
250 ================= T I T L E A M E N D M E N T ================
251 And the title is amended as follows:
252 Delete everything before the resolving clause
253 and insert:
254 A bill to be entitled
255 A joint resolution proposing amendments to Sections 4
256 and 6 of Article VII and Section 27 of Article XII and
257 the creation of Sections 32 and 33 of Article XII of
258 the State Constitution to allow the Legislature by
259 general law to prohibit increases in the assessed
260 value of homestead and specified nonhomestead property
261 if the just value of the property decreases, reduce
262 the limitation on annual assessment increases
263 applicable to nonhomestead real property, provide an
264 additional homestead exemption for owners of homestead
265 property who have not owned homestead property for a
266 specified time before purchase of the current
267 homestead property, and application and limitations
268 with respect thereto, delete a future repeal of
269 provisions limiting annual assessment increases for
270 specified nonhomestead real property, and provide
271 effective dates.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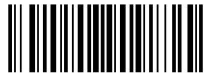
LEGISLATIVE ACTION

Senate	.	House
	.	
	.	
	.	
	.	
	.	

The Committee on Judiciary (Joyner) recommended the following:

1 **Senate Substitute for Amendment (764088) (with title**
2 **amendment)**
3
4 Delete everything after the resolving clause
5 and insert:
6 That the following amendments to Sections 4 and 6 of
7 Article VII and Section 27 of Article XII and the creation of
8 Sections 32 and 33 of Article XII of the State Constitution are
9 agreed to and shall be submitted to the electors of this state
10 for approval or rejection at the next general election or at an
11 earlier special election specifically authorized by law for that
12 purpose:
13 ARTICLE VII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14 FINANCE AND TAXATION
15 SECTION 4. Taxation; assessments.—By general law
16 regulations shall be prescribed which shall secure a just
17 valuation of all property for ad valorem taxation, provided:
18 (a) Agricultural land, land producing high water recharge
19 to Florida’s aquifers, or land used exclusively for
20 noncommercial recreational purposes may be classified by general
21 law and assessed solely on the basis of character or use.
22 (b) As provided by general law and subject to conditions,
23 limitations, and reasonable definitions specified therein, land
24 used for conservation purposes shall be classified by general
25 law and assessed solely on the basis of character or use.
26 (c) Pursuant to general law tangible personal property held
27 for sale as stock in trade and livestock may be valued for
28 taxation at a specified percentage of its value, may be
29 classified for tax purposes, or may be exempted from taxation.
30 (d) All persons entitled to a homestead exemption under
31 Section 6 ~~of this Article~~ shall have their homestead assessed ~~at~~
32 ~~just value as of January 1 of the year following the effective~~
33 ~~date of this amendment. This assessment shall change only~~ as
34 provided in this subsection.
35 (1) Assessments subject to this subsection shall change ~~be~~
36 ~~changed~~ annually on January 1 ~~1st~~ of each year. ~~; but those~~
37 ~~changes in assessments~~
38 a. A change in an assessment may ~~shall~~ not exceed the lower
39 of the following:
40 1. ~~a.~~ Three percent ~~(3%)~~ of the assessment for the prior
41 year.
42 2. ~~b.~~ The percent change in the Consumer Price Index for all

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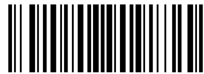
43 urban consumers, U.S. City Average, all items 1967=100, or a
44 successor index ~~reports~~ for the preceding calendar year as
45 initially reported by the United States Department of Labor,
46 Bureau of Labor Statistics.
47 b. The Legislature may provide by general law that except
48 for changes, additions, reductions, or improvements to homestead
49 property assessed as provided in paragraph (d)(5), an assessment
50 may not increase if the just value of the property is less than
51 the just value of the property on the preceding January 1.
52 (2) An ~~No~~ assessment may not ~~shall~~ exceed just value.
53 (3) After a ~~any~~ change of ownership, as provided by general
54 law, homestead property shall be assessed at just value as of
55 January 1 of the following year, unless the provisions of
56 paragraph (8) apply. Thereafter, the homestead shall be assessed
57 as provided in this subsection.
58 (4) New homestead property shall be assessed at just value
59 as of January 1 ~~1st~~ of the year following the establishment of
60 the homestead, unless the provisions of paragraph (8) apply.
61 That assessment shall ~~only~~ change only as provided in this
62 subsection.
63 (5) Changes, additions, reductions, or improvements to
64 homestead property shall be assessed as provided for by general
65 law. ~~; provided,~~ However, after the adjustment for any change,
66 addition, reduction, or improvement, the property shall be
67 assessed as provided in this subsection.
68 (6) In the event of a termination of homestead status, the
69 property shall be assessed as provided by general law.
70 (7) The provisions of this subsection ~~amendment~~ are
71 severable. If a provision ~~any of the provisions~~ of this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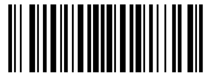
72 subsection is ~~amendment shall be~~ held unconstitutional by a ~~any~~
73 court of competent jurisdiction, the decision of the ~~such~~ court
74 does ~~shall~~ not affect or impair any remaining provisions of this
75 subsection ~~amendment~~.
76 (8)a. A person who ~~establishes a new homestead as of~~
77 ~~January 1, 2009, or January 1 of any subsequent year and who~~ has
78 received a homestead exemption pursuant to Section 6 ~~of this~~
79 ~~Article~~ as of January 1 of either of the 2 ~~two~~ years immediately
80 preceding the establishment of a ~~the~~ new homestead is entitled
81 to have the new homestead assessed at less than just value. ~~If~~
82 ~~this revision is approved in January of 2008, a person who~~
83 ~~establishes a new homestead as of January 1, 2008, is entitled~~
84 ~~to have the new homestead assessed at less than just value only~~
85 ~~if that person received a homestead exemption on January 1,~~
86 ~~2007.~~ The assessed value of the newly established homestead
87 shall be determined as follows:
88 1. If the just value of the new homestead is greater than
89 or equal to the just value of the prior homestead as of January
90 1 of the year in which the prior homestead was abandoned, the
91 assessed value of the new homestead shall be the just value of
92 the new homestead minus an amount equal to the lesser of
93 $500,000 or the difference between the just value and the
94 assessed value of the prior homestead as of January 1 of the
95 year in which the prior homestead was abandoned. Thereafter, the
96 homestead shall be assessed as provided in this subsection.
97 2. If the just value of the new homestead is less than the
98 just value of the prior homestead as of January 1 of the year in
99 which the prior homestead was abandoned, the assessed value of
100 the new homestead shall be equal to the just value of the new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101 homestead divided by the just value of the prior homestead and
102 multiplied by the assessed value of the prior homestead.
103 However, if the difference between the just value of the new
104 homestead and the assessed value of the new homestead calculated
105 pursuant to this sub-subparagraph is greater than $500,000, the
106 assessed value of the new homestead shall be increased so that
107 the difference between the just value and the assessed value
108 equals $500,000. Thereafter, the homestead shall be assessed as
109 provided in this subsection.
110 b. By general law and subject to conditions specified
111 therein, the legislature shall provide for application of this
112 paragraph to property owned by more than one person.
113 (e) The legislature may, by general law, for assessment
114 purposes and subject to the provisions of this subsection, allow
115 counties and municipalities to authorize by ordinance that
116 historic property may be assessed solely on the basis of
117 character or use. Such character or use assessment shall apply
118 only to the jurisdiction adopting the ordinance. The
119 requirements for eligible properties must be specified by
120 general law.
121 (f) A county may, in the manner prescribed by general law,
122 provide for a reduction in the assessed value of homestead
123 property to the extent of any increase in the assessed value of
124 that property which results from the construction or
125 reconstruction of the property for the purpose of providing
126 living quarters for one or more natural or adoptive grandparents
127 or parents of the owner of the property or of the owner’s spouse
128 if at least one of the grandparents or parents for whom the
129 living quarters are provided is 62 years of age or older. Such a

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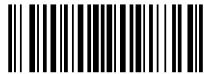
130 reduction may not exceed the lesser of the following:
131 (1) The increase in assessed value resulting from
132 construction or reconstruction of the property.
133 (2) Twenty percent of the total assessed value of the
134 property as improved.
135 (g) For all levies other than school district levies,
136 assessments of residential real property, as defined by general
137 law, which contains nine units or fewer and which is not subject
138 to the assessment limitations set forth in subsections (a)
139 through (d) shall change only as provided in this subsection.
140 (1) Assessments subject to this subsection shall be changed
141 annually on the date of assessment provided by law. However,~~;~~
142 ~~but~~ those changes in assessments may ~~shall~~ not exceed 3 ~~ten~~
143 percent ~~(10%)~~ of the assessment for the prior year. The
144 Legislature may provide by general law that an assessment may
145 not increase if the just value of the property is less than the
146 just value of the property on the preceding date of assessment
147 provided by law.
148 (2) An ~~No~~ assessment may not ~~shall~~ exceed just value.
149 (3) After a change of ownership or control, as defined by
150 general law, including any change of ownership of a legal entity
151 that owns the property, such property shall be assessed at just
152 value as of the next assessment date. Thereafter, such property
153 shall be assessed as provided in this subsection.
154 (4) Changes, additions, reductions, or improvements to such
155 property shall be assessed as provided for by general law.~~;~~
156 However, after the adjustment for any change, addition,
157 reduction, or improvement, the property shall be assessed as
158 provided in this subsection.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159 (h) For all levies other than school district levies,
160 assessments of real property that is not subject to the
161 assessment limitations set forth in subsections (a) through (d)
162 and (g) shall change only as provided in this subsection.
163 (1) Assessments subject to this subsection shall be changed
164 annually on the date of assessment provided by law. However,~~;~~
165 ~~but~~ those changes in assessments may ~~shall~~ not exceed 3 ~~ten~~
166 percent ~~(10%)~~ of the assessment for the prior year. The
167 Legislature may provide by general law that an assessment may
168 not increase if the just value of the property is less than the
169 just value of the property on the preceding date of assessment
170 provided by law.
171 (2) An ~~No~~ assessment may not ~~shall~~ exceed just value.
172 (3) The legislature must provide that such property shall
173 be assessed at just value as of the next assessment date after a
174 qualifying improvement, as defined by general law, is made to
175 such property. Thereafter, such property shall be assessed as
176 provided in this subsection.
177 (4) The legislature may provide that such property shall be
178 assessed at just value as of the next assessment date after a
179 change of ownership or control, as defined by general law,
180 including any change of ownership of the legal entity that owns
181 the property. Thereafter, such property shall be assessed as
182 provided in this subsection.
183 (5) Changes, additions, reductions, or improvements to such
184 property shall be assessed as provided for by general law.~~;~~
185 However, after the adjustment for any change, addition,
186 reduction, or improvement, the property shall be assessed as
187 provided in this subsection.

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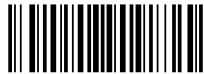
188 (i) The legislature, by general law and subject to
189 conditions specified therein, may prohibit the consideration of
190 the following in the determination of the assessed value of real
191 property used for residential purposes:
192 (1) Any change or improvement made for the purpose of
193 improving the property's resistance to wind damage.
194 (2) The installation of a renewable energy source device.
195 (j)(1) The assessment of the following working waterfront
196 properties shall be based upon the current use of the property:
197 a. Land used predominantly for commercial fishing purposes.
198 b. Land that is accessible to the public and used for
199 vessel launches into waters that are navigable.
200 c. Marinas and drystacks that are open to the public.
201 d. Water-dependent marine manufacturing facilities,
202 commercial fishing facilities, and marine vessel construction
203 and repair facilities and their support activities.
204 (2) The assessment benefit provided by this subsection is
205 subject to conditions and limitations and reasonable definitions
206 as specified by the legislature by general law.
207 SECTION 6. Homestead exemptions.—
208 (a) Every person who has the legal or equitable title to
209 real estate and maintains thereon the permanent residence of the
210 owner, or another legally or naturally dependent upon the owner,
211 shall be exempt from taxation thereon, except assessments for
212 special benefits, up to the assessed valuation of $25,000
213 ~~twenty-five thousand dollars~~ and, for all levies other than
214 school district levies, on the assessed valuation greater than
215 $50,000 ~~fifty thousand dollars~~ and up to $75,000 ~~seventy-five~~
216 ~~thousand dollars~~, upon establishment of right thereto in the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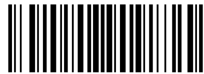
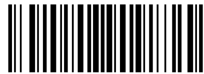
217 manner prescribed by law. The real estate may be held by legal
218 or equitable title, by the entireties, jointly, in common, as a
219 condominium, or indirectly by stock ownership or membership
220 representing the owner's or member's proprietary interest in a
221 corporation owning a fee or a leasehold initially in excess of
222 98 ~~ninety-eight~~ years. The exemption shall not apply with
223 respect to any assessment roll until such roll is first
224 determined to be in compliance with the provisions of Section 4
225 by a state agency designated by general law. This exemption is
226 repealed on the effective date of any amendment to this Article
227 which provides for the assessment of homestead property at less
228 than just value.
229 (b) Not more than one exemption shall be allowed any
230 individual or family unit or with respect to any residential
231 unit. No exemption shall exceed the value of the real estate
232 assessable to the owner or, in case of ownership through stock
233 or membership in a corporation, the value of the proportion
234 which the interest in the corporation bears to the assessed
235 value of the property.
236 (c) By general law and subject to conditions specified
237 therein, the legislature may provide to renters, who are
238 permanent residents, ad valorem tax relief on all ad valorem tax
239 levies. Such ad valorem tax relief shall be in the form and
240 amount established by general law.
241 (d) The legislature may, by general law, allow counties or
242 municipalities, for the purpose of their respective tax levies
243 and subject to the provisions of general law, to grant an
244 additional homestead tax exemption not exceeding $50,000 ~~fifty~~
245 ~~thousand dollars~~ to any person who has the legal or equitable



246 title to real estate and maintains thereon the permanent
247 residence of the owner and who has attained age 65 ~~sixty-five~~
248 and whose household income, as defined by general law, does not
249 exceed $20,000 ~~twenty thousand dollars~~. The general law must
250 allow counties and municipalities to grant this additional
251 exemption, within the limits prescribed in this subsection, by
252 ordinance adopted in the manner prescribed by general law, and
253 must provide for the periodic adjustment of the income
254 limitation prescribed in this subsection for changes in the cost
255 of living.
256 (e) Each veteran who is age 65 or older who is partially or
257 totally permanently disabled shall receive a discount from the
258 amount of the ad valorem tax otherwise owed on homestead
259 property the veteran owns and resides in if the disability was
260 combat related, the veteran was a resident of this state at the
261 time of entering the military service of the United States, and
262 the veteran was honorably discharged upon separation from
263 military service. The discount shall be in a percentage equal to
264 the percentage of the veteran's permanent, service-connected
265 disability as determined by the United States Department of
266 Veterans Affairs. To qualify for the discount granted by this
267 subsection, an applicant must submit to the county property
268 appraiser, by March 1, proof of residency at the time of
269 entering military service, an official letter from the United
270 States Department of Veterans Affairs stating the percentage of
271 the veteran's service-connected disability and such evidence
272 that reasonably identifies the disability as combat related, and
273 a copy of the veteran's honorable discharge. If the property
274 appraiser denies the request for a discount, the appraiser must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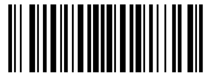
275 notify the applicant in writing of the reasons for the denial,
276 and the veteran may reapply. The legislature may, by general
277 law, waive the annual application requirement in subsequent
278 years. This subsection shall take effect December 7, 2006, is
279 self-executing, and does not require implementing legislation.
280 (f) As provided by general law and subject to conditions
281 specified therein, every person who establishes the right to
282 receive the homestead exemption provided in subsection (a)
283 within 1 year after purchasing the homestead property and who
284 has not owned property in the previous 3 calendar years to which
285 the homestead exemption provided in subsection (a) applied is
286 entitled to an additional homestead exemption in an amount equal
287 to 50 percent of the homestead property's just value on January
288 1 of the year the homestead is established for all levies other
289 than school district levies. The additional exemption shall
290 apply for a period of 5 years or until the year the property is
291 sold, whichever occurs first. The amount of the additional
292 exemption shall not exceed $200,000 and shall be reduced in each
293 subsequent year by an amount equal to 20 percent of the amount
294 of the additional exemption received in the year the homestead
295 was established or by an amount equal to the difference between
296 the just value of the property and the assessed value of the
297 property determined under Section 4(d), whichever is greater.
298 Not more than one exemption provided under this subsection shall
299 be allowed per homestead property. The additional exemption
300 shall apply to property purchased on or after January 1, 2011,
301 if this amendment is approved at a special election held on the
302 date of the 2012 presidential preference primary, or on or after
303 January 1, 2012, if approved at the 2012 general election, but


891718

shall not be available in the sixth and subsequent years after the additional exemption is first received.

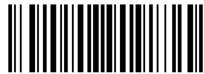
ARTICLE XII

SCHEDULE

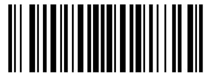
SECTION 27. Property tax exemptions and limitations on property tax assessments.—The amendments to Sections 3, 4, and 6 of Article VII, providing a $25,000 exemption for tangible personal property, providing an additional $25,000 homestead exemption, authorizing transfer of the accrued benefit from the limitations on the assessment of homestead property, and this section, if submitted to the electors of this state for approval or rejection at a special election authorized by law to be held on January 29, 2008, shall take effect upon approval by the electors and shall operate retroactively to January 1, 2008, or, if submitted to the electors of this state for approval or rejection at the next general election, shall take effect January 1 of the year following such general election. The amendments to Section 4 of Article VII creating subsections (f) and (g) of that section, creating a limitation on annual assessment increases for specified real property, shall take effect upon approval of the electors and shall first limit assessments beginning January 1, 2009, if approved at a special election held on January 29, 2008, or shall first limit assessments beginning January 1, 2010, if approved at the general election held in November of 2008. ~~Subsections (f) and (g) of Section 4 of Article VII are repealed effective January 1, 2019; however, the legislature shall by joint resolution propose an amendment abrogating the repeal of subsections (f) and (g), which shall be submitted to the electors of this state~~

891718

333 ~~for approval or rejection at the general election of 2018 and,~~
334 ~~if approved, shall take effect January 1, 2019.~~
335 SECTION 32. Property assessments.—This section and the
336 amendment of Section 4 of Article VII protecting homestead and
337 specified nonhomestead property having a declining just value
338 and reducing the limit on the maximum annual increase in the
339 assessed value of nonhomestead property from 10 percent to 3
340 percent, if submitted to the electors of this state for approval
341 or rejection at a special election authorized by law to be held
342 on the date of the 2012 presidential preference primary, shall
343 take effect upon approval by the electors and shall operate
344 retroactively to January 1, 2012, or, if submitted to the
345 electors of this state for approval or rejection at the 2012
346 general election, shall take effect January 1, 2013.
347 SECTION 33. Additional homestead exemption for owners of
348 homestead property who recently have not owned homestead
349 property.—This section and the amendment to Section 6 of Article
350 VII providing for an additional homestead exemption for owners
351 of homestead property who have not owned homestead property
352 during the 3 calendar years immediately preceding purchase of
353 the current homestead property, if submitted to the electors of
354 this state for approval or rejection at a special election
355 authorized by law to be held on the date of the 2012
356 presidential preference primary, shall take effect upon approval
357 by the electors and operate retroactively to January 1, 2012,
358 and the additional homestead exemption shall be available for
359 properties purchased on or after January 1, 2011, or if
360 submitted to the electors of this state for approval or
361 rejection at the 2012 general election, shall take effect


891718

362 January 1, 2013, and the additional homestead exemption shall be
363 available for properties purchased on or after January 1, 2012.
364 BE IT FURTHER RESOLVED that the following statement be
365 placed on the ballot:
366 CONSTITUTIONAL AMENDMENT
367 ARTICLE VII, SECTIONS 4, 6
368 ARTICLE XII, SECTIONS 27, 32, 33
369 PROPERTY TAX LIMITATIONS; ADDITIONAL HOMESTEAD EXEMPTION.—
370 (1) In certain circumstances, the law requires the assessed
371 value of real property to increase when the just value of the
372 property decreases. This amendment authorizes the Legislature,
373 by general law, to prohibit such increases in the assessment of
374 property whose just value has declined below its just value on
375 the preceding assessment date. This amendment takes effect upon
376 approval by the voters, if approved at a special election held
377 on the date of the 2012 presidential preference primary and
378 operates retroactively to January 1, 2012, or, if approved by
379 the voters at the general election, takes effect January 1,
380 2013.
381 (2) This amendment reduces from 10 percent to 3 percent the
382 limitation on annual increases in assessments of nonhomestead
383 real property. This amendment takes effect upon approval of the
384 voters, if approved at a special election held on the date of
385 the 2012 presidential preference primary and operates
386 retroactively to January 1, 2012, or, if approved by the voters
387 at the general election, takes effect January 1, 2013.
388 (3) This amendment also provides owners of homestead
389 property who have not owned homestead property during the 3
390 calendar years immediately preceding purchase of the current


891718

391 homestead property with an additional homestead exemption equal
392 to 50 percent of the property's just value in the first year for
393 all levies other than school district levies, limited to
394 $200,000; applies the additional exemption for the shorter of 5
395 years or the year of sale of the property; reduces the amount of
396 the additional exemption in each succeeding year for 5 years by
397 the greater of 20 percent of the amount of the initial
398 additional exemption or the difference between the just value
399 and the assessed value of the property; limits the additional
400 exemption to one per homestead property; limits the additional
401 exemption to properties purchased on or after January 1, 2011,
402 if approved by the voters at a special election held on the date
403 of the 2012 presidential preference primary, or on or after
404 January 1, 2012, if approved by the voters at the 2012 general
405 election; prohibits availability of the additional exemption in
406 the sixth and subsequent years after the additional exemption is
407 granted; and provides for the amendment to take effect upon
408 approval of the voters and operate retroactively to January 1,
409 2012, if approved at the special election held on the date of
410 the 2012 presidential preference primary, or on January 1, 2013,
411 if approved by the voters at the 2012 general election.
412 (4) This amendment also removes from the State Constitution
413 a repeal, scheduled to take effect in 2019, of constitutional
414 amendments adopted in 2008 that limit annual assessment
415 increases for specified nonhomestead real property.
416
417 ================= T I T L E A M E N D M E N T ================
418 And the title is amended as follows:
419 Delete everything before the resolving clause

891718

420 and insert:
421 A bill to be entitled
422 A joint resolution proposing amendments to Sections 4
423 and 6 of Article VII and Section 27 of Article XII and
424 the creation of Sections 32 and 33 of Article XII of
425 the State Constitution to allow the Legislature by
426 general law to prohibit increases in the assessed
427 value of homestead and specified nonhomestead property
428 if the just value of the property decreases, reduce
429 the limitation on annual assessment increases
430 applicable to nonhomestead real property, provide an
431 additional homestead exemption for owners of homestead
432 property who have not owned homestead property for a
433 specified time before purchase of the current
434 homestead property, and application and limitations
435 with respect thereto, delete a future repeal of
436 provisions limiting annual assessment increases for
437 specified nonhomestead real property, and provide
438 effective dates.

359804

LEGISLATIVE ACTION

Senate	.	House
Comm: WD	.	
04/11/2011	.	
	.	
	.	
	.	

The Committee on Judiciary (Richter) recommended the following:

Senate Amendment to Amendment (891718) (with ballot and title amendments)

Delete lines 142 - 147
and insert:
~~but~~ those changes in assessments may ~~shall~~ not exceed 10 ~~ten~~ percent ~~(10%)~~ of the assessment for the prior year. The Legislature may provide by general law that an assessment may not increase if the just value of the property is less than the just value of the property on the preceding date of assessment provided by law.

Delete lines 165 - 170

359804

14 and insert:
15 ~~but~~ those changes in assessments may ~~shall~~ not exceed 10 ~~ten~~
16 percent ~~(10%)~~ of the assessment for the prior year. The
17 Legislature may provide by general law that an assessment may
18 not increase if the just value of the property is less than the
19 just value of the property on the preceding date of assessment
20 provided by law.
21
22 Delete lines 336 - 340
23 and insert:
24 amendment of Section 4 of Article VII protecting homestead
25 property having a declining just value, if submitted to the
26 electors of this state for approval
27
28 ====== B A L L O T S T A T E M E N T A M E N D M E N T ======
29 And the ballot statement is amended as follows:
30 Delete lines 381 - 412
31 and insert:
32 (2) This amendment also provides owners of homestead
33 property who have not owned homestead property during the 3
34 calendar years immediately preceding purchase of the current
35 homestead property with an additional homestead exemption equal
36 to 50 percent of the property's just value in the first year for
37 all levies other than school district levies, limited to
38 $200,000; applies the additional exemption for the shorter of 5
39 years or the year of sale of the property; reduces the amount of
40 the additional exemption in each succeeding year for 5 years by
41 the greater of 20 percent of the amount of the initial
42 additional exemption or the difference between the just value

359804

43 and the assessed value of the property; limits the additional
44 exemption to one per homestead property; limits the additional
45 exemption to properties purchased on or after January 1, 2011,
46 if approved by the voters at a special election held on the date
47 of the 2012 presidential preference primary, or on or after
48 January 1, 2012, if approved by the voters at the 2012 general
49 election; prohibits availability of the additional exemption in
50 the sixth and subsequent years after the additional exemption is
51 granted; and provides for the amendment to take effect upon
52 approval of the voters and operate retroactively to January 1,
53 2012, if approved at the special election held on the date of
54 the 2012 presidential preference primary, or on January 1, 2013,
55 if approved by the voters at the 2012 general election.
56 (3) This amendment also removes from the State Constitution
57
58 ================ T I T L E A M E N D M E N T ================
59 And the title is amended as follows:
60 Delete lines 428 - 430
61 and insert:
62 if the just value of the property decreases, provide
63 an

158340

LEGISLATIVE ACTION

Senate	.	House
	.	
	.	
	.	
	.	
	.	

The Committee on Judiciary (Richter) recommended the following:

Senate Amendment to Substitute Amendment (891718) (with ballot amendment)

Delete lines 142 - 147
and insert:
~~but~~ those changes in assessments may ~~shall~~ not exceed 5 ~~ten~~ percent ~~(10%)~~ of the assessment for the prior year. The legislature may provide by general law that an assessment may not increase if the just value of the property is less than the just value of the property on the preceding date of assessment provided by law.

Delete lines 165 - 170

158340

14 and insert:
15 ~~but~~ those changes in assessments may ~~shall~~ not exceed 5 ~~ten~~
16 percent ~~(10%)~~ of the assessment for the prior year. The
17 legislature may provide by general law that an assessment may
18 not increase if the just value of the property is less than the
19 just value of the property on the preceding date of assessment
20 provided by law.
21
22 Delete lines 336 - 339
23 and insert:
24 amendment to Section 4 of Article VII protecting homestead
25 property having a declining just value and reducing the limit on
26 the maximum annual increase in the assessed value of
27 nonhomestead property from 10 percent to 5
28
29 ====== B A L L O T S T A T E M E N T A M E N D M E N T ======
30 And the ballot statement is amended as follows:
31 Delete line 381
32 and insert:
33 (2) This amendment reduces from 10 percent to 5 percent the

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SJR 658

INTRODUCER: Community Affairs Committee and Senator Fasano

SUBJECT: Homestead/Non-Homestead Property

DATE: April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gizzi	Yeatman	CA	**Fav/CS**
2.	Munroe	Maclure	JU	**Pre-meeting**
3.			BC	
4.			RC	
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... [X] Statement of Substantial Changes

B. AMENDMENTS........................ [ ] Technical amendments were recommended

[ ] Amendments were recommended

[ ] Significant amendments were recommended

I. Summary:

The joint resolution proposes an amendment to the Florida Constitution to prohibit increases in the assessed value of homestead property if the just value of the property decreases and to reduce, from 10 percent to 3 percent, the limitation on annual assessment increases applicable to non-homestead property. The joint resolution also creates an additional homestead exemption for specified homestead owners.

This joint resolution will require approval by a three-fifths vote of the membership of each house of the Legislature for passage.

This joint resolution creates sections 32 and 33, Article XII, of the Florida Constitution.
This joint resolution proposes an amendment to sections 4 and 6, Article VII, of the Florida Constitution.

II. Present Situation:

Property Valuation

A.) Just Value
Article VII, section 4, of the Florida Constitution, requires that all property be assessed at just value for ad valorem tax purposes. Just value has been interpreted by the courts to mean fair market value, or what a willing buyer would pay a willing seller for the property in an arm's length transaction.[1]

B.) Assessed Value
The Florida Constitution authorizes certain exceptions to the just valuation standard for specific types of property.[2] Agricultural land, land producing high water recharge to Florida's aquifers, and land used exclusively for noncommercial recreational purposes may be assessed solely on the basis of their character or use.[3] Livestock and tangible personal property that is held for sale as stock in trade may be assessed at a specified percentage of its value or totally exempt from taxation.[4] Counties and municipalities may authorize historic properties to be assessed solely on the basis of character and use.[5] Counties may also provide a reduction in the assessed value of property improvements on existing homesteads made to accommodate parents or grandparents who are 62 years of age or older.[6] The Legislature is authorized to prohibit the consideration of improvements to residential real property for purposes of improving the property's wind resistance or the installation of renewable energy source devices in the assessment of the property.[7] Certain working waterfront property is assessed based upon the property's current use.[8]

C.) Additional Assessment Limitations
Sections 4(g) and (h), Article VII, of the Florida Constitution, were created in January 2008, when Florida electors voted to provide an assessment limitation for residential real property containing nine or fewer units, and for all real property not subject to other specified classes or uses. For all levies, with the exception of school levies, the assessed value of property in each of these two categories may not be increased annually by more than 10 percent of the assessment in the prior year. However, residential real property containing nine or fewer units **must** be assessed at just value whenever there is a change in ownership or control. For the other real property subject to the limitation, the Legislature **may** provide that such property shall be assessed at just value after a change of ownership or control.[9]

---

[1] *See Walter v. Shuler,* 176 So. 2d 81 (Fla. 1965); *Deltona Corp. v. Bailey*, 336 So. 2d 1163 (Fla. 1976); *Southern Bell Tel. & Tel. Co. v. Dade County,* 275 So. 2d 4 (Fla. 1973).
[2] The constitutional provisions in article VII, section 4, of the Florida Constitution, were implemented in part II of ch. 193, F.S.
[3] FLA. CONST. art. VII, s. 4(a).
[4] FLA. CONST. art. VII, s. 4(c).
[5] FLA. CONST. art. VII, s. 4(e).
[6] FLA. CONST. art. VII, s. 4(f).
[7] FLA. CONST. art. VII, s. 4(i).
[8] FLA. CONST. art. VII, s. 4(j).
[9] FLA. CONST. art. VII, s. 4(g) and (h).

Article XII, section 27, of the Florida Constitution, provides that the amendments creating a limitation on annual assessment increases in subsections (f) and (g) are repealed effective January 1, 2019, and that the Legislature must propose an amendment abrogating the repeal, which shall be submitted to the voters for approval or rejection on the general election ballot for 2018.

D.) Taxable Value

The taxable value of real and tangible personal property is the assessed value minus any exemptions provided by the Florida Constitution or by Florida Statutes. Such exemptions include, but are not limited to: homestead exemptions and exemptions for property used for educational, religious, or charitable purposes.[10]

Homestead Exemption

Article VII, section 6, of the Florida Constitution, as amended in January 2008, provides that every person with legal and equitable title to real estate and who maintains the permanent residence of the owner is eligible for a $25,000 homestead tax exemption applicable to all ad valorem tax levies including school districts. An additional $25,000 homestead exemption applies to homesteads that have an assessed value greater than $50,000 and up to $75,000, excluding ad valorem taxes levied by schools.

Additional Homestead Exemption, Amendment 3 Proposed for 2010 Ballot *(2009 SJR 532)*

In 2009, the Legislature passed SJR 532 which was to go before the voters as Amendment 3 on the November 2010 ballot. The proposed amendment 3 sought to reduce the annual assessment limitation from 10 to five percent annually and to provide an additional homestead exemption for "a person or persons" who have not owned a principal residence in the previous *eight* years that is equal to *25 percent* of the just value of the homestead in the first year for all levies, up to *$100,000*. The amount of the additional homestead exemption decreases by 20 percent of the initial exemption each succeeding five years until it is no longer available in the sixth and subsequent years.[11]

However, in August 2010, the Florida Supreme Court removed Amendment 3 from the 2010 Ballot, on the grounds that the ballot title and summary were misleading and failed to comply with the constitutional accuracy requirement implicitly provided in Art. XI, section 5(a), of the Florida Constitution.[12] The Court stated that the accuracy requirement is implicitly indicated in section 5(a) through the statement that the proposed amendment "shall be submitted to the electors at the next general election." Specifically, the Court stated that:

> Implicit in this provision is the requirement that the proposed amendment be *accurately* represented on the ballot; otherwise, voter approval would be a nullity.[13]

---

[10] FLA. CONST. art. VII, ss. 3 and 6.
[11] Fla. CS for SJR 532, 1st Eng. (2009) (Senator Lynn and others)
[12] *Roberts v. Doyle*, 43 So. 3d 654 (Fla. 2010).
[13] *Id.* at 657, citing *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000) (further reiterating that the accuracy requirement is codified in s. 106.161(1), F.S. (2009)).

The Court further stated that the accuracy requirement is codified in Florida Statutes in s. 106.161(1), F.S., which in part provides that:

> Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot . . .

In determining whether a ballot title and summary are in compliance with the accuracy requirement, courts utilize a two-prong test, asking "first, whether the ballot title and summary 'fairly inform the voter of the chief purpose of the amendment,' and second, 'whether the language of the title and summary, as written, misleads the public.' "[14]

Based on this test, the Florida Supreme Court determined that the ballot title and summary for Amendment 3 were "neither accurate nor informative" and "are confusing to the average voter."[15] The Court supported its holding based on the following:

- Neither the title nor the summary provided notice that the additional exemption is only available for properties purchased on or after January 1, 2010. Stating that the "lack of an effective date renders it impossible for a voter to know which homeowners would qualify for the exemption."[16]
- The terms "new homestead owners" in the title coupled with "first-time homestead" in the summary are ambiguous as it conveys the message that to be eligible for the additional exemption, the property owner must have both not owned a principal residence during the preceding eight years *and* have never previously declared the property homestead.[17]
- The use of both the terms "principal residence" and "first-time homestead" in the ballot title and summary is misleading.[18]
- There is a material omission in the ballot title and summary, as they fail to "note that the additional exemption is not available to a person whose spouse has owned a principal residence in the preceding eight years."[19]

"Save Our Homes" Assessment Limitation

The "Save Our Homes" provision in article VII, section 4(d) of the Florida Constitution, limits the amount that a homestead's assessed value can increase annually to the lesser of three percent or the Consumer Price Index (CPI).[20] The Save Our Homes limitation was amended into the Florida Constitution in 1992, to provide that:

[14] *Id.* at 659, citing *Florida Dep't of State v. Slough,* 992 So. 2d 142, 147 (Fla. 2008).
[15] *Id.* at 657 and 660.
[16] *Id.*
[17] *Id.*
[18] *Roberts,* at 657 and 660.
[19] *Id.* at 657 and 661.
[20] FLA. CONST. art. VII, s. 4(d).

- All persons entitled to a homestead exemption under section 6, Art. II of the State Constitution, have their homestead assessed at just value by January 1 of the year following the effective date of the amendment.
- Thereafter, annual changes in homestead assessments on January 1 of each year could not exceed the lower of:
  - Three percent of the prior year's assessment, or
  - The percent change in the Consumer Price Index (CPI) for all urban consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.
- No assessment may exceed just value.

In 2008, Florida voters approved an additional amendment to article VII, section 4(d), of the Florida Constitution, to provide for the portability of the accrued "Save Our Homes" benefit. This amendment allows homestead property owners who relocate to a new homestead to transfer up to $500,000 of the "Save Our Homes" accrued benefit to the new homestead.

Section 193.155, Florida Statutes

In 1994, the Legislature enacted ch. 94-353, Laws of Florida, to implement the "Save Our Homes" amendment into s. 193.155, F.S. The legislation required all homestead property to be assessed at just value by January 1, 1994.[21] Starting on January 1, 1995, or the year after the property receives a homestead exemption (whichever is later), property receiving a homestead exemption must be reassessed annually on January 1 of each year. As provided in the "Save Our Homes" provision in Article VII, section 4(d), of the Florida Constitution, s. 193.155, F.S., requires that any change resulting from the reassessment may not exceed the lower of:

- Three percent of the assessed value from the prior year; or
- The percentage change in the CPI for all urban consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.[22]

Pursuant to s. 193.155(2), F.S., if the assessed value of the property exceeds the just value, the assessed value must be lowered to just value of the property.

Rule 12D-8.0062, Florida Administrative Code (F.A.C.): "The Recapture Rule"

In October 1995, the Governor and the Cabinet adopted rule 12D-8.0062, F.A.C., of the Department of Revenue, entitled "Assessments; Homestead; and Limitations."[23] The

[21] *See Fuchs v. Wilkinson*, 630 So. 2d 1044 (Fla. 1994) (stating that "the clear language of the amendment establishes January 1, 1994, as the first "just value" assessment date, and as a result, requires the operative date of the amendment's limitations, which establish the "tax value" of homestead property, to be January 1, 1995").

[22] Section 193.155(1), F.S.

[23] While s. 193.155, F.S., did not provide specific rulemaking authority, the Department of Revenue adopted Rule 12S-9.0062, F.A.C., pursuant to its general rulemaking authority under s. 195.927, F.S. Section 195.027, F.S., provides that the Department of Revenue shall prescribe reasonable rules and regulations for the assessing and collecting of taxes, and that the Legislature intends that the department shall formulate such rules and regulations that property will be assessed, taxes will be collected, and that the administration will be uniform, just and otherwise in compliance with the requirements of general law and the constitution.

administrative intent of this rule is to govern "the determination of the assessed value of property subject to the homestead assessment limitation under Article VII, section 4(c), of the Florida Constitution, and s. 193.155, F.S."[24]

Subsection (5) of Rule 12D-8.0062, F.A.C., is popularly known as the "recapture rule." This provision requires property appraisers to increase the prior year's assessed value of a homestead property by the lower of three percent or the CPI on all property where the value is lower than the just value. The specific language in Rule 12D-8.0062(5), F.A.C., which is referred to as the "recapture provision" states:

> (5) Where the current year just value of an individual property exceeds the prior year assessed value, the property appraiser is *required* to increase the prior year's assessed value ….[25]

Under current law, this requirement applies even if the just value of the homestead property has decreased from the prior year. Therefore, homestead owners entitled to the "Save Our Homes" cap whose property is assessed at less than just value may see an increase in the assessed value of their home during years where the just/market value of their property decreased.[26]

Subsection (6) provides that if the change in the CPI is negative, then the assessed value shall be equal to the prior year's assessed value decreased by that percentage.

Markham v. Department of Revenue[27]

On March 17, 1995, William Markham, a Broward County Property Appraiser, filed a petition challenging the validity of the Department of Revenue's proposed "recapture rule" within Rule 12D-8.0062, F.A.C. Markham alleged that the proposed rule was "an invalid exercise of delegated legislative authority and is arbitrary and capricious."[28] Markham also claimed that subsection (5) of the rule was at variance with the constitution – specifically that it conflicted with the "intent" of the ballot initiative and that a third limitation relating to market value or movement[29] should be incorporated into the language of the rule to make it compatible with the language in Article VII, section 4(c), of the Florida Constitution.

A final order was issued by The Division of Administrative Hearings on June 21, 1995, which upheld the validity of Rule 12D-8.0062, F.A.C., and the Department of Revenue's exercise of delegated legislative authority. The hearing officer determined that subsections (5) and (6) of the administrative rule were consistent with Article VII, section 4(c), of the Florida Constitution. The hearing officer also held that the challenged portions of the rule were consistent with the

[24] Rule 12D-8.0062(1), F.A.C.
[25] Rule 12D-8.0062(5), F.A.C. (emphasis added).
[26] *Markham v. Dep't of Revenue*, Case No. 95-1339RP (Fla. DOAH 1995) (stating that "subsection (5) requires an increase to the prior year's assessed value in a year where the CPI is greater than zero").
[27] *Id.*
[28] *Id.*
[29] *Id.* at ¶ 21 (stating that "[t]his limitation, grounded on "market movement," would mean that in a year in which market value did not increase, the assessed value of a homestead property would not increase").

agency's mandate to adopt rules under s. 195.027(1), F.S., since the rule had a factual and logical underpinning, was plain and unambiguous, and did not conflict with the implemented law.[30]

In response to the petitioner's assertion of a third limitation on market movement, the hearing officer concluded that the rule was not constitutionally infirm since there was no mention of "market movement" or "market value" in the ballot summary of the amendment nor did the petitioner present any evidence of legislative history concerning the third limitation.[31]

III. Effect of Proposed Changes:

This joint resolution proposes an amendment to Article VII, section 4, of the Florida Constitution, to prohibit increases in the assessed value of homestead property if the just value of the property decreases, and to reduce the limitation on annual assessment increases applicable to non-homestead property from 10 percent to three percent. This joint resolution also amends Article VII, section 6, of the Florida Constitution, to create an additional homestead exemption for specified homestead owners.

The joint resolution creates sections 32 and 33, Article XII, of the State Constitution, to provide when the amendments prescribed herein shall take effect.

Assessment Limitation on Homestead Property *(Recapture Rule)*

The joint resolution proposes an amendment paragraph 1 of subsection (d) in s. 4, Article VII, of the Florida Constitution, to provide that an assessment to homestead property may not increase if the just value of the property is less than the just value of the property on the preceding January 1. The joint resolution also deletes obsolete language provided in paragraph 8 of subsection (d) in s. 4, Article VII, of the Florida Constitution. This does not apply to the assessment of changes, additions, reductions, or improvements to homestead property as provided in (d)(5) of section 4, Article VII, of the Florida Constitution.

The joint resolution creates section 32, Article XII, of the Florida Constitution, to provide that if approved by Florida voters, this amendment will take effect on January 1, 2013.

Assessment Limitation on Non-Homestead Property

The joint resolution proposes to amend paragraph 1 of subsections (g) and (h) in s. 4, Article VII, of the Florida Constitution, to reduce the annual assessment limitation for specified non-homestead property from 10 percent to three percent. This assessment limitation is pursuant to general law and subject to the conditions specified in such law.

The joint resolution also creates section 32, Article XII, of the Florida Constitution, to provide that if approved by Florida voters, this amendment will take effect on January 1, 2013.

[30] *Id.* at ¶ 20.
[31] *Id.* at ¶ 22.

Additional Homestead Exemption for Specified Homestead Owners

The joint resolution proposes to create subsection (f) in s. 6, Article VII, of the Florida Constitution. This amendment allows individuals that are entitled to a homestead exemption under s. 6(a), Article VII, of the Florida Constitution, that have not previously received a homestead exemption in the past three years to receive an additional homestead exemption equal to 50 percent of the just value of the homestead property up to $200,000 for a period of five years or until the property is sold. The additional exemption is available within one year of purchasing the homestead and would be reduced by 20 percent of the initial exemption on January 1 of each succeeding year, until it is no longer available in the sixth and subsequent years. The exemption does not apply to school levies.

The joint resolution also creates section 33, Article XII, of the Florida Constitution, to provide that if approved by Florida voters, this amendment will take effect on January 1, 2013, and shall be available for properties purchased on or after January 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate provisions in Article VII, section 18, of the Florida Constitution, do not apply to joint resolutions.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Constitutional Amendments

Section 1, Article XI, of the Florida Constitution, authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by three-fifths vote of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State, or at a special election held for that purpose.

Section 5(d), Article XI, of the Florida Constitution, requires proposed amendments or constitutional revisions to be published in a newspaper of general circulation in each county where a newspaper is published. The amendment or revision must be published once in the tenth week and again in the sixth week immediately preceding the week the election is held. The Division of Elections within the Department of State estimated that the average cost per word to advertise an amendment to the State Constitution is $106.14 for this fiscal year.

Section 5(e), Article XI, of the Florida Constitution, requires a 60 percent voter approval for a constitutional amendment to take effect. An approved amendment becomes effective on the first Tuesday after the first Monday in January following the election at which it is approved, or on such other date as may be specified in the amendment or revision.

Section 5(a), Article XI, of the Florida Constitution, and s. 106.161(1), F.S., require constitutional amendments submitted to the vote of the people to be printed in clear and unambiguous language on the ballot. In determining whether a ballot title and summary are in compliance with the accuracy requirement, Florida courts utilize a two-prong test, asking "first, whether the ballot title and summary 'fairly inform the voter of the chief purpose of the amendment,' and second, 'whether the language of the title and summary, as written, misleads the public.'"[32]

Equal Protection Clause

The United States Constitution provides that "no State shall . . . deny to any person within its jurisdiction, the equal protection of law."[33] In the past, taxpayers have argued that disparate treatment in real property tax assessments constitutes an equal protection violation.[34] In these instances, courts have used the rational basis test to determine the constitutionality of discriminatory treatment in property tax assessments.[35] Under the rational basis test, a court must uphold a state statute so long as the classification bears a rational relationship to a legitimate state interest.[36]

It has been argued that the recapture rule provided in ss. (5) of Rule 12D-8.0062, F.A.C., diminishes the existing inequity between property assessments over time.[37] To the extent that this view is adopted, taxpayers may argue that the elimination of the recapture rule creates a stronger argument for an Equal Protection Clause violation. If this argument is made, the court would need to determine whether the components of this joint resolution are rationally related to a legitimate state interest.

[32] *Roberts,* at 659, citing *Florida Dep't of State v. Slough,* 992 So.2d 142, 147 (Fla. 2008).
[33] U.S. CONST. amend. XIV, § 1. *See also* FLA. CONST. art. I, s. 2.
[34] *Reinish v. Clark,* 765 So. 2d 197 (Fla. 1st DCA 2000) (holding that the Florida homestead exemption did not violate the Equal Protection Clause, the Privileges and Immunities Clause, or the Commerce Clause). *See also Lanning v. Pilcher*, 16 So. 3d 294 (Fla. 1st DCA 2009) (holding that the Save Our Homes Amendment of the State Constitution did not violate a nonresident's rights under the Equal Protection Clause). *See also Nordlinger v. Hahn,* 505 U.S. 1 (1992) (stating that the constitutional amendment in California that limited real property tax increases, in the absence of a change of ownership to 2% per year, was not a violation of the Equal Protection Clause).
[35] *Nordlinger,* at 33-34, stating that a "classification *rationally* furthers a state interest when there is some fit between the disparate treatment and the legislative purpose").
[36] *Id.*
[37] Walter Hellerstein et al., Shackelford Professor of Taxation, LEGAL ANALYSIS OF PROPOSED ALTERNATIVES TO FLORIDA'S HOMESTEAD PROPERTY TAX LIMITATIONS: FEDERAL CONSTITUTIONAL AND RELATED ISSUES, at 83 (on file with the Senate Committee on Community Affairs).

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

If approved by the voters, this joint resolution will provide an ad valorem tax relief to specified homestead owners. Owners of specified residential rental and commercial real property will experience further reduction in tax assessments due to the three percent assessment limitation. This joint resolution will also have an effect on local government revenue.

B. Private Sector Impact:

Assessment Limitation on Homestead Property *(Recapture Rule)*
If approved by the voters, taxes will be reduced for those taxpayers whose homesteads have depreciated but are still assessed at less than just value. The joint resolution will redistribute the tax burden. It may benefit homestead property that has a "Save Our Homes" differential; however, non-homestead and recently established homestead property will pay a larger proportion of the cost of local services. To the extent that local governments do not raise millage rates, taxpayers may experience a reduction in government and education services due to any reductions in ad valorem tax revenues.

Assessment Limitation on Non-Homestead Property
Owners of existing residential rental and commercial real property may experience property tax savings and will not see their taxes increase significantly in a single year. To the extent that local taxing authorities' budgets are not reduced, the tax burden on other properties will increase to offset these tax losses. New properties or properties that have changed ownership or undergone significant improvements will be assessed at just value, and will be at a competitive disadvantage compared to older properties with respect to their tax burden.

Additional Homestead Exemption for Specified Homestead Owners
If approved by the voters, specified homestead owners will experience temporary reductions in ad valorem taxes. The value of the reduction will decrease by one-fifth each year and will disappear in the sixth year after the homestead is established. During this period, the ad valorem taxes levied on the homestead will increase significantly each year. Other property owners in the taxing jurisdiction will pay higher taxes if the jurisdiction adjusts the millage rate to offset the loss to the tax base.

C. Government Sector Impact:

Local governments may experience a reduction in the ad valorem tax base if this joint resolution is approved by voters. Since this amendment would require voter approval, the Revenue Estimating Conference has adopted an indeterminate negative estimate for SJR 658.

Additional Homestead Exemption for Specified Homestead Owners
Should this amendment be approved by the Florida voters, the Revenue Estimating Conference has determined that the statewide impact on non-school taxes for the additional homestead exemption for specified homestead owners would be as follows: [38]

FY 2013-14	FY 2014-15	Recurring Impact
-$94.5 million	-$186.5 million	-$344.5 million

Assessment Limitation on Homestead Property *(Recapture Rule)*
The Revenue Estimating Conference has not reviewed the recapture provisions of SJR 658, however when addressing similar legislation on the recapture amendment (2011 SJR 210), the Revenue Estimating Conference determined that the fiscal impact on school taxes, should the joint resolution be approved by the voters, would be as follows for :

FY 2013-14	FY 2014-15	Recurring Impact
-$5.0 million	-$8.0 million	-$17.0 million

[39]

The fiscal impact on non-school taxes would be as follows:

FY 2013-14	FY 2014-15	Recurring Impact
-$6.0 million	-$11.0 million	-$18.0 million

[40]

Assessment Limitation on Non-Homestead Property
The Revenue Estimating Conference has not provided a fiscal impact on the constitutional amendment within SJR 658 that reduces from 10 percent to three percent, the limitation on annual assessment increases applicable to non-homestead property.

Publication Requirements
Section 5(d), Article XI, of the Florida Constitution, requires proposed amendments or constitutional revisions to be published in a newspaper of general circulation in each county where a newspaper is published. The amendment or revision must be published once in the tenth week and again in the sixth week immediately preceding the week the election is held. The Division of Elections within the Department of State estimated that the average cost per word to advertise an amendment to the State Constitution is $106.14 for this fiscal year.[41] The division has not estimated the full publication costs to advertise this constitutional amendment at this time.

[38] Revenue Estimating Conference, *First-Time Homesteaders SJR 658 & HJR 381* (Feb. 20, 2011) (assuming that 40 percent of homesteaders will be first-time homesteaders, to account for the definition of first-time homebuyers).
[39] Revenue Estimating Conference, *Recapture SJR 210 & HJR 381* (Feb. 17, 2011).
[40] Revenue Estimating Conference, *Recapture SJR 210 & HJR 381* (Feb. 17, 2011).
[41] Florida Department of State, *Senate Joint Resolution 390 Fiscal Analysis* (Jan. 28, 2011) (on file with the Senate Committee on Community Affairs).

VI. Technical Deficiencies:

On lines 55-56 of the bill, language that refers to the Consumer Price Index to be the report "as initially reported by the United States Department of Labor, Bureau of Labor Statistics" was inadvertently typed and stricken and should be restored to current law.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

CS by Community Affairs on March 14, 2011:
This committee substitute makes technical and clarifying amendments as recommended by the Department of Revenue.[42] Specifically the committee substitute:

- Changes references to "fair market" and "market" value to "just" value to make it consistent with provisions in the Florida Constitution and Florida Statutes.
- Changes the terms "an increase" to "a change" on line 49 of the joint resolution.
- Provides that the joint resolution has no effect on the assessment of changes, additions, reductions, or improvements to homestead property as provided in (d)(5) of section 4, Article VII, of the Florida Constitution.

B. Amendments:

None.

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

[42] *See* Florida Department of Revenue, *SJR 658 Fiscal Analysis,* at 3 (Feb. 11, 2011) (on file with the Senate Committee on Community Affairs).

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LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Joyner) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. If House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, is approved by a vote of the electors in the general election held in November 2012, section 193.155, Florida Statutes, is amended to read:

193.155 Homestead assessments.~~ Homestead property shall be assessed at just value as of January 1, 1994.~~ Property receiving the homestead exemption ~~after January 1, 1994,~~ shall be assessed at just value as of January 1 of the year in which the property receives the exemption unless the provisions of subsection (8)

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14 apply.
15 (1) Beginning in ~~1995, or~~ the year following the year the
16 property receives a homestead exemption~~, whichever is later~~, the
17 property shall be reassessed annually on January 1. Except for
18 changes, additions, reductions, or improvements to homestead
19 property assessed as provided in subsection (4):
20 (a) Any change resulting from such reassessment shall not
21 exceed the lower of the following:
22 1.~~(a)~~ Three percent of the assessed value of the property
23 for the prior year; or
24 2.~~(b)~~ The percentage change in the Consumer Price Index for
25 All Urban Consumers, U.S. City Average, all items 1967=100, or
26 successor reports for the preceding calendar year as initially
27 reported by the United States Department of Labor, Bureau of
28 Labor Statistics.
29 (b) The Legislature may provide by general law an
30 assessment may not increase if the just value of the property is
31 less than the just value of the property on the preceding
32 January 1.
33 (2) If the assessed value of the property as calculated
34 under subsection (1) exceeds the just value, the assessed value
35 of the property shall be lowered to the just value of the
36 property.
37 (3)(a) Except as provided in this subsection or subsection
38 (8), property assessed under this section shall be assessed at
39 just value as of January 1 of the year following a change of
40 ownership. Thereafter, the annual changes in the assessed value
41 of the property are subject to the limitations in subsections
42 (1) and (2). For the purpose of this section, a change of

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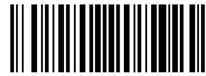
43 ownership means any sale, foreclosure, or transfer of legal
44 title or beneficial title in equity to any person, except as
45 provided in this subsection. There is no change of ownership if:
46 1. Subsequent to the change or transfer, the same person is
47 entitled to the homestead exemption as was previously entitled
48 and:
49 a. The transfer of title is to correct an error;
50 b. The transfer is between legal and equitable title or
51 equitable and equitable title and no additional person applies
52 for a homestead exemption on the property; or
53 c. The change or transfer is by means of an instrument in
54 which the owner is listed as both grantor and grantee of the
55 real property and one or more other individuals are additionally
56 named as grantee. However, if any individual who is additionally
57 named as a grantee applies for a homestead exemption on the
58 property, the application shall be considered a change of
59 ownership;
60 2. Legal or equitable title is changed or transferred
61 between husband and wife, including a change or transfer to a
62 surviving spouse or a transfer due to a dissolution of marriage;
63 3. The transfer occurs by operation of law to the surviving
64 spouse or minor child or children under s. 732.401; or
65 4. Upon the death of the owner, the transfer is between the
66 owner and another who is a permanent resident and is legally or
67 naturally dependent upon the owner.
68 (b) For purposes of this subsection, a leasehold interest
69 that qualifies for the homestead exemption under s. 196.031 or
70 s. 196.041 shall be treated as an equitable interest in the
71 property.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72 (4)(a) Except as provided in paragraph (b), changes,
73 additions, or improvements to homestead property shall be
74 assessed at just value as of the first January 1 after the
75 changes, additions, or improvements are substantially completed.
76 (b) Changes, additions, or improvements that replace all or
77 a portion of homestead property damaged or destroyed by
78 misfortune or calamity shall not increase the homestead
79 property's assessed value when the square footage of the
80 homestead property as changed or improved does not exceed 110
81 percent of the square footage of the homestead property before
82 the damage or destruction. Additionally, the homestead
83 property's assessed value shall not increase if the total square
84 footage of the homestead property as changed or improved does
85 not exceed 1,500 square feet. Changes, additions, or
86 improvements that do not cause the total to exceed 110 percent
87 of the total square footage of the homestead property before the
88 damage or destruction or that do not cause the total to exceed
89 1,500 total square feet shall be reassessed as provided under
90 subsection (1). The homestead property's assessed value shall be
91 increased by the just value of that portion of the changed or
92 improved homestead property which is in excess of 110 percent of
93 the square footage of the homestead property before the damage
94 or destruction or of that portion exceeding 1,500 square feet.
95 Homestead property damaged or destroyed by misfortune or
96 calamity which, after being changed or improved, has a square
97 footage of less than 100 percent of the homestead property's
98 total square footage before the damage or destruction shall be
99 assessed pursuant to subsection (5). This paragraph applies to
100 changes, additions, or improvements commenced within 3 years

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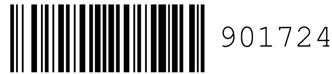
101 after the January 1 following the damage or destruction of the
102 homestead.
103 (c) Changes, additions, or improvements that replace all or
104 a portion of real property that was damaged or destroyed by
105 misfortune or calamity shall be assessed upon substantial
106 completion as if such damage or destruction had not occurred and
107 in accordance with paragraph (b) if the owner of such property:
108 1. Was permanently residing on such property when the
109 damage or destruction occurred;
110 2. Was not entitled to receive homestead exemption on such
111 property as of January 1 of that year; and
112 3. Applies for and receives homestead exemption on such
113 property the following year.
114 (d) Changes, additions, or improvements include
115 improvements made to common areas or other improvements made to
116 property other than to the homestead property by the owner or by
117 an owner association, which improvements directly benefit the
118 homestead property. Such changes, additions, or improvements
119 shall be assessed at just value, and the just value shall be
120 apportioned among the parcels benefiting from the improvement.
121 (5) When property is destroyed or removed and not replaced,
122 the assessed value of the parcel shall be reduced by the
123 assessed value attributable to the destroyed or removed
124 property.
125 (6) Only property that receives a homestead exemption is
126 subject to this section. No portion of property that is assessed
127 solely on the basis of character or use pursuant to s. 193.461
128 or s. 193.501, or assessed pursuant to s. 193.505, is subject to
129 this section. When property is assessed under s. 193.461, s.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130 193.501, or s. 193.505 and contains a residence under the same
131 ownership, the portion of the property consisting of the
132 residence and curtilage must be assessed separately, pursuant to
133 s. 193.011, for the assessment to be subject to the limitation
134 in this section.
135 (7) If a person received a homestead exemption limited to
136 that person’s proportionate interest in real property, the
137 provisions of this section apply only to that interest.
138 (8) Property assessed under this section shall be assessed
139 at less than just value when the person who establishes a new
140 homestead has received a homestead exemption as of January 1 of
141 either of the 2 immediately preceding years. ~~A person who~~
142 ~~establishes a new homestead as of January 1, 2008, is entitled~~
143 ~~to have the new homestead assessed at less than just value only~~
144 ~~if that person received a homestead exemption on January 1,~~
145 ~~2007, and only if this subsection applies retroactive to January~~
146 ~~1, 2008.~~ For purposes of this subsection, a husband and wife who
147 owned and both permanently resided on a previous homestead shall
148 each be considered to have received the homestead exemption even
149 though only the husband or the wife applied for the homestead
150 exemption on the previous homestead. The assessed value of the
151 newly established homestead shall be determined as provided in
152 this subsection.
153 (a) If the just value of the new homestead as of January 1
154 is greater than or equal to the just value of the immediate
155 prior homestead as of January 1 of the year in which the
156 immediate prior homestead was abandoned, the assessed value of
157 the new homestead shall be the just value of the new homestead
158 minus an amount equal to the lesser of $500,000 or the

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159 difference between the just value and the assessed value of the
160 immediate prior homestead as of January 1 of the year in which
161 the prior homestead was abandoned. Thereafter, the homestead
162 shall be assessed as provided in this section.
163 (b) If the just value of the new homestead as of January 1
164 is less than the just value of the immediate prior homestead as
165 of January 1 of the year in which the immediate prior homestead
166 was abandoned, the assessed value of the new homestead shall be
167 equal to the just value of the new homestead divided by the just
168 value of the immediate prior homestead and multiplied by the
169 assessed value of the immediate prior homestead. However, if the
170 difference between the just value of the new homestead and the
171 assessed value of the new homestead calculated pursuant to this
172 paragraph is greater than $500,000, the assessed value of the
173 new homestead shall be increased so that the difference between
174 the just value and the assessed value equals $500,000.
175 Thereafter, the homestead shall be assessed as provided in this
176 section.
177 (c) If two or more persons who have each received a
178 homestead exemption as of January 1 of either of the 2
179 immediately preceding years and who would otherwise be eligible
180 to have a new homestead property assessed under this subsection
181 establish a single new homestead, the reduction from just value
182 is limited to the higher of the difference between the just
183 value and the assessed value of either of the prior eligible
184 homesteads as of January 1 of the year in which either of the
185 eligible prior homesteads was abandoned, but may not exceed
186 $500,000.
187 (d) If two or more persons abandon jointly owned and

188 jointly titled property that received a homestead exemption as
189 of January 1 of either of the 2 immediately preceding years, and
190 one or more such persons who were entitled to and received a
191 homestead exemption on the abandoned property establish a new
192 homestead that would otherwise be eligible for assessment under
193 this subsection, each such person establishing a new homestead
194 is entitled to a reduction from just value for the new homestead
195 equal to the just value of the prior homestead minus the
196 assessed value of the prior homestead divided by the number of
197 owners of the prior homestead who received a homestead
198 exemption, unless the title of the property contains specific
199 ownership shares, in which case the share of reduction from just
200 value shall be proportionate to the ownership share. In
201 calculating the assessment reduction to be transferred from a
202 prior homestead that has an assessment reduction for living
203 quarters of parents or grandparents pursuant to s. 193.703, the
204 value calculated pursuant to s. 193.703(6) must first be added
205 back to the assessed value of the prior homestead. The total
206 reduction from just value for all new homesteads established
207 under this paragraph may not exceed $500,000. There shall be no
208 reduction from just value of any new homestead unless the prior
209 homestead is reassessed at just value or is reassessed under
210 this subsection as of January 1 after the abandonment occurs.
211 (e) If one or more persons who previously owned a single
212 homestead and each received the homestead exemption qualify for
213 a new homestead where all persons who qualify for homestead
214 exemption in the new homestead also qualified for homestead
215 exemption in the previous homestead without an additional person
216 qualifying for homestead exemption in the new homestead, the

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217 reduction in just value shall be calculated pursuant to
218 paragraph (a) or paragraph (b), without application of paragraph
219 (c) or paragraph (d).
220 (f) For purposes of receiving an assessment reduction
221 pursuant to this subsection, a person entitled to assessment
222 under this section may abandon his or her homestead even though
223 it remains his or her primary residence by notifying the
224 property appraiser of the county where the homestead is located.
225 This notification must be in writing and delivered at the same
226 time as or before timely filing a new application for homestead
227 exemption on the property.
228 (g) In order to have his or her homestead property assessed
229 under this subsection, a person must file a form provided by the
230 department as an attachment to the application for homestead
231 exemption. The form, which must include a sworn statement
232 attesting to the applicant's entitlement to assessment under
233 this subsection, shall be considered sufficient documentation
234 for applying for assessment under this subsection. The
235 department shall require by rule that the required form be
236 submitted with the application for homestead exemption under the
237 timeframes and processes set forth in chapter 196 to the extent
238 practicable.
239 (h)1. If the previous homestead was located in a different
240 county than the new homestead, the property appraiser in the
241 county where the new homestead is located must transmit a copy
242 of the completed form together with a completed application for
243 homestead exemption to the property appraiser in the county
244 where the previous homestead was located. If the previous
245 homesteads of applicants for transfer were in more than one

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246 county, each applicant from a different county must submit a
247 separate form.
248 2. The property appraiser in the county where the previous
249 homestead was located must return information to the property
250 appraiser in the county where the new homestead is located by
251 April 1 or within 2 weeks after receipt of the completed
252 application from that property appraiser, whichever is later. As
253 part of the information returned, the property appraiser in the
254 county where the previous homestead was located must provide
255 sufficient information concerning the previous homestead to
256 allow the property appraiser in the county where the new
257 homestead is located to calculate the amount of the assessment
258 limitation difference which may be transferred and must certify
259 whether the previous homestead was abandoned and has been or
260 will be reassessed at just value or reassessed according to the
261 provisions of this subsection as of the January 1 following its
262 abandonment.
263 3. Based on the information provided on the form from the
264 property appraiser in the county where the previous homestead
265 was located, the property appraiser in the county where the new
266 homestead is located shall calculate the amount of the
267 assessment limitation difference which may be transferred and
268 apply the difference to the January 1 assessment of the new
269 homestead.
270 4. All property appraisers having information-sharing
271 agreements with the department are authorized to share
272 confidential tax information with each other pursuant to s.
273 195.084, including social security numbers and linked
274 information on the forms provided pursuant to this section.

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275 5. The transfer of any limitation is not final until any
276 values on the assessment roll on which the transfer is based are
277 final. If such values are final after tax notice bills have been
278 sent, the property appraiser shall make appropriate corrections
279 and a corrected tax notice bill shall be sent. Any values that
280 are under administrative or judicial review shall be noticed to
281 the tribunal or court for accelerated hearing and resolution so
282 that the intent of this subsection may be carried out.
283 6. If the property appraiser in the county where the
284 previous homestead was located has not provided information
285 sufficient to identify the previous homestead and the assessment
286 limitation difference is transferable, the taxpayer may file an
287 action in circuit court in that county seeking to establish that
288 the property appraiser must provide such information.
289 7. If the information from the property appraiser in the
290 county where the previous homestead was located is provided
291 after the procedures in this section are exercised, the property
292 appraiser in the county where the new homestead is located shall
293 make appropriate corrections and a corrected tax notice and tax
294 bill shall be sent.
295 8. This subsection does not authorize the consideration or
296 adjustment of the just, assessed, or taxable value of the
297 previous homestead property.
298 9. The property appraiser in the county where the new
299 homestead is located shall promptly notify a taxpayer if the
300 information received, or available, is insufficient to identify
301 the previous homestead and the amount of the assessment
302 limitation difference which is transferable. Such notification
303 shall be sent on or before July 1 as specified in s. 196.151.

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304 10. The taxpayer may correspond with the property appraiser
305 in the county where the previous homestead was located to
306 further seek to identify the homestead and the amount of the
307 assessment limitation difference which is transferable.
308 11. If the property appraiser in the county where the
309 previous homestead was located supplies sufficient information
310 to the property appraiser in the county where the new homestead
311 is located, such information shall be considered timely if
312 provided in time for inclusion on the notice of proposed
313 property taxes sent pursuant to ss. 194.011 and 200.065(1).
314 12. If the property appraiser has not received information
315 sufficient to identify the previous homestead and the amount of
316 the assessment limitation difference which is transferable
317 before mailing the notice of proposed property taxes, the
318 taxpayer may file a petition with the value adjustment board in
319 the county where the new homestead is located.
320 (i) Any person who is qualified to have his or her property
321 assessed under this subsection and who fails to file an
322 application by March 1 may file an application for assessment
323 under this subsection and may, pursuant to s. 194.011(3), file a
324 petition with the value adjustment board requesting that an
325 assessment under this subsection be granted. Such petition may
326 be filed at any time during the taxable year on or before the
327 25th day following the mailing of the notice by the property
328 appraiser as provided in s. 194.011(1). Notwithstanding s.
329 194.013, such person must pay a nonrefundable fee of $15 upon
330 filing the petition. Upon reviewing the petition, if the person
331 is qualified to receive the assessment under this subsection and
332 demonstrates particular extenuating circumstances judged by the

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333 property appraiser or the value adjustment board to warrant
334 granting the assessment, the property appraiser or the value
335 adjustment board may grant an assessment under this subsection.
336 For the 2008 assessments, all petitioners for assessment under
337 this subsection shall be considered to have demonstrated
338 particular extenuating circumstances.
339 (j) Any person who is qualified to have his or her property
340 assessed under this subsection and who fails to timely file an
341 application for his or her new homestead in the first year
342 following eligibility may file in a subsequent year. The
343 assessment reduction shall be applied to assessed value in the
344 year the transfer is first approved, and refunds of tax may not
345 be made for previous years.
346 (k) The property appraisers of the state shall, as soon as
347 practicable after March 1 of each year and on or before July 1
348 of that year, carefully consider all applications for assessment
349 under this subsection which have been filed in their respective
350 offices on or before March 1 of that year. If, upon
351 investigation, the property appraiser finds that the applicant
352 is entitled to assessment under this subsection, the property
353 appraiser shall make such entries upon the tax rolls of the
354 county as are necessary to allow the assessment. If, after due
355 consideration, the property appraiser finds that the applicant
356 is not entitled under the law to assessment under this
357 subsection, the property appraiser shall immediately make out a
358 notice of such disapproval, giving his or her reasons therefor,
359 and a copy of the notice must be served upon the applicant by
360 the property appraiser either by personal delivery or by
361 registered mail to the post office address given by the

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362 applicant. The applicant may appeal the decision of the property
363 appraiser refusing to allow the assessment under this subsection
364 to the value adjustment board, and the board shall review the
365 application and evidence presented to the property appraiser
366 upon which the applicant based the claim and shall hear the
367 applicant in person or by agent on behalf of his or her right to
368 such assessment. Such appeal shall be heard by an attorney
369 special magistrate if the value adjustment board uses special
370 magistrates. The value adjustment board shall reverse the
371 decision of the property appraiser in the cause and grant
372 assessment under this subsection to the applicant if, in its
373 judgment, the applicant is entitled to be granted the assessment
374 or shall affirm the decision of the property appraiser. The
375 action of the board is final in the cause unless the applicant,
376 within 15 days following the date of refusal of the application
377 by the board, files in the circuit court of the county in which
378 the homestead is located a proceeding against the property
379 appraiser for a declaratory judgment as is provided by chapter
380 86 or other appropriate proceeding. The failure of the taxpayer
381 to appear before the property appraiser or value adjustment
382 board or to file any paper other than the application as
383 provided in this subsection does not constitute any bar to or
384 defense in the proceedings.
385 (9) Erroneous assessments of homestead property assessed
386 under this section may be corrected in the following manner:
387 (a) If errors are made in arriving at any assessment under
388 this section due to a material mistake of fact concerning an
389 essential characteristic of the property, the just value and
390 assessed value must be recalculated for every such year,

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391 including the year in which the mistake occurred.
392 (b) If changes, additions, or improvements are not assessed
393 at just value as of the first January 1 after they were
394 substantially completed, the property appraiser shall determine
395 the just value for such changes, additions, or improvements for
396 the year they were substantially completed. Assessments for
397 subsequent years shall be corrected, applying this section if
398 applicable.
399 (c) If back taxes are due pursuant to s. 193.092, the
400 corrections made pursuant to this subsection shall be used to
401 calculate such back taxes.
402 (10) If the property appraiser determines that for any year
403 or years within the prior 10 years a person who was not entitled
404 to the homestead property assessment limitation granted under
405 this section was granted the homestead property assessment
406 limitation, the property appraiser making such determination
407 shall record in the public records of the county a notice of tax
408 lien against any property owned by that person in the county,
409 and such property must be identified in the notice of tax lien.
410 Such property that is situated in this state is subject to the
411 unpaid taxes, plus a penalty of 50 percent of the unpaid taxes
412 for each year and 15 percent interest per annum. However, when a
413 person entitled to exemption pursuant to s. 196.031
414 inadvertently receives the limitation pursuant to this section
415 following a change of ownership, the assessment of such property
416 must be corrected as provided in paragraph (9)(a), and the
417 person need not pay the unpaid taxes, penalties, or interest.
418 Section 2. If House Joint Resolution 381 or Senate Joint
419 Resolution 658, 2011 Regular Session, is approved by a vote of

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420 the electors in a special election held concurrent with the
421 presidential preference primary in 2012, of section 193.155,
422 Florida Statutes, is amended to read:
423 193.155 Homestead assessments.~~ Homestead property shall be~~
424 ~~assessed at just value as of January 1, 1994.~~ Property receiving
425 the homestead exemption ~~after January 1, 1994,~~ shall be assessed
426 at just value as of January 1 of the year in which the property
427 receives the exemption unless the provisions of subsection (8)
428 apply.
429 (1) Beginning in ~~1995, or~~ the year following the year the
430 property receives a homestead exemption~~, whichever is later~~, the
431 property shall be reassessed annually on January 1. Except for
432 changes, additions, reductions, or improvements to homestead
433 property assessed as provided in subsection (4):
434 (a) Any change resulting from such reassessment shall not
435 exceed the lower of the following:
436 1.~~(a)~~ Three percent of the assessed value of the property
437 for the prior year; or
438 2.~~(b)~~ The percentage change in the Consumer Price Index for
439 All Urban Consumers, U.S. City Average, all items 1967=100, or
440 successor reports for the preceding calendar year as initially
441 reported by the United States Department of Labor, Bureau of
442 Labor Statistics.
443 (b) The Legislature may provide by general law that an
444 assessment may not increase if the just value of the property is
445 less than the just value of the property on the preceding
446 January 1.
447 (2) If the assessed value of the property as calculated
448 under subsection (1) exceeds the just value, the assessed value

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449 of the property shall be lowered to the just value of the
450 property.
451 (3)(a) Except as provided in this subsection or subsection
452 (8), property assessed under this section shall be assessed at
453 just value as of January 1 of the year following a change of
454 ownership. Thereafter, the annual changes in the assessed value
455 of the property are subject to the limitations in subsections
456 (1) and (2). For the purpose of this section, a change of
457 ownership means any sale, foreclosure, or transfer of legal
458 title or beneficial title in equity to any person, except as
459 provided in this subsection. There is no change of ownership if:
460 1. Subsequent to the change or transfer, the same person is
461 entitled to the homestead exemption as was previously entitled
462 and:
463 a. The transfer of title is to correct an error;
464 b. The transfer is between legal and equitable title or
465 equitable and equitable title and no additional person applies
466 for a homestead exemption on the property; or
467 c. The change or transfer is by means of an instrument in
468 which the owner is listed as both grantor and grantee of the
469 real property and one or more other individuals are additionally
470 named as grantee. However, if any individual who is additionally
471 named as a grantee applies for a homestead exemption on the
472 property, the application shall be considered a change of
473 ownership;
474 2. Legal or equitable title is changed or transferred
475 between husband and wife, including a change or transfer to a
476 surviving spouse or a transfer due to a dissolution of marriage;
477 3. The transfer occurs by operation of law to the surviving

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478 spouse or minor child or children under s. 732.401; or
479 4. Upon the death of the owner, the transfer is between the
480 owner and another who is a permanent resident and is legally or
481 naturally dependent upon the owner.
482 (b) For purposes of this subsection, a leasehold interest
483 that qualifies for the homestead exemption under s. 196.031 or
484 s. 196.041 shall be treated as an equitable interest in the
485 property.
486 (4)(a) Except as provided in paragraph (b), changes,
487 additions, or improvements to homestead property shall be
488 assessed at just value as of the first January 1 after the
489 changes, additions, or improvements are substantially completed.
490 (b) Changes, additions, or improvements that replace all or
491 a portion of homestead property damaged or destroyed by
492 misfortune or calamity shall not increase the homestead
493 property’s assessed value when the square footage of the
494 homestead property as changed or improved does not exceed 110
495 percent of the square footage of the homestead property before
496 the damage or destruction. Additionally, the homestead
497 property’s assessed value shall not increase if the total square
498 footage of the homestead property as changed or improved does
499 not exceed 1,500 square feet. Changes, additions, or
500 improvements that do not cause the total to exceed 110 percent
501 of the total square footage of the homestead property before the
502 damage or destruction or that do not cause the total to exceed
503 1,500 total square feet shall be reassessed as provided under
504 subsection (1). The homestead property’s assessed value shall be
505 increased by the just value of that portion of the changed or
506 improved homestead property which is in excess of 110 percent of

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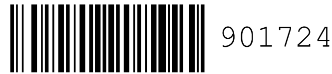
507 the square footage of the homestead property before the damage
508 or destruction or of that portion exceeding 1,500 square feet.
509 Homestead property damaged or destroyed by misfortune or
510 calamity which, after being changed or improved, has a square
511 footage of less than 100 percent of the homestead property's
512 total square footage before the damage or destruction shall be
513 assessed pursuant to subsection (5). This paragraph applies to
514 changes, additions, or improvements commenced within 3 years
515 after the January 1 following the damage or destruction of the
516 homestead.
517 (c) Changes, additions, or improvements that replace all or
518 a portion of real property that was damaged or destroyed by
519 misfortune or calamity shall be assessed upon substantial
520 completion as if such damage or destruction had not occurred and
521 in accordance with paragraph (b) if the owner of such property:
522 1. Was permanently residing on such property when the
523 damage or destruction occurred;
524 2. Was not entitled to receive homestead exemption on such
525 property as of January 1 of that year; and
526 3. Applies for and receives homestead exemption on such
527 property the following year.
528 (d) Changes, additions, or improvements include
529 improvements made to common areas or other improvements made to
530 property other than to the homestead property by the owner or by
531 an owner association, which improvements directly benefit the
532 homestead property. Such changes, additions, or improvements
533 shall be assessed at just value, and the just value shall be
534 apportioned among the parcels benefiting from the improvement.
535 (5) When property is destroyed or removed and not replaced,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536 the assessed value of the parcel shall be reduced by the
537 assessed value attributable to the destroyed or removed
538 property.
539 (6) Only property that receives a homestead exemption is
540 subject to this section. No portion of property that is assessed
541 solely on the basis of character or use pursuant to s. 193.461
542 or s. 193.501, or assessed pursuant to s. 193.505, is subject to
543 this section. When property is assessed under s. 193.461, s.
544 193.501, or s. 193.505 and contains a residence under the same
545 ownership, the portion of the property consisting of the
546 residence and curtilage must be assessed separately, pursuant to
547 s. 193.011, for the assessment to be subject to the limitation
548 in this section.
549 (7) If a person received a homestead exemption limited to
550 that person’s proportionate interest in real property, the
551 provisions of this section apply only to that interest.
552 (8) Property assessed under this section shall be assessed
553 at less than just value when the person who establishes a new
554 homestead has received a homestead exemption as of January 1 of
555 either of the 2 immediately preceding years. ~~A person who~~
556 ~~establishes a new homestead as of January 1, 2008, is entitled~~
557 ~~to have the new homestead assessed at less than just value only~~
558 ~~if that person received a homestead exemption on January 1,~~
559 ~~2007, and only if this subsection applies retroactive to January~~
560 ~~1, 2008.~~ For purposes of this subsection, a husband and wife who
561 owned and both permanently resided on a previous homestead shall
562 each be considered to have received the homestead exemption even
563 though only the husband or the wife applied for the homestead
564 exemption on the previous homestead. The assessed value of the

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565 newly established homestead shall be determined as provided in
566 this subsection.
567 (a) If the just value of the new homestead as of January 1
568 is greater than or equal to the just value of the immediate
569 prior homestead as of January 1 of the year in which the
570 immediate prior homestead was abandoned, the assessed value of
571 the new homestead shall be the just value of the new homestead
572 minus an amount equal to the lesser of $500,000 or the
573 difference between the just value and the assessed value of the
574 immediate prior homestead as of January 1 of the year in which
575 the prior homestead was abandoned. Thereafter, the homestead
576 shall be assessed as provided in this section.
577 (b) If the just value of the new homestead as of January 1
578 is less than the just value of the immediate prior homestead as
579 of January 1 of the year in which the immediate prior homestead
580 was abandoned, the assessed value of the new homestead shall be
581 equal to the just value of the new homestead divided by the just
582 value of the immediate prior homestead and multiplied by the
583 assessed value of the immediate prior homestead. However, if the
584 difference between the just value of the new homestead and the
585 assessed value of the new homestead calculated pursuant to this
586 paragraph is greater than $500,000, the assessed value of the
587 new homestead shall be increased so that the difference between
588 the just value and the assessed value equals $500,000.
589 Thereafter, the homestead shall be assessed as provided in this
590 section.
591 (c) If two or more persons who have each received a
592 homestead exemption as of January 1 of either of the 2
593 immediately preceding years and who would otherwise be eligible

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594 to have a new homestead property assessed under this subsection
595 establish a single new homestead, the reduction from just value
596 is limited to the higher of the difference between the just
597 value and the assessed value of either of the prior eligible
598 homesteads as of January 1 of the year in which either of the
599 eligible prior homesteads was abandoned, but may not exceed
600 $500,000.
601 (d) If two or more persons abandon jointly owned and
602 jointly titled property that received a homestead exemption as
603 of January 1 of either of the 2 immediately preceding years, and
604 one or more such persons who were entitled to and received a
605 homestead exemption on the abandoned property establish a new
606 homestead that would otherwise be eligible for assessment under
607 this subsection, each such person establishing a new homestead
608 is entitled to a reduction from just value for the new homestead
609 equal to the just value of the prior homestead minus the
610 assessed value of the prior homestead divided by the number of
611 owners of the prior homestead who received a homestead
612 exemption, unless the title of the property contains specific
613 ownership shares, in which case the share of reduction from just
614 value shall be proportionate to the ownership share. In
615 calculating the assessment reduction to be transferred from a
616 prior homestead that has an assessment reduction for living
617 quarters of parents or grandparents pursuant to s. 193.703, the
618 value calculated pursuant to s. 193.703(6) must first be added
619 back to the assessed value of the prior homestead. The total
620 reduction from just value for all new homesteads established
621 under this paragraph may not exceed $500,000. There shall be no
622 reduction from just value of any new homestead unless the prior

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623 homestead is reassessed at just value or is reassessed under
624 this subsection as of January 1 after the abandonment occurs.
625 (e) If one or more persons who previously owned a single
626 homestead and each received the homestead exemption qualify for
627 a new homestead where all persons who qualify for homestead
628 exemption in the new homestead also qualified for homestead
629 exemption in the previous homestead without an additional person
630 qualifying for homestead exemption in the new homestead, the
631 reduction in just value shall be calculated pursuant to
632 paragraph (a) or paragraph (b), without application of paragraph
633 (c) or paragraph (d).
634 (f) For purposes of receiving an assessment reduction
635 pursuant to this subsection, a person entitled to assessment
636 under this section may abandon his or her homestead even though
637 it remains his or her primary residence by notifying the
638 property appraiser of the county where the homestead is located.
639 This notification must be in writing and delivered at the same
640 time as or before timely filing a new application for homestead
641 exemption on the property.
642 (g) In order to have his or her homestead property assessed
643 under this subsection, a person must file a form provided by the
644 department as an attachment to the application for homestead
645 exemption. The form, which must include a sworn statement
646 attesting to the applicant's entitlement to assessment under
647 this subsection, shall be considered sufficient documentation
648 for applying for assessment under this subsection. The
649 department shall require by rule that the required form be
650 submitted with the application for homestead exemption under the
651 timeframes and processes set forth in chapter 196 to the extent

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652 practicable.
653 (h)1. If the previous homestead was located in a different
654 county than the new homestead, the property appraiser in the
655 county where the new homestead is located must transmit a copy
656 of the completed form together with a completed application for
657 homestead exemption to the property appraiser in the county
658 where the previous homestead was located. If the previous
659 homesteads of applicants for transfer were in more than one
660 county, each applicant from a different county must submit a
661 separate form.
662 2. The property appraiser in the county where the previous
663 homestead was located must return information to the property
664 appraiser in the county where the new homestead is located by
665 April 1 or within 2 weeks after receipt of the completed
666 application from that property appraiser, whichever is later. As
667 part of the information returned, the property appraiser in the
668 county where the previous homestead was located must provide
669 sufficient information concerning the previous homestead to
670 allow the property appraiser in the county where the new
671 homestead is located to calculate the amount of the assessment
672 limitation difference which may be transferred and must certify
673 whether the previous homestead was abandoned and has been or
674 will be reassessed at just value or reassessed according to the
675 provisions of this subsection as of the January 1 following its
676 abandonment.
677 3. Based on the information provided on the form from the
678 property appraiser in the county where the previous homestead
679 was located, the property appraiser in the county where the new
680 homestead is located shall calculate the amount of the

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681 assessment limitation difference which may be transferred and
682 apply the difference to the January 1 assessment of the new
683 homestead.
684 4. All property appraisers having information-sharing
685 agreements with the department are authorized to share
686 confidential tax information with each other pursuant to s.
687 195.084, including social security numbers and linked
688 information on the forms provided pursuant to this section.
689 5. The transfer of any limitation is not final until any
690 values on the assessment roll on which the transfer is based are
691 final. If such values are final after tax notice bills have been
692 sent, the property appraiser shall make appropriate corrections
693 and a corrected tax notice bill shall be sent. Any values that
694 are under administrative or judicial review shall be noticed to
695 the tribunal or court for accelerated hearing and resolution so
696 that the intent of this subsection may be carried out.
697 6. If the property appraiser in the county where the
698 previous homestead was located has not provided information
699 sufficient to identify the previous homestead and the assessment
700 limitation difference is transferable, the taxpayer may file an
701 action in circuit court in that county seeking to establish that
702 the property appraiser must provide such information.
703 7. If the information from the property appraiser in the
704 county where the previous homestead was located is provided
705 after the procedures in this section are exercised, the property
706 appraiser in the county where the new homestead is located shall
707 make appropriate corrections and a corrected tax notice and tax
708 bill shall be sent.
709 8. This subsection does not authorize the consideration or

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710 adjustment of the just, assessed, or taxable value of the
711 previous homestead property.
712 9. The property appraiser in the county where the new
713 homestead is located shall promptly notify a taxpayer if the
714 information received, or available, is insufficient to identify
715 the previous homestead and the amount of the assessment
716 limitation difference which is transferable. Such notification
717 shall be sent on or before July 1 as specified in s. 196.151.
718 10. The taxpayer may correspond with the property appraiser
719 in the county where the previous homestead was located to
720 further seek to identify the homestead and the amount of the
721 assessment limitation difference which is transferable.
722 11. If the property appraiser in the county where the
723 previous homestead was located supplies sufficient information
724 to the property appraiser in the county where the new homestead
725 is located, such information shall be considered timely if
726 provided in time for inclusion on the notice of proposed
727 property taxes sent pursuant to ss. 194.011 and 200.065(1).
728 12. If the property appraiser has not received information
729 sufficient to identify the previous homestead and the amount of
730 the assessment limitation difference which is transferable
731 before mailing the notice of proposed property taxes, the
732 taxpayer may file a petition with the value adjustment board in
733 the county where the new homestead is located.
734 (i) Any person who is qualified to have his or her property
735 assessed under this subsection and who fails to file an
736 application by March 1 may file an application for assessment
737 under this subsection and may, pursuant to s. 194.011(3), file a
738 petition with the value adjustment board requesting that an

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739 assessment under this subsection be granted. Such petition may
740 be filed at any time during the taxable year on or before the
741 25th day following the mailing of the notice by the property
742 appraiser as provided in s. 194.011(1). Notwithstanding s.
743 194.013, such person must pay a nonrefundable fee of $15 upon
744 filing the petition. Upon reviewing the petition, if the person
745 is qualified to receive the assessment under this subsection and
746 demonstrates particular extenuating circumstances judged by the
747 property appraiser or the value adjustment board to warrant
748 granting the assessment, the property appraiser or the value
749 adjustment board may grant an assessment under this subsection.
750 For the 2008 assessments, all petitioners for assessment under
751 this subsection shall be considered to have demonstrated
752 particular extenuating circumstances.
753 (j) Any person who is qualified to have his or her property
754 assessed under this subsection and who fails to timely file an
755 application for his or her new homestead in the first year
756 following eligibility may file in a subsequent year. The
757 assessment reduction shall be applied to assessed value in the
758 year the transfer is first approved, and refunds of tax may not
759 be made for previous years.
760 (k) The property appraisers of the state shall, as soon as
761 practicable after March 1 of each year and on or before July 1
762 of that year, carefully consider all applications for assessment
763 under this subsection which have been filed in their respective
764 offices on or before March 1 of that year. If, upon
765 investigation, the property appraiser finds that the applicant
766 is entitled to assessment under this subsection, the property
767 appraiser shall make such entries upon the tax rolls of the

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768 county as are necessary to allow the assessment. If, after due
769 consideration, the property appraiser finds that the applicant
770 is not entitled under the law to assessment under this
771 subsection, the property appraiser shall immediately make out a
772 notice of such disapproval, giving his or her reasons therefor,
773 and a copy of the notice must be served upon the applicant by
774 the property appraiser either by personal delivery or by
775 registered mail to the post office address given by the
776 applicant. The applicant may appeal the decision of the property
777 appraiser refusing to allow the assessment under this subsection
778 to the value adjustment board, and the board shall review the
779 application and evidence presented to the property appraiser
780 upon which the applicant based the claim and shall hear the
781 applicant in person or by agent on behalf of his or her right to
782 such assessment. Such appeal shall be heard by an attorney
783 special magistrate if the value adjustment board uses special
784 magistrates. The value adjustment board shall reverse the
785 decision of the property appraiser in the cause and grant
786 assessment under this subsection to the applicant if, in its
787 judgment, the applicant is entitled to be granted the assessment
788 or shall affirm the decision of the property appraiser. The
789 action of the board is final in the cause unless the applicant,
790 within 15 days following the date of refusal of the application
791 by the board, files in the circuit court of the county in which
792 the homestead is located a proceeding against the property
793 appraiser for a declaratory judgment as is provided by chapter
794 86 or other appropriate proceeding. The failure of the taxpayer
795 to appear before the property appraiser or value adjustment
796 board or to file any paper other than the application as

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797 provided in this subsection does not constitute any bar to or
798 defense in the proceedings.
799 (9) Erroneous assessments of homestead property assessed
800 under this section may be corrected in the following manner:
801 (a) If errors are made in arriving at any assessment under
802 this section due to a material mistake of fact concerning an
803 essential characteristic of the property, the just value and
804 assessed value must be recalculated for every such year,
805 including the year in which the mistake occurred.
806 (b) If changes, additions, or improvements are not assessed
807 at just value as of the first January 1 after they were
808 substantially completed, the property appraiser shall determine
809 the just value for such changes, additions, or improvements for
810 the year they were substantially completed. Assessments for
811 subsequent years shall be corrected, applying this section if
812 applicable.
813 (c) If back taxes are due pursuant to s. 193.092, the
814 corrections made pursuant to this subsection shall be used to
815 calculate such back taxes.
816 (10) If the property appraiser determines that for any year
817 or years within the prior 10 years a person who was not entitled
818 to the homestead property assessment limitation granted under
819 this section was granted the homestead property assessment
820 limitation, the property appraiser making such determination
821 shall record in the public records of the county a notice of tax
822 lien against any property owned by that person in the county,
823 and such property must be identified in the notice of tax lien.
824 Such property that is situated in this state is subject to the
825 unpaid taxes, plus a penalty of 50 percent of the unpaid taxes

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826 for each year and 15 percent interest per annum. However, when a
827 person entitled to exemption pursuant to s. 196.031
828 inadvertently receives the limitation pursuant to this section
829 following a change of ownership, the assessment of such property
830 must be corrected as provided in paragraph (9)(a), and the
831 person need not pay the unpaid taxes, penalties, or interest.
832 Section 3. If House Joint Resolution 381 or Senate Joint
833 Resolution 658, 2011 Regular Session, is approved by a vote of
834 the electors in the general election held in November 2012,
835 subsection (3) of section 193.1554, Florida Statutes, is amended
836 to read:
837 193.1554 Assessment of nonhomestead residential property.—
838 (3) Beginning in 2013 ~~2009~~, or the year following the year
839 the property is placed on the tax roll, whichever is later, the
840 property shall be reassessed annually on January 1. Except for
841 changes, additions, reductions, or improvements to nonhomestead
842 property assessed as provided in subsection (6):
843 (a) Any change resulting from such reassessment may not
844 exceed 3 ~~10~~ percent of the assessed value of the property for
845 the prior year.
846 (b) The Legislature may provide by general law that an
847 assessment may not increase if the just value of the property is
848 less than the just value of the property on the preceding
849 January 1.
850 Section 4. If House Joint Resolution 381 or Senate Joint
851 Resolution 658, 2011 Regular Session, is approved by a vote of
852 the electors in a special election held concurrent with the
853 presidential preference primary in 2012, subsection (3) of
854 section 193.1554, Florida Statutes, is amended to read:

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855 193.1554 Assessment of nonhomestead residential property.—
856 (3) Beginning in 2012 ~~2009~~, or the year following the year
857 the property is placed on the tax roll, whichever is later, the
858 property shall be reassessed annually on January 1. Except for
859 changes, additions, reductions, or improvements to nonhomestead
860 property assessed as provided in subsection (6):
861 (a) Any change resulting from such reassessment may not
862 exceed 3 ~~10~~ percent of the assessed value of the property for
863 the prior year.
864 (b) The Legislature may provide by general law that an
865 assessment may not increase if the just value of the property is
866 less than the just value of the property on the preceding
867 January 1.
868 Section 5. If House Joint Resolution 381 or Senate Joint
869 Resolution 658, 2011 Regular Session, is approved by a vote of
870 the electors in the general election held in November 2012,
871 subsection (3) of section 193.1555, Florida Statutes, is amended
872 to read:
873 193.1555 Assessment of certain residential and
874 nonresidential real property.—
875 (3) Beginning in 2013 ~~2009~~, or the year following the year
876 the property is placed on the tax roll, whichever is later, the
877 property shall be reassessed annually on January 1. Except for
878 changes, additions, reductions, or improvements to nonhomestead
879 property assessed as provided in subsection (6):
880 (a) Any change resulting from such reassessment may not
881 exceed 3 ~~10~~ percent of the assessed value of the property for
882 the prior year.
883 (b) The Legislature may provide by general law that an

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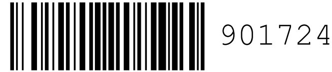
884 assessment may not increase if the just value of the property is
885 less than the just value of the property on the preceding
886 January 1.
887 Section 6. If House Joint Resolution 381 or Senate Joint
888 Resolution 658, 2011 Regular Session, is approved by a vote of
889 the electors in a special election held concurrent with the
890 presidential preference primary in 2012, subsection (3) of
891 section 193.1555, Florida Statutes, is amended to read:
892 193.1555 Assessment of certain residential and
893 nonresidential real property.—
894 (3) Beginning in 2012 ~~2009~~, or the year following the year
895 the property is placed on the tax roll, whichever is later, the
896 property shall be reassessed annually on January 1. Except for
897 changes, additions, reductions, or improvements to nonhomestead
898 property assessed as provided in subsection (6):
899 (a) Any change resulting from such reassessment may not
900 exceed 3 ~~10~~ percent of the assessed value of the property for
901 the prior year.
902 (b) The Legislature may provide by general law that an
903 assessment may not increase if the just value of the property is
904 less than the just value of the property on the preceding
905 January 1.
906 Section 7. If House Joint Resolution 381 or Senate Joint
907 Resolution 658, 2011 Regular Session, is approved by a vote of
908 the electors in the general election held in November 2012,
909 section 196.078, Florida Statutes, is created to read:
910 196.078 Additional homestead exemption for a first-time
911 Florida homesteader.—
912 (1) As used in this section, the term "first-time Florida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913 homesteader” means a person who establishes the right to receive
914 the homestead exemption provided in s. 196.031 within 1 year
915 after purchasing the homestead property and who has not owned
916 property in the previous 3 years to which the homestead
917 exemption provided in s. 196.031(1)(a) applied.
918 (2) Every first-time Florida homesteader is entitled to an
919 additional homestead exemption in an amount equal to 50 percent
920 of the homestead property’s just value on January 1 of the year
921 the homestead is established for all levies other than school
922 district levies. The additional exemption applies for a period
923 of 5 years or until the year the property is sold, whichever
924 occurs first. The amount of the additional exemption may not
925 exceed $200,000 and shall be reduced in each subsequent year by
926 an amount equal to 20 percent of the amount of the additional
927 exemption received in the year the homestead was established or
928 by an amount equal to the difference between the just value of
929 the property and the assessed value of the property determined
930 under s. 193.155, whichever is greater. Not more than one
931 exemption provided under this subsection is allowed per
932 homestead property. The additional exemption applies to property
933 purchased on or after January 1, 2012, but is not available in
934 the sixth and subsequent years after the additional exemption is
935 first received.
936 (3) The property appraiser shall require a first-time
937 Florida homesteader claiming an exemption under this section to
938 submit, not later than March 1 on a form prescribed by the
939 Department of Revenue, a sworn statement attesting that the
940 taxpayer, and each other person who holds legal or equitable
941 title to the property, has not owned property in the prior 3

901724

942 years that received the homestead exemption provided by s.
943 196.031. In order for the exemption to be retained upon the
944 addition of another person to the title to the property, the
945 person added must also submit, not later than the subsequent
946 March 1 on a form prescribed by the department, a sworn
947 statement attesting that he or she has not owned property in the
948 prior 3 years that received the homestead exemption provided by
949 s. 196.031.
950 (4) Sections 196.131 and 196.161 apply to the exemption
951 provided in this section.
952 Section 8. If House Joint Resolution 381 or Senate Joint
953 Resolution 658, 2011 Regular Session, is approved by a vote of
954 the electors in a special election held concurrent with the
955 presidential preference primary in 2012, section 196.078,
956 Florida Statutes, is created to read:
957 196.078 Additional homestead exemption for a first-time
958 Florida homesteader.—
959 (1) As used in this section, the term "first-time Florida
960 homesteader" means a person who establishes the right to receive
961 the homestead exemption provided in s. 196.031 within 1 year
962 after purchasing the homestead property and who has not owned
963 property in the previous 3 years to which the homestead
964 exemption provided in s. 196.031(1)(a) applied.
965 (2) Every first-time Florida homesteader is entitled to an
966 additional homestead exemption in an amount equal to 50 percent
967 of the homestead property's just value on January 1 of the year
968 the homestead is established for all levies other than school
969 district levies. The additional exemption applies for a period
970 of 5 years or until the year the property is sold, whichever

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971 occurs first. The amount of the additional exemption may not
972 exceed $200,000 and shall be reduced in each subsequent year by
973 an amount equal to 20 percent of the amount of the additional
974 exemption received in the year the homestead was established or
975 by an amount equal to the difference between the just value of
976 the property and the assessed value of the property determined
977 under s. 193.155, whichever is greater. Not more than one
978 exemption provided under this subsection is allowed per
979 homestead property. The additional exemption applies to property
980 purchased on or after January 1, 2011, but is not available in
981 the sixth and subsequent years after the additional exemption is
982 first received.
983 (3) The property appraiser shall require a first-time
984 Florida homesteader claiming an exemption under this section to
985 submit, not later than March 1 on a form prescribed by the
986 Department of Revenue, a sworn statement attesting that the
987 taxpayer, and each other person who holds legal or equitable
988 title to the property, has not owned property in the prior 3
989 years that received the homestead exemption provided by s.
990 196.031. In order for the exemption to be retained upon the
991 addition of another person to the title to the property, the
992 person added must also submit, not later than the subsequent
993 March 1 on a form prescribed by the department, a sworn
994 statement attesting that he or she has not owned property in the
995 prior 3 years that received the homestead exemption provided by
996 s. 196.031.
997 (4) Sections 196.131 and 196.161 apply to the exemption
998 provided in this section.
999 Section 9. (1) In anticipation of implementing this act,

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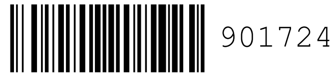
1000 the executive director of the Department of Revenue is
1001 authorized, and all conditions are deemed met, to adopt
1002 emergency rules under ss. 120.536(1) and 120.54(4), Florida
1003 Statutes, to make necessary changes and preparations so that
1004 forms, methods, and data records, electronic or otherwise, are
1005 ready and in place if sections 2, 4, 6, and 8 or sections 1, 3,
1006 5, and 7 of this act become law.
1007 (2) Notwithstanding any other provision of law, such
1008 emergency rules shall remain in effect for 18 months after the
1009 date of adoption and may be renewed during the pendency of
1010 procedures to adopt rules addressing the subject of the
1011 emergency rules.
1012 Section 10. This act shall take effect upon becoming a law,
1013 except that the sections of this act that take effect upon the
1014 approval of House Joint Resolution 381 or Senate Joint
1015 Resolution 658, 2011 Regular Session, by a vote of the electors
1016 in a special election held concurrent with the presidential
1017 preference primary in 2012 shall apply retroactively to the 2012
1018 tax roll if the revision of the State Constitution contained in
1019 House Joint Resolution 381 or Senate Joint Resolution 658, 2011
1020 Regular Session, is approved by a vote of the electors in a
1021 special election held concurrent with the presidential
1022 preference primary in 2012; or the sections of this act that
1023 take effect upon the approval of House Joint Resolution 381 or
1024 Senate Joint Resolution 658, 2011 Regular Session, by a vote of
1025 the electors in the general election held in November 2012 shall
1026 apply to the 2013 tax roll if the revision of the State
1027 Constitution contained in House Joint Resolution 381 or Senate
1028 Joint Resolution 658, 2011 Regular Session, is approved by a


901724

1029 vote of the electors in the general election held in November
1030 2012.
1031
1032 ================= T I T L E A M E N D M E N T ================
1033 And the title is amended as follows:
1034
1035 Delete everything before the enacting clause
1036 and insert:
1037 A bill to be entitled
1038 An act relating to ad valorem taxation; amending s.
1039 193.155, F.S.; revising provisions relating to annual
1040 reassessment of property; providing that an assessment
1041 may not increase if the just value of the property is
1042 less than the just value of the property on the
1043 preceding January 1; deleting an obsolete provision;
1044 amending s. 193.1554, F.S.; providing exceptions to
1045 reducing the amount that any change in the value of
1046 nonhomestead residential property resulting from an
1047 annual reassessment may exceed the assessed value of
1048 the property for the prior year; providing exceptions;
1049 providing that an assessment may not increase if the
1050 just value of the property is less than the just value
1051 of the property on the preceding date of assessment
1052 provided by law; amending s. 193.1555, F.S.; reducing
1053 the amount that any change in the value of certain
1054 residential and nonresidential real property resulting
1055 from an annual reassessment may exceed the assessed
1056 value of the property for the prior year; providing
1057 exceptions; providing that an assessment may not

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1058 increase if the just value of the property is less
1059 than the just value of the property on the preceding
1060 date of assessment provided by law; creating s.
1061 196.078, F.S.; providing a definition; providing a
1062 first-time Florida homesteader with an additional
1063 homestead exemption; providing for calculation of the
1064 exemption; providing for the applicability period of
1065 the exemption; providing for an annual reduction in
1066 the exemption during the applicability period;
1067 providing application procedures; providing for
1068 applicability of specified provisions; providing for
1069 contingent effect of provisions and varying dates of
1070 application depending on the adoption and adoption
1071 date of specified joint resolutions; authorizing the
1072 Department of Revenue to adopt emergency rules;
1073 providing for application and renewal of emergency
1074 rules; providing for certain contingent effect and
1075 retroactive application; providing an effective date.

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LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Joyner) recommended the following:

1 **Senate Substitute for Amendment (901724) (with title**
2 **amendment)**
3
4 Delete everything after the enacting clause
5 and insert:
6 Section 1. If House Joint Resolution 381 or Senate Joint
7 Resolution 658, 2011 Regular Session, is approved by a vote of
8 the electors in the general election held in November 2012,
9 subsection (3) of section 193.1554, Florida Statutes, is amended
10 to read:
11 193.1554 Assessment of nonhomestead residential property.—
12 (3) Beginning in 2013 ~~2009~~, or the year following the year
13 the property is placed on the tax roll, whichever is later, the

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14 property shall be reassessed annually on January 1. Any change
15 resulting from such reassessment may not exceed 3 ~~10~~ percent of
16 the assessed value of the property for the prior year, except as
17 provided in subsection (6).
18 Section 2. If House Joint Resolution 381 or Senate Joint
19 Resolution 658, 2011 Regular Session, is approved by a vote of
20 the electors in a special election held concurrent with the
21 presidential preference primary in 2012, subsection (3) of
22 section 193.1554, Florida Statutes, is amended to read:
23 193.1554 Assessment of nonhomestead residential property.—
24 (3) Beginning in 2012 ~~2009~~, or the year following the year
25 the property is placed on the tax roll, whichever is later, the
26 property shall be reassessed annually on January 1. Any change
27 resulting from such reassessment may not exceed 3 ~~10~~ percent of
28 the assessed value of the property for the prior year, except as
29 provided in subsection (6).
30 Section 3. If House Joint Resolution 381 or Senate Joint
31 Resolution 658, 2011 Regular Session, is approved by a vote of
32 the electors in the general election held in November 2012,
33 subsection (3) of section 193.1555, Florida Statutes, is amended
34 to read:
35 193.1555 Assessment of certain residential and
36 nonresidential real property.—
37 (3) Beginning in 2013 ~~2009~~, or the year following the year
38 the property is placed on the tax roll, whichever is later, the
39 property shall be reassessed annually on January 1. Any change
40 resulting from such reassessment may not exceed 3 ~~10~~ percent of
41 the assessed value of the property for the prior year, except as
42 provided in subsection (6).

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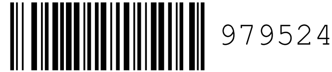
43 Section 4. If House Joint Resolution 381 or Senate Joint
44 Resolution 658, 2011 Regular Session, is approved by a vote of
45 the electors in a special election held concurrent with the
46 presidential preference primary in 2012, subsection (3) of
47 section 193.1555, Florida Statutes, is amended to read:
48 193.1555 Assessment of certain residential and
49 nonresidential real property.—
50 (3) Beginning in 2012 ~~2009~~, or the year following the year
51 the property is placed on the tax roll, whichever is later, the
52 property shall be reassessed annually on January 1. Any change
53 resulting from such reassessment may not exceed 3 ~~10~~ percent of
54 the assessed value of the property for the prior year, except as
55 provided in subsection (6).
56 Section 5. If House Joint Resolution 381 or Senate Joint
57 Resolution 658, 2011 Regular Session, is approved by a vote of
58 the electors in the general election held in November 2012,
59 section 196.078, Florida Statutes, is created to read:
60 196.078 Additional homestead exemption for a first-time
61 Florida homesteader.—
62 (1) As used in this section, the term "first-time Florida
63 homesteader" means a person who establishes the right to receive
64 the homestead exemption provided in s. 196.031 within 1 year
65 after purchasing the homestead property and who has not owned
66 property in the previous 3 years to which the homestead
67 exemption provided in s. 196.031(1)(a) applied.
68 (2) Every first-time Florida homesteader is entitled to an
69 additional homestead exemption in an amount equal to 50 percent
70 of the homestead property's just value on January 1 of the year
71 the homestead is established for all levies other than school


979524

72 district levies. The additional exemption applies for a period
73 of 5 years or until the year the property is sold, whichever
74 occurs first. The amount of the additional exemption may not
75 exceed $200,000 and shall be reduced in each subsequent year by
76 an amount equal to 20 percent of the amount of the additional
77 exemption received in the year the homestead was established or
78 by an amount equal to the difference between the just value of
79 the property and the assessed value of the property determined
80 under s. 193.155, whichever is greater. Only one exemption
81 provided under this subsection is allowed per homestead
82 property. The additional exemption applies to property purchased
83 on or after January 1, 2012, but is not available in the 6th and
84 subsequent years after the additional exemption is first
85 received.
86 (3) The property appraiser shall require a first-time
87 Florida homesteader claiming an exemption under this section to
88 submit by March 1 on a form prescribed by the Department of
89 Revenue a sworn statement attesting that the taxpayer, and each
90 other person who holds legal or equitable title to the property,
91 has not owned property in the prior 3 years which received the
92 homestead exemption provided by s. 196.031. In order for the
93 exemption to be retained upon the addition of another person to
94 the title to the property, the person added must also submit by
95 the subsequent March 1 on a form prescribed by the department a
96 sworn statement attesting that he or she has not owned property
97 in the prior 3 years which received the homestead exemption
98 provided by s. 196.031.
99 (4) Sections 196.131 and 196.161 apply to the exemption
100 provided in this section.

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101 Section 6. If House Joint Resolution 381 or Senate Joint
102 Resolution 658, 2011 Regular Session, is approved by a vote of
103 the electors in a special election held concurrent with the
104 presidential preference primary in 2012, section 196.078,
105 Florida Statutes, is created to read:
106 196.078 Additional homestead exemption for a first-time
107 Florida homesteader.—
108 (1) As used in this section, the term "first-time Florida
109 homesteader" means a person who establishes the right to receive
110 the homestead exemption provided in s. 196.031 within 1 year
111 after purchasing the homestead property and who has not owned
112 property in the previous 3 years to which the homestead
113 exemption provided in s. 196.031(1)(a) applied.
114 (2) Every first-time Florida homesteader is entitled to an
115 additional homestead exemption in an amount equal to 50 percent
116 of the homestead property's just value on January 1 of the year
117 the homestead is established for all levies other than school
118 district levies. The additional exemption applies for a period
119 of 5 years or until the year the property is sold, whichever
120 occurs first. The amount of the additional exemption may not
121 exceed $200,000 and shall be reduced in each subsequent year by
122 an amount equal to 20 percent of the amount of the additional
123 exemption received in the year the homestead was established or
124 by an amount equal to the difference between the just value of
125 the property and the assessed value of the property determined
126 under s. 193.155, whichever is greater. Only one exemption
127 provided under this subsection is allowed per homestead
128 property. The additional exemption applies to property purchased
129 on or after January 1, 2011, but is not available in the 6th and

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130 subsequent years after the additional exemption is first
131 received.
132 (3) The property appraiser shall require a first-time
133 Florida homesteader claiming an exemption under this section to
134 submit by March 1 on a form prescribed by the Department of
135 Revenue a sworn statement attesting that the taxpayer, and each
136 other person who holds legal or equitable title to the property,
137 has not owned property in the prior 3 years which received the
138 homestead exemption provided by s. 196.031. In order for the
139 exemption to be retained upon the addition of another person to
140 the title to the property, the person added must also submit by
141 the subsequent March 1 on a form prescribed by the department a
142 sworn statement attesting that he or she has not owned property
143 in the prior 3 years which received the homestead exemption
144 provided by s. 196.031.
145 (4) Sections 196.131 and 196.161 apply to the exemption
146 provided in this section.
147 Section 7. (1) In anticipation of implementing this act,
148 the executive director of the Department of Revenue is
149 authorized, and all conditions are deemed met, to adopt
150 emergency rules under ss. 120.536(1) and 120.54(4), Florida
151 Statutes, to make necessary changes and preparations so that
152 forms, methods, and data records, electronic or otherwise, are
153 ready and in place if sections 2, 4, and 6, or sections 1, 3,
154 and 5 of this act become law.
155 (2) Notwithstanding any other provision of law, such
156 emergency rules shall remain in effect for 18 months after the
157 date of adoption and may be renewed during the pendency of
158 procedures to adopt rules addressing the subject of the

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159 emergency rules.
160 Section 8. This act shall take effect upon becoming a law,
161 except that the sections of this act which take effect upon the
162 approval of House Joint Resolution 381 or Senate Joint
163 Resolution 658, 2011 Regular Session, by a vote of the electors
164 in a special election held concurrent with the presidential
165 preference primary in 2012 apply retroactively to the 2012 tax
166 roll if the revision of the State Constitution contained in
167 House Joint Resolution 381 or Senate Joint Resolution 658, 2011
168 Regular Session, is approved by a vote of the electors in a
169 special election held concurrent with the presidential
170 preference primary in 2012; or the sections of this act which
171 take effect upon the approval of House Joint Resolution 381 or
172 Senate Joint Resolution 658, 2011 Regular Session, by a vote of
173 the electors in the general election held in November 2012 apply
174 to the 2013 tax roll if the revision of the State Constitution
175 contained in House Joint Resolution 381 or Senate Joint
176 Resolution 658, 2011 Regular Session, is approved by a vote of
177 the electors in the general election held in November 2012.
178
179 ================ T I T L E A M E N D M E N T ================
180 And the title is amended as follows:
181 Delete everything before the enacting clause
182 and insert:
183 A bill to be entitled
184 An act relating to ad valorem taxation; amending ss.
185 193.1554 and 193.1555, F.S.; reducing the amount that
186 any change in the value of certain real property
187 resulting from an annual reassessment may exceed the

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188 assessed value of the property for the prior year
189 under specified circumstances; providing exceptions;
190 creating s. 196.078, F.S.; providing a definition;
191 providing a first-time Florida homesteader with an
192 additional homestead exemption; providing for
193 calculation of the exemption; providing for the
194 applicability period of the exemption; providing for
195 an annual reduction in the exemption during the
196 applicability period; providing application
197 procedures; providing for applicability of specified
198 provisions; providing for contingent effect of
199 provisions and varying dates of application depending
200 on the adoption and adoption date of specified joint
201 resolutions; authorizing the Department of Revenue to
202 adopt emergency rules; providing for application and
203 renewal of emergency rules; providing for certain
204 contingent effect and retroactive application;
205 providing an effective date.

497276

LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Joyner) recommended the following:

1 **Senate Amendment to Substitute Amendment (979524) (with**
2 **title amendment)**
3
4 Between lines 159 and 160
5 insert:
6 Section 8. If House Joint Resolution 381 or Senate Joint
7 Resolution 658, 2011 Regular Session, is approved by a vote of
8 the electors in a special election held concurrent with the
9 presidential preference primary in 2012 or in the general
10 election held in November 2012, section 218.12, Florida
11 Statutes, is amended to read:
12 218.12 Appropriations to offset reductions in ad valorem
13 tax revenue in fiscally constrained counties.—

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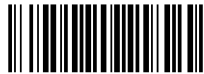
14 (1)(a) Beginning in fiscal year 2008-2009, the Legislature
15 shall appropriate moneys to offset the reductions in ad valorem
16 tax revenue experienced by fiscally constrained counties, as
17 defined in s. 218.67(1), which occur as a direct result of the
18 implementation of revisions of Art. VII of the State
19 Constitution approved in the special election held on January
20 29, 2008. The moneys appropriated for this purpose shall be
21 distributed in January of each fiscal year among the fiscally
22 constrained counties based on each county's proportion of the
23 total reduction in ad valorem tax revenue resulting from the
24 implementation of the revision.
25 (b) ~~(2)~~ On or before November 15 of each year, beginning in
26 2008, each fiscally constrained county shall apply to the
27 Department of Revenue to participate in the distribution of the
28 appropriation and provide documentation supporting the county's
29 estimated reduction in ad valorem tax revenue in the form and
30 manner prescribed by the Department of Revenue. The
31 documentation must include an estimate of the reduction in
32 taxable value directly attributable to revisions of Art. VII of
33 the State Constitution for all county taxing jurisdictions
34 within the county and shall be prepared by the property
35 appraiser in each fiscally constrained county. The documentation
36 must also include the county millage rates applicable in all
37 such jurisdictions for both the current year and the prior year;
38 rolled-back rates, determined as provided in s. 200.065, for
39 each county taxing jurisdiction; and maximum millage rates that
40 could have been levied by majority vote pursuant to s. 200.185.
41 For purposes of this section, each fiscally constrained county's
42 reduction in ad valorem tax revenue shall be calculated as 95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43 percent of the estimated reduction in taxable value times the
44 lesser of the 2007 applicable millage rate or the applicable
45 millage rate for each county taxing jurisdiction in the prior
46 year.
47 (c) ~~(3)~~ In determining the reductions in ad valorem tax
48 revenues occurring as a result of the implementation of the
49 revisions to Art. VII of the State Constitution approved in the
50 special election held on January 29, 2008, the value of
51 assessments reduced pursuant to s. 4(d)(8)a., Art. VII of the
52 State Constitution shall include only the reduction in taxable
53 value for homesteads established January 1 of the year in which
54 the determination is being made.
55 (2)(a) Beginning in the 2012-2013 fiscal year, the
56 Legislature shall appropriate moneys to offset the reductions in
57 ad valorem tax revenue experienced by fiscally constrained
58 counties, as defined in s. 218.67(1), which occur as a direct
59 result of the implementation of the revision of Art. VII of the
60 State Constitution contained in SJR 658 or HJR 381, 2011 Regular
61 Session. The moneys appropriated for this purpose shall be
62 distributed among the fiscally constrained counties based on
63 each county’s proportion of the total reduction in ad valorem
64 tax revenue resulting from the implementation of the revision.
65 (b) On or before February 1 each year, each fiscally
66 constrained county shall apply to the Executive Office of the
67 Governor to participate in the distribution of the appropriation
68 and provide documentation supporting the county’s estimated
69 reduction in ad valorem tax revenue to the Executive Office of
70 the Governor.
71

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72

73 ================= T I T L E A M E N D M E N T ================

74 And the title is amended as follows:

75 Delete line 203

76 and insert:

77 renewal of emergency rules; amending s. 218.12, F.S.;

78 requiring the Legislature to appropriate funds to

79 fiscally constrained counties to offset reductions in

80 ad valorem tax revenue as the result of the

81 implementation of certain proposed revisions to the

82 State Constitution; providing for certain

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 1722

INTRODUCER: Senator Fasano

SUBJECT: Ad Valorem Taxation

DATE: April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gizzi	Yeatman	CA	**Favorable**
2.	Munroe	Maclure	JU	**Pre-meeting**
3.			BC	
4.			RC	
5.				
6.				

I. Summary:

The bill provides statutory implementation of SJR 658 or HJR 381, should either joint resolution be approved by the voters. The bill reduces the limitation on annual assessment increases applicable to non-homestead property and residential and nonresidential property from 10 percent to 3 percent. The bill also provides an additional homestead exemption for specified "first-time Florida homesteaders," as defined herein.

Upon voter approval of HJR 81 or SJR 658, this bill amends sections 193.1554 and 193.1555, Florida Statutes.

Upon voter approval of HJR 381 or SJR 658, this bill creates s. 196.078, Florida Statutes, and an undesignated section of law to provide emergency rulemaking authority to the Department of Revenue.

II. Present Situation:

Property Valuation

A.) Just Value

Article VII, section 4 of the Florida Constitution, requires that all property be assessed at just value for ad valorem tax purposes. Just value has been interpreted by the courts to mean fair

market value, or what a willing buyer would pay a willing seller for the property in an arm's length transaction.[1]

B.) Assessed Value

The Florida Constitution authorizes certain exceptions to the just valuation standard for specific types of property.[2] Agricultural land, land producing high water recharge to Florida's aquifers, and land used exclusively for noncommercial recreational purposes may be assessed solely on the basis of their character or use.[3] Livestock and tangible personal property that is held for sale as stock in trade may be assessed at a specified percentage of its value or totally exempt from taxation.[4] Counties and municipalities may authorize historic properties to be assessed solely on the basis of character and use.[5] Counties may also provide a reduction in the assessed value of property improvements on existing homesteads made to accommodate parents or grandparents that are 62 years of age or older.[6] The Legislature is authorized to prohibit the consideration of improvements to residential real property for purposes of improving the property's wind resistance or the installation of renewable energy source devices in the assessment of the property.[7] Certain working waterfront property is assessed based upon the property's current use.[8]

C.) Additional Assessment Limitations

Sections 4(g) and (h), Article VII, of the Florida Constitution, were created in January 2008, when Florida electors voted to provide an assessment limitation for residential real property containing nine or fewer units, and for all real property not subject to other specified classes or uses. For all levies, with the exception of school levies, the assessed value of property in each of these two categories may not be increased annually by more than 10 percent of the assessment in the prior year. However, residential real property containing nine or fewer units **must** be assessed at just value whenever there is a change in ownership or control. For the other real property subject to the limitation, the Legislature **may** provide that such property shall be assessed at just value after a change of ownership or control.[9]

Article XII, section 27 of the Florida Constitution, provides that the amendments creating a limitation on annual assessment increases in subsections (f) and (g) are repealed effective January 1, 2019, and that the Legislature must propose an amendment abrogating the repeal, which shall be submitted to the voters for approval or rejection on the general election ballot for 2018.

---

[1] *See Walter v. Shuler,* 176 So. 2d 81 (Fla. 1965); *Deltona Corp. v. Bailey*, 336 So. 2d 1163 (Fla. 1976); *Southern Bell Tel. & Tel. Co. v. Dade County,* 275 So. 2d 4 (Fla. 1973).
[2] The constitutional provisions in article VII, section 4 of the Florida Constitution, were implemented in Part II of ch. 193, F.S.
[3] FLA. CONST. art. VII, s. 4(a).
[4] FLA. CONST. art. VII, s. 4(c).
[5] FLA. CONST. art. VII, s. 4(e).
[6] FLA. CONST. art. VII, s. 4(f).
[7] FLA. CONST. art. VII, s. 4(i).
[8] FLA. CONST. art. VII, s. 4(j).
[9] FLA. CONST. art. VII, s. 4(g) and (h).

D.) Taxable Value

The taxable value of real and tangible personal property is the assessed value minus any exemptions provided by the Florida Constitution or by Florida Statutes. Such exemptions include, but are not limited to: homestead exemptions and exemptions for property used for educational, religious, or charitable purposes.[10]

Homestead Exemption

Article VII, section 6 of the Florida Constitution, as amended in January 2008, provides that every person with legal and equitable title to real estate and who maintains the permanent residence of the owner is eligible for a $25,000 homestead tax exemption applicable to all ad valorem tax levies including school districts. An additional $25,000 homestead exemption applies to homesteads that have an assessed value greater than $50,000 and up to $75,000, excluding ad valorem taxes levied by schools.

Additional Homestead Exemption, Amendment 3 Proposed for 2010 Ballot *(2009 SJR 532)*

In 2009, the Legislature passed SJR 532 which was scheduled to go before the voters as Amendment 3 on the November 2010 ballot. The proposed amendment 3 sought to reduce the annual assessment limitation from 10 to five percent annually and to provide an additional homestead exemption for “a person or persons” who have not owned a principal residence in the previous *eight* years that is equal to *25 percent* of the just value of the homestead in the first year for all levies, up to *$100,000*. The amount of the additional homestead exemption decreases by 20 percent of the initial exemption each succeeding five years until it is no longer available in the sixth and subsequent years.[11]

However, in August 2010, the Florida Supreme Court removed Amendment 3 from the 2010 Ballot, on the grounds that the ballot title and summary were misleading and failed to comply with the constitutional accuracy requirement implicitly provided in Article XI, section 5(a) of the Florida Constitution.[12] The Court stated that the accuracy requirement is implicitly indicated in section 5(a) through the statement that the proposed amendment “shall be submitted to the electors at the next general election.” Specifically, the Court stated that:

> Implicit in this provision is the requirement that the proposed amendment be *accurately* represented on the ballot; otherwise, voter approval would be a nullity.[13]

The Court further stated that the accuracy requirement is codified in Florida Statutes in s. 106.161(1), F.S., which in part provides that:

[10] FLA. CONST. art. VII, ss. 3 and 6.
[11] Fla. CS for SJR 532, 1st Eng. (2009) (Senator Lynn and others).
[12] *Roberts v. Doyle*, 43 So. 3d 654 (Fla. 2010).
[13] *Id.* at 657, citing *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000) (further reiterating that the accuracy requirement is codified in s. 106.161(1), F.S. (2009)).

> Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot . . .

In determining whether a ballot title and summary are in compliance with the accuracy requirement, courts utilize a two-prong test, asking "first, whether the ballot title and summary 'fairly inform the voter of the chief purpose of the amendment,' and second, 'whether the language of the title and summary, as written, misleads the public'."[14]

Based on this test, the Florida Supreme Court determined that the ballot title and summary for Amendment 3 were "neither accurate nor informative" and "are confusing to the average voter."[15] The Court supported its holding based on the following:

- Neither the title nor the summary provided notice that the additional exemption is only available for properties purchased on or after January 1, 2010. Stating that the "lack of an effective date renders it impossible for a voter to know which homeowners would qualify for the exemption."[16]
- The term "new homestead owners" in the title coupled with "first-time homestead" in the summary is ambiguous as it conveys the message that to be eligible for the additional exemption, the property owner must have both not owned a principal residence during the preceding eight years *and* have never previously declared the property homestead.[17]
- The use of both the terms "principal residence" and "first-time homestead" in the ballot title and summary is misleading.[18]
- There is a material omission in the ballot title and summary, as they fail to "note that the additional exemption is not available to a person whose spouse has owned a principal residence in the preceding eight years."[19]

2011 Regular Session: Senate Joint Resolution 658 and House Joint Resolution 381

A.) Senate Joint Resolution 658

Senate Joint Resolution (SJR) 658 proposes an amendment to Article VII, section 4 of the Florida Constitution, to prohibit increases in the assessed value of homestead property if the just value of the property decreases, and to reduce the limitation on annual assessment increases applicable to non-homestead property from 10 percent to three percent.[20]

SJR 658 also proposes an amendment to Article VII, section 6 of the Florida Constitution, to create an additional homestead exemption for specified homestead owners. This amendment allows individuals that are entitled to a homestead exemption under s. 6(a), Article VII of the Florida Constitution, that have not previously received a homestead exemption in the past three

[14] *Id.* at 659, citing *Florida Dep't of State v. Slough,* 992 So. 2d 142, 147 (Fla. 2008).
[15] *Id.* at 657 and 660.
[16] *Id.*
[17] *Id.*
[18] *Roberts,* at 657 and 660.
[19] *Id.* at 657 and 661.
[20] *See* CS/SJR 658 (2011 Regular Session).

years[21] to receive an additional homestead exemption equal to 50 percent of the just value of the homestead property up to $200,000 for a period of five years or until the property is sold. The additional exemption is available within one year of purchasing the homestead and would be reduced by 20 percent of the initial exemption on January 1 of each succeeding year, until it is no longer available in the sixth and subsequent years. The exemption does not apply to school levies.[22]

B.) House Joint Resolution 381

HJR 381 makes similar amendments to sections 4 and 6 of Article VII of the Florida Constitution. However, HJR 381 does not amend Article VII, section 4 of the Florida Constitution to prohibit increases in the assessed value of the homestead property if the just value of the property decreases.[23]

SJR 658 and HJR 381 also provide different effective dates:

- The reduction in non-homestead property annual assessment increases from 10 to 3 percent takes effect January 1, <u>2013</u>, in SJR 658, whereas it takes effect January 1, <u>2012</u>, in HJR 381.
- The additional homestead exemption applies to properties purchased on or after January 1, <u>2012</u>, and takes effect January 1, <u>2013</u>, in SJR 658, whereas it applies to properties purchased on or after January 1, <u>2011</u>, and takes effect January 1, <u>2012</u>, in HJR 381.

III. Effect of Proposed Changes:

This bill provides statutory implementation of SJR 658 or HJR 381, should either joint resolution be approved by the voters. The bill provides separate amendments to each statute based upon when the joint resolution is approved by the voters, which may be: during a general election held in November 2012 *or* during a special election held concurrent with the presidential preference primary in 2012.

Assessment of Non-Homestead Residential Property

<u>Section 1</u> Upon voter approval of SJR 658 or HJR 381 during a *general election held in November 2012*, this section amends s. 193.1554, F.S., to reduce the limitation on annual assessment increases applicable to non-homestead residential property from 10 percent to three percent and provides for these provisions to begin in 2013.

<u>Section 2</u> Upon voter approval of SJR 658 or HJR 381 during *a special election held concurrent with the presidential preference primary in 2012*, this section amends s. 193.1554, F.S., to reduce the limitation on annual assessment increases applicable to non-homestead residential property from 10 percent to three percent and provides for these provisions to begin in 2012.

Assessment of Certain Residential and Non-Residential Real Property

<u>Section 3</u> Upon voter approval of SJR 658 or HJR 381 during a *general election held in November 2012*, this section amends s. 193.1555, F.S., to reduce the limitation on annual

[21] SJR 658 specifies "three calendar years," HJR 381 just states "three years."
[22] *Id.*
[23] *See* CS/HJR 381 (2011 Regular Session).

assessment increases applicable to certain residential and nonresidential property from 10 percent to three percent and provides for these provisions to begin in 2013.
Section 4 Upon voter approval of SJR 658 or HJR 381 during a *special election held concurrent with the presidential preference primary in 2012,* this section amends s. 193.1555, F.S., to reduce the limitation on annual assessment increases applicable to certain residential and nonresidential property from 10 percent to three percent and provides for these provisions to begin in 2012.

Additional Homestead Exemption for Specified Homestead Owners

Section 5 Upon voter approval of SJR 658 or HJR 381 during a *general election held in November 2012*, this bill creates s. 196.078, F.S., to provide an additional homestead exemption for specified homestead owners (defined in the bill as "first-time homesteaders").

Specifically this section:

- Definition Defines "first-time Florida homesteader" as a person who establishes the right to receive the homestead exemption provided in s. 196.031, F.S., within one year after purchasing the homestead property and who has not owned property in the previous three years to which the homestead exemption provided in s. 196.031(1)(a), F.S., applied.
- Amount of Exemption Provides that every first-time Florida homesteader is entitled to an additional homestead exemption in an amount equal to 50 percent of the just value of the homestead property up to $200,000 for a period of five years or until the property is sold. The additional exemption is available within one year of purchasing the homestead and would be reduced by 20 percent of the initial exemption on January 1 of each succeeding year, until it is no longer available in the sixth and subsequent years. The exemption does not apply to school levies. Not more than one exemption shall be allowed per homestead property.
- Sworn Statement Directs the property appraiser to require all first-time Florida homesteaders claiming the additional exemption under this section to submit a sworn statement on a form by the Department of Revenue no later than March 1, attesting that the taxpayer and each other person who hold legal/equitable title to the property has not owned property in the prior three years that received the homestead exemption provided in s. 196.031, F.S. In order for the exemption to be retained upon the addition of another person to the title of the property, that person must also submit a sworn statement as prescribed herein.

Sections 196.131 and 196.161, F.S., shall apply to the exemption provided in this section.

Section 6 Upon voter approval of SJR 658 or HJR 381 during a *special election held concurrent with the presidential preference primary in 2012*, this bill creates s. 196.078, F.S., to provide an additional homestead exemption for specified homestead owners (defined in the bill as "first-time homesteaders").

Similar to section 5 of the bill, this section:

- Definition Defines "first-time Florida homesteader" as a person who establishes the right to receive the homestead exemption provided in s. 196.031, F.S., within one year after purchasing the homestead property and who has not owned property in the previous three years to which the homestead exemption provided in s. 196.031(1)(a), F.S., applied.

- Amount of Exemption Provides that every first-time Florida homesteader is entitled to an additional homestead exemption in an amount equal to 50 percent of the just value of the homestead property up to $200,000 for a period of five years or until the property is sold. The additional exemption is available within one year of purchasing the homestead and would be reduced by 20 percent of the initial exemption on January 1 of each succeeding year, until it is no longer available in the sixth and subsequent years. The exemption does not apply to school levies. Not more than one exemption shall be allowed per homestead property.
- Sworn Statement Directs the property appraiser to require all first-time Florida homesteaders claiming the additional exemption under this section to submit a sworn statement on a form by the Department of Revenue no later than March 1, attesting that the taxpayer and each other person who hold legal/equitable title to the property has not owned property in the prior three years that received the homestead exemption provided in s. 196.031, F.S. In order for the exemption to be retained upon the addition of another person to the title of the property, that person must also submit a sworn statement as prescribed herein.

Sections 196.131 and 196.161, F.S., shall apply to the exemption provided in this section.

Department of Revenue Emergency Rulemaking Authority

Section 7 provides that in anticipation of implementing this act, the executive director of the Department of Revenue (DOR) is authorized to adopt emergency rules under ss. 120.536(1) and 120.54(4), F.S., in order to make the necessary changes and preparations so that forms, methods, and electronic or other data records are ready and in place if the relative provisions of this act become law.

The bill also states that, notwithstanding other provisions of law, such DOR emergency rules shall remain in effect for 18 months after the date of adoption and may be renewed thereafter during the pendency of procedures to adopt rules addressing the subject of the emergency rules.

Effective Date

Section 8 provides that this act shall take effect upon becoming law, except that:

- Provisions of this act that take effect upon the approval of HJR 381 or SJR 658 by the electors at a *special election held concurrent with the presidential preference primary in 2012* shall apply retroactively to the 2012 tax roll if the revision of the State Constitution contained in HJR 381 or SJR 658 is approved in such special election.
- Provisions of this act that take effect upon the approval of HJR 381 or SJR 658 by the electors at a *general election held in November 2012* shall apply to the 2013 tax roll if the revision of the State Constitution contained in HJR 381 or SJR 658 is approved in such general election.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill seeks to implement the proposed constitutional amendments to sections 4 and 6 of Article VII, of the Florida Constitution, contained in HJR 381 or SJR 658, 2011

Regular Session, subject to voter approval. For these reasons, the bill does not fall under the mandate provisions in Article VII, section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

If HJR 381 or SJR 658 is approved by the voters, this bill will provide an ad valorem tax relief to specified homestead owners. Owners of specified residential rental and commercial real property will experience further reduction in tax assessments due to the three percent assessment limitation. The provisions of this bill, as implemented by either joint resolution, will have an effect on local government revenue.

B. Private Sector Impact:

Assessment Limitation on Non-Homestead Property and Residential & Non-Residential Property

If HJR 381 or SJR 658 is approved by the voters, owners of existing residential rental and commercial real property may experience property tax savings and will not see their taxes increase significantly in a single year. To the extent that local taxing authorities' budgets are not reduced, the tax burden on other properties will increase to offset these tax losses. New properties or properties that have changed ownership or undergone significant improvements will be assessed at just value, and will be at a competitive disadvantage compared to older properties with respect to their tax burden.

Additional Homestead Exemption for Specified Homestead Owners

If HJR 381 or SJR 658 is approved by the voters, specified homestead owners will experience temporary reductions in ad valorem taxes. The value of the reduction will decrease by one-fifth each year and will disappear in the sixth year after the homestead is established. During this period, the ad valorem taxes levied on the homestead will increase significantly each year. Other property owners in the taxing jurisdiction will pay higher taxes if the jurisdiction adjusts the millage rate to offset the loss to the tax base.

C. Government Sector Impact:

If HJR 381 or SJR 658 is approved by the voters and the provisions of this bill take effect, local governments may experience a reduction in the ad valorem tax base. The

revenue estimating conference adopted an indeterminate negative estimate for SJR 658 and HJR 381 since those amendments would require voter approval.

Additional Homestead Exemption for Specified Homestead Owners

Should either joint resolution be approved by the Florida voters, the Revenue Estimating Conference determined that the statewide impact on non-school taxes for the additional homestead exemption for specified homestead owners would be as follows:

For the January 1, 2013, effective date (SJR 658):[24]

FY 2013-14	FY 2014-15	Recurring Impact
-$94.5 million	-$186.5 million	-$344.5 million

For the January 1, 2012, effective date (HJR 381):[25]

FY 2012-13	FY 2013-14	FY 2014-15	Recurring Impact
-$110.0 million	-$165.1 million	-$221.0 million	-$281.0 million

Assessment Limitation on Non-Homestead Property

Should either joint resolution be approved by the Florida voters, the Revenue Estimating Conference has determined that the statewide impact on non-school taxes for reducing the limitation on annual assessment increases for non-homestead property from 10 percent to three percent would be as follows:[26]

For the January 1, 2013, effective date (SJR 658):

FY 2013-14	FY 2014-15	FY 2015-16
-$225.0 million	-$526.1 million	-$903.9 million

For the January 1, 2012, effective date (HJR 381):

FY 2012-13	FY 2013-14	FY 2014-15	FY 2015-16
-$121.6 million	-$326.1 million	-$619.6 million	-$990.9 million

VI. Technical Deficiencies:

The Department of Revenue states that the use of the term “purchasing” may give rise to multiple interpretations of what “purchasing” means which might cause some taxpayers to be excluded from the exemption by such interpretations. For these reasons, the Department

[24] Revenue Estimating Conference, *First-Time Homesteaders part of SJR 658 & HJR 381* (Feb. 20, 2011) (assuming that 40 percent of homesteaders will be first-time homesteaders to account for the definition of first-time homebuyers).
[25] Revenue Estimating Conference, *First-Time Homesteaders part of HJR 381* (March 9, 2011) (assuming that 40 percent of homesteaders will be first-time homesteaders to account for the definition of first-time homebuyers).
[26] Revenue Estimating Conference, *Reduction of annual assessment limitation for non-homestead property from 10 percent to 3 percent, HJR 381*, *SJR 658* (March 14, 2011).

recommends deleting the term "purchasing/purchased" and inserting "acquiring/acquired" on the following lines of the bill: line 85, line 103, line 132, line 150.[27]For clarification of the amendment discussed above, the Department recommends inserting the following language on lines 87 and 134 of the bill after the period:

- "For purposes of this section, the date on which the deed or other transfer instrument was signed and notarized or otherwise executed shall be considered the date a property was acquired."

The Department has also made the following recommendations:

- On lines 102 and 149, insert the following for consistency with ss. 196.031(1)(a) and 193.155(7), F.S., and because the term "homestead's property just value" is not defined in bill:
  - "Except for owners of an estate held by the entireties or held jointly with the right of survivorship, the amount of the exemption may not exceed the proportionate assessed valuation of all owners who reside on the property."
- In terms of the Department's emergency rulemaking authority, add the terms "amended and repealed" on line 179, so that the Department may "renew, amend, and repeal" any emergency rule.
- Property exemptions are applied to the assessed value of the property, which may include any limitations or exemptions to the property's just value. For these reasons, clarification may be needed on lines 90 and 137 of the bill which states that "the amount [of the additional homestead exemption] shall be equal to 50 percent of the homestead property's just value on January 1 . . . ."

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

None.

B. Amendments:

None.

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

[27] Florida Department of Revenue, *Fiscal Impact of SB 1722*, 6-7 (March 14, 2011) (on file with the Senate Committee on Community Affairs).

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SCR 1558

INTRODUCER: Senator Benacquisto

SUBJECT: Repeal of Federal Law or Regulation

DATE: April 11, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	White/Maclure	Maclure	JU	**Pre-meeting**
2.			GO	
3.			RC	
4.				
5.				
6.				

I. Summary:

Through this concurrent resolution, the Legislature calls upon Congress to convene a constitutional convention under article V of the U.S. Constitution for the purpose of proposing amendments to the Constitution to permit repeal of any federal law or regulation by vote of two-thirds of the state legislatures. The concurrent resolution specifies that it is revoked and withdrawn, nullified, and superseded if it is used for the purpose of calling or conducting a convention to amend the U.S. Constitution for any other purpose.

II. Present Situation:

Conventions as Method of Proposing Amendments to U.S. Constitution

The Constitution of the United States prescribes two methods for proposing amendments to the document. Under the first method, Congress – upon the agreement of two-thirds of both houses – may propose an amendment itself. Under the second, Congress – upon application from legislatures in two-thirds of the states – "shall call a Convention for proposing Amendments."[1]

[1] U.S. CONST. art. V. By comparison, the Florida Constitution provides the following methods for proposing amendments to the document: by joint resolution agreed to by three-fifths of the membership of each house of the Legislature (FLA. CONST. art. XI, s. 1); by constitutional revision commission (FLA. CONST. art. XI, s. 2); by citizen initiative (FLA. CONST. art. XI, s. 3); by a constitutional convention to consider revision to the entire document called by the people of the state (FLA. CONST. art. XI, s. 4); and by a taxation and budget reform commission (FLA. CONST. art. XI, s. 6). Regardless of the method by which an amendment to the Florida Constitution is proposed, the amendment must be approved by at least 60 percent of the electors voting on the measure (FLA. CONST. art. XI, s. 5(e)).

Under either method, Congress is authorized to specify whether the amendment must be ratified by the legislatures of three-fourths of the states or by conventions in three-fourths of the states.[2]

Legal scholarship notes that the convention method for proposing amendments to the U.S. Constitution emerged as a compromise among "Founding Fathers" who disagreed on the respective roles of Congress and the states in proposing amendments to the document. Although some participants in the Philadelphia Convention of 1787 argued that Congress' concurrence should not be required to amend the Constitution, others argued that Congress should have the power to propose amendments, and the states' role should be restricted to ratification.[3] The language ultimately agreed upon, and which became article V of the U.S. Constitution, states:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Despite the fact that over time states have made at least 400 convention applications to Congress on a variety of topics,[4] the constitutional convention method of proposing amendments has never been fully employed and, as authors have noted, occupies some unknown legal territory. Some of the legal questions surrounding the method relate to whether Congress has discretion to call a convention once 34 states make application; whether the scope of a convention may be limited to certain subject matters and by whom; and how applications from the states are to be tallied – "separately by subject matter or cumulatively, regardless of their subject matter."[5]

Over time, some states have rescinded applications, in part amid concerns that the scope of a constitutional convention could extend to subjects beyond the subject proposed in a given state's application. For example, in 2003 the Arizona Legislature adopted a concurrent resolution that "repeals, rescinds, cancels, renders null and void and supersedes any and all existing applications to the Congress … for a constitutional convention … for any purpose, whether limited or general."[6] Article V of the U.S. Constitution is silent on the legal effect of a state's decision to rescind a previously submitted application.

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[2] U.S. CONST. art. V. Only once, for the 21st Amendment, has Congress employed state conventions, rather than state legislatures, to ratify an amendment. See Russell L. Caplan, *Constitutional Brinksmanship: Amending the Constitution by National Convention* 126 (1988).

[3] James Kenneth Rogers, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J.L. & PUB. POL'Y 1005, 1006-07 (2007).

[4] *Id*. at 1005. The author cites this figure as of 1993.

[5] *Id.*

[6] Senate Concurrent Resolution 1022, State of Arizona, Senate, Forty-sixth Legislature (First Reg. Sess. 2003) (copy on file with the Senate Committee on Judiciary). The concurrent resolution notes that "certain persons or states have called for a constitutional convention on issues that may be directly in opposition to the will of the people of this state." *Id*.

Calls for a Constitutional Convention on a Balanced Federal Budget

One of the country's most significant movements toward activation of the constitutional convention method of proposing an amendment to the U.S. Constitution occurred starting in the mid-1970s, when eventually 32 states adopted measures, of varying forms, urging Congress to convene a constitutional convention to address federal budget deficits.[7] The Florida Legislature passed memorials related to a convention for a balanced federal budget, including Senate Memorial 234[8] and House Memorial 2801[9] in 1976, and Senate Memorial 302[10] in 1988. Depending upon the manner of tallying applications, the total count was two short of the 34 state applications necessary under article V of the U.S. Constitution.[11]

In 2010, the Florida Legislature adopted Senate Concurrent Resolution 10 (SCR 10). The concurrent resolution called upon Congress to convene a constitutional convention under article V of the U.S. Constitution for the purpose of proposing amendments to the Constitution to achieve and maintain a balanced federal budget and to control the ability of the federal government to require states to expend funds.

The 2010 resolution specified that it superseded "all previous memorials applying to the Congress of the United States to call a convention for the purpose of proposing an amendment to the Constitution of the United States."[12] Furthermore, SCR 10 contained a self-executing revocation clause. The resolution specifies that if it is used for the purpose of, or in support of, calling or conducting a convention to amend the U.S. Constitution for any purpose other than requiring a balanced federal budget or limiting the ability of the Federal Government to require states to spend money, then it is revoked and withdrawn, nullified, and superseded.

Tenth Amendment and the Balance of Power between State and Federal Government

By the provisions of the U.S. Constitution, certain powers are entrusted solely to the federal government alone, while others are reserved to the states, and still others may be exercised concurrently by both the federal and state governments.[13] All attributes of government that have not been relinquished by the adoption of the U.S. Constitution and its amendments have been reserved to the states.[14] The Tenth Amendment to the U.S. Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As noted by one Supreme Court Justice:

> [t]his amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and

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[7] E. Donald Elliott, *Constitutional Conventions and the Deficit*, 1985 DUKE L.J. 1077, 1078 (1985).
[8] Senate Memorial 234 (Reg. Sess. 1976).
[9] House Memorial 2801 (Reg. Sess. 1976).
[10] Senate Memorial 302 (Reg. Sess. 1988).
[11] For a list of state applications for a constitutional convention, including the applications of 32 states for a convention to discuss a balanced budget amendment, see, Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 765-89 (1993).
[12] Senate Concurrent Resolution 10 (Reg. Sess. 2010).
[13] 48A FLA. JUR 2D, *State of Florida* s. 13 (2010).
[14] *Id.*

> enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.[15]

Therefore, courts have consistently interpreted the Tenth Amendment to mean that "'[t]he States unquestionably do retai[n] a significant measure of sovereign authority. . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.'"[16] Under the federalist system of government in the United States, states may enact more rigorous restraints on government intrusion than the federal charter imposes.[17] However, a state may not adopt more restrictions on the fundamental rights of a citizen than the U.S. Constitution allows.[18]

The U.S. Supreme Court has recognized that the framers of the Constitution explicitly chose a constitution that affords to Congress the power to regulate individuals, not states.[19] Therefore, the Court has consistently held that the Tenth Amendment does not afford Congress the power to require states to enact particular laws or require that states regulate in a particular manner.[20] For example, in *New York v. United States*, the Court, in interpreting the Tenth Amendment, ruled that the Constitution does not confer upon Congress the power to compel states to provide for disposal of radioactive waste generated within their borders, though Congress has substantial power under the Constitution to encourage states to do so.[21]

Recent Tenth Amendment Legislation

A movement has emerged in the United States over the past couple of years in which state legislators have sponsored pieces of legislation invoking the Tenth Amendment for the purpose of declaring some power or powers as retained within the sovereignty of the state. The main premise of this state sovereignty movement is the belief that the balance of power has tilted too far in favor of the federal government. Proponents of this movement have urged legislators and citizens to support resolutions or state constitutional amendments that often mandate that the state government will hold the federal government accountable to the United States Constitution to protect state residents from federal abuse. For example, during the term of the 111th Congress, fourteen states passed declaratory Tenth Amendment resolutions declaring the sovereignty of the state over all matters not delegated by limited enumeration of powers in the United States Constitution to the federal government.[22]

Additionally, state legislators have introduced bills that attempt to declare specific instruments to be beyond the scope of federal regulation, most often citing the Commerce Clause as the power

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[15] *New York v. United States*, 505 U.S. 144, 156 (1992) (quoting 3 J. Story, *Commentaries on the Constitution of the United States* 752 (1833)).
[16] *Id.*
[17] 48A FLA. JUR 2D, *State of Florida* s. 13 (2010).
[18] *Id.* (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985)).
[19] *New York v. United States*, 505 U.S. at 156.
[20] *Id; see also Baggs v. City of South Pasadena*, 947 F. Supp. 1580 (M.D. Fla. 1996).
[21] *New York v. United States*, 505 U.S. at 156.
[22] Such a measure was introduced but not adopted in Florida (SJR 1240 (Reg. Sess. 2010)). During the 2011 Regular Session, a similar measure was filed, SJR 1438. Similarly, SM 358 is a memorial recognizing Florida's sovereignty under the Tenth Amendment to the United States Constitution over all powers not otherwise enumerated and granted to the federal government.

breached. For example, the Oklahoma Communications Freedom Act declared intrastate radio communications beyond the scope of the federal government's Commerce Clause authority.[23] In Montana, the Firearms Freedom Act was enacted,[24] and another bill asserted "state rights and challeng[ed] federal authority" with respect to federal regulations protecting gray wolves.[25] In Arizona, a bill declared incandescent light bulbs manufactured in Arizona and not exported to other states as purely intrastate goods not subject to federal regulation under the Commerce Clause.[26]

Federal Budget Deficit and National Debt

The contribution of federal budget deficits to a growing national debt is often cited by proponents of the state sovereignty movement.[27] A sharp rise in national debt has occurred due to "lower tax revenues and higher federal spending related to the recent severe recession and turmoil in financial markets," and an "imbalance between spending and revenues that predated those economic developments."[28] Currently, the debt held by the public is estimated to be $9.59 trillion.[29]

Federal budget deficits are estimated to total $7 trillion over the next decade if current laws remain unchanged; although "[i]f certain policies that are scheduled to expire under current law are extended instead, deficits may be much larger."[30] The 2011 federal budget deficit is projected to equal 9.8 percent of GDP.[31]

The Congressional Budget Office notes that, "[t]o prevent federal debt from becoming unsupportable, lawmakers will have to restrain the growth of spending substantially, raise revenues significantly above their historical share of GDP, or pursue some combination of those two approaches."[32] Otherwise, federal debt may continue to expand faster than the economy, and "the growth of people's income will slow, the share of federal spending devoted to paying interest on the debt will rise, and the risk of a fiscal crisis will increase."[33]

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[23] HB 2812, 52nd Leg., 2d Sess. (Okla. 2010).
[24] HB 246, 61st Leg. (Mont. 2009), *codified in* 70 MONT. CODE ANN. ss. 30-20-101 to 106 (2007 & Supp. 2010).
[25] SB 0183, 61st Leg. (Mont. 2009) (bill died in committee).
[26] HB 2337, 49th Leg., 2d Reg. Sess. (Ariz. 2010).
[27] Marianne Moran, *Give States A Tool to Check Federal Power*, Richmond Times Dispatch (column) (Sep. 19, 2010), available at http://www.repealamendment.org/press-coverage.html (last visited Apr. 4, 2011).
[28] Congressional Budget Office, *The Long-Term Budget Outlook*, 1 (June 2010, revised August 2010), *available at* http://www.cbo.gov/ftpdocs/115xx/doc11579/06-30-LTBO.pdf.
[29] TreasuryDirect, *The Debt to the Penny and Who Holds It*, http://www.treasurydirect.gov/NP/BPDLogin?application=np (last visited Mar. 29, 2011). TreasuryDirect is a financial services website through which a person may purchase and redeem securities directly from the U.S. Department of the Treasury in paperless electronic form. TreasuryDirect is a service of the U.S. Department of the Treasury Bureau of the Public Debt. See TreasuryDirect, *About TreasuryDirect*, http://www.treasurydirect.gov/about.htm (last visited Mar. 29, 2011).
[30] Congressional Budget Office, *Spending and Revenue Options*, *Summary* (March 2011), http://www.cbo.gov/doc.cfm?index=12085 (last visited Mar. 29, 2011).
[31] *Id.*
[32] *Id.*
[33] *Id.*

State Legislative Concerns over Federal Mandates

In recent years, state legislatures have given increasing attention to the effect of mandates imposed by the federal government on states and localities. According to the National Conference of State Legislatures (NCSL), the growth of mandates and other costs imposed by the federal government is one of the most serious fiscal issues facing state and local governments. The NCSL notes that:

The manner in which the federal government imposes costly unfunded mandates on state and local governments is multi-faceted, including:

- direct federal orders without sufficient funding to pay for their implementation[;]
- burdensome conditions on grant assistance;
- cross sanctions and redirection penalties that imperil grant funding in order to regulate and preempt the states actions in both related and unrelated programmatic areas;
- amendments to the tax code that impose direct compliance costs on states or restrict state revenues;
- overly prescriptive regulatory procedures that move beyond the scope of congressional intent;
- incomplete and vague definitions which cause ambiguity; and
- perceived or actual intrusion on state sovereignty.[34]

Congress enacted the Unfunded Mandate Reform Act of 1995,[35] which is designed, in part, "to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate Federal funding, in a manner that may displace other essential State, local, and tribal government priorities."[36] Among other provisions, the act requires the use of new information in the legislative process and of new procedures designed to reduce the creation of unfunded mandates. Further, the act contemplates certain executive branch procedures on the development of regulations that might lead to new mandates.[37]

Challenges to the Patient Protection and Affordable Care Act

Federal health care reform legislation titled the "Patient Protection and Affordable Care Act" is one of the focuses of the state sovereignty movement. Following the enactment of the legislation in 2010, the attorneys general, including the attorney general of Florida, or governors of 26 states, two private citizens, and the National Federation of Independent Business filed suit in the United States District Court for the Northern District of Florida challenging the constitutionality

[34] Nat'l Conference of State Legislatures, State-Federal Relations and Standing Committees, *2009-2010 Policies for the Jurisdiction of the Budgets and Revenue Committee: Federal Mandate Relief*, http://www.ncsl.org/default.aspx?TabID=773&tabs=855,20,632#855 (last visited Mar. 8, 2010).
[35] Public Law 104-4 (Mar. 22, 1995).
[36] *Id*. at s. 2.
[37] Sandra S. Osbourn, Government Division, Congressional Research Service, *Unfunded Mandate Reform Act: A Brief Summary* (95-246 GOV) (Mar. 17, 1995) (on file with the Senate Committee on Judiciary).

of the Act.[38] Plaintiffs alleged that the individual mandate set forth in the Act requiring everyone to purchase federally approved health insurance violates the Commerce Clause of the United States Constitution. In addition, plaintiffs alleged that the provisions in the Act expanding Medicaid violate the Spending Clause, as well as the Ninth and Tenth Amendments of the United States Constitution. On January 31, 2011, the court concluded that:

> Congress exceeded the bounds of its authority in passing the Act with the individual mandate. . . . Because the individual mandate is unconstitutional and not severable, the entire Act must be declared void.[39]

This ruling is consistent with the United States District Court for the Eastern District of Virginia's ruling that provisions of the Act exceed the constitutional boundaries of congressional power.[40] However, two federal district courts have upheld the constitutionality of the provisions of the Act.[41]

III. Effect of Proposed Changes:

In this concurrent resolution, the Legislature calls upon Congress to convene a constitutional convention under article V of the U.S. Constitution for the purpose of proposing amendments to the Constitution to permit repeal of any federal law or regulation by vote of two-thirds of the state legislatures. The concurrent resolution specifies the following language for the proposed constitutional amendment:

> Any provision of law or regulation of the United States may be repealed by the several states, and such repeal shall be effective when the legislatures of two-thirds of the several states approve resolutions for this purpose that particularly describe the same provision or provisions of law or regulation to be repealed.

Similar to other legislation citing to the Tenth Amendment, the call for a convention on a repeal amendment[42] purports to "halt federal encroachment and restore a proper balance between the powers of Congress and those of the several states." Unlike other Tenth Amendment legislation that has largely been declaratory, the repeal amendment seeks to create a future method by which states can override federal regulations. Should a Constitutional Convention be called, and the repeal amendment adopted and ratified, then two-thirds of the states could attempt to repeal any federal law or regulation.

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[38] *State of Florida v. United States Department of Health and Human Services*, Case No. 3:10-CV-91-RV/EMT (N.D. Fla. 2010).

[39] *State of Florida v. United States Department of Health and Human Services*, *Order Granting Summary Judgment,* Case No. 3:10-CV-91-RV/EMT, 76 (N.D. Fla. 2011).

[40] *Commonwealth of Virginia v. Kathleen Sebelius, Secretary of the Department of Health and Human Services*, *Memorandum Opinion (Cross Motions for Summary Judgment)*, Case No. 3:10CV188-HEH (E.D. Va. 2011).

[41] *Thomas More Law Center v. Obama*, 720 F.Supp.2d 882 (E.D. Mich. 2010); *Liberty University, Inc. v. Geithner*, 2010 WL 4860299 (W.D. Va. 2010).

[42] The constitutional language proposed by the concurrent resolution matches language referred to as the "Repeal Amendment" and advocated by The Repeal Amendment, Inc. The organization's website is www.repealamendment.org (last visited April 10, 2011).

The concurrent resolution contains a self-executing revocation clause, specifying that it is revoked and withdrawn, nullified, and superseded if it is used for the purpose of calling or conducting a convention to amend the U.S. Constitution for a purpose other than consideration of the amendment proposed by the resolution. Nonetheless, the concurrent resolution also specifies that the State of Florida reserves the right to add future amendments to the application, as determined by the Florida Legislature.

In addition, the concurrent resolution affirms that selection procedures for delegates to a constitutional convention should be established by the legislatures of the several states.

Under the Senate rules, a concurrent resolution must be read twice by the title, passed by both houses of the Legislature, and signed by the presiding officers.[43]

Other Potential Implications:

Amending the U.S. Constitution to permit repeal of federal laws and regulations by the states could represent a fundamental change in the nature of federalism in the United States. If the repeal method provided for by the amendment is successful, it would undoubtedly affect decisions ranging from the nature and quantity of government revenue generation, regulations, services, and expenditures. The potential implications for government at all levels and for private citizens and businesses are difficult to quantify but likely to be significant.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This concurrent resolution makes an application to Congress under article V of the U.S. Constitution for a convention to propose amendments to the Constitution permitting repeal of federal law or regulation by the states. See the "Present Situation" section of this bill analysis for a discussion of the convention as a method of proposing amendments to the Constitution.

[43] The Florida Senate, *Manual for Drafting Legislation*, 129 (6th ed. 2009); *see also* Rule 4.13, *Rules and Manual of the Senate of the State of Florida, Senator Mike Haridopolos, President, 2010-2012.*

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The concurrent resolution itself does not directly affect the private sector fiscally. However, to the extent applications from the states to Congress for a constitutional convention ultimately result in an amendment to the U.S. Constitution that actually results in repeal of federal laws and regulations, the private sector may be affected by policy changes stemming from the constitutional changes.

C. Government Sector Impact:

The concurrent resolution itself does not directly affect state government or local governments fiscally. However, to the extent applications from the states to Congress for a constitutional convention ultimately result in an amendment to the U.S. Constitution that actually results in repeal of federal laws and regulations, the government sector may be affected by policy changes stemming from the constitutional changes.

VI. Technical Deficiencies:

The concurrent resolution does not specify whether it supersedes previous resolutions applying to Congress for a constitutional convention for the purpose of proposing an amendment to the U.S. Constitution. It is difficult to assess what effect this legislation could have on Senate Concurrent Resolution 10, the resolution adopted by the Legislature in 2010 which called upon Congress to convene a constitutional convention for the purpose of proposing amendments to the Constitution to achieve and maintain a balanced federal budget. It contained a self-executing revocation clause. The resolution specified that if it is used for the purpose of, or in support of, calling or conducting a convention to amend the U.S. Constitution for any purpose other than requiring a balanced federal budget or limiting the ability of the Federal Government to require states to spend money, then it is revoked and withdrawn, nullified, and superseded.

Concurrent Resolution 1558 provides for the ability to add future amendments to this application, as determined by the Florida Legislature. It is not immediately clear how the ability to add future amendments reconciles with the provision in the resolution stating that it is revoked should it be used in support of conducting a convention for any purpose other than consideration of the amendment proposed by the resolution.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

None.

B. Amendments:

None.

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

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LEGISLATIVE ACTION

Senate	.	House
Comm: WD	.	
04/06/2011	.	
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The Committee on Judiciary (Bogdanoff) recommended the following:

1 **Senate Amendment (with title amendment)**
2
3 Delete everything after the enacting clause
4 and insert:
5 Section 1. Section 790.338, Florida Statutes, is created to
6 read:
7 790.338 Medical privacy concerning firearms; prohibitions;
8 penalties, exceptions.—
9 (1) A health care practitioner licensed under chapter 456
10 or a health care facility licensed under chapter 395 may not
11 intentionally enter any disclosed information concerning firearm
12 ownership into the patient’s medical record if the practitioner

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13 knows that such information is not relevant to the patient's
14 medical care or safety, or the safety of others.
15 (2) A health care practitioner licensed under chapter 456
16 or a health care facility licensed under chapter 395 shall
17 respect a patient's right to privacy and should refrain from
18 making a written inquiry or asking questions concerning the
19 ownership of a firearm or ammunition by the patient or by a
20 family member of the patient, or the presence of a firearm in a
21 private home or other domicile of the patient or a family member
22 of the patient. Notwithstanding this provision, a health care
23 practitioner or health care facility that in good faith believes
24 that this information is relevant to the patient's medical care
25 or safety, or the safety of others, may make such a verbal or
26 written inquiry.
27 (3) Any emergency medical technician or paramedic acting
28 under the supervision of an Emergency Medical Services Director
29 under chapter 401 may make an inquiry concerning the possession
30 or presence of a firearm if he or she, in good faith, believes
31 that information regarding the possession of a firearm by the
32 patient or the presence of a firearm in the home or domicile of
33 a patient or a patient's family member is necessary to treat a
34 patient during the course and scope of a medical emergency or
35 that the presence or possession of a firearm would pose an
36 imminent danger or threat to the patient or others.
37 (4) A patient may decline to answer or provide any
38 information regarding ownership of a firearm by the patient or a
39 family member of the patient, or the presence of a firearm in
40 the domicile of the patient or a family member of the patient. A
41 patient's decision not to answer a question relating to the

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42 presence or ownership of a firearm does not alter existing law
43 regarding a physician's authorization to choose his or her
44 patients.
45 (5) A health care practitioner licensed under chapter 456
46 or a health care facility licensed under chapter 395 may not
47 discriminate against a patient based solely upon the patient's
48 exercise of the constitutional right to own and possess firearms
49 or ammunition.
50 (6) A health care practitioner licensed under chapter 456
51 or a health care facility licensed under chapter 395 shall
52 respect a patient's legal right to own or possess a firearm and
53 should refrain from unnecessarily harassing a patient about
54 firearm ownership during an examination.
55 (7) Violations of the provisions of subsections (1)-(4)
56 constitute grounds for disciplinary action under ss. 456.072(2)
57 and 395.1055.
58 Section 2. Paragraph (b) of subsection (4) of section
59 381.026, Florida Statutes, is amended to read:
60 381.026 Florida Patient's Bill of Rights and
61 Responsibilities.—
62 (4) RIGHTS OF PATIENTS.—Each health care facility or
63 provider shall observe the following standards:
64 (b) Information.—
65 1. A patient has the right to know the name, function, and
66 qualifications of each health care provider who is providing
67 medical services to the patient. A patient may request such
68 information from his or her responsible provider or the health
69 care facility in which he or she is receiving medical services.
70 2. A patient in a health care facility has the right to

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71 know what patient support services are available in the
72 facility.
73 3. A patient has the right to be given by his or her health
74 care provider information concerning diagnosis, planned course
75 of treatment, alternatives, risks, and prognosis, unless it is
76 medically inadvisable or impossible to give this information to
77 the patient, in which case the information must be given to the
78 patient's guardian or a person designated as the patient's
79 representative. A patient has the right to refuse this
80 information.
81 4. A patient has the right to refuse any treatment based on
82 information required by this paragraph, except as otherwise
83 provided by law. The responsible provider shall document any
84 such refusal.
85 5. A patient in a health care facility has the right to
86 know what facility rules and regulations apply to patient
87 conduct.
88 6. A patient has the right to express grievances to a
89 health care provider, a health care facility, or the appropriate
90 state licensing agency regarding alleged violations of patients'
91 rights. A patient has the right to know the health care
92 provider's or health care facility's procedures for expressing a
93 grievance.
94 7. A patient in a health care facility who does not speak
95 English has the right to be provided an interpreter when
96 receiving medical services if the facility has a person readily
97 available who can interpret on behalf of the patient.
98 8. A health care provider or health care facility shall
99 respect a patient's right to privacy and should refrain from

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100 making a written inquiry or asking questions concerning the
101 ownership of a firearm or ammunition by the patient or by a
102 family member of the patient, or the presence of a firearm in a
103 private home or other domicile of the patient or a family member
104 of the patient. Notwithstanding this provision, a health care
105 provider or health care facility that in good faith believes
106 that this information is relevant to the patient's medical care
107 or safety, or safety or others, may make such a verbal or
108 written inquiry.
109 9. A patient may decline to answer or provide any
110 information regarding ownership of a firearm by the patient or a
111 family member of the patient, or the presence of a firearm in
112 the domicile of the patient or a family member of the patient. A
113 patient's decision not to answer a question relating to the
114 presence or ownership of a firearm does not alter existing law
115 regarding a physician's authorization to choose his or her
116 patients.
117 10. A health care provider or health care facility may not
118 discriminate against a patient based solely upon the patient's
119 exercise of the constitutional right to own and possess firearms
120 or ammunition.
121 11. A health care provider or health care facility shall
122 respect a patient's legal right to own or possess a firearm and
123 should refrain from unnecessarily harassing a patient about
124 firearm ownership during an examination.
125 Section 3. Subsection (mm) is added to subsection (1) of
126 section 456.072, Florida Statutes, to read:
127 456.072 Grounds for discipline; penalties; enforcement.—
128 (1) The following acts shall constitute grounds for which

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129 the disciplinary actions specified in subsection (2) may be
130 taken:
131 (mm) Violating any of the provisions of s. 790.338.
132 Section 4. An insurer issuing any type of insurance policy
133 pursuant to chapter 627, Florida Statutes, may not deny coverage
134 or increase any premium, or otherwise discriminate against any
135 insured or applicant for insurance, on the basis of or upon
136 reliance upon the lawful ownership or possession of a firearm or
137 ammunition or the lawful use or storage of a firearm or
138 ammunition. Nothing herein shall prevent an insurer from
139 considering the fair market value of firearms or ammunition in
140 the setting of premiums for scheduled personal property
141 coverage.
142 Section 5. This act shall take effect upon becoming a law.
143
144 ================ T I T L E A M E N D M E N T ================
145 And the title is amended as follows:
146 Delete everything before the enacting clause
147 and insert:
148 A bill to be entitled
149 An act relating to the privacy of firearm owners;
150 creating s. 790.338, F.S.; providing that a licensed
151 medical care practitioner or health care facility may
152 not record information regarding firearm ownership in
153 a patient’s medical record; providing an exception for
154 relevance of the information to the patient’s medical
155 care or safety or the safety of others; providing that
156 unless the information is relevant to the patient’s
157 medical care or safety or the safety of others,

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158 inquiries regarding firearm ownership or possession
159 should not be made by licensed health care
160 practitioners or health care facilities; providing an
161 exception for emergency medical technicians and
162 paramedics; providing that a patient may decline to
163 provide information regarding the ownership or
164 possession of firearms; clarifying that a physician's
165 authorization to choose his or her patients is not
166 altered by the act; prohibiting discrimination by
167 licensed health care practitioners or facilities based
168 solely upon a patient's firearm ownership or
169 possession; prohibiting harassment of a patient
170 regarding firearm ownership by a licensed health care
171 practitioner or facility during an examination;
172 providing for disciplinary action; amending s.
173 381.026, F.S.; providing that unless the information
174 is relevant to the patient's medical care or safety,
175 or the safety of others, inquiries regarding firearm
176 ownership or possession should not be made by licensed
177 health care providers or health care facilities;
178 providing that a patient may decline to provide
179 information regarding the ownership or possession of
180 firearms; clarifying that a physician's authorization
181 to choose his or her patients is not altered by the
182 act; prohibiting discrimination by licensed health
183 care providers or facilities based solely upon a
184 patient's firearm ownership or possession; prohibiting
185 harassment of a patient regarding firearm ownership
186 during an examination by a licensed health care

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187 provider or facility; amending s. 456.072, F.S.;
188 including the violation of the provisions of s.
189 790.338, F.S., as grounds for disciplinary action;
190 prohibiting denial of insurance coverage, increased
191 premiums, or any other form of discrimination by
192 insurance companies issuing policies pursuant to ch.
193 627, F.S., on the basis of an insured’s or applicant’s
194 ownership, possession, or storage of firearms or
195 ammunition; clarifying that an insurer is not
196 prohibited from considering the fair market value of
197 firearms or ammunition in setting personal property
198 coverage premiums; providing an effective date.

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LEGISLATIVE ACTION

Senate	.	House
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115 provider or health care facility that in good faith believes
116 that this information is relevant to the patient's medical care
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133 should refrain from unnecessarily harassing a patient about
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141 (mm) Violating any of the provisions of s. 790.338.
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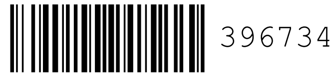
154 a patient's medical record; providing an exception for
155 relevance of the information to the patient's medical
156 care or safety or the safety of others; providing that
157 unless the information is relevant to the patient's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158 medical care or safety or the safety of others,
159 inquiries regarding firearm ownership or possession
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161 practitioners or health care facilities; providing an
162 exception for emergency medical technicians and
163 paramedics; providing that a patient may decline to
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165 possession of firearms; clarifying that a physician's
166 authorization to choose his or her patients is not
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168 licensed health care practitioners or facilities based
169 solely upon a patient's firearm ownership or
170 possession; prohibiting harassment of a patient
171 regarding firearm ownership by a licensed health care
172 practitioner or facility during an examination;
173 prohibiting denial of insurance coverage, increased
174 premiums, or any other form of discrimination by
175 insurance companies issuing policies on the basis of
176 an insured's or applicant's ownership, possession, or
177 storage of firearms or ammunition; clarifying that an
178 insurer is not prohibited from considering the fair
179 market value of firearms or ammunition in setting
180 personal property coverage premiums; providing for
181 disciplinary action; amending s. 381.026, F.S.;
182 providing that unless the information is relevant to
183 the patient's medical care or safety, or the safety of
184 others, inquiries regarding firearm ownership or
185 possession should not be made by licensed health care
186 providers or health care facilities; providing that a

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187 patient may decline to provide information regarding
188 the ownership or possession of firearms; clarifying
189 that a physician's authorization to choose his or her
190 patients is not altered by the act; prohibiting
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192 facilities based solely upon a patient's firearm
193 ownership or possession; prohibiting harassment of a
194 patient regarding firearm ownership during an
195 examination by a licensed health care provider or
196 facility; amending s. 456.072, F.S.; including the
197 violation of the provisions of s. 790.338, F.S., as
198 grounds for disciplinary action; providing an
199 effective date.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/CS/SB 432

INTRODUCER: Health Regulation Committee, Criminal Justice Committee, and Senator Evers

SUBJECT: Privacy of Firearm Owners

DATE: April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Fav/CS**
2.	O'Callaghan	Stovall	HR	**Fav/CS**
3.	Munroe	Maclure	JU	**Pre-meeting**
4.			BC	
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... [X] Statement of Substantial Changes
B. AMENDMENTS........................ [ ] Technical amendments were recommended
[ ] Amendments were recommended
[ ] Significant amendments were recommended

I. Summary:

The bill specifies that a health care provider or health care facility may not intentionally enter disclosed information concerning firearm ownership into a patient's medical record if the provider knows that the information is not relevant to the patient's medical care or safety. Furthermore, the bill provides that a health care provider or health care facility should refrain from inquiring about ownership of a firearm or ammunition by the patient or a family member of the patient or the presence of a firearm in a home or domicile of the patient or a family member of the patient, unless the provider or facility believes in good faith that the information is relevant to the patient's medical care or safety.

The bill provides that a patient may decline to answer questions about ownership of a firearm or the presence of a firearm in the home of the patient or a patient's family member, and the patient's refusal to answer does not alter existing law regarding a physician's authorization to choose his or her patients. The bill prohibits discrimination by a provider or facility based on a patient's exercise of the constitutional right to own or possess a firearm or ammunition.

The bill requires a provider or facility to respect a patient's legal right to own or possess a firearm and provides that the health care provider or health care facility should refrain from unnecessarily harassing a patient about such ownership.

The bill provides that certain violations under the bill constitute grounds for certain disciplinary actions.

The bill prohibits an insurer from denying coverage or increasing a premium, or otherwise discriminating against an insured or applicant for insurance, based on the lawful ownership, possession, use, or storage of a firearm or ammunition.

The bill provides for certain patient's rights concerning the ownership of firearms or ammunition under the Florida Patient's Bill of Rights and Responsibilities.

This bill substantially amends the following sections of the Florida Statutes: 381.026 and 456.072.

This bill creates section 790.338, Florida Statutes.

This bill creates an undesignated section of the Florida Statutes.

II. Present Situation:

Physicians Inquiring About Firearms

In recent months, there has been media attention surrounding an incident in Ocala, Florida, where, during a routine doctor's visit, an Ocala pediatrician asked a patient's mother whether there were firearms in the home. When the mother refused to answer, the doctor advised her that she had 30 days to find a new pediatrician.[1] The doctor stated that he asked all of his patients the same question in an effort to provide safety advice in the event there was a firearm in the home.[2] He further stated that he asked similar questions about whether there was a pool at the home, and whether teenage drivers use their cell phone while driving for similar reasons – to give safety advice to patients. The mother, however, felt that the question invaded her privacy.[3] This incident has led many to question whether it should be an accepted practice for a doctor to inquire about a patient's firearm ownership.

Various professional medical groups have adopted policies that encourage or recommend that physicians ask patients about the presence of a firearm in the home. For example, the American Medical Association (AMA) encourages its members to inquire as to the presence of household firearms as a part of childproofing the home and to educate patients to the dangers of firearms to children.[4]

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[1] Fred Hiers, *Family and pediatrician tangle over gun question*, July 23 2010, Ocala.com, available at: http://www.ocala.com/article/20100723/news/100729867/1402/news?p=1&tc=pg (last visited Mar. 31, 2011).

[2] *Id.*

[3] *Id.*

[4] American Medical Association, *H-145.990 Prevention of Firearm Accidents in Children*, available at:

Additionally, the American Academy of Pediatrics (AAP) recommends that pediatricians incorporate questions about guns into their patient history taking.[5]

Florida law contains numerous provisions relating to the regulation of the medical profession, regulation of medical professionals, and the sale, purchase, possession, and carrying of firearms.[6] However, Florida law does not contain any provision that prohibits physicians or other medical staff from asking a patient whether he or she owns a firearm or whether there is a firearm in the patient's home.

Florida Firearms Safety Regulations Concerning Minors

Section 790.001, F.S., defines the term "firearm" to mean any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term "firearm" does not include an antique firearm unless the antique firearm is used in the commission of a crime.

Section 790.174, F.S., requires a person who stores or leaves, on a premise under his or her control, a loaded firearm and who knows (or reasonably should know) that a minor[7] is likely to gain access to the firearm without the lawful permission of the minor's parent or the person having charge of the minor, or without the supervision required by law, to keep the firearm in a securely locked box or container or in a location which a reasonable person would believe to be secure. Otherwise the person shall secure the firearm with a trigger lock, except when the person is carrying the firearm on his or her body or within such close proximity thereto that he or she can retrieve and use it as easily and quickly as if he or she carried it on his or her body.

It is a misdemeanor of the second degree, punishable as provided in s. 775.082, F.S., or s. 775.083, F.S., if a person fails to store or leave a firearm in the manner required by law and as a result thereof a minor gains access to the firearm, without the lawful permission of the minor's parent or the person having charge of the minor, and possesses or exhibits it, without the supervision required by law in a public place; or in a rude, careless, angry, or threatening manner in violation of s. 790.10, F.S. However, a person is not guilty of such an act if the minor obtains the firearm as a result of an unlawful entry by any person.

Section 790.175, F.S., requires that upon the retail commercial sale or retail transfer of any firearm, the seller or transferor is required to deliver a written warning to the purchaser or transferee, which must state, in block letters not less than 1/4 inch in height:

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https://ssl3.ama-assn.org/apps/ecomm/PolicyFinderForm.pl?site=www.ama-assn.org&uri=%2fama1%2fpub%2fupload%2fmm%2fPolicyFinder%2fpolicyfiles%2fHnE%2fH-145.990.HTM (last visited accessed Mar. 31, 2011).

[5] American Academy of Pediatrics, *Firearm-Related Injuries Affecting the Pediatric Population*, Pediatrics Vol. 105, No. 4, April 2000, pp. 888-895, available at: http://aappolicy.aappublications.org/cgi/content/full/pediatrics;105/4/888 (last visited Mar. 31, 2011). *See also* American Academy of Pediatrics, Committee on Injury, Violence, and Poison Prevention, TIPP (The Injury Prevention Program), *A Guide to Safety Counseling in Office Practice*, 1994, available at: http://www.aap.org/family/TIPPGuide.pdf (last accessed Mar. 31, 2011).

[6] *See, e.g.,* chs. 456, 458, and 790, F.S., respectively.

[7] A minor is any person under the age of 16. *See s.* 790.174(3), F.S.

> It is unlawful, and punishable by imprisonment and fine, for any adult to store or leave a firearm in any place within the reach or easy access of a minor under 18 years of age or to knowingly sell or otherwise transfer ownership or possession of a firearm to a minor or a person of unsound mind.

Additionally, any retail or wholesale store, shop, or sales outlet that sells firearms must conspicuously post at each purchase counter the following warning in block letters not less than 1 inch in height:

> It is unlawful to store or leave a firearm in any place within the reach or easy access of a minor under 18 years of age or to knowingly sell or otherwise transfer ownership or possession of a firearm to a minor or a person of unsound mind.

Any person or business knowingly violating a requirement to provide warning under this s. 790.175, F.S., commits a misdemeanor of the second degree, punishable as provided in s. 775.082, F.S., or s. 775.083, F.S.

Terminating the Doctor-Patient Relationship

The relationship between a physician and a patient is generally considered a private relationship and contractual in nature. According to the AMA, both the patient and the physician are free to enter into or decline the relationship.[8] Once a physician-patient relationship has been established, patients are free to terminate the relationship at any time.[9] Generally, doctors can only terminate existing relationships after giving the patient notice and a reasonable opportunity to obtain the services of another physician.[10] Florida's statutes do not currently contain any provisions that dictate when physicians and patients can terminate a doctor-patient relationship.

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[8] American Medical Association, Code of Medical Ethics, Opinion 9.12, *Patient-Physician Relationship: Respect for Law and Human Rights*, available at: http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion912.shtml (last visited Mar. 9, 2011). However, doctors who offer their services to the public may not decline to accept patients because of race, color, religion, national origin, sexual orientation, gender identity, or any other basis that would constitute invidious discrimination.

[9] American Medical Association, Code of Medical Ethics, Opinion 9.06, *Free Choice,* available at: http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion906.page (last visited Mar. 31, 2011).

[10] A health care provider owes a duty to the patient to provide the necessary and appropriate medical care to the patient with due diligence and to continue providing those services until: 1) they are no longer needed by the patient; 2) the relationship is ended with the consent of or at the request of the patient; or 3) the health care provider withdraws from the relationship after giving the patient notice and a reasonable opportunity to obtain the services of another health care provider. The relationship typically terminates when the patient's medical condition is cured or resolved, and this often occurs at the last visit when the health care provider notes in his records that the patient is to return as needed. *See Saunders v. Lischkoff*, 188 So. 815 (Fla. 1939). *See also*, *Ending the Patient-Physician Relationship*, AMA White Paper, available at: http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/ending-patient-physician-relationship.shtml (last accessed Mar. 9, 2011); American Medical Association, Code of Medical Ethics, Opinion 8.115 *Termination of the Physician-Patient Relationship*, available at: http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion8115.shtml (last visited Mar. 31, 2011).

Health Insurance Portability and Accountability Act

In 1996, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA). The HIPAA contains detailed requirements for the use or disclosure of protected health information (PHI). The regulations define PHI as all "individually identifiable health information," which includes information relating to:

- The individual's past, present, or future physical or mental health or condition;
- The provision of health care to the individual; or
- The past, present, or future payment for the provision of health care to the individual, and that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual.[11]

Covered entities[12] may only use and disclose PHI as permitted by the HIPAA or more protective state rules.[13] The HIPAA establishes both civil monetary penalties and criminal penalties for the knowing use or disclosure of individually identifiable health information in violation of the HIPAA.[14]

Confidentiality of Medical Records in Florida

Under s. 456.057(7), F.S., medical records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient. However, medical records may be released without written authorization in the following circumstances:

- When any person, firm, or corporation has procured or furnished such examination or treatment with the patient's consent.
- When compulsory physical examination is made pursuant to Rule 1.360, Florida Rules of Civil Procedure, in which case copies of the medical records shall be furnished to both the defendant and the plaintiff.
- In any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or the patient's legal representative by the party seeking such records.

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[11] 45 C.F.R. s. 160.103

[12] A "covered entity" is a health plan, a health care clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction covered under the HIPAA. *See id.*

[13] In general, covered entities may use PHI for the purposes of treatment, payment and health care operations (TPO) without any special permission from a patient. Special permission, called an authorization, must be obtained for uses and disclosures other than for TPO. For some uses and disclosures, a covered entity need not obtain an authorization but must give the patient the opportunity to agree or object (e.g., give patients the option to disclose health information to family or friends). Finally, in some situations, such as reporting to public health authorities, emergencies, or in research studies in which a waiver has been obtained from an Institutional Review Board (IRB), a covered entity does not need to obtain an authorization or provide an opportunity to agree or object. Yale University, *Health Insurance Portability and Accountability Act*, available at: http://hipaa.yale.edu/overview/index.html (last visited Mar. 9, 2011).

[14] *Id.* Fines under HIPAA range from $100 to $50,000 per violation with specified annual caps. Criminal penalties include fines ranging from $50,000 to $250,000 and imprisonment of up to 10 years. *See* American Medical Association, *HIPAA Violations and Enforcement*, available at: http://www.ama-assn.org/ama/pub/physician-resources/solutions-managing-your-practice/coding-billing-insurance/hipaahealth-insurance-portability-accountability-act/hipaa-violations-enforcement.shtml (last accessed Mar. 31, 2011).

- For statistical and scientific research, provided the information is abstracted in such a way as to protect the identity of the patient or provided written permission is received from the patient or the patient's legal representative.
- To a regional poison control center for purposes of treating a poison episode under evaluation, case management of poison cases, or compliance with data collection and reporting requirements of s. 395.1027, F.S., and the professional organization that certifies poison control centers in accordance with federal law.

The Florida Supreme Court has addressed the issue of whether a health care provider, absent any of the above-referenced circumstances, can disclose confidential information contained in a patient's medical records as part of a medical malpractice action.[15] The Florida Supreme Court ruled that, pursuant to s. 455.241, F.S. (the predecessor to current s. 456.057(7)(a), F.S.), only a health care provider who is a defendant, or reasonably expects to become a defendant, in a medical malpractice action can discuss a patient's medical condition.[16] The Court also held that the health care provider can only discuss the patient's medical condition with his or her attorney in conjunction with the defense of the action.[17] The Court determined that a defendant's attorney cannot have ex parte discussions about the patient's medical condition with any other treating health care provider.

III. Effect of Proposed Changes:

The bill specifies that a health care provider or a health care facility[18] may not intentionally enter disclosed information concerning firearm ownership into a patient's medical record if the provider knows that the information is not relevant to the patient's medical care or safety.

The bill also provides that a health care provider or health care facility must respect a patient's right to privacy and should refrain from making a written or verbal inquiry about the ownership of a firearm or ammunition by the patient or the patient's family members or the presence of a firearm in a home or domicile of the patient or the patient's family members, unless the provider or facility in good faith believes that the information is relevant to the patient's medical care or safety.

The bill provides that a patient may decline to answer questions about ownership of a firearm by the patient or the patient's family members or the presence of a firearm in the home of the patient or a patient's family member. The patient's refusal to answer does not alter existing law regarding a physician's authorization to choose his or her patients. The bill prohibits discrimination by a provider or facility based solely on a patient's exercise of the constitutional right to own or possess a firearm or ammunition.

The bill requires a provider or facility to respect a patient's legal right to own or possess a firearm and provides that a health care provider or health care facility should refrain from unnecessarily harassing a patient about such ownership.

[15] *Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996).
[16] *Id.*
[17] *Id.*
[18] Health care facilities licensed under ch. 395, F.S., include hospitals, ambulatory surgical centers, and mobile surgical facilities.

The bill provides that the following violations constitute grounds for disciplinary actions under s. 456.072(2) and s. 395.1055, F.S.:[19]

- Entering disclosed information concerning firearm ownership into the patient's medical record, if the information is not relevant to the patient's medical care or safety.
- Making a written or verbal inquiry as to the ownership of a firearm or ammunition by a patient or the patient's family members or the presence of a firearm in the home of the patient or the patient's family members and the information is not relevant to the patient's medical care or safety.
- Requiring a patient to answer information regarding the ownership of a firearm by the patient or a family member or the presence of a firearm in the home of the patient or a family member.
- Discriminating against a patient based solely upon the patient's exercise of the constitutional right to own and possess firearms or ammunition.[20]

The bill prohibits an insurer from denying coverage or increasing a premium, or otherwise discriminating against an insured or applicant for insurance, based on the lawful ownership, possession, use, or storage of a firearm or ammunition.

The bill provides the following under the Florida Patient's Bill of Rights and Responsibilities:

- A health care provider or health care facility must respect a patient's right to privacy and should refrain from making a written or verbal inquiry about the ownership of a firearm or ammunition by the patient or the patient's family members or the presence of a firearm in a home or domicile of the patient or the patient's family members, unless the provider or facility in good faith believes that the information is relevant to the patient's medical care or safety.
- A patient may decline to answer questions about ownership of a firearm by the patient or the patient's family members or the presence of a firearm in the home of the patient or a patient's family member, and the patient's refusal to answer does not alter existing law regarding a physician's authorization to choose his or her patients.
- A health care provider or health care facility may not discriminate against a patient based solely on the patient's exercise of the constitutional right to own or possess a firearm or ammunition.
- A health care provider or health care facility must respect a patient's legal right to own or possess a firearm, and a health care provider or health care facility should refrain from unnecessarily harassing a patient about such ownership.

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[19] The appropriate board within the DOH, or the DOH if there is no board may impose the following disciplinary actions: (1) Refusal to certify, or to certify with restrictions, an application for a license; (2) Suspension or permanent revocation of a license. (3) Restriction of practice or license. (4) Imposition of an administrative fine not to exceed $10,000 for each count or separate offense. (5) Issuance of a reprimand or letter of concern. (6) Placement of the licensee on probation for a period of time and subject to such conditions as the board or the DOH may specify. (7) Corrective action. (8) Imposition of an administrative fine in accordance with s. 381.0261, F.S., for violations regarding patient rights. (9) Refund of fees billed and collected from the patient or a third party on behalf of the patient. (10) Requirement that the practitioner undergo remedial education.

[20] However, the bill contains a redundancy because it also provides that any violation of s. 790.338, F.S., constitutes grounds for disciplinary action. *See* explanation under the heading "Technical Deficiencies."

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

Although this bill states that a health care provider or health care facility should refrain from making a written or verbal inquiry about the ownership of a firearm or ammunition or presence of a firearm in the home of a patient or his or her family, it should be noted that the individual's right to exercise free speech is only regulated in the most egregious of circumstances.

The First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech."[21] The Florida Constitution similarly provides that "[n]o law shall be passed to restrain or abridge the liberty of speech…"[22] Florida courts have equated the scope of the Florida Constitution with that of the Federal Constitution in terms of the guarantees of freedom of speech.[23]

A regulation that abridges speech because of the content of the speech is subject to the strict scrutiny standard of judicial review.[24] However, the state may regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.[25] "Unlike the case of personal speech, it is not necessary to show a compelling state interest in order to justify infringement of commercial speech through regulation."[26] Commercial free speech that concerns lawful activity and is not misleading may be restricted where the asserted

[21] U.S. CONST. amend. I.
[22] FLA. CONST. art. I, s. 4.
[23] *See, Florida Canners Ass'n v. State, Dep't of Citrus,* 371 So.2d 503 (Fla.1979).
[24] *See, e.g., Reno v. Flores,* 507 U.S. 292, 302 (1993); *Mitchell v. Moore,* 786 So.2d 521, 527 (Fla.2001).
[25] *See United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 813 (2000); *Sable Commc'ns of Cal., Inc. v. FCC,* 492 U.S. 115, 126 (1989).
[26] *Florida Canners Ass'n*, 371 So.2d at 519.

governmental interest is substantial, the regulation directly advanced that interest, and the regulation is no more extensive than necessary to serve that interest.[27]

It should also be noted that any civil action that might ensue will likely raise issues surrounding personal, professional, and contractual obligations between the parties; physician-patient privileges of confidentiality; and the weight given to the right to exercise free speech versus a right to privacy.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

A person who violates certain provisions of the bill may be subject to disciplinary action, including, but not limited to, the imposition of an administrative fine not to exceed $10,000 for each count or separate offense and the suspension or permanent revocation of a license.[28]

C. Government Sector Impact:

Additional regulatory and enforcement action may occur for the boards and agencies with oversight responsibilities of the health care professionals and health care facilities due to patient complaints.

VI. Technical Deficiencies:

Lines 53, 59, 78, and 83 refer to health care providers licensed under ch. 456, F.S. Health care providers are not licensed under that chapter, although certain health care practitioners are subject to the general provisions of ch. 456, F.S.

Lines 89 through 90 of the bill provide that certain violations constitute grounds for disciplinary action under ss. 456.072 and 395.1055, F.S. However, s. 395.1055, F.S., does not provide for any disciplinary action and instead requires the Agency for Health Care Administration to adopt rules that relate to standards of care, among other things.

Lines 88 through 89 of the bill provide that a violation of certain provisions within s. 790.338, F.S., constitutes grounds for disciplinary action under s. 456.072(2), F.S. This appears to be redundant because line 163 provides that *any* violation under s. 790.338, F.S., constitutes grounds for which disciplinary actions may be taken under s. 456.072(2), F.S.

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[27] *See Abramson v. Gonzalez*, 949 F.2d 1567, 1575-76 (11th Cir. 1992) (holding that is not misleading for an unlicensed person who practices psychology to call himself or herself a psychologist although a state statute defines psychologist as someone with a psychologist license).
[28] *See* s. 456.072, F.S.

VII. Related Issues:

Lines 164 through 170 of the bill may affect an insurer's current insurance policy pertaining to the insuring of firearms.

Because the provision of the bill that prohibits an insurer from discriminating against an insured or applicant for insurance on the basis of his or her lawful ownership, possession, use, or storage of a firearm or ammunition is in an undesignated section of the Florida Statutes, it is unclear what penalty, if any, the insurer would be subject to if the insurer committed this violation.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

CS/CS by Health Regulation on March 28, 2011:

- Specifies that a health care provider or health care facility may not intentionally enter disclosed information concerning firearm ownership into a patient's medical record if the provider knows the information is not relevant to the patient's medical care or safety.
- Provides that a health care provider or health care facility should refrain from inquiring about ownership of a firearm or ammunition by the patient or a family member of the patient or the presence of a firearm in a home or domicile of the patient or a family member of the patient, unless the provider or facility believes in good faith that the information is relevant to the patient's medical care or safety.
- Permits a patient to decline to answer questions about ownership of a firearm or the presence of a firearm in the home of the patient or a family member of the patient and a patient's refusal to answer does not alter existing law regarding a physician's authorization to choose his or her patients.
- Prohibits discrimination by a provider or facility based on a patient's constitutional right to own or possess a firearm or ammunition.
- Requires a provider or facility to respect a patient's legal right to own or possess a firearm and to refrain from unnecessarily harassing a patient about such ownership.
- Provides for certain patient rights concerning the ownership of firearms or ammunition in the Florida Patient's Bill of Rights and Responsibilities.
- Provides that any violations related to disclosures, inquiries, discrimination, and harassment constitutes grounds for certain disciplinary actions.
- Prohibits an insurer from denying coverage or increasing a premium, or otherwise discriminating against an insured or applicant for insurance based on the lawful ownership, possession, use, or storage of a firearm or ammunition.

CS by Criminal Justice on February 22, 2011:

- Removes the criminal penalties from the bill and instead provides for noncriminal violations which could result in graduated fines for each successive violation of the prohibitions in the bill.
- Provides limited exemptions from the prohibitions in the bill in the course of emergency treatment, including mental health emergencies, and where certain mental

health professionals believe it is necessary to inquire about firearm possession. The patient's response is only to be disclosed to others participating in the patient's treatment or to law enforcement conducting an active investigation of the events giving rise to a medical emergency.

- Provides an exemption for medical records created on or before the effective date of the bill.

B. Amendments:

None.

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

348370

LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Bogdanoff) recommended the following:

1 **Senate Amendment (with title amendment)**
2
3 Between lines 164 and 165
4 insert:
5 Section 4. Subsection (1) of section 790.053, Florida
6 Statutes, is amended to read:
7 790.053 Open carrying of weapons.—
8 (1) Except as otherwise provided by law and in subsection
9 (2), it is unlawful for any person to openly carry on or about
10 his or her person any firearm or electric weapon or device,
11 except as provided in s. 790.06(1). It shall not be a violation
12 of this section for a person who is licensed to carry a

348370

13 concealed firearm, and who is lawfully carrying it in a
14 concealed manner, to accidentally or inadvertently display the
15 firearm to the ordinary sight of another person so long as the
16 firearm is not displayed in a rude, angry, or threatening
17 manner.
18
19 ================= T I T L E A M E N D M E N T ================
20 And the title is amended as follows:
21 Delete line 16
22 and insert:
23 place in another state. amending s. 790.053, F.S.;
24 providing that person in compliance with the terms of
25 a concealed carry license is not in violation of s.
26 790.053(1), F.S. when the concealed firearm is
27 accidentally or inadvertently displayed to the
28 ordinary sight of another person; providing an
29 effective date.

589950

LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Bogdanoff) recommended the following:

1 **Senate Substitute for Amendment (348370) (with title**
2 **amendment)**
3
4 Delete lines 35 - 36
5 and insert:
6 notwithstanding the provisions of s. 790.01. The licensee must
7 carry the license,
8 Between lines 164 and 165
9 insert:
10 Section 4. Subsection (1) of section 790.053, Florida
11 Statutes, is amended to read:
12 790.053 Open carrying of weapons.—

589950

13 (1) Except as otherwise provided by law and in subsection (2),
14 it is unlawful for any person to openly carry on or about his or
15 her person any firearm or electric weapon or device, except as
16 provided in s. 790.06(1). It shall not be a violation of this
17 section for a person who is licensed to carry a concealed
18 firearm, and who is lawfully carrying it in a concealed manner,
19 to accidentally or inadvertently display the firearm to the
20 ordinary sight of another person so long as the firearm is not
21 displayed in a rude, angry, or threatening manner.
22
23 ================= T I T L E A M E N D M E N T ================
24 And the title is amended as follows:
25 Delete lines 3 - 5
26 and insert:
27 allowing the
28 Delete line 116
29 and insert:
30 place in another state. amending s. 790.053, F.S.;
31 providing that person in compliance with the terms of
32 a concealed carry license is not in violation of s.
33 790.053(1), F.S. when the concealed firearm is
34 accidentally or inadvertently displayed to the
35 ordinary sight of another person; providing an
36 effective date.

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 234

INTRODUCER: Criminal Justice Committee, Senators Evers, and others

SUBJECT: Firearms

DATE: April 11, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Fav/CS**
2.	Munroe	Maclure	JU	**Pre-meeting**
3.			RC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... [X] Statement of Substantial Changes
B. AMENDMENTS........................ [ ] Technical amendments were recommended
[ ] Amendments were recommended
[ ] Significant amendments were recommended

I. Summary:

Committee Substitute for Senate Bill 234 amends the concealed weapons license law to provide that a person who is in compliance with the concealed carry license requirements and limitations may carry such weapon openly in addition to carrying it in a concealed manner.

The bill provides that a person who is licensed to carry a weapon or firearm shall not be prohibited from carrying it in or storing it in a vehicle for lawful purposes.

The bill allows the Department of Agricultural and Consumer Services to take the fingerprints that license applicants submit with their applications for licensure. This will provide applicants with an additional location where their prints can be taken.

The bill also amends Florida law regarding the transfer of firearms by Florida residents which occur in other states.

This bill amends sections 790.06 and 790.065, Florida Statutes. This bill repeals section 790.28, Florida Statutes.

II. Present Situation:

Under current Florida law, it is lawful for a person to carry a *concealed* weapon without a concealed weapon license for purposes of lawful self-defense, so long as the weapon is limited to self-defense chemical spray, a nonlethal stun gun, a dart-firing stun gun, or other nonlethal electric weapon or device that is designed solely for defensive purposes.[1]

However, without licensure, a person carrying a different type of concealed weapon,[2] electric weapon, or device other than one designed solely for defensive purposes is liable for a first degree misdemeanor.[3] A person who carries a concealed firearm without proper licensure is liable for a third degree felony offense.[4]

It is lawful for a person to *openly* carry a self-defense chemical spray, nonlethal stun gun or dart-firing stun gun, or other nonlethal electric weapon or device that is designed solely for defensive purposes.[5]

Certain persons under particular circumstances are exempt from the limitations on the open carry of weapons in s. 790.053, F.S., and the concealed firearm carry licensure requirements in s. 790.06, F.S., when the weapons and firearms are lawfully owned, possessed, and used. These persons and circumstances include:

- Members of the Militia, National Guard, Florida State Defense Force, Army, Navy, Air Force, Marine Corps, Coast Guard, organized reserves, and other armed forces of the state and of the United States, when on duty, when training or preparing themselves for military duty, or while subject to recall or mobilization;
- Citizens of this state subject to duty in the Armed Forces under s. 2, Art. X of the State Constitution, under chs. 250 and 251, F.S., and under federal laws, when on duty or when training or preparing themselves for military duty;
- Persons carrying out or training for emergency management duties under ch. 252, F.S.;
- Sheriffs, marshals, prison or jail wardens, police officers, Florida highway patrol officers, game wardens, revenue officers, forest officials, special officers appointed under the provisions of ch. 354, F.S., and other peace and law enforcement officers and their deputies and assistants and full-time paid peace officers of other states and of the Federal Government who are carrying out official duties while in this state;
- Officers or employees of the state or United States duly authorized to carry a concealed weapon;
- Guards or messengers of common carriers, express companies, armored car carriers, mail carriers, banks, and other financial institutions, while actually employed in and about the

[1] s. 790.01(4), F.S.
[2] A concealed weapon, under s. 790.001(3)(a), F.S., means any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon carried on or about a person in such a manner as to conceal the weapon from the ordinary sight of another person. The weapons listed in this definition require licensure to carry them in a concealed manner.
[3] s. 790.01(1), F.S.
[4] s. 790.01(2), F.S.
[5] s. 790.053(2), F.S.

shipment, transportation, or delivery of any money, treasure, bullion, bonds, or other thing of value within this state;
- Regularly enrolled members of any organization duly authorized to purchase or receive weapons from the United States or from this state, or regularly enrolled members of clubs organized for target, skeet, or trap shooting, while at or going to or from shooting practice; or regularly enrolled members of clubs organized for modern or antique firearms collecting, while such members are at or going to or from their collectors' gun shows, conventions, or exhibits;
- A person engaged in fishing, camping, or lawful hunting or going to or returning from a fishing, camping, or lawful hunting expedition;
- A person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person while engaged in the lawful course of such business;
- A person firing weapons for testing or target practice under safe conditions and in a safe place not prohibited by law or going to or from such place;
- A person firing weapons in a safe and secure indoor range for testing and target practice;
- A person traveling by private conveyance when the weapon is securely encased or in a public conveyance when the weapon is securely encased and not in the person's manual possession;
- A person while carrying a pistol unloaded and in a secure wrapper, concealed or otherwise, from the place of purchase to his or her home or place of business or to a place of repair or back to his or her home or place of business;
- A person possessing arms at his or her home or place of business; and
- Investigators employed by the public defenders and capital collateral regional counsel of the state, while actually carrying out official duties.[6]

Concealed Weapons Licensure

The Department of Agriculture and Consumer Services (DACS) is authorized to issue concealed weapon licenses to those applicants who qualify.[7] Concealed weapons or concealed firearms are defined as a handgun, electronic weapon or device, tear gas gun, knife, or billie but not a machine gun for purposes of the licensure law.[8]

According to the FY 2009-2010 statistics, the DACS received 167,240 new licensure applications and 91,963 requests for licensure renewal during that time period.[9]

To obtain a concealed weapons license, a person must complete, under oath, an application that includes:

- The name, address, place and date of birth, race, and occupation of the applicant;

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[6] s. 790.25(3), F.S.
[7] s. 790.06(1), F.S.
[8] *Id.*
[9] Fla. Dep't of Agriculture and Consumer Services, Concealed Weapon or Firearm License Reports, Applications and Dispositions by County July 1, 2009 – June 30, 2010, http://licgweb.doacs.state.fl.us/stats/07012009_06302010_cw_annual.pdf (last visited Apr. 4, 2011).

- A full frontal view color photograph of the applicant which must be taken within the preceding 30 days;
- A statement that the applicant has been furnished with a copy of ch. 790, F.S., relating to weapons and firearms and is knowledgeable of its provisions;
- A warning that the application is executed under oath with penalties for falsifying or substituting false documents;
- A statement that the applicant desires a concealed weapon or firearms license as a means of lawful self-defense;
- A full set of fingerprints;
- Documented proof of completion of a firearms safety and training course; and
- A nonrefundable license fee no greater than $85.[10]

Additionally, the applicant must attest that he or she is in compliance with the criteria contained in subsections (2) and (3) of s. 790.06, F.S.

Subsection (2) of s. 790.06, F.S., requires the DACS to issue the license to carry a concealed weapon, if all other requirements are met, and the applicant:

- Is a resident of the United States and a citizen of the United States or a permanent resident alien of the United States, as determined by the United States Bureau of Citizenship and Immigration Services, or is a consular security official of a foreign government that maintains diplomatic relations and treaties of commerce, friendship, and navigation with the United States and is certified as such by the foreign government and by the appropriate embassy in this country;
- Is 21 years of age or older;
- Does not suffer from a physical infirmity that prevents the safe handling of a weapon or firearm;
- Is not ineligible to possess a firearm pursuant to s. 790.23, F.S., by virtue of having been convicted of a felony;
- Has not been committed for the abuse of a controlled substance or been found guilty of a crime under the provisions of ch. 893, F.S., or similar laws of any other state relating to controlled substances within a three-year period immediately preceding the date on which the application is submitted;
- Does not chronically and habitually use alcoholic beverages or other substances to the extent that his or her normal faculties are impaired. It shall be presumed that an applicant chronically and habitually uses alcoholic beverages or other substances to the extent that his or her normal faculties are impaired if the applicant has been committed under ch. 397, F.S., or under the provisions of former ch. 396, F.S., or has been convicted under s. 790.151, F.S., or has been deemed a habitual offender under s. 856.011(3), F.S., or has had two or more convictions under s. 316.193, F.S., or similar laws of any other state, within the three-year period immediately preceding the date on which the application is submitted;
- Has not been adjudicated an incapacitated person under s. 744.331, F.S., or similar laws of any other state, unless five years have elapsed since the applicant’s restoration to capacity by court order;

[10] s. 790.06(1)-(5), F.S.

- Has not been committed to a mental institution under ch. 394, F.S., or similar laws of any other state, unless the applicant produces a certificate from a licensed psychiatrist that he or she has not suffered from disability for at least five years prior to the date of submission of the application;
- Has not had adjudication of guilt withheld or imposition of sentence suspended on any felony or misdemeanor crime of domestic violence unless three years have elapsed since probation or any other conditions set by the court have been fulfilled, or the record has been sealed or expunged;
- Has not been issued an injunction that is currently in force and effect and that restrains the applicant from committing acts of domestic violence or acts of repeat violence; and
- Is not prohibited from purchasing or possessing a firearm by any other provision of Florida or federal law.[11]

The Department of Agriculture and Consumer Services must deny the application if the applicant has been found guilty of, had adjudication of guilt withheld for, or had imposition of sentence suspended for one or more crimes of violence constituting a misdemeanor, unless three years have elapsed since probation or any other conditions set by the court have been fulfilled or the record has been sealed or expunged.[12]

The Department of Agriculture and Consumer Services shall revoke a license if the licensee has been found guilty of, had adjudication of guilt withheld for, or had imposition of sentence suspended for one or more crimes of violence within the preceding three years.[13]

The Department of Agriculture and Consumer Services shall, upon notification by a law enforcement agency, a court, or the Florida Department of Law Enforcement and subsequent written verification, suspend a license or the processing of an application for a license if the licensee or applicant is arrested or formally charged with a crime that would disqualify such person from having a license under this section, until final disposition of the case.[14] The DACS shall suspend a license or the processing of an application for a license if the licensee or applicant is issued an injunction that restrains the licensee or applicant from committing acts of domestic violence or acts of repeat violence.[15]

In addition, the DACS is required to suspend or revoke a concealed weapons license if the licensee:

- Is found to be ineligible under the criteria set forth in subsection (2);
- Develops or sustains a physical infirmity that prevents the safe handling of a weapon or firearm;
- Is convicted of a felony that would make the licensee ineligible to possess a firearm pursuant to s. 790.23, F.S.;

[11] s. 790.06(2), F.S.
[12] s. 790.06(3), F.S.
[13] *Id.*
[14] *Id.*
[15] *Id.*

- Is found guilty of a crime under the provisions of ch. 893, F.S., or similar laws of any other state, relating to controlled substances;
- Is committed as a substance abuser under ch. 397, F.S., or is deemed a habitual offender under s. 856.011(3), F.S., or similar laws of any other state;
- Is convicted of a second violation of s. 316.193, F.S., (driving under the influence), or a similar law of another state, within three years of a previous conviction of such section, or similar law of another state, even though the first violation may have occurred prior to the date on which the application was submitted;
- Is adjudicated an incapacitated person under s. 744.331, F.S., or similar laws of any other state; or
- Is committed to a mental institution under ch. 394, F.S., or similar laws of any other state.[16]

Licensees must carry their license and valid identification any time they are in actual possession of a concealed weapon or firearm and display both documents upon demand by a law enforcement officer.[17] A person's failure to have proper documentation and display it upon demand makes the person liable for a second degree misdemeanor.[18]

A concealed weapon or firearms license does not authorize a person to carry a weapon or firearm in a concealed manner into:

- any place of nuisance as defined in s. 823.05, F.S.;
- any police, sheriff, or highway patrol station;
- any detention facility, prison, or jail;
- any courthouse;
- any courtroom, except that nothing in this section would preclude a judge from carrying a concealed weapon or determining who will carry a concealed weapon in his or her courtroom;
- any polling place;
- any meeting of the governing body of a county, public school district, municipality, or special district;
- any meeting of the Legislature or a committee thereof;
- any school, college, or professional athletic event not related to firearms;
- any school administration building;
- any portion of an establishment licensed to dispense alcoholic beverages for consumption on the premises, which portion of the establishment is primarily devoted to such purpose;
- any elementary or secondary school facility;
- any career center;
- any college or university facility unless the licensee is a registered student, employee, or faculty member of such college or university and the weapon is a stun gun or nonlethal electric weapon or device designed solely for defensive purposes and the weapon does not fire a dart or projectile;

[16] s. 790.06(10), F.S.
[17] s. 790.06(1), F.S.
[18] *Id.*

- inside the passenger terminal and sterile area of any airport, provided that no person shall be prohibited from carrying any legal firearm into the terminal, which firearm is encased for shipment for purposes of checking such firearm as baggage to be lawfully transported on any aircraft; or
- any place where the carrying of firearms is prohibited by federal law.

Any person who willfully violates any of the above-listed provisions commits a misdemeanor of the second degree.[19]

Firearms in Vehicles

It is lawful for a person 18 years of age or older to possess a concealed firearm or other weapon for self-defense or other lawful purpose within the interior of a private conveyance, without a license, if the firearm or other weapon is securely encased or is otherwise not readily accessible for immediate use. The same is true for a legal long gun (gun with a longer barrel), without the need for encasement, when it is carried in the private conveyance for a lawful purpose.[20]

“Securely encased” means in a glove compartment, whether or not locked; snapped in a holster; in a gun case, whether or not locked; in a zippered gun case; or in a closed box or container that requires a lid or cover to be opened for access.[21] The term “readily accessible for immediate use” means that a firearm or other weapon is carried on the person or within such close proximity and in such a manner that it can be retrieved and used as easily and quickly as if carried on the person.[22]

Section 790.251, F.S., became law in 2008. It addressed the lawful possession of firearms in vehicles within the parking lots of businesses, and was commonly known as the “Guns at Work” law. The law was challenged quickly after its passage.[23] The court recognized the state’s authority to protect an *employee* from employment discrimination where the employee had a concealed carry license and kept a firearm in a vehicle at work.[24]

However, because of the statutory definitions of employer and employee, the court found a problem in the application of the law to *customers*.[25] The court’s reading of the statutory definitions led to this conclusion: a business that happened to employ a person with a concealed weapon license (who kept a firearm secured in his or her vehicle in the parking lot at work) would have been prohibited from expelling a customer who had a firearm in his or her car; a business without such an employee would have been free to expel such a customer.[26] The court held the s. 790.251, F.S., unconstitutional to the extent the law “compels some businesses but not others-with no rational basis for the distinction-to allow a *customer* to secure a gun in a

[19] s. 790.06(12), F.S.
[20] s. 790.25(5), F.S.
[21] s. 790.001(17), F.S.
[22] s. 790.001(16), F.S.
[23] *Florida Retail Federation v. Attorney General,* 576 F.Supp.2d 1281 (N.D.Fla. 2008).
[24] *Id.* at 1284.
[25] *Id.*
[26] *Id.* at 1284-85.

vehicle."[27] The court found that there was no rational basis for treating two similarly situated businesses differently just because one happened to employ someone with a concealed weapons license; therefore, the state was enjoined from enforcing the part of the law that applied to customers.[28]

Florida Residents Purchasing Shotguns and Rifles in Other States

In 1968, the federal Gun Control Act (GCA) was enacted.[29] Among its many provisions was a section that made it unlawful for a licensed importer, manufacturer, dealer, or collector[30] to sell or deliver any firearm[31] to any person who the licensee knew or had reasonable cause to believe did not reside in the state in which the licensee's place of business was located.[32] The GCA specified that this prohibition did not apply to the sale or delivery of a rifle[33] or shotgun[34] to a resident of a state contiguous to the state in which the licensee's place of business was located if:

- The purchaser's state of residence permitted such sale or delivery by law;
- The sale fully complied with the legal conditions of sale in both such contiguous states; and
- The purchaser and the licensee had, prior to the sale of the rifle or shotgun, complied with federal requirements applicable to intrastate firearm transactions that took place at a location other than at the licensee's premises.[35]

Subsequent to the enactment of the GCA, several states, including Florida, enacted statutes that mirrored the GCA's provisions that allowed a licensee to sell a rifle or a shotgun to a resident of a state contiguous to the state in which the licensee's place of business was located.[36] Florida's statute, s. 790.28, F.S., entitled "Purchase of rifles and shotguns in contiguous states," was enacted in 1979, and currently provides the following:

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[27] *Id.*
[28] *Id.*
[29] Pub. L. No. 90-618 (codified at 18 U.S.C. §§ 921-928).
[30] The term "importer" means any person engaged in the business of importing or bringing firearms or ammunition into the United States for purposes of sale or distribution. The term "manufacturer" means any person engaged in the business of manufacturing firearms or ammunition for purposes of sale or distribution. The term "dealer" means any person engaged in the business of selling firearms at wholesale or retail; any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms; or any person who is a pawnbroker. The term "collector" means any person who acquires, holds, or disposes of firearms as curios or relics, as the Attorney General shall by regulation define. To be "licensed," an entity listed above must be licensed under the provisions of 18 U.S.C. Ch. 44. *See* 18.U.S.C. § 921.
[31] 18 U.S.C. § 921 defines the term "firearm" as any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or any destructive device. Such term does not include an antique firearm.
[32] 18 U.S.C. § 922(b)(3) (1968).
[33] 18 U.S.C. § 921 defines the term "rifle" as a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire only a single projectile through a rifled bore for each single pull of the trigger.
[34] 18 U.S.C. § 921 defines the term "shotgun" as a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.
[35] 18 U.S.C. § 922(b)(3) (1968).
[36] *See, e.g.,* O.C.G.A. § 10-1-100 (2011), specifying that residents of the state of Georgia may purchase rifles and shotguns in any state of the United States, provided such residents conform to applicable provisions of statutes and regulations of the United States, of the state of Georgia, and of the state in which the purchase is made.

> A resident of this state may purchase a rifle or shotgun in any state contiguous to this state if he or she conforms to applicable laws and regulations of the United States, of the state where the purchase is made, and of this state.

In 1986, the federal Firearm Owners' Protection Act (FOPA) was enacted.[37] The Firearm Owners' Protection Act amended the GCA's "contiguous state" requirement to allow licensees to sell or deliver a rifle or shotgun to a resident of any state (not just contiguous states) if:

- The transferee meets in person with the transferor to accomplish the transfer; and
- The sale, delivery, and receipt fully comply with the legal conditions of sale in both such states.[38]

Subsequent to the enactment of FOPA, many states revised or repealed their statutes that imposed a "contiguous state" requirement on the interstate purchase of rifles and shotguns. Florida has not revised or repealed its statute.

It should be noted that federal-licensed firearms dealers, importers, and manufacturers are required by the federal government to collect and submit identifying information from prospective firearm purchasers to the National Instant Criminal Background Check System before transferring the firearm.[39]

III. Effect of Proposed Changes:

The bill provides that a person who holds a valid concealed weapon or firearm license, issued by the Department of Agriculture and Consumer Affairs (DACS) under s. 790.06, F.S., may carry a weapon or firearm openly.

Also, the bill inserts a provision in s. 790.06(12), F.S., that specifically protects a licensed person from being prohibited from carrying or storing a firearm in a vehicle for lawful purposes.

A person who carries a weapon or firearm into one of the prohibited locations set forth in subsection (12) of s. 790.06, F.S., or a person who prohibits a licensee from carrying or storing a firearm in a vehicle for lawful purposes, commits a second degree misdemeanor if they do so knowingly and willfully under the provisions of the bill.

The bill also authorizes the DACS to take fingerprints from a license-applicant for inclusion with the application packet for a concealed weapon or firearm license. This provides the applicant with an additional place to have his or her prints taken if necessary.

Section 790.28, F.S., is repealed by the bill. It is the provision that limits Florida residents to the purchase of rifles and shotguns in contiguous states. Section 790.065, F.S., is amended to clarify

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[37] Pub. L. No. 99-308.

[38] 18 U.S.C. § 922(b)(3) (1986). See David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 633-34 (1986/1987).

[39] 18 U.S.C. § 922(t)(1).

that a licensed dealer's shotgun or rifle sale to a Florida resident in another state is subject only to the federal law and the law of the state wherein the transfer is made.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on March 14, 2011:
Deleted revisions to the definitions of places a person may not carry a firearm, concealed or openly, thereby restoring current law.

B. Amendments:

None.

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

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LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Braynon) recommended the following:

Senate Amendment (with title amendment)

Between lines 13 and 14
insert:
Section 1. Section 2.01, Florida Statutes, is amended to
read:
2.01 Common law and certain statutes declared in force.—
(1) The common and statute laws of England which are of a
general and not a local nature, with the exception hereinafter
mentioned, down to the 4th day of July, 1776, are declared to be
of force in this state to the extent such common and statute
laws are~~; provided, the said statutes and common law be~~ not
inconsistent with the Constitution and laws of the United States

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14 and the acts of the Legislature of this state.
15 (2) Notwithstanding subsection (1), provisions including,
16 but not limited to, the following are declared to be of force in
17 this state:
18 (a) Those clearly expressed, or obviously and reasonably
19 implied without clear expression, in the language and wording of
20 the acts of the Legislature.
21 (b) Those that provide for rights and claims in tort
22 liability for acts committed directly or indirectly involving
23 judicial and administrative proceedings. In such cases,
24 litigation privilege or judicial, qualified, or absolute
25 immunity and similar privileges and immunities are not and may
26 not be considered as viable or valid defenses.
27 (c) Those relating to claims for or defenses of abuse of
28 process, malicious prosecution, and fraud upon the court, also
29 known as extrinsic fraud, that must be strictly enforced. In
30 such cases, litigation privilege or judicial, qualified, or
31 absolute immunity and similar privileges and immunities are not
32 and may not be considered as viable or valid defenses.
33 (d) Those relating to criminal offenses under 18 U.S.C. ss.
34 241 and 242 and claims under 42 U.S.C. ss. 1983, 1985, 1986, and
35 1988, as prescribed by federal statutes and the decisions of the
36 federal courts.
37 Section 2. Subsections (1) and (4) of section 25.382,
38 Florida Statutes, are amended, and subsections (5), (6), and (7)
39 are added to that section, to read:
40 25.382 State courts system.—
41 (1) As used in this section, “state courts system” means
42 all officers, employees, and divisions of the Supreme Court,

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43 district courts of appeal, circuit courts, and county courts,
44 also known as the judicial branch of state government.
45 (4) The Supreme Court shall ensure that clearly written
46 policies, procedures, and goals for the recruitment, selection,
47 promotion, and retention of minorities, including minority
48 women, are established throughout all levels of the judicial
49 system. An annual report ~~shall be submitted to the Chief Justice~~
50 outlining progress, problems, and corrective actions relating to
51 the implementation of this plan shall be submitted to the Chief
52 Justice, the Governor, the President of the Senate, and the
53 Speaker of the House of Representatives. Three copies of the
54 report shall be submitted to each legislative substantive and
55 appropriations committee having jurisdiction over state courts
56 or judicial matters. The report shall be used for legislative
57 interim projects.
58 (5) The Supreme Court shall ensure that clearly written
59 policies, procedures, and goals are developed into a plan for
60 promoting civics for residents of this state, together with
61 education concerning the judicial branch in order to develop
62 trust and confidence in the state's judicial system. An annual
63 report outlining progress, problems, and corrective actions
64 relating to the implementation of this plan shall be submitted
65 to the Chief Justice, the Governor, the Cabinet, the President
66 of the Senate, and the Speaker of the House of Representatives.
67 Three copies of the report shall be submitted to each
68 legislative substantive and appropriations committee having
69 jurisdiction over state courts or judicial matters. The report
70 shall be used for legislative interim projects.
71 (6) The Supreme Court shall submit all final reports

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72 completed by assigned court committees, whether by rule or
73 order, dating from 2000 and thereafter, as follows: one copy
74 each to the Governor, the Cabinet, the President of the Senate,
75 and the Speaker of the House of Representatives and three copies
76 to each legislative substantive and appropriations committee
77 having jurisdiction over state courts or judicial matters. The
78 reports may be used for legislative interim projects.
79 (7) Pursuant to ss. 11.45(2)(a), 11.51(1), and 11.513(5),
80 the Auditor General and the Office of Program Policy Analysis
81 and Government Accountability shall conduct a full audit review
82 and examination of the state courts system and prepare a report
83 containing appropriate recommendations. The audit must be
84 conducted every 2 years beginning July 1, 2011, in accordance
85 with the full authority and responsibilities conferred upon the
86 Auditor General and the Office of Program Policy Analysis and
87 Government Accountability by general law. The report and
88 recommendations must be submitted within 1 year after the audit
89 to the chair and vice chair of the Legislative Budget
90 Commission, the chair and vice chair of the Legislative Auditing
91 Committee, the Governor, and the Chief Justice of the Supreme
92 Court.
93 Section 3. Subsection (1) of section 26.012, Florida
94 Statutes, is amended, and subsection (6) is added to that
95 section, to read:
96 26.012 Jurisdiction of circuit court.—
97 (1) Circuit courts shall have jurisdiction of appeals from
98 county courts except appeals of county court orders or judgments
99 declaring invalid a state statute or a provision of the State
100 Constitution and except orders or judgments of a county court

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101 which are certified by the county court to the district court of
102 appeal to be of great public importance and which are accepted
103 by the district court of appeal for review. Circuit courts shall
104 have jurisdiction of interlocutory appeals from orders on
105 motions to dismiss, for dismissal, and for summary judgment
106 rendered in cases in which a circuit court has exclusive
107 original jurisdiction. Circuit courts shall have jurisdiction of
108 appeals from final administrative orders of local government
109 code enforcement boards.
110 (6) The following special divisions of judicial circuits
111 are created:
112 (a) *Unified family courts.*—A unified family division is
113 established in each judicial circuit for the purpose of
114 consolidating cases and integrating subject matter pertaining to
115 children and their families who are parties or persons of
116 interest in proceedings or matters under chapters 39, 61, and
117 63, s. 68.07, and chapters 88, 741, 742, 743, 984, 985, and
118 1003. Each judicial circuit shall administer the division as
119 prescribed by general law or s. 43.30 for the resolution of
120 disputes involving children and families through a fully
121 integrated, comprehensive approach that includes coordinated
122 case management; the concept of "one family, one judge";
123 collaboration with the community for referral to needed
124 services; and methods of alternative dispute resolution.
125 (b) *Teen courts.*—A teen division is established in each
126 judicial circuit for the purpose of administering teen courts as
127 provided by s. 938.19. Each judicial circuit shall administer
128 the division as prescribed by general law or s. 43.30.
129 (c) *Drug and mental health courts.*—A drug and mental health

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130 division is established in each judicial circuit for the purpose
131 of administering the programs under ss. 394.656, 394.658, and
132 397.334. Each judicial circuit shall administer the division as
133 prescribed by general law or s. 43.30.
134 Section 4. Subsections (1), (2), and (5) of section 43.20,
135 Florida Statutes, are amended, and subsections (6) and (7) are
136 added to that section, to read:
137 43.20 Judicial Qualifications Commission.—
138 (1) PURPOSE.—The purpose of this section is to implement s.
139 12(a) ~~(b)~~, Art. V of the State Constitution which provides for a
140 Judicial Qualifications Commission.
141 (2) MEMBERSHIP; TERMS.—The commission shall consist of 15
142 ~~13~~ members. The members of the commission shall serve for terms
143 of 6 years.
144 (5) EXPENSES.—The compensation of members and their staff
145 and referees shall be the travel expense or transportation and
146 per diem allowance provided by s. 112.061. Other administrative
147 costs and expenses shall be appropriated under the state courts
148 system.
149 (6) COMMISSION STAFF.—The commission shall hire separate
150 staff for each commission panel, which staff may be compensated
151 or may be provided by volunteer services.
152 (a) Staff for each commission panel must consist of at
153 least one designated staff committee of five common citizen
154 electors to assist and engage in the deliberations for each
155 panel of members of the commission in carrying out its powers
156 and duties. Such designated staff committee must consist of
157 persons who are not considered to be officers of the court. The
158 designated staff committee shall prepare a report of suggestions

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159 or comments.
160 (b) The designated staff committee shall provide a copy of
161 the report of its suggestions or comments to:
162 1. The hearing panel upon submission of formal charges by
163 the commission's investigative panel to assist the hearing panel
164 in its pending proceedings and final recommendations.
165 2. The Supreme Court, together with the recommendations of
166 the commission's hearing panel, to assist the Supreme Court in
167 its final determination.
168 (c) The reports of the suggestions or comments of the
169 designated staff committee shall be public records and available
170 upon the final determination of any case rendered by any
171 commission panel.
172 (d) The commission shall adopt rules to implement this
173 subsection.
174 (7) COMMISSION ACCOUNTABILITY AND EFFICIENCY.—Pursuant to
175 ss. 11.45(2)(a), 11.51(1), and 11.513(5), the Auditor General
176 and the Office of Program Policy Analysis and Government
177 Accountability shall conduct a full audit review and examination
178 of the commission and prepare a report containing appropriate
179 recommendations. The audit must be conducted every 2 years
180 commencing July 1, 2011, in accordance with the full authority
181 and responsibilities conferred upon the Auditor General and the
182 Office of Program Policy Analysis and Government Accountability
183 by general law. The report and recommendations shall be
184 submitted within 1 year after the audit to the chair and vice
185 chair of the Legislative Budget Commission, the chair and vice
186 chair of the Legislative Auditing Committee, the Governor, and
187 the Chief Justice of the Supreme Court.

188 Section 5. The amendment to section 2.01, Florida Statutes,
189 made by this act applies retroactively and prospectively.
190
191 ================= T I T L E A M E N D M E N T ================
192 And the title is amended as follows:
193 Delete line 2
194 and insert:
195 An act relating to the state judicial system; amending
196 s. 2.01, F.S.; construing application of the common
197 and statute laws of England to this state; amending s.
198 25.382, F.S.; revising a definition; expanding the
199 list of recipients required to be provided a certain
200 annual report of the Florida Supreme Court; specifying
201 a required use of such report; requiring the Supreme
202 Court to develop a plan for certain civics promotion
203 and judicial branch education purposes; requiring an
204 annual plan implementation report; specifying report
205 recipients and uses; requiring the Supreme Court to
206 submit to certain recipients all final reports
207 completed by certain committees; specifying uses of
208 such reports; requiring the Auditor General and the
209 Office of Program Policy Analysis and Government
210 Accountability to conduct biennial full audit reviews
211 and examinations of the state courts system; requiring
212 reports; specifying recipients of the reports;
213 amending s. 26.012, F.S.; specifying certain
214 additional jurisdiction of circuit courts;
215 establishing certain divisions within each judicial
216 circuit for certain purposes; providing for

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217 administration of the divisions; amending s. 43.20,
218 F.S.; correcting a cross-reference; increasing
219 membership of the Judicial Qualifications Commission;
220 revising expenses authorization for the commission;
221 requiring the commission to hire staff for each
222 commission panel; providing requirements for staff
223 committees for commission panels; requiring reports of
224 staff committees; specifying recipients of the reports
225 for certain purposes; designating such reports as
226 public records; requiring the commission to adopt
227 rules; requiring the Auditor General and the Office of
228 Program Policy Analysis and Government Accountability
229 to conduct biennial full audit reviews and
230 examinations of the commission; requiring reports;
231 specifying recipients of the reports; specifying
232 application of certain provisions;

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 2170

INTRODUCER: Judiciary Committee

SUBJECT: Judicial Nominating Commissions

DATE: April 11, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Boland	Maclure	JU	**Pre-meeting**
2.			RC	
3.				
4.				
5.				
6.				

I. Summary:

Currently, vacancies in judgeships are filled by appointment of the Governor, as directed by the Florida Constitution. The Governor makes these appointments from a list of not fewer than three and not more than six persons nominated by a judicial nominating committee. The membership of each judicial nominating committee is a creature of statute and has varied throughout Florida's history. Presently, each judicial nominating committee is composed of nine members, and five of those members are appointed to the commission at the sole discretion of the Governor. The remaining four commission positions are also appointed by the Governor; however, the Governor must make his appointment for each of those four positions from a list of nominees recommended to the Governor by the Board of Governors of The Florida Bar. The Board of Governors of the Florida Bar recommends three people for each position on the judicial nominating commission, and the Governor must make his selection from that list of three or reject all three recommendations and request that a new list of three be provided.

The bill amends the current statute controlling the appointment process for members of judicial nominating commissions. Specifically, the bill eliminates the role of The Florida Bar in the appointment of members to the commissions by removing statutory direction for the Board of Governors of The Bar to make recommendations to the Governor for the appointment of four members of each commission. Instead, the bill vests the authority to make recommendations for these four positions with the Attorney General. Furthermore, the bill amends the current statute to provide that the terms of all current members of a judicial nominating commission are terminated, and the Governor shall appoint two new members for terms ending July 1, 2012 (one of which shall be an appointment selected from nominations by the Attorney General), two new members for terms ending July 1, 2013, and two new members for terms ending July 1, 2014.

This bill substantially amends section 43.291, Florida Statutes.

II. Present Situation:

When there is a vacancy on an appellate or trial court, the State Constitution directs the Governor to fill the vacancy by appointing one person from no fewer than three and no more than six persons nominated by a judicial nominating commission.[1] The commission shall offer recommendations within 30 days of the vacancy, unless the period is extended for no more than 30 days by the Governor, and the Governor shall make the appointment within 60 days of receiving the nominations.[2]

Article V, section 11(d) of the Florida Constitution provides for a separate judicial nominating commission, as provided by general law, for the Supreme Court, each district court of appeal, and each judicial circuit for all trial courts within the circuit. The nine-member composition of each judicial nominating commission is a creature of statute.[3] The statute provides for the Governor to make all nine appointments. However, four of those appointments are based on nominees from The Florida Bar, while five are within the Governor's sole appointment discretion. The four commission members recommended by the Bar must be members of The Florida Bar, must be engaged in the practice of law, and must reside in the territorial jurisdiction where they are appointed. In that same regard, the Board of Governors of The Florida Bar submits three recommended nominees for each open position to the Governor. The Governor has the authority to reject all the nominees and request a new list of recommended nominees who have not been previously recommended. Of the five commission members appointed by the Governor under his or her sole discretion, at least two must be members of The Florida Bar engaged in the practice of law, and all must reside in the territorial jurisdiction where they are appointed. Members serve four-year terms and may be suspended for cause by the Governor.[4]

The Legislature enacted the current statutory framework governing membership of the judicial nominating commissions in 2001.[5] Immediately prior to that change, the Board of Governors of The Florida Bar had authority to directly appoint members of each commission. Specifically, prior to the 2001 changes:

- Three members were appointed by the Board of Governors of the Florida Bar, each of whom had to be a member of the Florida Bar and actively engaged in the practice of law in the applicable territorial jurisdiction;
- Three members were appointed by the Governor, each of whom had to be a resident of the applicable territorial jurisdiction; and
- Three members were appointed by majority vote of the other six members, each of whom had to be an elector who resided in the applicable territorial jurisdiction.[6]

---

[1] FLA. CONST. art. V, s. 11(a).
[2] FLA. CONST. art. V, s. 11(c).
[3] Section 43.291, F.S.
[4] *Id.*
[5] Chapter 2001-282, s. 1, Laws of Fla.
[6] See s. 43.29, F.S. (2000) (repealed by ch. 2001-282, s. 3, Laws of Fla.)

III. Effect of Proposed Changes:

The bill eliminates The Florida Bar's statutory role in the recommendation of members of a judicial nominating commission and vests that function in the Attorney General. The bill provides that, in regard to four positions on each judicial nominating commission, the Attorney General shall submit to the Governor three recommended nominees for each position. The Governor shall select the appointee from the list of nominees recommended for that position, but the Governor may reject all of the nominees recommended for a position and request that the Attorney General submit a new list of three different recommended nominees for that position who have not been previously recommended by the Attorney General. The bill retains the provisions in current law under which the Governor is directed to appoint five additional members of each judicial nominating commission and each of those appointments remains within the Governor's sole discretion.

The bill removes the provision, currently in statute, that current members of a judicial nominating commission appointed directly by the Board of Governors of The Florida Bar shall serve the remainder of their terms. The bill provides that all current members of a judicial nominating commission are hereby terminated, and the Governor shall appoint new members to each judicial nominating commission in the following manner:

- Two appointments for terms ending July 1, 2012, one of which shall be an appointment selected from nominations submitted by the Attorney General;
- Two appointments for terms ending July 1, 2013; and
- Two appointments for terms ending July 1, 2014.

In setting the terms as shown above, the bill staggers the terms of six of the members of each judicial nominating commission. The bill maintains those staggered terms by providing that each expired term or vacancy shall be filled by appointment in the same manner as the member whose position is being filled. Additionally, it should be noted that the statute only enumerates conditions for the terms of six appointments on each judicial nominating commission, and only one of those appointments must be selected from nominations submitted by the Attorney General. Due to the bill's prior mandate that each judicial nominating commission be composed of nine members, four of which must be selected from nominations submitted by the Attorney General, each of the three subsequent appointments must be selected from nominations submitted by the Attorney General. The bill provides that each subsequent appointment, except an appointment to fill a vacant, unexpired term, shall be for four years.

The bill provides that this act shall take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

This bill could have an impact on the Attorney General's office to the extent that the duty to recommend nominees to the Governor for appointment to judicial nominating commissions creates additional workload or expenses for the Attorney General or her or his staff.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 182

INTRODUCER: Senator Sobel

SUBJECT: Primary Sponsor of Legislation

DATE: April 11, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	JU	**Pre-meeting**
2.			RC	
3.				
4.				
5.				
6.				

I. Summary:

This bill provides that the names of one primary Senate sponsor and one primary House of Representatives sponsor may be included in the short title of a bill and its companion. The inclusion of this information in the short title must be agreed upon by all of the members of each house who are primary sponsors of a general bill and its companion.

II. Present Situation:

Constitutional Framework for Legislation

Article III of the Florida Constitution provides for the legislative power of the state to be vested in the Senate and the House of Representatives.[1] Among other requirements, this article provides that:

- A bill may originate in either house of the Legislature;
- A bill shall be read in each house on three separate days, unless this requirement is waived by two-thirds vote;
- Passage of a bill requires a majority vote in each house; and
- Each bill and joint resolution passed in both houses shall be signed by presiding officers of the respective houses and by the Secretary of the Senate and the Clerk of the House of Representatives.[2]

[1] FLA. CONST. art. III, s. 1.
[2] FLA. CONST. art. III, ss. 6 and 7.

Further, each house shall determine its rules of procedure.[3]

Introduction or Sponsorship of Legislation

Under the rules of the Senate, a bill is "approved for introduction by a Senator whose name is affixed to the original."[4] Further, any senator may co-introduce a bill, and his or her name shall be affixed to the original bill.[5]

The original version of a bill must be approved by the senator who is introducing the measure and backed in a folder-jacket. The name and district number of the introducer and any co-introducers are inscribed on the jacket.[6]

When companion measures are filed in the Senate and the House of Representatives, the same version of one of the bills must pass both houses in order to be enrolled and presented to the Governor. The Senate rules address the existence of companion measures as follows:

> When a Senate bill is reached on the calendar of the Senate for consideration, either on second (2nd) or third (3rd) reading, and there is also pending on the calendar of the Senate a companion measure already passed by the House, it shall be in order to move that the House companion measure be substituted and considered in lieu of the Senate measure. Such motion may be adopted by a majority vote of those Senators present, provided the House measure is on the same reading; otherwise, the motion shall be to waive the Rules by a two-thirds (2/3) vote of those Senators present and read such House measure. A companion measure shall be substantially the same and identical as to specific intent and purpose as the measure for which it is being substituted. *At the moment the Senate passes the House companion measure, the original Senate measure shall be regarded as automatically tabled.* Recommitment of a Senate bill shall automatically carry with it any House companion measure then on the calendar.[7]

As a consequence, only one of the two bills will be sent to the Governor for signature. Thus, a senator may introduce a Senate bill, but the House bill may be the one ultimately enacted by the Legislature and presented to the Governor (and vice versa with respect to a representative sponsoring a House bill).

Practice in the Senate is for the names of the Senate introducer and co-introducers to appear on the top face of a publicly released Senate bill, until the bill is engrossed following adoption of amendments on the floor of the Senate or enrolled upon being passed by both houses, at which time the names are removed. Under practice in the House of Representatives, the name of the

[3] FLA. CONST. art. III, s. 4(a).
[4] Rule 3.12, *Rules and Manual of the Senate of the State of Florida, Senator Mike Haridopolos, President, 2010-2012.*
[5] *Id*. In its comparable rules, the House of Representatives uses the terms "sponsor," "co-sponsor," and "sponsorship." *See, e.g.,* Rule 5.4, *The Rules*: *Florida House of Representatives 2010-2012, Dean Cannon, Speaker*.
[6] Rule 3.1(2), *Rules and Manual of the Senate of the State of Florida, Senator Mike Haridopolos, President, 2010-2012.*
[7] Rule 3.11, *Rules and Manual of the Senate of the State of Florida, Senator Mike Haridopolos, President, 2010-2012* (emphasis added). The House of Representatives has similar rules governing sponsorship of legislation and governing substitution of a companion measure on the floor of the House. See Rules 5.4 and 5.14, *The Rules*: *Florida House of Representatives 2010-2012, Dean Cannon, Speaker*.

House sponsor does not appear on the face of the publicly released House bill. Thus, an enrolled version of a bill from either house does not include the names of any legislators on the face of the bill.

Dissemination of Information on Legislation

The Legislature's Division of Legislative Information Services creates, maintains, and distributes accurate and timely information on the status of legislation and on lobbyist registrations to legislators, staff, public agencies, and the public. Functions of the division include, but are not limited to:

- Determining companion status of bills;
- Composing short titles;
- Processing bill actions;
- Creating a subject index;
- Processing introducers/sponsors;
- Producing and publishing a legislative bill information book;
- Publishing and distributing reports;
- Providing access the Bill Information System; and
- Responding to requests for information.[8]

The term "short title" refers to a brief description, prepared by the division, of what the bill does. The short title may be a condensed version of the full title for the bill. A short title typically is used in a variety of legislative information resources on bills, including, for example, the websites and calendars for the two houses. Currently, the short title itself does not identify the introducer or co-introducers for that particular Senate or House bill. However, other fields of information maintained by the division or automatically populated into the two houses' technology systems do identify the introducer for the bill. In addition, information maintained by the division also includes identification of companion measures for a given Senate or House bill and the introducers of those companion measures.[9]

In addition to other legislative resources, the websites of the respective houses, in turn, disseminate this information to the public. For example, the websites for both houses identify, among other relevant information, the following details for each:

- The bill type (e.g., general bill);
- The introducer/sponsor;
- The bill subject or topic (e.g., "neglience");
- The short title; and
- Effective date information.

Further, upon identifying a given Senate or House bill, a person can use the websites to identify any related bills, whether filed in the same house or the other house, as well as the introducers

[8] Florida Legislature, Office of Legislative Services, *Division of Legislative Information Services*, http://intranet/ols/index.cfm?p=lis&a=lisadd (last visited April 11, 2011).
[9] Conversation with staff of the Division of Legislative Information Services, April 11, 2011.

and co-introducers of the related bills. Because sponsorship is unique to each chamber, a member of the public searching for information, for example, on a House bill that becomes law, without separately researching the Senate companion bill, would see solely the names of the House sponsors (and vice versa for a person searching a Senate bill that becomes law).[10]

Joint or Cross-Sponsorship of Legislation

As described by the National Conference of State Legislatures (NCSL), "[j]oint or cross-sponsorship occurs when a bill has authors or co-authors from both chambers."[11] Among the advantages to the practice, as noted by NCSL, are:

- Allowing senators and representatives who have overlapping districts to jointly sponsor bills that affect their shared constituencies;
- Allowing members of both chambers to share the spotlight on key bills, thereby reducing the incentive to "pirate" from other members; and
- Reducing the number of duplicate bills, saving legislative time, staff time, and printing and administrative costs.[12]

Among the disadvantages are:

- Necessitating additional work and complications if the houses of the legislature have separate computerized bill tracking systems;
- Creating the potential for disputes over who is listed as the primary sponsor or who gets the most credit for the bill; and
- Allowing for only one opportunity for the passage of a measure.[13]

III. Effect of Proposed Changes:

This bill provides that the names of one primary Senate sponsor and one primary House of Representatives sponsor may be included in the short title of a bill and its companion. The inclusion of this information in the short title must be agreed upon by all of the members of each house who are the primary sponsors of a general bill and its companion.

The bill appears to contemplate that once a companion is identified for a given Senate or House bill, the sponsor of the companion measure could be listed in the short title of the given bill, even though he or she is not a member of that house of the Legislature. The bill does not specify at what point in the process the listing could occur (e.g., when the bills are filed, upon final passage by both houses, etc.). If the listing is to occur when the two measures are first filed, it is not

[10] The history report of a bill enacted by the Legislature (as published on the respective houses' websites and in the legislative bill information book published by the Division of Legislative Information Services) does provide the number of the companion measure. In addition, the respective journals of the two houses, for the day the substitution of a companion measure occurs, would also identify the companion measure. However, a person typically must research the companion measure separately to determine the introducers or sponsors of the companion measure.
[11] National Conference of State Legislatures, *Joint or Cross-Sponsorship of Bills* (undated) (on file with the Senate Committee on Judiciary).
[12] *Id.*
[13] *Id.*

immediately clear if the sponsor of the Senate bill, for example, would be able to request that his or her name be removed from the short title of House bill should the content of the two bills begin to diverge as the measures move through the legislative process.

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill may result in costs to the Legislature to reprogram bill-related computer systems to include additional information in the short title for a bill and, to the extent necessary, track that information and any changes to it. In addition, the houses of the Legislature may incur costs to develop forms or mechanisms for securing the approval from the affected legislators, as contemplated by the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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

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LEGISLATIVE ACTION

Senate	.	House
	.	
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The Committee on Judiciary (Bogdanoff) recommended the following:

1 **Senate Amendment (with title amendment)**
2
3 Delete lines 64 - 74
4 and insert:
5 (5)(a) It is unlawful for any person to knowingly possess,
6 control, or intentionally view a photograph, motion picture,
7 exhibition, show, representation, image, data, computer
8 depiction, or other presentation which, in whole or in part, he
9 or she knows to include any sexual conduct by a child. The
10 possession, control, or intentional viewing of each such
11 photograph, motion picture, exhibition, show, image, data,
12 computer depiction, representation, or presentation is a

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separate offense. A person who ~~Whoever~~ violates this subsection commits ~~is guilty of~~ a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) This subsection does not apply to material possessed, controlled, or intentionally viewed as part of a law enforcement investigation.

================= T I T L E A M E N D M E N T ================

And the title is amended as follows:

Delete line 8

and insert:

sexual conduct by a child; providing an exception; providing penalties;

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 846

INTRODUCER: Criminal Justice Committee and Senators Benacquisto and Gaetz

SUBJECT: Prevention of Child Exploitation

DATE: April 11, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	**Fav/CS**
2.	Boland	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... [X] Statement of Substantial Changes
B. AMENDMENTS........................ [ ] Technical amendments were recommended
[ ] Amendments were recommended
[ ] Significant amendments were recommended

I. Summary:

This bill amends the statute prohibiting possession of child pornography to extend its prohibitions to controlling or intentionally viewing child pornography. The bill also specifically adds an "image," "data," and "computer depiction" to the enumeration of the items that cannot be possessed, controlled, or viewed.

This bill substantially amends section 827.071, Florida Statutes.

II. Present Situation:

Section 827.071(5), F.S., prohibits a person from possessing a photograph, motion picture, exhibition, show, representation, or other presentation that he or she knows to include any sexual conduct by a child in whole or in part. Violation of the statute is a third-degree felony ranked at Level 5 of the Criminal Punishment Code, punishable by up to five years in prison. A computer image falls within the definition of the proscribed materials.[1]

[1] *State v. Cohen*, 696 So. 2d 435, 436 (Fla. 4th DCA 1997).

While it is clear that it is illegal to knowingly possess child pornography, in the computer age it is much more difficult to determine whether a person knowingly possesses an image of child pornography. It is clear that intentionally saving an image to a computer hard drive constitutes knowing possession. However, courts in a number of states have held that an image is not knowingly possessed if it is on a computer hard drive because it has been automatically saved as a temporary Internet file. In Florida and many other states, viewing child pornography without possessing or distributing it is not a crime. In *Strouse v. State*, the Fourth District Court of Appeal noted that "passive viewing on the Internet of child pornography does not violate the law because viewing does not constitute possession."[2] However, the court upheld the defendant's conviction because it concluded that testimony given by his girlfriend was sufficient to establish that the child pornography on his computer was not merely an automatically stored temporary Internet file. Without the girlfriend's testimony, it is likely that the defendant would have been acquitted.[3]

In reaching its conclusion in *Strouse*, the appellate court considered federal court decisions that addressed the possession issue:

> Federal courts have analyzed the issue of temporary Internet files in the context of the federal child pornography statute. In *United States v. Perez,* the court held the mere viewing of a child pornographic image does not constitute knowing possession of the image under 18 U.S.C. § 2252A(a)(5)(B). 247 F.Supp.2d 459, 484 n. 12 (S.D.N.Y.2003) (citing *United States v. Zimmerman,* 277 F.3d 426, 435 (3d Cir.2002)). However, the court acknowledged that "knowing possession" should be based upon the manner in which the defendant manages the files. *Id.,* (citing *United States v. Tucker,* 305 F.3d 1193, 1205 (10th Cir.2002) (upholding a conviction based on automatically stored files because the defendant habitually deleted the temporary files manually, demonstrating that he exercised control over them), *cert. denied,* 537 U.S. 1223, 123 S.Ct. 1335, 154 L.Ed.2d 1082 (2003)).[4]

In 2008, Congress resolved this issue for federal courts by amending 18 U.S.C. § 2252A(a)(5)(B) to criminalize the conduct of a person who "knowingly accesses with intent to view" child pornography.

III. Effect of Proposed Changes:

The bill amends s. 827.071, F.S., in several ways. It adds a prohibition against "controlling" or "intentionally viewing" child pornography. As previously noted, the existence of a temporary Internet image file of child pornography on a computer hard drive is not "possession" in violation of the statute unless there is proof that the image was intentionally saved. The bill criminalizes the intentional viewing of child pornography. Therefore, temporary Internet files of child pornography images found on a computer could be used as evidence that a person was intentionally viewing prohibited material. For example, a prosecutor could argue that the existence of numerous temporary Internet files on a hard drive indicates that someone intentionally viewed the images. If the prosecutor is able to offer sufficient proof that the

[2] *Strouse v. State*, 932 So. 2d 326 (Fla. 4th DCA 2006).
[3] *Id*. at 329.
[4] *Id*.

defendant was the person who intentionally viewed the images, a judge or jury may conclude that the defendant is guilty of intentionally viewing child pornography.

The changes made by the bill could create a situation in which a person could potentially be convicted based upon testimony that he or she was observed viewing child pornography (either on a computer or in another form) even if there is no physical evidence to corroborate the testimony. As in all cases, the judge or jury would be required to determine whether such testimony proved the defendant's guilt beyond a reasonable doubt.

The bill defines "intentionally view" as meaning to "deliberately, purposefully, and voluntarily view." This clearly does not include inadvertent or unintentional viewing that might happen, for example, if a person is using the Internet and an image of child pornography pops up on a computer screen, or the person accidently accesses a site with child pornography. However, the decision of whether to charge a person with "intentional viewing" is up to the discretion of the prosecutor, and ultimate conviction depends upon the judge or jury concluding that the charge has been proven beyond a reasonable doubt.

The addition of a prohibition against "controlling" an image of child pornography addresses emerging technologies. A person can maintain images of child pornography on a remote server ("in the cloud") and control what happens to the image, even though arguably the person does not possess the image. It is possible that the prohibition against "controlling" images could be used to prosecute such cases in the unusual situation when there is insufficient evidence of distributing, transmitting, or intentionally viewing an image.

The bill also adds "image," "data," and "computer depiction" as specific materials to which the prohibition against possession, controlling, or intentionally viewing materials that include sexual conduct by a child are applied. It appears that possession of any of these materials is prohibited under the current statute as either a "photograph" or under the more general categories of "presentation" or "other representation."[5] However, specifically adding the terms removes any question as to whether they are among the materials that are prohibited.

The bill amends s. 921.0022(3)(e), F.S., which is Level 5 of the Offense Severity Ranking Chart in the Criminal Punishment Code, to incorporate the amendments to s. 827.071, F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

[5] *See, e.g.,* Footnote 1, citing the opinion in *State v. Cohen* holding that a computer image falls within the definition of the proscribed materials.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference found that the bill would have an indeterminate fiscal impact.[6]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on April 4, 2011:
"Image," "data," and "computer depiction" are specifically added to the enumeration of the items that cannot be possessed, controlled or viewed. This removes any question as to whether they are included among more general categories that are already in the statute.

B. Amendments:

None.

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

[6] Office of Economic and Demographic Research, Criminal Justice Impact Conference, *Conference Results*, *available at* http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/index.cfm.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 242

INTRODUCER: Rules Committee and Senator Joyner

SUBJECT: Voter Information Cards

DATE: April 11, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Seay	Roberts	EE	**Fav/1 Amendment**
2.	Seay	Phelps	RC	**Fav/CS**
3.	Boland	Maclure	JU	**Pre-meeting**
4.			BC	
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS........................		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The committee substitute requires the voter information card prescribed in statute and furnished by the supervisor of elections to include the address of the polling place. It provides that if an elector's polling place address changes, the supervisor must send the elector a new voter information card. The committee substitute also specifies that the supervisor must provide a voter information card meeting the requirements of this act for any elector who, on or after August 1, 2012, registers to vote, requests a replacement card, or changes his or her name, address, or party affiliation.

This bill substantially amends section 97.071, Florida Statutes.

II. Present Situation:

Currently, every supervisor of elections must furnish a voter information card to every registered voter in the supervisor's county. The card must contain the following information:

- Voter's registration number;
- Date of registration;

- Full name;
- Party affiliation;
- Date of birth;
- Address of legal residence;
- Precinct number;
- Supervisor's name and contact information; and
- Any other information deemed necessary by the supervisor.[1]

Replacement cards are provided free of charge upon verification of the voter's registration, if the voter provides a signed written request for a replacement card.[2] The uniform statewide voter registration application may also be used to request a replacement card.[3] New cards are automatically issued when a voter's name, address, or party affiliation changes.[4]

A survey in 2010[5] indicated that 61 counties include the polling place address on the voter information card. The following six counties did not include the polling place address on the voter information card: Glades, Jefferson, Madison, Orange,[6] Taylor, and Volusia.

If a designated polling place becomes unavailable, inadequate, or noncompliant with the law, the supervisor of elections can change the polling place. The supervisor must publish notice of the change in the paper not more than 30 days or less than seven days before the election, and the supervisor must send notice of the change to each registered elector or each household in which there is a registered elector at least two weeks before the election. If the supervisor lacks sufficient time to comply with these procedures, the supervisor must post a notice at the old polling place with information about the new polling place location.[7]

Additionally, in 2010 Florida created a new online voter look-up system. This voter look-up system allows the voter to electronically access his or her precinct and polling place as recorded by the supervisor of elections.[8]

III. Effect of Proposed Changes:

The committee substitute requires the voter information card to include an elector's polling place address. It provides that when an elector's polling place address changes, the supervisor must send a new card to the elector. The committee substitute also specifies that the supervisor must provide a voter information card meeting the requirements of this act for any elector who, on or

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[1] Section 97.071(1), F.S.
[2] Section 97.071(2), F.S.
[3] Section 97.052(1), F.S.
[4] Section 97.071(3), F.S.; *see also* s. 97.1031, F.S.
[5] Unofficial Survey, *Voter Card with Polling Place Address*, conducted by Florida State Association of Supervisors of Elections (February 2010).
[6] While Orange County does not print the polling place address on the voter information cards, the polling place address is provided on the sample ballots that are mailed out prior to each election. The Orange County Supervisor of Elections office has explained that the office provides the polling place address on the sample ballot instead of the voter information card as the polling place varies for municipal elections and general elections. *See id.*
[7] Section 101.71, F.S.
[8] Florida Division of Elections, *Check Your Voter Status*, http://registration.elections.myflorida.com/, (last visited April 5, 2011).

after August 1, 2012, registers to vote, requests a replacement card, or changes his or her name, address, or party affiliation.

This bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The Voting Rights Act of 1965 was enacted to enforce compliance with the 15th Amendment to the United States Constitution, which prohibits denial of a citizen's right to vote. Under the act, a state or political subdivision may be required to obtain preclearance from the U.S. Department of Justice before implementing a voting change. The determination of whether a state or subdivision is subject to this requirement is based on historical practices and data which indicate that the practices affected the ability of people to vote. Specifically, a state or subdivision may be subject to preclearance if:

- In 1964 it had in place in a "test or device" that restricted the opportunity to vote; and
- In the 1964 presidential election, less than 50 percent of voting age residents were registered or actually voted.

If a state or subdivision falls into this category, it must obtain preclearance by the U.S. Department of Justice before any change affecting voting in that state or subdivision may take effect.[9]

The definition of "test or device" was expanded in 1975 to include the practice of providing voting or election information only in English in states or political subdivisions where members of a single-language minority constitute more than five percent of the citizens of voting age.[10] Under the 1975 expanded definition, five counties in Florida are covered: Collier, Hardee, Hendry, Hillsborough, and Monroe.[11] The proposed voting changes would affect those five counties; as such, if the U.S. Attorney General objects to

[9] *See* 42 U.S.C. s. 1973b (b).
[10] Jonel Newman, *Voting Rights in Florida 1982-2006*, Report of RenewtheVRA.org, 7 (March 2006), *available at* http://www.aclufl.org/issues/voting_rights/FloridaVRA2.pdf (last visited April 5, 2011).
[11] *Id*.

the voting change, he or she could institute a proceeding through which a court could suspend the voting practice.[12] However, it is not likely that the U.S. Attorney General would object to these changes as they do not appear to have the intent or effect of discriminating against any minority group. Also, it should be noted that statistics show a sharp decline in the U.S. Justice Department objection rate (down to .2 percent from 1995-2004) in recent years, despite a sharp increase in voting-change pre-clearance submissions.[13]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Six counties will be required to issue new voter information cards reflecting the polling place address. Additionally, all other Florida counties will be required to issue new voter information cards upon any change in polling place address. While it varies from county to county, the average county cost to print and mail one card is roughly 52 cents.[14] However, any additional costs will likely be minimal since all counties will be issuing new voter information cards in 2012 as a result of reapportionment. The Florida Department of State stated that the fiscal impact of the bill is indeterminate.[15]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

CS by Rules on March 29, 2011:
The committee substitute incorporates a traveling amendment that changes the date that

[12] 42 U.S.C. s. 1973a (b). See also Fla. Dep't of State, analysis of SB 242, Jan. 21, 2011 (on file with the Senate Committee on Judiciary).
[13] U.S. Commission on Civil Rights, *Voting Rights Enforcement and Reauthorization*, 22 (May 2006), http://www.usccr.gov/pubs/051006VRAStatReport.pdf (last visited April 5, 2011).
[14] The cost estimate is based on 2009 data provided by the Florida State Association of Supervisors of Elections.
[15] Florida Dep't of State, analysis of SB 242, Jan. 21, 2011 (on file with the Senate Committee on Judiciary).

supervisors must provide voter information cards with polling place addresses from September 1, 2011, to August 1, 2012.

B. Amendments:

None.

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

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LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Bogdanoff) recommended the following:

1 **Senate Amendment (with title amendment)**
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3 Delete everything after the enacting clause
4 and insert:
5 Section 1. Present subsection (9) of section 61.08, Florida
6 Statutes, is renumbered as subsection (10), a new subsection (9)
7 is added to that section, and subsections (2), (7), and (8) of
8 that section are amended, to read:
9 61.08 Alimony.—
10 (2) In determining whether to award alimony or maintenance,
11 the court shall first make a specific factual determination as
12 to whether either party has an actual need for alimony or

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13 maintenance and whether either party has the ability to pay
14 alimony or maintenance. If the court finds that a party has a
15 need for alimony or maintenance and that the other party has the
16 ability to pay alimony or maintenance, then in determining the
17 proper type and amount of alimony or maintenance under
18 subsections (5)-(8), the court shall consider all relevant
19 factors, including, but not limited to:
20 (a) The standard of living established during the marriage.
21 (b) The duration of the marriage.
22 (c) The age and the physical and emotional condition of
23 each party.
24 (d) The financial resources of each party, including the
25 nonmarital and the marital assets and liabilities distributed to
26 each.
27 (e) The earning capacities, educational levels, vocational
28 skills, and employability of the parties and, when applicable,
29 the time necessary for either party to acquire sufficient
30 education or training to enable such party to find appropriate
31 employment.
32 (f) The contribution of each party to the marriage,
33 including, but not limited to, services rendered in homemaking,
34 child care, education, and career building of the other party.
35 (g) The responsibilities each party will have with regard
36 to any minor children they have in common.
37 (h) The tax treatment and consequences to both parties of
38 any alimony award, including the designation of all or a portion
39 of the payment as a nontaxable, nondeductible payment.
40 (i) All sources of income available to either party,
41 including income available to either party through investments

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42 of any asset held by that party.
43 (j) Any other factor necessary to do equity and justice
44 between the parties.
45 (7) Durational alimony may be awarded when permanent
46 periodic alimony is inappropriate. The purpose of durational
47 alimony is to provide a party with economic assistance for a set
48 period of time following a marriage of short or moderate
49 duration, or following a marriage of long duration if there is
50 no ongoing need for support on a permanent basis. An award of
51 durational alimony terminates upon the death of either party or
52 upon the remarriage of the party receiving alimony. The amount
53 of an award of durational alimony may be modified or terminated
54 based upon a substantial change in circumstances in accordance
55 with s. 61.14. However, the length of an award of durational
56 alimony may not be modified except under exceptional
57 circumstances and may not exceed the length of the marriage.
58 (8) Permanent alimony may be awarded to provide for the
59 needs and necessities of life as they were established during
60 the marriage of the parties for a party who lacks the financial
61 ability to meet his or her needs and necessities of life
62 following a dissolution of marriage. Permanent alimony may be
63 awarded following a marriage of long duration if such an award
64 is appropriate upon consideration of the factors set forth in
65 subsection (2), following a marriage of moderate duration if
66 such an award is appropriate based upon clear and convincing
67 evidence after consideration of the factors set forth in
68 subsection (2), or following a marriage of short duration if
69 there are written findings of exceptional circumstances. In
70 awarding permanent alimony, the court shall include a finding

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71 that no other form of alimony is fair and reasonable under the
72 circumstances of the parties. An award of permanent alimony
73 terminates upon the death of either party or upon the remarriage
74 of the party receiving alimony. An award may be modified or
75 terminated based upon a substantial change in circumstances or
76 upon the existence of a supportive relationship in accordance
77 with s. 61.14.
78 (9) The award of alimony award may not leave the payor with
79 significantly less net income than the net income of the
80 recipient unless there are written findings of exceptional
81 circumstances.
82 Section 2. The amendments to s. 61.08, Florida Statutes,
83 made by this act apply to all initial awards of alimony entered
84 after July 1, 2011, and to all modifications of alimony of such
85 awards made after July 1, 2011. Such amendments may not serve as
86 a basis to modify awards entered before July 1, 2011, or as a
87 basis to change amounts or duration of awards existing before
88 July 1, 2011. The amendments to s. 61.08, Florida Statutes, made
89 by this act are applicable to all cases pending on or filed
90 after July 1, 2011.
91 Section 3. This act shall take effect July 1, 2011.
92
93 ================= T I T L E A M E N D M E N T ================
94 And the title is amended as follows:
95
96 Delete everything before the enacting clause
97 and insert:
98 A bill to be entitled
99 An act relating to alimony; amending s. 61.08, F.S.;

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100 revising provisions relating to factors to be
101 considered for alimony awards; revising provisions
102 relating to awards of durational alimony; revising
103 provisions relating to awards of permanent alimony;
104 providing that the award of alimony may not leave the
105 payor with significantly less net income than the net
106 income of the recipient unless there are written
107 findings of exceptional circumstances; providing for
108 applicability of the act; providing an effective date.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 1978

INTRODUCER: Senator Bogdanoff

SUBJECT: Alimony

DATE: April 11, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Connor	Maclure	JU	**Pre-meeting**
2.			CF	
3.			RC	
4.				
5.				
6.				

I. Summary:

The bill revises Florida law relating to alimony to:

- Provide that the court determine the proper type and amount of alimony or maintenance pursuant to statutory provisions that contain descriptions of the different types of alimony;
- Delete the provision that provides that only a marriage of short or moderate duration may be awarded durational alimony;
- Maintain the availability of permanent alimony in marriages of moderate duration, but delete a provision directing the court to consider statutory factors before ordering such an award;
- Revise the provision relating to permanent alimony for a marriage of long duration to require the court to include findings regarding the applicability of the needs and necessities of life established during the marriage to the alimony award; and
- Specify that the changes made by the bill will apply to modifications of awards of permanent alimony made after July 1, 2011, and apply to awards for marriages of short or moderate duration.

This bill substantially amends section 61.08, Florida Statutes.

II. Present Situation:

Alimony

Traditionally, alimony was more often awarded to a woman based on the premise that she was the dependent spouse, having foregone or sacrificed career opportunities to fulfill the dual role of homemaking and child rearing. Today, alimony is considered to be gender-neutral.[1]

Under Florida law, the court may grant alimony to either party in a dissolution of marriage proceeding, either to balance an inequitable property division or to ensure support to a financially dependent spouse.[2] Alimony is based primarily on need and ability to pay; thus, an alimony award is not appropriate when the requesting spouse has no need for support or when the paying spouse does not have the ability to pay.[3] Before a court may make an award of any type of alimony, the court must first make a specific factual determination as to whether there is an actual need for alimony or maintenance by either party and whether either party has the ability to pay.[4]

Pursuant to s. 61.08(2), F.S., in determining a proper award of alimony, the court is required to consider all relevant factors, including:

- The standard of living established during the marriage;
- The duration of the marriage;
- The age and the physical and emotional condition of each party;
- The financial resources of each party, including the nonmarital and the marital assets and liabilities distributed to each;
- The earning capacities, educational levels, vocational skills, and employability of the parties and, when applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment;
- The contribution of each party to the marriage, including, but not limited, services rendered in homemaking, child care, education, and career building of the other party;
- The responsibilities each party will have with regard to any minor children they have in common;
- The tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a nontaxable nondeductible payment;
- All sources of income available to either party, including income available to either party through investments of any asset held by that party; and
- Any other factor necessary to do equity and justice between the parties.

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[1] Comm. on Judiciary, The Florida Senate, *Review of Alimony Payments*, 1 (Interim Report 2005-146) (Nov. 2004), *available at* http://archive.flsenate.gov/data/Publications/2005/Senate/reports/interim_reports/pdf/2005-146ju.pdf (last visited April 8, 2011).

[2] Section 61.08(1), F.S.; s*ee also* Victoria M. Ho and Jennifer L. Johnson, *Overview of Florida Alimony*, 78 FLA. B.J. 71, 71 (Oct. 2004).

[3] *Schlagel v. Schlagel*, 973 So. 2d 672, 676 (Fla. 2d DCA 2008); Ho and Johnson, *supra* note 2, at 71.

[4] Section 61.08(2), F.S.

The court is given broad discretion to consider any other factor necessary to do equity and justice between the parties.[5] A court may also consider the adultery of either party, and the circumstances surrounding that adultery in determining an award of alimony.[6]

The length of a marriage is the period of time from the date of marriage until the date of filing of an action for dissolution of marriage.[7] For purposes of determining alimony, there is a rebuttable presumption that:

- A short-term marriage is a marriage having a duration of less than seven years;
- A moderate-term marriage is a marriage having a duration of greater than seven years but less than 17 years; and
- A long-term marriage is a marriage having a duration of 17 years or greater.[8]

Florida law provides for four types of alimony: bridge-the-gap,[9] rehabilitative,[10] durational,[11] and permanent.[12]

Bridge-the-Gap Alimony

Bridge-the-gap alimony may be awarded to assist a party by providing support to allow the party to make a transition from being married to being single. Bridge-the-gap alimony is designed to assist a party with legitimate identifiable short-term needs. The length of an award may not exceed two years. An award of bridge-the-gap alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. An award of bridge-the-gap alimony is not modifiable in amount or duration.[13]

Rehabilitative Alimony

Rehabilitative alimony may be awarded to assist a party in establishing the capacity for self-support through either the redevelopment of previous skills or credentials; or the acquisition of education, training, or work experience necessary to develop appropriate employment skills or credentials.[14] In order to award rehabilitative alimony, there must be a specific and defined rehabilitative plan which shall be included as a part of any order awarding rehabilitative alimony.[15] An award of rehabilitative alimony can be modified or terminated based on a substantial change in circumstances, noncompliance with the rehabilitative plan, or completion of the rehabilitative plan.[16]

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[5] Section 61.08(2)(j), F.S.
[6] Section 61.08(1), F.S.
[7] Section 61.08(4), F.S.
[8] *Id.*
[9] Section 61.08(5), F.S.
[10] Section 61.08(6), F.S.
[11] Section 61.08(7), F.S.
[12] Section 61.08(8), F.S.
[13] Section 61.08(5), F.S.
[14] Section 61.08(6)(a), F.S.
[15] Section 61.08(6)(b), F.S.
[16] Section 61.08(6)(c), F.S.

Durational Alimony

Durational alimony may be awarded when permanent periodic alimony is inappropriate. The purpose of durational alimony is to provide a party with economic assistance for a set period of time following a marriage of short or moderate duration. An award of durational alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. The amount of an award of durational alimony may be modified or terminated based upon a substantial change in circumstances. However, the length of an award of durational alimony may not be modified except under exceptional circumstances and may not exceed the length of the marriage.[17]

Permanent Alimony

Permanent alimony may be awarded to provide for the needs and necessities of life as they were established during the marriage of the parties for a party who lacks the financial ability to meet his or her needs and necessities of life following dissolution of marriage. Permanent alimony may be awarded following a marriage of long duration, a marriage of moderate duration if such an award is appropriate upon consideration of the factors set forth in s. 61.08(2), F.S., or a marriage of short duration if there are exceptional circumstances. An award of permanent alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. An award may be modified or terminated based upon a substantial change in circumstances or upon the existence of a supportive relationship in accordance with s. 61.14, F.S.[18]

III. Effect of Proposed Changes:

The bill amends s. 61.08, F.S., to provide that the court determine the proper type and amount of alimony or maintenance pursuant to subsections (5)-(8) of that section. These subsections refer to the four types of alimony: bridge-the-gap, rehabilitative, durational, and permanent. The bill deletes the provision that provides that only a marriage of short or moderate duration may be awarded durational alimony. The deletion of this provision will allow a court to award durational alimony to a party in a long-term marriage.

The bill maintains the availability of permanent alimony in marriages of moderate duration, but deletes a provision directing the court to consider statutory factors before ordering such an award. This change seems to have the effect of allowing an award of permanent alimony for marriages of moderate duration without the court's consideration of any specific criteria. Finally, the bill revises the provision relating to permanent alimony for a marriage of long duration to require the court to include findings regarding the applicability of the needs and necessities of life established during the marriage to the alimony award.

The bill further specifies that the changes made by the bill will apply to modifications of awards of permanent alimony made after July 1, 2011, and apply to awards for marriages of short or

[17] Section 61.08(7), F.S.

[18] Section 61.08(8), F.S. See s. 61.14, F.S., Enforcement and modification of support, maintenance, or alimony agreements or orders.

moderate duration. The effect of this language is unclear because it makes a distinction between permanent alimony and alimony awards for marriages of short or moderate duration, but these types of alimony are not mutually exclusive. It is not clear, for example, when the bill would apply to an award of permanent alimony in the case of a marriage of short or moderate duration. It is also unclear when the intended timeframe is for application to marriages of short or moderate duration.et

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

None.

B. Amendments:

None.

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

895890

LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Bogdanoff) recommended the following:

1 **Senate Amendment (with title amendment)**
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3
4 Between lines 16 and 17
5 insert:
6 Section 1. Section 92.55, Florida Statutes, is amended to
7 read:
8 92.55 Judicial or other proceedings involving victim or
9 witness under the age of 16 or person with mental retardation;
10 special protections; use of registered service or therapy
11 animals.—
12 (1) Upon motion of any party, upon motion of a parent,

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13 guardian, attorney, or guardian ad litem for a child under the
14 age of 16 or person with mental retardation, or upon its own
15 motion, the court may enter any order necessary to protect a
16 child under the age of 16 or person with mental retardation who
17 is a victim or witness in any judicial proceeding or other
18 official proceeding from severe emotional or mental harm due to
19 the presence of the defendant if the child or person with mental
20 retardation is required to testify in open court. Such orders
21 shall relate to the taking of testimony and shall include, but
22 not be limited to:
23 (a) Interviewing or the taking of depositions as part of a
24 civil or criminal proceeding.
25 (b) Examination and cross-examination for the purpose of
26 qualifying as a witness or testifying in any proceeding.
27 (c) The use of testimony taken outside of the courtroom,
28 including proceedings under ss. 92.53 and 92.54.
29 (2) In ruling upon the motion, the court shall take into
30 consideration:
31 (a) The age of the child, the nature of the offense or act,
32 the relationship of the child to the parties in the case or to
33 the defendant in a criminal action, the degree of emotional
34 trauma that will result to the child as a consequence of the
35 defendant's presence, and any other fact that the court deems
36 relevant; or
37 (b) The age of the person with mental retardation, the
38 functional capacity of the person with mental retardation, the
39 nature of the offenses or act, the relationship of the person
40 with mental retardation to the parties in the case or to the
41 defendant in a criminal action, the degree of emotional trauma

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42 that will result to the person with mental retardation as a
43 consequence of the defendant's presence, and any other fact that
44 the court deems relevant.
45 (3) In addition to such other relief as is provided by law,
46 the court may enter orders limiting the number of times that a
47 child or person with mental retardation may be interviewed,
48 prohibiting depositions of a child or person with mental
49 retardation, requiring the submission of questions prior to
50 examination of a child or person with mental retardation,
51 setting the place and conditions for interviewing a child or
52 person with mental retardation or for conducting any other
53 proceeding, or permitting or prohibiting the attendance of any
54 person at any proceeding. The court shall enter any order
55 necessary to protect the rights of all parties, including the
56 defendant in any criminal action.
57 (4) The court may set any other conditions on the taking of
58 testimony by children which it finds just and appropriate,
59 including the use of a registered service or therapy animal.
60 When deciding whether to permit a child to testify with the
61 assistance of a registered service or therapy animal, the court
62 shall take into consideration the age of the child, the
63 interests of the child, the rights of the parties to the
64 litigation, and any other relevant factor that would aid in the
65 facilitation of testimony by the child. Such registered service
66 or therapy animals shall be evaluated and registered according
67 to national standards.
68
69 ================ T I T L E A M E N D M E N T ================
70 And the title is amended as follows:

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71 Delete line 2
72 and insert:
73 An act relating to children; amending s. 92.55, F.S.;
74 authorizing a court to use registered service or
75 therapy animals to aid children in giving testimony in
76 legal proceedings when appropriate; requiring the
77 court to consider certain factors before permitting
78 such testimony; requiring that such registered service
79 or therapy animals be evaluated and registered
80 according to national standards; amending s.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 504

INTRODUCER: Children, Families, and Elder Affairs Committee and Senator Bogdanoff

SUBJECT: Child Visitation

DATE: April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Walsh	CF	**Fav/CS**
2.	O'Connor	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... [X] Statement of Substantial Changes

B. AMENDMENTS........................ [ ] Technical amendments were recommended

[ ] Amendments were recommended

[ ] Significant amendments were recommended

I. Summary:

This bill amends Florida's Keeping Children Safe Act to require probable cause of sexual abuse by a parent or caregiver in order to create a presumption of detriment to a child. The bill further provides that persons meeting specified criteria may not visit or have contact with a child without a hearing and order by the court, and in order to begin or resume contact with the child, there must be an evidentiary hearing to determine whether contact is appropriate. The bill provides that the court shall hold a hearing within seven business days of finding out that a person is attempting to influence the testimony of the child. The hearing is to determine whether visitation with the person who is alleged to have influenced the testimony of the child is in the best interest of the child.

This bill also amends the legislative intent of the Act to provide that it is the intent to protect children who have been sexually abused or exploited by a parent or caregiver by placing additional requirements on judicial determinations related to contact between a parent or caregiver who meets certain criteria and a child victim in any proceeding pursuant to ch. 39, F.S.

This bill substantially amends section 39.0139, Florida Statutes.

II. Present Situation:

Supervised Visitation

Children involved in custody and visitation disputes are often considered "high risk" and can present emotional and behavioral difficulties later in life.[1] Research has shown that a child's long-term behavioral and emotional adjustment will be more positive if he or she has contact with both parents.[2]

Supervised visitation programs "emerged as a service necessary for families experiencing separation and divorce, when conflict between the parents necessitates an 'outside resource' to allow the child contact with a noncustodial parent."[3] These programs provide parents who may pose a risk to their children or to another parent an opportunity to experience parent-child contact while in the presence of an appropriate third party.[4] Supervision is available in a variety of ways: on-site visitation, off-site visitation at a neutral location, off-site visitation at the home of a relative or foster parent, or supervision of telephone calls between the parent and child.[5]

In addition to enabling and building healthy relationships between parents and children, other purposes of supervised visitation programs include:

- Preventing child abuse;
- Reducing the potential for harm to victims of domestic violence and their children;
- Providing written factual information to the court regarding supervised contact;
- Reducing the risk of parental kidnapping;
- Assisting parents with juvenile dependency case plan compliance; and
- Facilitating reunification, where appropriate.[6]

The use of supervised visitation programs has grown throughout the years. In 1995, there were 56 documented programs throughout the United States and by 1998, 94 programs had been identified.[7] In January 2005, the Florida Clearinghouse on Supervised Visitation started collecting program and service data in a web-based database.[8] By 2006, Florida had more than 60 supervised visitation programs, and the database held information on 5,196 cases.[9]

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[1] Rachel Birnbaum and Ramona Alaggia, *Supervised Visitation: A Call for a Second Generation of Research*, 44 FAM. CT. REV. 119, 119 (Jan. 2006).
[2] *Id.*
[3] Wendy P. Crook et al., Institute for Family Violence Studies, Florida State University, *Florida's Supervised Visitation Programs: A Report from the Clearinghouse on Supervised Visitation*, 6 (Jan. 2007), *available at* http://familyvio.csw.fsu.edu/1996/BigDig1_2007.pdf (last visited Mar. 16, 2011).
[4] Nat Stern et al., *Visitation Decisions in Domestic Violence Cases: Seeking Lessons from One State's Experience*, 23 WIS. J.L. GENDER & SOC'Y 113, 114 (Spring 2008).
[5] Nancy Thoennes and Jessica Pearson, *Supervised Visitation: A Profile of Providers*, 37 FAM. & CONCILIATION COURTS REV. 460, 465 (Oct. 1999).
[6] Wendy P. Crook, *supra* note 3, at 6.
[7] *Id.*
[8] *Id.* at 7. The Clearinghouse on Supervised Visitation was created in 1996 to provide statewide technical assistance on issues related to the delivery of supervised visitation services to providers. *Id.* at 3.
[9] *Id.* at 7.

As of 2007, Florida was the only state that tracked the statewide usage of supervised visitation across all types of referrals, including domestic violence, child abuse and neglect, and separation or divorce cases.[10]

In an attempt to create program uniformity in certain areas, the Florida Supreme Court's Family Court Steering Committee began developing a minimum set of standards for supervised visitation programs in 1998. Chief Justice Harding endorsed the standards and issued an administrative order mandating that the chief judge of each circuit enter into an agreement with local programs that agreed to comply with the standards.[11] Seven years later, the Legislature amended ch. 753, F.S., to provide for the development of new standards, procedures for a certification process, and development of an advisory board, known as the Supervised Visitation Standards Committee (committee).[12] The committee prepared a report to the Legislature explaining the four overarching principles – safety, training, dignity and diversity, and community – and the standards through which the principles are implemented.

Keeping Children Safe Act

In 2007, the Legislature created the Keeping Children Safe Act (Act)[13] to keep children in the custody of the Department of Children and Family Services (DCF or department) or its contractors safe during visitation or other contact with an individual who is alleged to have committed sexual abuse or some related criminal conduct. The Act creates a rebuttable presumption that visitation with a parent or caregiver will be detrimental to the child if the parent or caregiver has been reported to the child abuse hotline for sexual abuse of a child or has been convicted of certain crimes involving children.[14] If the presumption is not rebutted, visitation must be prohibited or allowed only through a supervised visitation program.[15]

In *In re: Te Interest of Helen Potts*, the circuit court in Pasco County held that s. 39.0139(3)(a)(1), F.S., the section of law finding a presumption of detriment if a parent or caregiver has been reported to the child abuse hotline, was unconstitutional.[16] The court explained that because the statute impinges a fundamental liberty interest – the right to parent[17] – the statute must serve a compelling state interest and use the least intrusive means possible to achieve its compelling interest. Although the court found that s. 39.0139(3)(a)(1), F.S., serves a compelling state interest – to protect children from acts of sexual abuse and exploitation committed by a parent or caregiver – the statute did not do so in the least restrictive means possible. The statute does provide for an evidentiary hearing for those parents or caregivers who fall within the statute; however, those persons are deprived of visitation and contact with their child until the hearing is held. Additionally, the court stated that "there is no other place in the

[10] *Id*. at 6.
[11] Nat Stern et al., *supra* note 4, at 117. The Minimum Standards for Supervised Visitation Program Agreements can be found at http://www.flcourts.org/gen_public/family/bin/svnstandard.pdf (last visited Mar. 16, 2011).
[12] Nat Stern and Karen Oehme, *A Comprehensive Blueprint for a Crucial Service: Florida's New Supervised Visitation Strategy*, 12 J.L. & FAM. STUD. 199, 206 (2010).
[13] Chapter 2007-109, s. 1, Laws of Fla.
[14] Section 39.0139(3), F.S.
[15] Section 39.0139(5), F.S.
[16] *In re: The Interest of Helen Potts*, case no. 07-00742DPAWS (Fla. 6th Jud. Cir. 2007).
[17] *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000).

Florida Statutes that permits interference with a fundamental right based solely on an anonymous tip."[18] Accordingly, the court found s. 39.0139(3)(a)(1), F.S., unconstitutional because:

> The statute creates a rebuttable presumption that visitation of a dependent child by a parent or caregiver who has been reported to the child abuse hotline for sexual abuse, is detrimental to the child. The parent is not entitled to notice or entitled to be heard before his or her rights are eliminated. If a hearing is held at some future undetermined time, the onus is on the parent to rebut the presumption by clear and convincing evidence. Any and all evidence is permitted and the rules of evidence simply do not apply. . . . There is no other place in Chapter 39 that shifts the burden to the parent.[19]

The Keeping Children Safe Act also permits a court to immediately suspend visitation or other contact with a person who attempts to influence the testimony of a child.[20] Moreover, the Act requires a court to convene a hearing within seven business days to evaluate a report from the child's therapist that visitation is impeding the child's therapeutic process.[21]

III. Effect of Proposed Changes:

This bill amends s. 39.0139, F.S., the Keeping Children Safe Act, by requiring a court to find probable cause that a parent or caregiver has sexually abused a child before creating a rebuttable presumption of detriment to the child. The bill provides that if a person meets certain criteria as set out in law, that person may not visit or have contact with a child without a hearing and order by the court. If visitation or contact is denied and the person wishes to begin or resume contact with the child victim, there must be an evidentiary hearing to determine whether contact is appropriate. The bill clarifies that *prior* to the hearing, the court shall appoint a guardian ad litem or attorney ad litem for the child.

The bill also provides that at the hearing, the court may receive evidence, to the extent of its probative value, such as recommendations from the child protective team, the child's therapist, or the child's guardian ad litem or attorney ad litem, even if the evidence may not be admissible under the rules of evidence. Regardless of whether the court finds that the person did or did not rebut the presumption of detriment, the court must enter a written order setting forth findings of fact.

The bill provides that once a rebuttable presumption of detriment has arisen or if visitation has already been ordered and a party or participant informs the court that a person is attempting to influence the testimony of the child, the court must hold a hearing within seven business days to determine whether it is in the best interests of the child to prohibit or restrict visitation with the person who is alleged to have influenced the testimony of the child.

The bill also amends the legislative intent of the Act to provide that it is the intent to protect children who have been sexually abused or exploited by a parent or caregiver by placing

[18] *In re*, *supra* note 16, at 7.
[19] *Id.*
[20] Section 39.0139(6)(a), F.S.
[21] Section 39.0139(6)(b), F.S.

additional requirements on judicial determinations related to contact between a parent or caregiver who meets certain criteria and a child victim in any proceeding pursuant to ch. 39, F.S.

The bill makes technical and conforming changes.

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The Keeping Children Safe Act (Act) creates a rebuttable presumption that visitation with a parent or caregiver will be detrimental to the child if the parent or caregiver has been reported to the child abuse hotline for sexual abuse of a child or has been convicted of certain crimes involving children. If the person meets certain criteria, the person may not visit or have contact with the child until a hearing is held. At the hearing, all evidence is admissible, even if it is not generally admissible under the rules of evidence, and the person must try and overcome the presumption by clear and convincing evidence.

In *In re: The Interest of Helen Potts*,[22] the circuit court in Pasco County held that certain portions of the Act unconstitutionally infringed on the fundamental right to parent because the Act created a presumption of detriment based on an anonymous tip and did not provide notice or a time frame in which a hearing must be held. Also, the court raised issue with the fact that all evidence is permitted and the rules of evidence do not apply and that the burden is placed on the parent to rebut the presumption by clear and convincing evidence.

This bill addresses the issue that a presumption of detriment could arise based on an anonymous call. The bill also provides that "to the extent of its probative value" all evidence may be heard, regardless of whether it would be admissible under the rules of evidence. According to representatives from The Florida Bar, evidence in ch. 39, F.S., cases is usually allowed to be heard despite the rules of evidence, but in an attempt to address the possible constitutional concern raised by the court, the bill does limit

[22] *In re: The Interest of Helen Potts*, case no. 07-00742DPAWS (Fla. 6th Jud. Cir. 2007).

evidence "to the extent of its probative value."[23] It is unclear how a court will rule in the future.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

After the Keeping Children Safe Act (Act) was created, there was debate on whether it applied only to children with cases under ch. 39, F.S., or whether it applied to all judicial determinations relating to visitation and contact with children.[24] This bill amends the legislative intent of the Act to provide that it is the intent to protect children who have been sexually abused or exploited by a parent or caregiver by placing additional requirements on judicial determinations related to contact between a parent or caregiver who meets certain criteria and a child victim in any proceeding pursuant to ch. 39, F.S. This change makes it clear that the provisions of s. 39.0139, F.S., only apply in cases under ch. 39, F.S.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Children, Families, and Elder Affairs on March 22, 2011:
The committee substitute provides that it is the intent of the Legislature to protect children who have been sexually abused or exploited by a parent or caregiver by placing additional requirements on judicial determinations related to contact between a parent or caregiver who meets certain criteria and a child victim in *any proceeding pursuant to ch. 39, F.S.*, rather than in any proceeding under the laws of the state.

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[23] Conversation with Thomas Duggar, Duggar & Duggar, P.A., representative of the Family Law Section of The Florida Bar (Mar. 21, 2011).

[24] *See* Alex Caballero and Ingrid Anderson, *Florida Statute Section 39.0139: Protecting Children from Sexual Abuse from Those Entrusted with Their Care*, 83 FLA. B.J. 59 (Mar. 2008); Judge Sue Robbins, *Florida Statute Section 39.0139: Limiting the Risk of Serious Harm to Children*, 82 FLA. B.J. 45 (May 2008).

B. Amendments:

None.

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

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LEGISLATIVE ACTION

Senate	.	House
	.	
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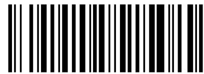
The Committee on Judiciary (Bogdanoff) recommended the following:

1 **Senate Amendment (with title amendment)**
2
3 Delete everything after the enacting clause
4 and insert:
5 Section 1. Sections 25.051, 26.21, 26.22, 26.23, 26.24,
6 26.25, 26.26, 26.27, 26.28, 26.29, 26.30, 26.31, 26.32, 26.33,
7 26.34, 26.35, 26.36, 26.361, 26.362, 26.363, 26.364, 26.365,
8 26.37, 26.38, 26.39, 26.40, 26.42, 35.10, 35.11, 907.05, and
9 907.055, Florida Statutes, are repealed.
10 Section 2. Section 26.46, Florida Statutes, is amended to
11 read:
12 26.46 Jurisdiction of resident judge after assignment.—When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13 a circuit judge is assigned to another circuit, none of the
14 circuit judges in such other circuit shall, because of such
15 assignment, be deprived of or affected in his or her
16 jurisdiction other than to the extent essential so as not to
17 conflict with the authority of the temporarily assigned circuit
18 judge as to the particular case or cases or class of cases~~, or~~
19 ~~in presiding at the particular term or part of term named or~~
20 ~~specified in the assignment~~.
21 Section 3. Section 27.04, Florida Statutes, is amended to
22 read:
23 27.04 Summoning and examining witnesses for state.—The
24 state attorney shall have summoned all witnesses required on
25 behalf of the state; and he or she is allowed the process of his
26 or her court to summon witnesses from throughout the state to
27 appear before the state attorney ~~in or out of term time~~ at such
28 convenient places in the state attorney's judicial circuit and
29 at such convenient times as may be designated in the summons, to
30 testify before him or her as to any violation of the law upon
31 which they may be interrogated, and he or she is empowered to
32 administer oaths to all witnesses summoned to testify by the
33 process of his or her court or who may voluntarily appear before
34 the state attorney to testify as to any violation or violations
35 of the law.
36 Section 4. Section 30.12, Florida Statutes, is amended to
37 read:
38 30.12 Power to appoint sheriff.—Whenever any sheriff in the
39 state shall fail to attend, in person or by deputy, ~~any term of~~
40 the circuit court or county court of the county, from sickness,
41 death, or other cause, the judge attending said court may

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42 appoint an interim ~~a~~ sheriff, who shall assume all the
43 responsibilities, perform all the duties, and receive the same
44 compensation as if he or she had been duly appointed sheriff~~,~~
45 for only the ~~said~~ term of nonattendance ~~court~~ and no longer.
46 Section 5. Paragraph (c) of subsection (1) of section
47 30.15, Florida Statutes, is amended to read:
48 30.15 Powers, duties, and obligations.—
49 (1) Sheriffs, in their respective counties, in person or by
50 deputy, shall:
51 (c) Attend all sessions ~~terms~~ of the circuit court and
52 county court held in their counties.
53 Section 6. Subsection (2) of section 34.13, Florida
54 Statutes, is amended to read:
55 34.13 Method of prosecution.—
56 (2) Upon the finding of indictments by the grand jury for
57 crimes cognizable by the county court, the clerk of the court,
58 without any order therefor, shall docket the same on the trial
59 docket of the county court ~~on or before the first day of its~~
60 ~~next succeeding term~~.
61 Section 7. Subsection (2) of section 35.05, Florida
62 Statutes, is amended to read:
63 35.05 Headquarters.—
64 (2) A district court of appeal may designate other
65 locations within its district as branch headquarters for the
66 conduct of the business of the court ~~in special or regular term~~
67 and as the official headquarters of its officers or employees
68 pursuant to s. 112.061.
69 Section 8. Section 38.23, Florida Statutes, is amended to
70 read:

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71 38.23 Contempt ~~Contempts~~ defined.—A refusal to obey any
72 legal order, mandate or decree, made or given by any judge
73 ~~either in term time or in vacation~~ relative to any of the
74 business of said court, after due notice thereof, shall be
75 considered a contempt, and punished accordingly. ~~But nothing~~
76 ~~said or written, or published, in vacation, to or of any judge,~~
77 ~~or of any decision made by a judge, shall in any case be~~
78 ~~construed to be a contempt.~~
79 Section 9. Section 43.43, Florida Statutes, is created to
80 read:
81 43.43 Terms of courts.—The Supreme Court may establish
82 terms of court for the Supreme Court, the district courts of
83 appeal, and the circuit courts; may provide that district courts
84 and circuit courts may establish their own terms of court; or
85 may dispense with terms of court.
86 Section 10. Section 43.44, Florida Statutes, is created to
87 read:
88 43.44 Mandate of an appeals court.—An appellate court has
89 the jurisdiction and power, as the circumstances and justice of
90 the case may require, to reconsider, revise, reform, or modify
91 its own judgments for the purpose of making the same accord with
92 law and justice. Accordingly, an appellate court has the power
93 to recall its own mandate for the purpose of enabling it to
94 exercise such jurisdiction and power in a proper case. A mandate
95 may not be recalled more than 120 days after it is filed with
96 the lower tribunal.
97 Section 11. Paragraph (b) of subsection (1) of section
98 112.19, Florida Statutes, is amended to read:
99 112.19 Law enforcement, correctional, and correctional

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100 probation officers; death benefits.—
101 (1) Whenever used in this section, the term:
102 (b) “Law enforcement, correctional, or correctional
103 probation officer” means any officer as defined in s. 943.10(14)
104 or employee of the state or any political subdivision of the
105 state, including any law enforcement officer, correctional
106 officer, correctional probation officer, state attorney
107 investigator, or public defender investigator, whose duties
108 require such officer or employee to investigate, pursue,
109 apprehend, arrest, transport, or maintain custody of persons who
110 are charged with, suspected of committing, or convicted of a
111 crime; and the term includes any member of a bomb disposal unit
112 whose primary responsibility is the location, handling, and
113 disposal of explosive devices. The term also includes any full-
114 time officer or employee of the state or any political
115 subdivision of the state, certified pursuant to chapter 943,
116 whose duties require such officer to serve process or to attend
117 session ~~terms~~ of a circuit or county court as bailiff.
118 Section 12. Subsection (2) of section 206.215, Florida
119 Statutes, is amended to read:
120 206.215 Costs and expenses of proceedings.—
121 (2) The clerks of the courts performing duties under the
122 provisions aforesaid shall receive the same fees as prescribed
123 by the general law for the performance of similar duties, and
124 witnesses attending any investigation pursuant to subpoena shall
125 receive the same mileage and per diem as if attending as a
126 witness before the circuit court ~~in term time~~.
127 Section 13. Subsection (4) of section 450.121, Florida
128 Statutes, is amended to read:

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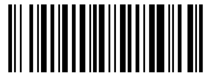
129 450.121 Enforcement of Child Labor Law.—
130 (4) Grand juries shall have inquisitorial powers to
131 investigate violations of this chapter; also, trial court judges
132 shall specially charge the grand jury~~, at the beginning of each~~
133 ~~term of the court,~~ to investigate violations of this chapter.
134 Section 14. Section 831.10, Florida Statutes, is amended to
135 read:
136 831.10 Second conviction of uttering forged bills.—Whoever,
137 having been convicted of the offense mentioned in s. 831.09 is
138 again convicted of the like offense committed after the former
139 conviction~~, and whoever is at the same term of the court~~
140 ~~convicted upon three distinct charges of such offense,~~ shall be
141 deemed a common utterer of counterfeit bills, and shall be
142 punished as provided in s. 775.084.
143 Section 15. Section 831.17, Florida Statutes, is amended to
144 read:
145 831.17 Violation of s. 831.16; second or subsequent
146 conviction.—Whoever having been convicted of either of the
147 offenses mentioned in s. 831.16, is again convicted of either of
148 the same offenses, committed after the former conviction~~, and~~
149 ~~whoever is at the same term of the court convicted upon three~~
150 ~~distinct charges of said offenses,~~ commits a felony of the
151 second degree, punishable as provided in s. 775.082, s. 775.083,
152 or s. 775.084.
153 Section 16. Subsection (4) of section 877.08, Florida
154 Statutes, is amended to read:
155 877.08 Coin-operated vending machines and parking meters;
156 defined; prohibited acts, penalties.—
157 (4) Whoever violates ~~the provisions of~~ subsection (3) a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158 second or subsequent time commits~~, and is convicted of such~~
159 ~~second separate offense, either at the same term or a subsequent~~
160 ~~term of court, shall be guilty of~~ a felony of the third degree,
161 punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
162 Section 17. Subsection (1) of section 902.19, Florida
163 Statutes, is amended to read:
164 902.19 When prosecutor liable for costs.—
165 (1) When a person makes a complaint before a county court
166 judge that a crime has been committed and is recognized by the
167 county court judge to appear before ~~at the next term of~~ the
168 court having jurisdiction to give evidence of the crime and
169 fails to appear, the person shall be liable for all costs
170 occasioned by his or her complaint, and the county court judge
171 may enter ~~obtain~~ a judgment and execution for the costs as in
172 other cases.
173 Section 18. Subsection (2) of section 903.32, Florida
174 Statutes, is amended to read:
175 903.32 Defects in bond.—
176 (2) If no day, or an impossible day, is stated in a bond
177 for the defendant's appearance before a trial court judge for a
178 hearing or trial, the defendant shall be bound to appear 10 days
179 after receipt of notice to appear by the defendant, the
180 defendant's counsel, or any surety on the undertaking. ~~If no~~
181 ~~day, or an impossible day, is stated in a bond for the~~
182 ~~defendant's appearance for trial, the defendant shall be bound~~
183 ~~to appear on the first day of the next term of court that will~~
184 ~~commence more than 3 days after the undertaking is given.~~
185 Section 19. Section 905.01, Florida Statutes, is amended to
186 read:

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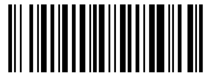
187 905.01 Number and procurement of grand jury; replacement of
188 member<u>; term of grand jury</u>.—
189 (1) The grand jury shall consist of not fewer than 15 nor
190 more than 21 persons. The provisions of law governing the
191 qualifications, disqualifications, excusals, drawing, summoning,
192 supplying deficiencies, compensation, and procurement of petit
193 jurors apply to grand jurors. In addition, an elected public
194 official is not eligible for service on a grand jury.
195 (2) The chief judge of any circuit court may provide for
196 the replacement of any grand juror who, for good cause, is
197 unable to complete the term of the grand jury. Such replacement
198 shall be made by appropriate order of the chief judge from the
199 list of prospective jurors from which the grand juror to be
200 replaced was selected.
201 (3) The chief judge of <u>each</u> ~~any~~ circuit court <u>shall</u>
202 <u>regularly order</u> ~~may dispense with~~ the convening of the grand
203 jury <u>for a</u> ~~at any~~ term of <u>6 months</u> ~~court by filing a written~~
204 ~~order with the clerk of court directing that a grand jury not be~~
205 ~~summoned~~.
206 Section 20. Section 905.09, Florida Statutes, is amended to
207 read:
208 905.09 Discharge and recall of grand jury.—A grand jury
209 that has been dismissed may be recalled at any time during the
210 ~~same~~ term of <u>the grand jury</u> ~~court~~.
211 Section 21. Section 905.095, Florida Statutes, is amended
212 to read:
213 905.095 Extension of grand jury term.—Upon petition of the
214 state attorney or the foreperson of the grand jury acting on
215 behalf of a majority of the grand jurors, the circuit court may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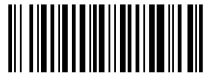
216 extend the term of a grand jury impaneled under this chapter
217 beyond the term ~~of court~~ in which it was originally impaneled. A
218 grand jury whose term has been extended as provided herein shall
219 have the same composition and the same powers and duties it had
220 during its original term. In the event the term of the grand
221 jury is extended under this section, it shall be extended for a
222 time certain, not to exceed a total of 90 days, and only for the
223 purpose of concluding one or more specified investigative
224 matters initiated during its original term.
225 Section 22. Section 914.03, Florida Statutes, is amended to
226 read:
227 914.03 Attendance of witnesses.—A witness summoned by a
228 grand jury ~~or in a criminal case~~ shall remain in attendance
229 until excused by the grand jury. A witness summoned in a
230 criminal case shall remain in attendance until excused by the
231 court. A witness who departs without permission of the court
232 shall be in criminal contempt of court. ~~A witness shall attend~~
233 ~~each succeeding term of court until the case is terminated.~~
234 Section 23. Subsection (2) of section 924.065, Florida
235 Statutes, is amended to read:
236 924.065 Denial of motion for new trial or arrest of
237 judgment; appeal bond; supersedeas.—
238 (2) An appeal shall not be a supersedeas to the execution
239 of the judgment, sentence, or order until the appellant has
240 entered into a bond with at least two sureties to secure the
241 payment of the judgment, fine, and any future costs that may be
242 adjudged by the appellate court. The bond shall be conditioned
243 on the appellant's personally answering and abiding by the final
244 order, sentence, or judgment of the appellate court and, if the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245 action is remanded, on the appellant's appearing before ~~at the~~
246 ~~next term of~~ the court in which the case was originally
247 determined and not departing without leave of court.
248 Section 24. Section 932.47, Florida Statutes, is amended to
249 read:
250 932.47 Informations filed by prosecuting attorneys.—
251 Informations may be filed by the prosecuting attorney of the
252 circuit court with the clerk of the circuit court ~~in vacation or~~
253 ~~in term~~ without leave of the court first being obtained.
254 Section 25. This act shall take effect January 1, 2012.
255
256 ================= T I T L E A M E N D M E N T ================
257 And the title is amended as follows:
258 Delete everything before the enacting clause
259 and insert:
260 A bill to be entitled
261 An act relating to the judiciary; repealing s. 25.051,
262 F.S., relating to regular terms of the Supreme Court;
263 repealing s. 26.21, F.S., relating to terms of the
264 circuit courts; repealing s. 26.22, F.S., relating to
265 terms of the First Judicial Circuit; repealing s.
266 26.23, F.S., relating to terms of the Second Judicial
267 Circuit; repealing s. 26.24, F.S., relating to terms
268 of the Third Judicial Circuit; repealing s. 26.25,
269 F.S., relating to terms of the Fourth Judicial
270 Circuit; repealing s. 26.26, F.S., relating to terms
271 of the Fifth Judicial Circuit; repealing s. 26.27,
272 F.S., relating to terms of the Sixth Judicial Circuit;
273 repealing s. 26.28, F.S., relating to terms of the

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274 Seventh Judicial Circuit; repealing s. 26.29, F.S.,
275 relating to terms of the Eighth Judicial Circuit;
276 repealing s. 26.30, F.S., relating to terms of the
277 Ninth Judicial Circuit; repealing s. 26.31, F.S.,
278 relating to terms of the Tenth Judicial Circuit;
279 repealing s. 26.32, F.S., relating to terms of the
280 Eleventh Judicial Circuit; repealing s. 26.33, F.S.,
281 relating to terms of the Twelfth Judicial Circuit;
282 repealing s. 26.34, F.S., relating to terms of the
283 Thirteenth Judicial Circuit; repealing s. 26.35, F.S.,
284 relating to terms of the Fourteenth Judicial Circuit;
285 repealing s. 26.36, F.S., relating to terms of the
286 Fifteenth Judicial Circuit; repealing s. 26.361, F.S.,
287 relating to terms of the Sixteenth Judicial Circuit;
288 repealing s. 26.362, F.S., relating to terms of the
289 Seventeenth Judicial Circuit; repealing s. 26.363,
290 F.S., relating to terms of the Eighteenth Judicial
291 Circuit; repealing s. 26.364, F.S., relating to terms
292 of the Nineteenth Judicial Circuit; repealing s.
293 26.365, F.S., relating to terms of the Twentieth
294 Judicial Circuit; repealing s. 26.37, F.S., relating
295 to requiring a judge to attend the first day of each
296 term of the circuit court; repealing s. 26.38, F.S.,
297 relating to a requirement for a judge to state a
298 reason for nonattendance; repealing s. 26.39, F.S.,
299 relating to penalty for nonattendance of judge;
300 repealing s. 26.40, F.S., relating to adjournment of
301 the circuit court upon nonattendance of the judge;
302 repealing s. 26.42, F.S., relating to calling all

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303 cases on the docket at the end of each term; repealing
304 s. 35.10, F.S., relating to regular terms of the
305 district courts of appeal; repealing s. 35.11, F.S.,
306 relating to special terms of the district courts of
307 appeal; repealing s. 907.05, F.S., relating to a
308 requirement that criminal trials be heard in the term
309 of court prior to civil cases; repealing s. 907.055,
310 F.S., relating to a requirement that persons in
311 custody be arraigned and tried in the term of court
312 unless good cause is shown; amending ss. 26.46, 27.04,
313 30.12, 30.15, 34.13, 35.05, and 38.23, F.S.;
314 conforming provisions to changes made by the act;
315 creating s. 43.43, F.S.; allowing the Supreme Court to
316 set terms of court for the Supreme Court, district
317 courts of appeal, and circuit courts; creating s.
318 43.44, F.S.; providing that appellate courts may
319 withdraw a mandate within 120 days after its issuance;
320 amending ss. 112.19, 206.215, 450.121, 831.10, 831.17,
321 877.08, 902.19, 903.32, 905.01, 905.09, 905.095,
322 914.03, 924.065, and 932.47, F.S.; conforming
323 provisions to changes made by the act; providing an
324 effective date.

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LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Bogdanoff) recommended the following:

1 **Senate Amendment to Amendment (332504) (with title**
2 **amendment)**
3
4 Delete line 254
5 and insert:
6 Section 25. Eligibility criteria for government-funded
7 pretrial release.—
8 (1) It is the policy of this state that only defendants who
9 are indigent and therefore qualify for representation by the
10 public defender are eligible for government-funded pretrial
11 release. Further, it is the policy of this state that, to the
12 greatest extent possible, the resources of the private sector be

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13 used to assist in the pretrial release of defendants. It is the
14 intent of the Legislature that this section not be interpreted
15 to limit the discretion of courts with respect to ordering
16 reasonable conditions for pretrial release for any defendant.
17 However, it is the intent of the Legislature that government-
18 funded pretrial release be ordered only as an alternative to
19 release on a defendant's own recognizance or release by the
20 posting of a surety bond.
21 (2) A pretrial release program established by an ordinance
22 of the county commission, an administrative order of the court,
23 or by any other means in order to assist in the release of
24 defendants from pretrial custody is subject to the eligibility
25 criteria set forth in this section. These eligibility criteria
26 supersede and preempt all conflicting local ordinances, orders,
27 or practices. Each pretrial release program shall certify
28 annually, in writing, to the chief circuit court judge, that it
29 has complied with the reporting requirements of s. 907.043(4),
30 Florida Statutes.
31 (3) A defendant is eligible to receive government-funded
32 pretrial release only by order of the court after the court
33 finds in writing upon consideration of the defendant's affidavit
34 of indigence that the defendant is indigent or partially
35 indigent as set forth in Rule 3.111, Florida Rules of Criminal
36 Procedure, and that the defendant has not previously failed to
37 appear at any required court proceeding. A defendant may not
38 receive a government-funded pretrial release if the defendant's
39 income is above 300 percent of the then-current federal poverty
40 guidelines prescribed for the size of the household of the
41 defendant by the United States Department of Health and Human

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42 Services, unless the defendant is receiving Temporary Assistance
43 for Needy Families-Cash Assistance, poverty-related veterans'
44 benefits, Supplemental Security Income (SSI), food stamps, or
45 Medicaid.
46 (4) If a defendant seeks to post a surety bond pursuant to
47 a bond schedule established by administrative order as an
48 alternative to government-funded pretrial release, the defendant
49 shall be permitted to do so without any interference or
50 restriction by a pretrial release program.
51 (5) This section does not prohibit the court from:
52 (a) Releasing a defendant on the defendant's own
53 recognizance.
54 (b) Imposing upon the defendant any additional reasonable
55 condition of release as part of release on the defendant's own
56 recognizance or the posting of a surety bond upon a finding of
57 need in the interest of public safety, including, but not
58 limited to, electronic monitoring, drug testing, substance abuse
59 treatment, or attending a batterers' intervention program.
60 (6) In lieu of using a government-funded program to ensure
61 the court appearance of any defendant, a county may reimburse a
62 licensed surety agent for the premium costs of a surety bail
63 bond that secures the appearance of an indigent defendant at all
64 court proceedings if the court establishes a bail bond amount
65 for the indigent defendant.
66 (7) A defendant who is not otherwise eligible for
67 government-funded pretrial release under subsection (3) is
68 eligible for government-funded pretrial release 48 hours after
69 the defendant's arrest.
70 (8) The income eligibility limitations applicable to

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71 government-funded pretrial release programs apply only to those
72 counties with a population equal to or greater than 350,000
73 persons.
74 (9) This section does not prohibit a law enforcement
75 officer or a code enforcement officer authorized under s.
76 162.23, Florida Statutes, from issuing a notice to appear in
77 lieu of jail.
78 Section 26. (1) Sections 1 through 24 of this act shall
79 take effect January 1, 2012.
80 (2) Section 25 of this act pertaining to government-funded
81 pretrial release shall take effect October 1, 2011.
82 Section 27. Except as otherwise expressly provided in this
83 act, this act shall take effect October 1, 2011.
84
85 ================= T I T L E A M E N D M E N T ================
86 And the title is amended as follows:
87 Delete lines 323 - 324
88 and insert:
89 provisions to changes made by the act; providing state
90 policy and legislative intent; requiring each pretrial
91 release program established by ordinance of a county
92 commission, by administrative order of a court, or by
93 any other means in order to assist in the release of a
94 defendant from pretrial custody to conform to the
95 eligibility criteria set forth in the act; preempting
96 any conflicting local ordinances, orders, or
97 practices; requiring that the defendant satisfy
98 certain eligibility criteria in order to be assigned
99 to a pretrial release program; providing that the act

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100 does not prohibit a court from releasing a defendant
101 on the defendant’s own recognizance or imposing any
102 other reasonable condition of release on the
103 defendant; authorizing a county to reimburse a
104 licensed surety agent for the premium costs of a bail
105 bond for the pretrial release of an indigent defendant
106 under certain circumstances; providing that a
107 defendant who is not otherwise eligible for
108 government-funded pretrial release becomes eligible
109 for government-funded pretrial release 48 hours after
110 the defendant’s arrest; providing that the income
111 eligibility limitations applicable to government-
112 funded pretrial release programs apply only to certain
113 specified counties; providing that the act does not
114 prohibit a law enforcement officer or a code
115 enforcement officer from issuing a notice to appear in
116 certain conditions; providing effective dates.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 1398

INTRODUCER: Senator Bogdanoff

SUBJECT: Judiciary

DATE: April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	JU	**Pre-meeting**
2.			BC	
3.				
4.				
5.				
6.				

I. Summary:

This bill repeals multiple provisions related to the judiciary which appear to be obsolete. The repealed provisions relate to:

- Regular terms of court for the Florida Supreme Court;
- Compensation of the Florida Supreme Court marshal;
- Commissions for taking a census of the population of judicial circuits;
- Term of the circuit courts;
- A judge's attendance at the first day of a term;
- A judge's stated reason for nonattendance;
- The penalty for nonattendance of a judge;
- Adjournment of court upon nonattendance of a judge;
- Calling the docket at end of a term;
- Identification of the sheriff as the executive officer of the circuit court;
- Requiring the clerk of circuit court, or his or her deputy clerk, to reside at the county seat or within two miles of the county seat;
- Regular terms of court for the district courts of appeal;
- Compensation of the marshals for the district courts of appeal; and
- Guardians of incapacitated world war veterans.

This bill repeals the following sections of the Florida Statutes: 25.051, 25.281, 26.011, 26.21, 26.22, 26.23, 26.24, 26.25, 26.26, 26.27, 26.28, 26.29, 26.30, 26.31, 26.32, 26.33, 26.34, 26.35, 26.36, 26.361, 26.362, 26.363, 26.364, 26.365, 26.37, 26.38, 26.39, 26.40, 26.42, 26.49, 28.08, 35.10, 35.27, and 744.103.

II. Present Situation:

Article V of the Florida Constitution establishes the judicial branch of government, including prescribing the various courts in which the judicial power is vested. The Florida State Courts System consists of all officers, employees, and divisions of the entities noted below.[1]

- The Supreme Court, the highest state appellate court, has seven justices and statewide jurisdiction. The Chief Justice is the administrator of the state courts system. The court also regulates admission of lawyers to The Florida Bar and the discipline of judges and lawyers.
- The district courts of appeal, the state appellate courts, have jurisdiction within the limits of their five geographic districts and are served by approximately 60 judges.
- The circuit courts, the highest level trial court in each of the 20 judicial circuits, are served by approximately 600 judges. The circuit courts hear, for example, felony cases, family law matters, and civil cases over $15,000.
- The county courts, the lowest level trial courts, with at least one judge in each county, are served by approximately 320 judges. The county courts hear, for example, misdemeanor cases, small claims cases, and civil cases under $15,000.

Some of the other entities that also have a role in the judicial system include:

- Office of the State Courts Administrator, created by the Supreme Court to assist in administering the state courts system;
- Judicial nominating commissions, which recommend persons to fill judicial vacancies;
- Judicial Qualifications Commission, which investigates and recommends discipline of judges;
- Clerks of court, who have multiple responsibilities, including keeping a docket for court cases, reporting case filings and dispositions, and collecting court costs and fees;
- State attorneys, who prosecute or defend on behalf of the state, all suits, applications, or motions, civil or criminal, in which the state is a party;
- Attorney General, who represents the state in criminal appeals and other issues related to state agency legal actions;
- Statewide Prosecutor, who prosecutes on behalf of the state for crimes that include multiple jurisdictions;
- Public defenders, who represent indigent persons charged with a felony or certain misdemeanors, alleged delinquents, and other persons, such as alleged mentally ill persons, who are being involuntarily placed (usually for health care reasons);
- Capital Collateral Regional Counsels, who represent indigent persons in death row appeals; and
- Sheriffs, who are responsible for executing all processes of the courts and for the provision of bailiffs.

[1] Office of Program Policy Analysis and Government Accountability, Fla. Legislature, Government Program Summaries, *State Courts System* (last updated Jan. 12, 2011), http://www.oppaga.state.fl.us/profiles/1072/ (last visited Mar. 30, 2011).

This bill repeals a number of statutory provisions related to the judiciary. The present situation for each of the relevant provisions is discussed in the "Effect of Proposed Changes" section of this bill analysis, below.

III. Effect of Proposed Changes:

Regular Terms of Supreme Court

Present Situation: Enacted in 1957, s. 25.051, F.S., requires the Supreme Court to hold two terms in each year, in the Supreme Court Building, commencing respectively on the first day of January and July, or the first day thereafter if that is a Sunday or holiday.

Effect of the Bill: Section 1 repeals s. 25.051, F.S.

Compensation of Supreme Court Marshal

Present Situation: Article V, subsection (3)(c) of the Florida Constitution requires that the Supreme Court appoint a marshal and provides that the salary of the marshal "shall be fixed by general law." Enacted in 1957, s. 5.281, F.S., requires that the compensation of the marshal "be provided by law."

Currently, a personnel schedule supporting preparation of the annual general appropriations act prescribes the salary associated with specific categories of state-employee positions, including the marshal of the Supreme Court.[2]

Effect of the Bill: Section 1 repeals s. 25.281, F.S. This bill does not affect the current constitutional requirement for the marshal's compensation to be fixed by general law.[3]

Census Commission; Judicial Circuits

Present Situation: Enacted in 1956, s. 26.011, F.S., provides the methods through which the Legislature can have the Governor appoint commissioners to take a census of the population of a judicial circuit and gives those findings, as proclaimed by the Governor, the force of law.

Effect of the Bill: Section 1 repeals s. 26.011, F.S.

Terms of Circuit Courts

Present Situation: Sections 26.21-26.365, F.S., require at least two regular terms of the circuit court to be held in each county each year and allow for special terms as needed. There is a separate statute for each of the 20 circuits which provides for the starting day of each term.

Effect of the Bill: Section 1 repeals ss. 26.21-26.365, F.S.

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[2] The schedule, although not part of the general appropriations act, guides the Legislature in prescribing an annual appropriation of positions and salaries and benefits for the Supreme Court. Conversation with staff of the Senate Budget Subcommittee on Criminal and Civil Justice Appropriations (Mar. 19, 2011).

[3] FLA. CONST. art. V, s. 3(c).

Judge to Attend First Day of Term

Present Situation: Enacted in 1849, s. 26.37, F.S., requires every judge of a circuit court, unless prevented by sickness or other providential causes, to attend the first day of each term of the circuit court. If the judge fails to attend, he or she is subject to a $100 deduction from his or her salary.

Effect of the Bill: Section 1 repeals s. 26.37, F.S.

Judge's Reason for Nonattendance

Present Situation: Enacted in 1849, s. 26.38, F.S., requires a judge who misses the first day of each term to state the reasons of such failure in writing to be handed to the clerk of the court.

Effect of the Bill: Section 1 repeals s. 26.38, F.S.

Penalty for Nonattendance of Judge

Present Situation: Enacted in 1849, s. 26.39, F.S., requires the clerk of court to notify the Chief Financial Officer of the state when a judge fails to attend the first day of the term of court. The CFO is then directed to deduct $100 from the judge's pay for every such default.

Effect of the Bill: Section 1 repeals s. 26.39, F.S.

Adjournment of Court upon Nonattendance

Present Situation: Enacted in 1828, s. 26.40, F.S., requires that, whenever a judge does not attend on the first day of any term, the court shall stand adjourned until 12 o'clock on the second day. If the judge does not attend court at that time, the clerk must continue all causes and adjourn the court to such time as the judge may appoint or to the next regular term.

Effect of the Bill: Section 1 repeals s. 26.40, F.S.

Calling Docket at End of Term

Present Situation: Enacted in 1828, s. 26.42, F.S., requires a judge, after other court business of the term has been completed, to call the remaining cases on the docket and make such orders and entries as necessary.

Effect of the Bill: Section 1 repeals s. 26.42, F.S.

Executive Officer of Circuit Court

Present Situation: Enacted in 1845, s. 26.49, F.S., identifies the sheriff of the county as the executive officer of the circuit court of the county.

Effect of the Bill: Section 1 repeals s. 26.49, F.S.

Place of Residence

Present Situation: Enacted in 1851, s. 28.08, F.S., requires that the clerk of the circuit court or a deputy clerk must reside at the county seat or within two miles of the county seat.

Effect of the Bill: Section 1 repeals s. 28.08, F.S.

A candidate, at the time of qualifying as candidate for public office, must subscribe to an oath that he or she is a qualified elector of the county.[4] In order to be a qualified elector, one must be a resident of Florida and the county in which he or she registers to vote.[5] The Division of Elections has "opined that unless otherwise provided constitutionally, legislatively or judicially, the qualifications one must possess for public office, which would include residency, are effective at the commencement of the term of office."[6] Thus, according to the division opinion, a county constitutional officer must be a resident of the county at the time of assuming office.[7]

Regular Terms of District Courts of Appeal

Present Situation: Enacted in 1957, s. 35.10, F.S., requires the district courts of appeal to hold two regular terms each year at their headquarters. The terms shall commence on the second Tuesday in January and July.

Effect of the Bill: Section 1 repeals s. 35.10, F.S.

Compensation of District Court of Appeal Marshal

Present Situation: Article V, subsection 4(c) of the Florida Constitution requires that a district court of appeal appoint a marshal and provides that the compensation of the marshal "shall be fixed by general law." Enacted in 1957, s. 35.27, F.S., provides that the compensation of the marshal "shall be as provided by law."

Currently, a personnel schedule supporting preparation of the annual general appropriations act prescribes the salary associated with specific categories of state-employee positions, including the marshals of the district courts of appeal.[8]

Effect of the Bill: Section 1 repeals s. 35.27, F.S. This bill does not affect the current constitutional requirement for the marshal's compensation to be fixed by general law.[9]

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[4] Section 99.021, F.S.
[5] Fla. Dept. of State, Div. of Elections, Advisory Opinion DE 94-04 (March 3, 1994).
[6] *Id.*
[7] *See id*.
[8] The schedule, although not part of the general appropriations act, guides the Legislature in prescribing an annual appropriation of positions and salaries and benefits for the district courts of appeal. Conversation with staff of the Senate Budget Subcommittee on Criminal and Civil Justice Appropriations (Mar. 19, 2011).
[9] FLA. CONST. art. V, s. 4(c).

Guardians of Incapacitated World War Veterans

Present Situation: Enacted in 1974, s. 744.103, F.S., provides that the provisions of the guardianship law shall extend to incapacitated world war veterans, provided for in chapters 293 and 294, F.S. The statute further provides that the provisions of this law are cumulative to those chapters. However, chapters 293 and 294, F.S., have both been repealed in previous legislative sessions or had provisions transferred to part VIII of chapter 744, F.S. (governing veterans' guardianship). Former s. 293.16, F.S., setting forth the procedure for placing veterans with a federal agency such as United States Department of Veterans Affairs, was transferred and renumbered as s. 394.4672, F.S.

Effect of the Bill: Section 1 repeals s. 744.103, F.S.

Effective Date

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

See "Related Issues" section, below, for possible impact on judicial workload.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill repeals provisions relating to terms of court. Reference to terms of court is still relevant today for two purposes: designating the terms of local grand juries and limiting withdrawal of an appellate mandate. Historically, although not explicitly required by statute, the terms of a grand jury coincide with the term of the court. In the appellate courts, the terms of court limit an appellate court's ability to withdraw a mandate, a rare procedure. Under current law, a mandate may only be withdrawn during the current term of the appellate court, which leads to the result of some appellate court opinions being subject to withdrawal for nearly six months while others may only be subject to withdrawal for a few days.

The Office of the State Courts Administrator (OSCA) noted that repeal of appellate terms of court "may impair the ability of appellate courts to finalize cases. Similarly, because grand juries are impaneled for specific terms of court, repeal of terms of court in the various judicial circuits will leave trial court chief judges without explicit authority to convene grand juries."[10] The OSCA also noted the potential for an increase in judicial workload related to "requests to reopen criminal appeals and other appellate matters for which mandates have already been issued."[11]

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

None.

B. Amendments:

None.

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

[10] Fla. Office of the State Courts Administrator, *2011 Judicial Impact Statement: SB 1398*, Mar. 3, 2011 (on file with the Senate Committee on Judiciary).
[11] *Id*.

294754

LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Bogdanoff) recommended the following:

1 **Senate Amendment**
2
3 Delete line 103
4 and insert:
5 2011. However, this section does not apply to any order in
6 effect on July 1, 2011, which was duly entered by a court of
7 this state and which restricts or limits access to any
8 photograph or video or audio recording that depicts or records
9 the killing of a person. This section applies only to
10 photographs and video or audio recordings that constitute public
11 records as defined in s. 119.011, Florida Statutes.

153872

LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Bogdanoff) recommended the following:

1 **Senate Amendment**

2

3 Delete line 138

4 and insert:

5

6 application, except as provided herein, because it is remedial

7 in nature.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 416

INTRODUCER: Criminal Justice Committee and Senator Bogdanoff

SUBJECT: Public Records

DATE: April 11, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon	CJ	**Fav/CS**
2.	Munroe	Maclure	JU	**Pre-meeting**
3.			GO	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... [X] Statement of Substantial Changes
B. AMENDMENTS........................ [ ] Technical amendments were recommended
[ ] Amendments were recommended
[ ] Significant amendments were recommended

I. Summary:

This bill creates an exemption from public records requirements for photographs and video and audio recordings that depict or record the killing of a person. (The exemption is comparable to the public records exemption in s. 406.135, F.S., relating to photographs and video and audio recordings of an autopsy held by a medical examiner.) The exemption is subject to the Open Government Sunset Review Act and as such, will be repealed on October 2, 2016, unless reviewed and reenacted by the Legislature.

The exemption permits a surviving spouse to view, listen, and copy these photographs and video and audio recordings that depict or record the killing of a person. If there is no surviving spouse, then the deceased's surviving parents may view and copy them. If there are no surviving parents, then an adult child of the deceased may view and copy them. The surviving relative who has the authority to view and copy these records is authorized to designate in writing any other person to view, copy, or publish them.

Additionally, federal, state, and local governmental agencies, upon written request, may have access to these records in the performance of their duties. Other than these exceptions, the

custodian is prohibited from releasing the records to any other person not authorized under the exemption without a court order. Knowingly violating these provisions is a third degree felony.

This bill creates an unnumbered section of the Florida Statutes.

II. Present Situation:

During the 2001 Legislative Session, the Legislature enacted s. 406.135, F.S., which provides a public records exemption for photographs, video and audio recordings of an autopsy held by a medical examiner.[1] These photographs, video and audio recordings are confidential and exempt from public disclosure except that a surviving spouse and other enumerated family members may obtain them.[2] In addition to the family members, local governmental entities and state and federal agencies may have access to these autopsy records by requesting in writing to view and copy them when such records are necessary in furtherance of that governmental agency's duties. Other than these exceptions, the custodian of the photographs or video and audio recordings is prohibited from releasing them to any other person not authorized under the exemption without a court order.

The Office of the Attorney General has issued a couple of opinions relating to the exemption for autopsy photographs, video and audio recordings. In one of the opinions, the Attorney General concluded that a medical examiner is authorized under s. 406.135, F.S., to show autopsy photographs or videotapes to public agencies for purposes of professional training or educational efforts if the identity of the deceased is protected, and the agency has made a written request.[3]

Another opinion reiterated this finding and expressly concluded that these photographs or videotapes may not be shown to private entities unless a court has made the requisite finding that good cause exists, and the family of the deceased has received the proper notification and opportunity to be heard at any hearing on the matter.[4]

The Attorney General Opinion, citing the Fifth District Court of Appeal case of *Campus Communications, Inc., v. Earnhardt,*[5] concluded that the court can allow any person access to the autopsy photographs or videotapes when good cause is established, after evaluating the following criteria:

- whether disclosure is necessary to assess governmental performance;
- the seriousness of the intrusion on the deceased's family's right to privacy;
- whether disclosure is the least intrusive means available; and
- the availability of similar information in other public records.[6]

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[1] Chapter 2001-1, s. 1, L.O.F.
[2] Chapter 2003-184, s. 1, L.O.F.
[3] 2001-47 Fla. Op. Att'y Gen. 4 (2001).
[4] 2003-25 Fla. Op. Att'y Gen. (2003).
[5] 821 So. 2d 388 (Fla. 5th DCA 2002), *review dismissed* 845 So. 2d 894 (Fla. 2003), *review denied,* 848 So. 2d 1153 (Fla. 2003) *certiorari denied* 540 U.S. 1049 (2003).
[6] 2003-25 Fla. Op. Att'y Gen. 2, 3 (2003).

In *Earnhardt*, the Fifth District Court of Appeal upheld the law exempting autopsy photographs against an unconstitutional overbreath challenge brought by a newspaper. The court held that the newspaper had not established good cause to view or copy the photographs and that the exemption applied retroactively.[7] The court found that s. 406.135, F.S., met constitutional and statutory requirements that the exemption is no broader than necessary to meet its public purpose, even though not all autopsy recordings are graphic and result in trauma when viewed. The court also found that the Legislature stated with specificity the public necessity justifying the exemption in ch. 2001-1, L.O.F.[8]

Furthermore, the court found the statute provides for disclosure of written autopsy reports, allows for the publication of exempted records upon good cause if the requisite statutory criterion is met, and is supported by a thoroughly articulated public policy to protect against trauma that is likely to result upon disclosure to the public.[9]

The court concluded that it is the prerogative of the Legislature to determine that autopsy photographs are private and need to be protected and that this privacy right prevails over the right to inspect and copy public records. The court also stated that its function is to determine whether the Legislature made this determination in a constitutional manner. Finding that the statute was constitutionally enacted and that it was properly applied to the facts in this case, the Fifth District Court of Appeal affirmed the lower court's finding of constitutionality.[10]

The Fifth District Court of Appeal certified the question of constitutionality to the Florida Supreme Court. On July 1, 2003, the Florida Supreme Court, per curiam, denied review of this case, leaving in place the appellate court's holding.[11]

Article I, s. 23 of the Florida Constitution provides that every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. Article I, s. 23 of the Florida Constitution also expressly states that the section "shall not be construed to limit the public's right of access to public records and meetings as provided by law." The public's right of access to public records and meetings in Florida is based in Article I, s. 24 of the Florida Constitution and is difficult to compare to the statutory federal right of access to public records and meetings under the Freedom of Information Act.[12]

Despite the substantial differences between state and federal law on the public's right of access to records and meetings, it is significant to note that relational or derivative privacy of families has also been asserted under federal law. The United States Supreme Court held that the Freedom of Information Act recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images and that the decedent's family's privacy

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[7] *Campus Communications, Inc., supra* note 5.
[8] *Id.* at 395.
[9] *Id.* at 394.
[10] *Id.* at 403.
[11] 848 So. 2d 1153 (Fla. 2003).
[12] 5 U.S.C.A. § 552.

interest outweighed public interest in disclosure.[13] The Freedom of Information Act provides an exemption for information if disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[14] The U.S. Supreme Court articulated a two-prong test for a person requesting disclosure under the Freedom of Information Act when privacy concerns addressed by the exemption are present: 1) the person requesting the information must show that a significant public interest in the requested information exists, and 2) the person requesting the information must demonstrate that disclosure of the information is likely to advance that significant public interest.[15] If the requester fails to meet the test, "the invasion of privacy is unwarranted."[16]

III. Effect of Proposed Changes:

This bill creates an exemption from public records requirements for photographs and video and audio recordings that depict or record the killing of a person. The exemption is comparable to the public record exemption in s. 406.135, F.S., relating to photographs and video and audio recordings of an autopsy held by a medical examiner.

Section 1 of the bill:

- Defines "killing of a person" to mean "all acts or events that cause or otherwise relate to the death of any human being, including any related acts or events immediately preceding or subsequent to the acts or events that were the proximate cause of death."

- Permits a surviving spouse to view, listen to, and copy these photographs and video and audio recordings. If there is no surviving spouse, then the deceased's surviving parents may view, listen to, and copy them. If there are no surviving parents, then an adult child of the deceased may view, listen to, and copy them. The surviving relative who has the authority to view, listen to, and copy these records is authorized to designate in writing any person to view, copy, or publish them.

- Allows access to these records by federal, state, and local governmental agencies, upon written request, in the performance of their duties. Other than these exceptions, the custodian is prohibited from releasing the records to any other person not authorized under the exemption without a court order.

- Allows other persons who are not covered by the exceptions above to have access to the photos and recordings only with a court order upon a showing of good cause, and limited by any restrictions or stipulations that the court deems appropriate. In determining good cause, the court must consider the following:

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[13] *National Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004). See Samuel A. Terilli and Sigman L. Splichal, *Public Access to Autopsy and Death-Scene Photographs: Relational Privacy, Public Records and Avoidable Collisions*, 10 COMM. L. & POL'Y 313, 323-26 (Summer 2005).

[14] 5 U.S.C.A. § 552(b)(7).

[15] *National Archives and Records Administration*, 541 U.S. at 172.

[16] *Id.*

- o whether such disclosure is necessary for the public evaluation of governmental performance;
- o the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and
- o the availability of similar information in other public records, regardless of form.

- Requires that specified family members are given reasonable notice of a petition for access to photographs, video and audio recordings that depict or record the killing of a person, as well as a copy of the petition and the opportunity to be heard. Such access, if granted by the court, must be performed under the direct supervision of the custodian of the record or his or her designee.

- Provides that it is a third degree felony for any custodian of a photo, video or audio recording that depicts or records the killing of a person to willingly and knowingly violate the provisions of this section. It also provides a third degree felony penalty for anyone who willingly and knowingly violates a court order issued under this section. (A third degree felony is punishable by imprisonment not to exceed five years and/or a fine up to $5,000.)

- Provides that criminal and administrative proceedings are exempt from this section, but shall be subject to all other provisions of ch. 119, F.S.; however, nothing prohibits a court in a criminal or administrative proceeding from restricting the disclosure of a killing, crime scene, or similar photograph or video or audio recording.

- Provides for retroactive application of the exemption because it is remedial in nature.

- Makes the exemption subject to the Open Government Sunset Review Act and, as such, repeals it on October 2, 2016, unless reviewed and reenacted by the Legislature.

Section 2 of the bill provides a similar public necessity statement justifying the exemption as was used when creating the autopsy photographs and recordings exemption. The justification statement is as follows:

> … photographs or video or audio recordings that depict or record the killing of any person render a visual or aural representation of the deceased in graphic and often disturbing fashion. Such photographs or video or audio recordings provide a view of the deceased in the final moments of life, often bruised, bloodied, broken, with bullet wounds or other wounds, cut open, dismembered, or decapitated. As such, photographs or video or audio recordings that depict or record the killing of any person are highly sensitive representations of the deceased which, if heard, viewed, copied, or publicized, could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injury to the memory of the deceased. The Legislature recognizes that the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of such photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of photographs and video and audio recordings would subject the immediate family of the deceased to continuous injury. The Legislature further

recognizes that there continue to be other types of available information, such as crime scene reports, which are less intrusive and injurious to the immediate family members of the deceased and which continue to provide for public oversight.

The Legislature additionally finds that the exemption provided in this act should be given retroactive application because it is remedial in nature.

Section 3 of the bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

In *Campus Communications, Inc., v. Earnhardt*,[17] the Fifth District Court of Appeal upheld a similar law exempting autopsy photographs and video and audio recordings against an unconstitutional overbreath challenge brought by a newspaper (see details in Present Situation). The court went on to certify the question of constitutionality to the Florida Supreme Court. On July 1, 2003, the Florida Supreme Court, per curiam, denied review of this case, leaving in place the appellate court's holding.[18]

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Senate Bill 416 was on the March 2nd Criminal Justice Impact Conference agenda, and the fiscal impact was deemed insignificant because of low volume and because of the unranked third degree felonies.[19]

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[17] Campus Communications, *Inc.,* 821 So. 2d at 403.

[18] *Campus Communications, Inc. v. Earhardt*, 845 So. 2d 894 (Fla. 2003), *review denied,* 848 So. 2d 1153 (Fla. 2003) *certiorari denied* 540 U.S. 1049 (2003).

[19] Office of Economic and Demographic Research, The Florida Legislature, Criminal Justice Impact Conference (Mar. 2, 2011) (The Criminal Justice Impact Conference Results are available at: http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/index.cfm (last visited on Apr. 10, 2011).

The Office of the State Courts Administrator has indicated that the bill will likely increase the number of hearings where parties will attempt to gain access to the material exempted under the bill. An additional workload is expected in providing surviving family members with notice of the hearing on disclosure. The fiscal impact of the bill cannot be accurately determined because it unclear how many hearings may be requested for the material exempt from disclosure under the bill.[20]

VI. Technical Deficiencies:

None.

VII. Related Issues:

The First Amendment Foundation has expressed concerns with the bill, primarily that it will result in restricted oversight of governmental action and less accountability:

> As you may recall, in January of 2006, Martin Lee Anderson, a resident of the Bay County Boot Camp, which was operated by the Bay County Sheriff's Office, died a day after entering boot camp from suffocation. A videotape of the events surrounding his death, specifically the activities of boot camp employees, resulted in the Legislature closing boot camps, but only after the news media and others made the video public. Also, in 1990, the execution of Jesse Joseph Tafero was botched causing his head to catch fire. Videos or photos of this event would be protected under this bill, also limiting oversight. Further, under the bill, traffic stops by law enforcement officers which end up with the officer, driver or other passengers being killed would be protected, making it more difficult to determine what really resulted in any of their deaths.[21]
>
> While we do not wish to disparage government officers or employees, experience has shown us that private citizens and the news media are sometimes required to ensure that bad actors are caught and punished or policies changed. This bill restricts that opportunity by requiring activists and the media to have to go to court to view or copy the records, to rely upon a judge to grant them their right to view or copy the record, and by requiring requestors to have to pay court costs and fees to exercise a constitutional right of access.[22]

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

CS by Criminal Justice on March 28, 2011:

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[20] Office of the State Courts Administrator, Judicial Impact Statement on SB 416, (Feb. 3, 2011) (on file with the Senate Committee on Judiciary)). (Subsequent amendments adopted on SB 416 do not appear to significantly change the fiscal impact of the legislation on the courts).

[21] Letter from the First Amendment Foundation to Senator Bogdanoff Re SB 416, dated February 25, 2011 (on file with the Senate Committee on Criminal Justice).

[22] *Id.*

Allows the surviving relative who has the authority to view, listen to, and copy these records to designate in writing any other person to view, copy, or publish them (rather than the current authorization to designate an agent to obtain the records for the surviving relative).

B. Amendments:

None.

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

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 1196

INTRODUCER: Regulated Industries Committee and Senator Bogdanoff

SUBJECT: Construction Liens on Leased Premises

DATE: April 11, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harrington	Imhof	RI	**Fav/CS**
2.	Munroe	Maclure	JU	**Pre-meeting**
3.			CM	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... [X] Statement of Substantial Changes
B. AMENDMENTS........................ [ ] Technical amendments were recommended
[ ] Amendments were recommended
[ ] Significant amendments were recommended

I. Summary:

The construction lien law allows persons who are enhancing an owner's property to file a lien for the value of the improvement. In certain circumstances, a construction lien may be placed against the property of a lessor (he [or she] who grants a lease)[1] for work done on behalf of a lessee. However, a lessor may limit or prohibit such liens provided the lessor includes a prohibition in the lease and records notice thereof in the public records. The bill revises the procedures for protecting a leased premise from a construction lien when the improvement is contracted for by a lessee (tenant) of the property.

The bill provides that a lessor may file a memorandum of the lease, in lieu of a copy of the lease or short form of the lease, in the official records of the county where the leased premises are located. In the alternative, a lessor may file a notice advising that leases for the rental of premises on a parcel of land prohibit liens in the official records of the county where the land is located. The notice must contain the name of the lessor, legal description of the parcel of land, specific language contained in the various leases, and a statement that all or a majority of the leases on

[1] Black's Law Dictionary, 5th Abridged Ed.

the parcel of land expressly prohibit liability. The bill requires the notice or copy of the lease to be filed prior to the filing of a Notice for Commencement.

The bill deletes the provision that specified that the interest of a lessor shall not be subject to a lien when the lessee is a mobile home owner who is leasing a mobile home lot in a mobile home park.

The bill provides that a contractor may serve a demand on the lessor for a verified copy of the provision in the lease. Failure of the lessor to comply with the demand may result in the contractor being able to attach a lien on the property.

The bill also provides that the lessee who contracts for an improvement must be listed on a Notice of Commencement as the owner of the property.

This bill amends sections 713.10 and 713.13, Florida Statutes.

II. Present Situation:

Overview

A construction lien[2] is an equitable device designed to protect subcontractors, sub-subcontractors, laborers, and suppliers of material who remain unpaid after the owner has paid the contractor directly.[3] The lien law protects subcontractors, sub-subcontractors, laborers, and suppliers of materials by allowing them to place a lien to ensure payment on the property receiving their services. Another purpose of lien law is to protect owners by requiring subcontractors to provide a notice of possible liens, thereby preventing double payments to contractors and subcontractors, material suppliers, or laborers for the same services or materials.

Construction lien statutes set forth a right of action that did not exist at common law, and thus construction liens are purely statutory.

Part I of ch. 713, F.S., requires various notices, demands, and requests to be provided in writing to the homeowner, contractor, subcontractor, lender, and building officials. It requires that the notices, demands, and requests be in a statutory form. The following notices are complicated but important for the homeowner to understand during this process: Notice of Commencement, Notice to Owner, Claim of Lien, Notice of Termination, Waiver and Release of Lien, Notice of Contest of Lien, Contractor's Final Payment Affidavit, and Demands of Written Statement of Account. The procedure that a homeowner follows in paying for improvements under part I of

[2] Lien is not defined in ch. 713, F.S., but can be found elsewhere in the Florida Statutes to mean "a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien." *See* ss. 726.102(8) and 727.103(9), F.S.
[3] *Stunkel v. Gazebo Landscaping Design, Inc*., 660 So. 2d 623 (Fla. 1995).

ch. 713, F.S., determines whether a payment is proper or improper.[4] An improper payment could result in the homeowner paying twice for the same improvement.[5]

Notice of Commencement

Section 713.13, F.S., provides that the recording of a Notice of Commencement gives constructive notice that claims of lien may be recorded and will have priority over any conveyance, encumbrance, or demand not recorded against the real property prior to the time the notice is recorded. However, any conveyance, encumbrance, or demand recorded prior to the time the notice is recorded and any proceeds thereof, regardless of when disbursed, shall have priority over liens.

The notice of commencement must be recorded with the clerk of the court where the property is located[6] by the owner or the owner's agent before a contractor actually begins an improvement to real property or recommences completion of any improvement after default or abandonment.[7] A certified copy of the recorded notice or a notarized statement of filing and a copy must be posted at the jobsite.[8] The notice of commencement must include the legal description of the property, the street address, and the tax folio number, if available.[9] It must also include a general description of the improvement, the name and address of the owner, the name and address of the contractor, the name and address of any person designated to receive notices, the anticipated expiration date if different from one year, and other specified information.[10] The form for the notice of commencement is provided in s. 713.13(1)(d), F.S.

For contracts greater than $2,500, the applicant for the building permit must file a certified copy of the recorded notice or a notarized statement of filing and a copy with the building permit authority. The notice must be filed before the first inspection, or the property will not be inspected.[11]

A notice of commencement is specifically not required prior to issuing a building permit.[12] The building permit must include a "14-point, capitalized, boldfaced type" warning regarding the

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[4] An improper payment is a payment made by a homeowner to a contractor that does not fall within the proper payment defense to a lien under s. 713.06(3), F.S. Improper payments can occur if the homeowner fails to file a Notice of Commencement or fails to obtain a release or waiver of lien after receiving a notice to owner and paying the subcontractor.
[5] The procedure that a homeowner follows in paying for improvements under part I of ch. 713, F.S., determines whether a payment is proper or improper. Making a payment that is improper could result in the homeowner paying twice for the same improvement because the payment is not credited against the owners' potential liability for payment of liens. *See* Fred R. Dudley, *Florida Construction Liens: Representing the Residential Owner,* 79 Fla. Bar J. 34 (Dec. 2005). *See also Review of the Florida Construction Lien Law,* Interim Report No. 2009-124, Florida Senate Committee on Regulated Industries, October 2008.
[6] Section 713.01(4), F.S., defines "clerk's office" to mean the office of the clerk of the circuit court of the county in which the real property is located.
[7] Section 713.13(1)(a), F.S.
[8] *Id.*
[9] *Id.*
[10] Section 713.13(1)(a)-(d), F.S.
[11] Section 713.135(1)(d), F.S. However, the requirement to file a certified copy of the recorded notice or a notarized statement of filing and a copy with the building permit authority does not apply to a direct contract to repair or replace an existing heating or air conditioning system, unless the contract is for an amount equal to or greater than $7,500.
[12] Section 713.135(1)(d) and (e), F.S.

necessity of filing a notice of commencement.[13] All liens from persons who do work to improve a property relate back to the filing of the notice of commencement.[14]

The notice of commencement is valid for one year, unless otherwise stated in the notice. Any payments made by the owner after the expiration of the notice of commencement are considered to be improper payments.[15] If the improvement described in the notice of commencement is not commenced within 90 days of the recording of the notice, then the notice is void, and any payments made by the owner after that time are improper.[16]

Liens on Leased Premises

Section 713.10, F.S., provides that a lien extends only to the right, title, and interest of the person who contracts for the improvement as such right, title, and interest exists at the commencement of the improvement or is later acquired in the property. If a lessee contracts for improvements to the real property, in agreement with the lessor, any resulting liens shall also extend to the interest of the lessor.[17] If the lease provides that the lessor is not subject to any resulting liens from contracts of the lessee, the lessee must disclose the terms of the lease to the contractor so that the contractor can act accordingly. If the lessee knowingly or willfully fails to notify the contractor of such a term in the lease, the contract is voidable at the option of the contractor.[18]

Section 713.10, F.S., provides two alternatives for lessors to avoid liens. The section provides that the interest of the lessor shall not be subject to liens when:

- The lease or a short form of the lease is recorded in the clerk's office and the terms of the lease expressly prohibit liability for liens;[19] or
- All of the leases entered into by a lessor for the rental of premises on a parcel of land prohibit such liability and a notice that sets forth the following is recorded by the lessor in the public records of the county in which the parcel of land is located:
  - The name of the lessor.
  - The legal description of the parcel of land to which the notice applies.
  - The specific language contained in the various leases prohibiting the liability.
  - A statement that all leases entered into for premises on the parcel of land contain the language identified above.[20]

In addition, the interest of the lessor shall not be subject to liens when the lessee is a mobile home owner who is leasing a mobile home lot in a mobile home park from the lessor.[21]

[13] Section 713.135(1)(a), F.S.
[14] Section 713.07(2), F.S.
[15] Section 713.13(1)(c), F.S.
[16] Section 713.13(1)(c) and (2), F.S.
[17] Section 713.10, F.S.
[18] *Id.*
[19] Section 713.10(1), F.S.
[20] Section 713.10(2), F.S.
[21] Section 713.10(3), F.S.

Court Interpretation

In 2010, the Fourth District Court of Appeal held that a lessor who attempted to avail himself of the protection against liens resulting from contracts of tenants filed a defective notice.[22] The lessor posted a notice that all of the leases on his property contained language prohibiting liens and the court held that the notice was defective because the notice did not contain the specific language prohibiting the liens from every contract.[23] In this case, every lease for the property contained a prohibition against liens, although with variation in terms, but the notice that was filed contained language different from the language in the lease.[24] Even though all leases and notices contained a prohibition against liens, and even though it was not in dispute that the notices were filed in the public records prior to the lessee contracting for the project, the court held that, because the plain language of s. 713.10(2), F.S., requires the notice to contain the "specific language" contained in the various leases, the notice was defective because it contained different language.[25]

Because of this interpretation, when a lessor seeks to prohibit liens from attaching to his property, a lessor must use the same language in every contract and must use that language in his notice. Otherwise, lessors of properties on a parcel of land cannot avail themselves of s. 713.10(2), F.S., and must instead file a copy of every lease or short form with the clerk's office in the county where the property is located.

III. Effect of Proposed Changes:

The bill revises the procedures for protecting a leased premise from a construction lien when the improvement is contracted for by a tenant of the property.

The bill amends s. 713.10(1), F.S., to add that a lessor may record a memorandum of the lease that contains the specific language in the lease that prohibits the imposition of a lien in the official records of the county where the leased premise is located, in lieu of filing a copy or short form of the actual lease. The bill also requires that the recording of the lease or memorandum of the lease must be recorded prior to the recording of a notice of commencement to be effective. The bill clarifies that the recording be done in the official records of the county where the leased premise is located.

The bill amends s. 713.10(2), F.S., to provide that a lessor who leases more than one premise on a parcel of land, when some of the leases expressly prohibit the imposition of a lien, may record a notice in the official records of the county where the leased premises are located which includes:

- The name of the lessor.
- The legal description of the parcel of land to which the notice applies.
- The specific language contained in the various leases prohibiting such liability.

[22] *Everglades Electric Supply, Inc. v. Paraiso Granite, LLC*, 28 So. 3d 235 (Fla. 4th DCA 2010).
[23] *Id.* at 237-38.
[24] *Id.*
[25] *Id.*

- A statement that all or a majority of the leases of premises on the parcel expressly prohibit the imposition of a lien.

The bill requires that the recording of the notice in the official records must be complete prior to the recording of a notice of commencement to be effective.

The bill deletes provisions in current s. 713.10(3), F.S., that provide that the interest of a lessor shall not be subject to a lien when the lessee is a mobile home owner who is leasing a mobile home lot in a mobile home park.

The bill amends s. 713.10(3) to provide that a contractor or lienor may serve written demand on a lessor for a copy of the provision in the lease between such lessee and lessor which prohibits the imposition of a lien for an improvement made by the lessee. The copy must be verified under s. 92.525, F.S.[26] A demand for a copy of the pertinent portion of the lease must contain a warning to the lessor in conspicuous type and be in substantially the following form:

> YOUR FAILURE TO SERVE THE REQUESTED VERIFIED COPY WITHIN 30 DAYS OR THE SERVICE OF A FALSE COPY MAY RESULT IN YOUR PROPERTY BEING SUBJECT TO THE CLAIM OF LIEN OF THE PERSON REQUESTING THE VERIFIED COPY.

The bill provides that the lessor must serve a copy of the provision of the lease, which must be verified, on the contractor or lienor within 30 days after receipt of the demand. If the lessor fails to comply, the lessor's property is subject to a lien if the party demanding the verified copy is otherwise entitled to a lien and did not have actual notice that the interest of the lessor is not subject to liens for improvements made by the lessee.

The bill amends s. 713.13(1)(a), F.S., to provide that a lessee who contracts for the improvement is an owner for purposes of the notice of commencement and must be listed as owner on the notice of commencement form.

The bill provides an effective date of October 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

[26] See s. 92.525, F.S., which specifies requirements for the verification of documents

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill amends the current procedures for a lessor to protect his property against liens. The bill appears to make it easier for a lessor to protect his property from contracts of his or her lessees.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Regulated Industries on March 29, 2011:
The committee substitute amends the types of notice that a lessor must file in the official records where the lessor's property is located. The committee substitute provides only two methods, instead of three, for the lessor to prohibit liens on his leased property. First, the lessor may file a copy of the lease, memorandum, or short form of the lease that contains the prohibition against liens in the official records of the county. Second, the lessor may file a notice that provides that some of the liens on a parcel of land contain a prohibition against liens. The notice must contain a statement that all or a majority of the leases on the parcel of land expressly prohibit liens. The committee substitute removes the prohibition against liens for leased mobile home property. The committee substitute requires the lease, memorandum, short form, or notice to be filed in the official records prior to the filing of a notice of commencement. The committee substitute amends the warning for the written demand that may be served on a lessor by a contractor. The committee substitute changes the effective date to October 1, 2011.

B. Amendments:

None.

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

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 828

INTRODUCER: Community Affairs Committee and Senator Bogdanoff

SUBJECT: Public Records/Local Government Inspector General

DATE: April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wolfgang	Yeatman	CA	**Fav/CS**
2.	O'Connor	Maclure	JU	**Pre-meeting**
3.			GO	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS........................		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill creates an exemption from statutory and constitutional public records requirements for information received as part of active investigations of the inspector general on behalf of a unit of local government.

The exemption is subject to legislative review and repeal under the provisions of the Open Government Sunset Review Act.[1]

Because this bill creates a new public records exemption, it requires a two-thirds vote of each house of the Legislature for passage.[2]

This bill substantially amends section 119.0713, Florida Statutes.

[1] Section 119.15, F.S.

[2] FLA. CONST. art. I, s. 24(c).

II. Present Situation:

Florida's Public Records Law

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

Article I, section 24(a) of the State Constitution, provides that:

> Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The Public Records Law is contained in ch. 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record[3] must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency[4] records are to be available for public inspection.

Section 119.011(12), F.S., defines the term "public records" to include all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are "intended to perpetuate, communicate, or formalize knowledge."[5]

Only the Legislature is authorized to create exemptions to open government requirements.[6] Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to

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[3] Section 119.011(12), F.S.

[4] Section 119.011(2), F.S., defines "agency" as "…any state, county, district, authority, or municipal officer, department, division, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."

[5] *Shevin v. Byron, Harless*
+*, Shafer, Reid, and Assocs., Inc.,* 379 So. 2d 633, 640 (Fla. 1980).

[6] FLA. CONST. art. I, s. 24(c).

accomplish the stated purpose of the law.[7] A bill enacting an exemption[8] may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.[9]

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.[10] If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[11]

Open Government Sunset Review Act

The Open Government Sunset Review Act established in s. 119.15, F.S., provides a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or in the fifth year after substantial amendment of an existing exemption, the exemption is repealed on October 2, unless reenacted by the Legislature. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

Local Government Auditing

Section 218.32 (1), F.S., requires that local governments submit to the Department of Financial Services (DFS) an Annual Financial Report covering their operations for the preceding fiscal year. The DFS makes available to local governments an electronic filing system that accumulates the financial information reported on the annual financial reports in a database. Section 218.39, F.S., provides that if a local government will not be audited by the Auditor General, the local government must provide for an annual financial audit to be completed within 12 months after the end of the fiscal year. The audit must be conducted by an independent certified public accountant retained by the entity and paid for from public funds.

Under s. 119.0713, F.S., the audit report of an internal auditor prepared for or on behalf of a unit of government becomes a public record when the audit becomes final. Audit work papers and notes related to the audit are confidential and exempt from s. 119.07(1) and article I, section 24(a) of the Florida Constitution until the audit report becomes final.

Local Government Investigations: Public Records

If certified pursuant to statute, an investigatory record of the Chief Inspector General within the Executive Office of the Governor or of the employee designated by an agency head as the

[7] *See Memorial Hospital-West Volusia v. News-Journal Corporation,* 729 So. 2d 373, 380 (Fla. 1999) (quoting FLA. CONST. art. I, s. 24(c)); *Halifax Hospital Medical Center v. News-Journal Corporation,* 724 So. 2d 567 (Fla. 1999).
[8] Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.
[9] FLA. CONST. art. I, s. 24(c).
[10] Op. Att'y Gen. Fla. 85-62 (1985).
[11] *Williams v. City of Minneola,* 575 So. 2d 683, 687 (Fla. 5th DCA), review denied, 589 So. 2d 289 (Fla. 1991).

agency inspector general (which would include local government entities)[12] has a public records exemption until the investigation ceases to be active, or a report detailing the investigation is provided to the Governor or the agency head, or 60 days from the inception of the investigation for which the record was made or received, whichever occurs first. Investigatory records are those records that are related to the investigation of an alleged, specific act or omission, or other wrongdoing, with respect to an identifiable person or group of persons, based on information compiled by the Chief Inspector General, or by an agency inspector general, as named under the provisions of s. 112.3189, F.S., in the course of an investigation. Under s. 112.31901, F.S., an investigation is active if it is continuing with a reasonable, good faith anticipation of resolution and with reasonable dispatch.[13] At the local government level, there is concern that 60 days is too little time to carry out an investigation, particularly if it is a criminal investigation. Additionally, the Palm Beach County Inspector General is an independent entity responsible for the county, 38 municipalities (by referendum), and the Solid Waste Authority (by interlocal agreement).[14] As a result, there is no single agency head to certify the investigation as exempt.

Section 112.3188, F.S., governs the confidentiality of information given to inspectors general in whistleblower cases. Certain specified information is confidential until the conclusion of an investigation when the investigation is related to whether an employee, or agent of an agency, or independent contractor:

- Has violated or is suspected of having violated any federal, state, or local law, rule, or regulation, thereby creating and presenting a substantial and specific danger to the public's health, safety, or welfare; or
- Has committed an act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, or gross neglect of duty.

Information, other than the name or identity of a person who discloses certain types of incriminating information about a public employee, may be disclosed when the investigation is no longer active. Section 112.3188, F.S., defines what constitutes an active investigation.

Section 112.324(2), F.S., (recently amended by ch. 2010-130, Laws of Florida) provides local governments with a public records exemption for ethics investigations.[15] A recent Florida Attorney General Opinion responded to the following question: "Do the public records and meeting exemptions provided for in ch. 2010-130, Laws of Florida, apply to the investigatory process of the Palm Beach County Inspector General?"[16] The opinion concluded that to the extent that the inspector general is investigating complaints involving the violation of ethics codes, the provisions of ch. 2010-130 would apply. Confidentiality under s. 112.324, F.S., does not extend beyond ethics investigations. However, the Attorney General Opinion did note that similar investigations would be covered under s. 112.3188, F.S., as discussed above.

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[12] Section 112.312, F.S., defining "agency" as any state, regional, county, local, or municipal government entity of this state, whether executive, judicial, or legislative; any department, division, bureau, commission, authority, or political subdivision of this state therein; or any public school, community college, or state university.
[13] Section 112.31901, F.S.
[14] Email from the Palm Beach County Inspector General, on record with the Senate Committee on Community Affairs.
[15] *See also* s. 112.31901, F.S. (related to investigatory records of ethics violations).
[16] Op. Att'y Gen. Fla. 2010-39, September 16, 2010.

III. Effect of Proposed Changes:

Section 1 amends s. 119.0713, F.S., to expand the public records exemptions for audit records prepared by internal auditors for or on behalf of a local government. The bill revises the exemption to also include investigative reports of an inspector general until the investigation becomes final, and information received, produced, or derived from an investigation until the investigation is complete or when the investigation is no longer active. An investigation is active if it is continuing with a reasonable, good faith anticipation of resolution and with reasonable dispatch. This exemption for audits and investigations is subject to the Open Government Sunset Review Act and shall stand repealed on October 2, 2016, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2 provides a statement of public necessity required by the Florida Constitution. The bill states that the exemption is necessary because the release of such information could potentially be defamatory to an individual or entity under audit or investigation, causing unwarranted damage to the good name or reputation of an individual or company, or could significantly impair an administrative or criminal investigation.

Section 3 provides an effective date of October 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement: Article I, section 24(c) of the State Constitution requires a two-thirds vote of each house of the Legislature for passage of a newly created public records or public meetings exemption. Because this bill creates a new public records exemption, it requires a two-thirds vote for passage.

Subject Requirement: Article I, section 24(c) of the State Constitution requires the Legislature to create public records or public meetings exemptions in legislation separate from substantive law changes. This bill complies with that requirement.

Public Necessity Statement: Article I, section 24(c) of the State Constitution requires a public necessity statement for a newly created public records or public meetings exemption. Because this bill creates a new public records exemption, it includes a public necessity statement.

Breadth: A public records exemption must be no broader than necessary to accomplish the stated purpose of the law.[17] To survive constitutional scrutiny, the bill must be

[17] *Memorial Hospital-West Volusia v. News-Journal Corporation,* 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation,* 724 So. 2d 567 (Fla. 1999).

narrowly tailored to protect individuals or entities from the release of defamatory information.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Community Affairs on March 21, 2011:
Adds the definition of what constitutes an active investigation.

B. Amendments:

None.

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

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 708

INTRODUCER: Senator Thrasher

SUBJECT: Lawyer-Client Privilege

DATE: April 11, 2011 REVISED: ________ ________ ________ ________

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Connor	Maclure	JU	**Pre-meeting**
2.			CJ	
3.			RC	
4.				
5.				
6.				

I. Summary:

The bill provides that communications between a client acting as a fiduciary and a lawyer are privileged to the same extent as other clients who seek legal advice.

This bill creates section 90.5021, Florida Statutes.

II. Present Situation:

Evidentiary Privileges

Under Florida law, a person may not: refuse to be a witness, refuse to disclose a matter, refuse to produce any object or writing, or prevent another from doing so, unless the person is the holder of an evidentiary privilege.[1] These privileges are created by statute, the state and federal constitutions, and court rules.[2] Chapter 90, F.S., the Florida Evidence Code, "recognizes privileges when the legislature judges the protection of an interest or a relationship is sufficiently important to justify the sacrifice of facts which might be needed for the administration of justice."[3]

Under the Florida Evidence Code, the Legislature has recognized the following evidentiary privileges:

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[1] Section 90.501, F.S.; Charles W. Ehrhardt, FLORIDA EVIDENCE, 332-33 (2010 ed.).
[2] *Id.*
[3] Ehrhardt, *supra* note 1, at 332-33.

- Journalist's privilege;[4]
- Lawyer-client privilege;[5]
- Psychotherapist-patient privilege;[6]
- Sexual assault counselor-victim privilege;[7]
- Domestic violence advocate-victim privilege;[8]
- Husband-wife privilege;[9]
- Privilege with respect to communications with clergy;[10]
- Accountant-client privilege;[11] and
- Privilege with respect to trade secrets.[12]

Lawyer-Client Privilege[13]

Florida recognizes a lawyer-client privilege applicable to confidential communications between a lawyer and client.[14] The lawyer-client privilege is the oldest of the privileges for confidential communications known in the common law, and existed as part of the common law of Florida until its codification.[15] The privilege was first codified in 1976.[16] Florida law provides that the lawyer-client privilege does not apply where legal advice is sought in the furtherance of crime or fraud.[17]

A client is defined in the evidence code as "any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer."[18] A person, bank, or trust company who serves as a trustee or personal representative, as well as a person acting on behalf of another's person, property, or both, fits the statutory definition of a "client" when seeking legal advice.[19]

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[4] Section 90.5015, F.S.
[5] Section 90.502, F.S.
[6] Section 90.503, F.S.
[7] Section 90.5035, F.S.
[8] Section 90.5036, F.S.
[9] Section 90.504, F.S.
[10] Section 90.505, F.S.
[11] Section 90.5055, F.S.
[12] Section 90.506, F.S.
[13] The bulk of this analysis is derived from materials supplied by the Real Property, Probate, and Trust Law Section of The Florida Bar and a Florida Bar Journal article by Jack A. Falk, Jr., titled *The Fiduciary's Lawyer-Client Privilege: Does It Protect Communications from Discovery by a Beneficiary?*
[14] Section 90.502, F.S.
[15] Jack A. Falk, Jr., *The Fiduciary's Lawyer-Client Privilege: Does It Protect Communications from Discovery by a Beneficiary?*, Florida Bar Journal, Volume LXXVII, No. 3, 18 (March 2003) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *American Tobacco Co. v. State*, 697 So. 2d 1249, 1252 (Fla. 4th DCA 1997); s. 2.01, F.S. (1849); *Keir v. State*, 11 So. 2d 886, 888 (1943)).
[16] Chapter 76-237, s. 1, Laws of Fla.
[17] Section 90.502(4)(a), F.S.
[18] Section 90.502(1)(b), F.S.
[19] Falk, *supra*. note 15.

Fiduciary Obligations Owed to Beneficiary

The relationship between a trustee and a beneficiary is one that Florida courts have frequently addressed, with results leading to uncertainty in the applicability of the lawyer-client privilege to communications between a client acting as a fiduciary and his or her lawyer. A trustee is charged with a fundamental duty to administer a trust diligently for the benefit of the beneficiaries.[20] A personal representative has a similar duty to administer an estate diligently for the benefit of the beneficiaries and creditors.[21] A trustee has an array of duties owed to a beneficiary in addition to the duties of good faith and loyalty in administering the trust for the benefit of the beneficiaries.[22] Because the fiduciary's efforts must be driven and circumscribed by these duties, courts have come to differing conclusions about whether the lawyer-client privilege overrides the fiduciary's duties to a beneficiary.

The existing statute does not expressly address whether the privilege applies to communications between a client, who is acting as a fiduciary by a written instrument in administering fiduciary property, and an attorney. A few relevant cases on this issue are discussed below.

In *Tripp v. Salkovitz*, the personal representative of an estate filed a complaint against the decedent's guardian for failure to properly manage his financial affairs and sought to compel production of confidential communications between the guardian and his attorney.[23] The court ruled that the trial court could require the guardian and attorney to produce confidential documents for in camera inspection, but could not preclude them from raising the attorney-client privilege at a deposition.[24] Furthermore, *Jacob v. Barton* states that if the beneficiary is the person "who will ultimately benefit from the legal work" the fiduciary has instructed the attorney to perform, the beneficiary may be considered the "real client."[25] When the beneficiary is determined to be the real client, the beneficiary holds the privilege and is entitled to communications between the fiduciary and the attorney.

Other cases have discussed the fiduciary's lawyer-client privilege in administering fiduciary property. The Second District Court of Appeal appeared to embrace an exception to the privilege in *Barnett Banks Trust Co. v. Compson,* even though the court refused to permit the beneficiary access to communications between the fiduciary and lawyer because the plaintiff beneficiary's position in the suit was antagonistic to the aligned beneficiaries of the trust.[26] There, the court employed the analysis set forth in the seminal case decided in 1976 in Delaware, *Riggs National Bank v. Zimmer*, which held that communications between the fiduciary and lawyer about administering fiduciary property were not privileged and were discoverable.[27] The *Compson* court did not permit the beneficiary to avail herself of the rule in *Riggs* because she sought to deplete, rather than return, trust assets. The court held that she stood to benefit in her personal

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[20] Section 736.0802(1), F.S.
[21] Section 733.602, F.S.
[22] Falk, *supra* note 15 (citing *Griffin v. Griffin,* 463 So. 2d 569 (Fla. 1st DCA 1985); *Van Dusen v. Southeast First Nat'l Bank of Miami*, 478 So. 2d 82, 92 (Fla. 3d DCA 1985) ("The duty of loyalty owed by trustees is of the highest order.")).
[23] *Tripp v. Salkovitz*, 919 So. 2d 716 (Fla. 2d DCA 2006).
[24] *Id.*
[25] *Jacob v. Barton*, 877 So. 2d 935, 937 (Fla. 2d DCA 2004) (citing *Riggs National Bank v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976)).
[26] *Barnett Banks Trust Co. v. Compson*, 629 So. 2d 849 (Fla. 2d DCA 1993).
[27] *Riggs National Bank v. Zimmer,* 355 A.2d 709 (Del. Ch. 1976).

capacity, but not in her capacity as a beneficiary of the trust, unlike the beneficiary in *Riggs*. Under the *Riggs* reasoning, if a trust beneficiary's interest in a suit against a trustee is aligned with the other beneficiaries, and if the claim is consistent with their status as a beneficiary, the suing beneficiary would be deemed the "real client" of the lawyer retained by the fiduciary for the administration of the trust.

The First District Court of Appeal noted in *First Union Nat'l Bank v. Turney* that usually a lawyer retained by a trust represents the trustee, not the beneficiary.[28] The court in *In re Estate of Gory* addressed an alleged conflict involving the personal representative's lawyer and determined that the lawyer did not have a lawyer-client relationship with the beneficiaries.[29]

The court in *Turney* declined to determine whether to apply an exception to the fiduciary privilege by instead applying the crime-fraud exception to permit discovery.[30] The court therefore did not have to decide whether a "'fiduciary exception' to the attorney-client privilege exists in Florida."[31]

Fiduciary Acting on Behalf of the Person and/or Property

There are other fiduciary relationships not specifically protected by the existing lawyer-client privilege that may not always involve the administration of property. For example, a guardian, as defined in statute, is "a person who has been appointed by the court to act on behalf of a ward's person or property, or both."[32] A guardian's communications with counsel in connection with the administration of the guardianship is not specifically privileged under current law.

III. Effect of Proposed Changes:

The bill provides that communications between a fiduciary who administers fiduciary property and a lawyer are privileged to the same extent as other clients who seek legal advice. Additionally, the privilege specified by the bill would also extend to clients acting on behalf of a person where the fiduciary relationship does not involve property, such as in the case of a court-appointed guardian and other fiduciary relationships as enumerated in the bill. The bill does not affect the existing statutory exception to the lawyer-client privilege when legal advice is sought in the furtherance of crime or fraud.

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

[28] *First Union Nat'l Bank v. Turney*, 824 So. 2d 172, 185-86 (Fla. 1st DCA 2001); *see also Compson*, 629 So. 2d at 851.
[29] *In re Estate of Gory*, 570 So. 2d 1381 (Fla. 4th DCA 1990).
[30] *Turney*, 824 So. 2d 172.
[31] *Id.* at 186.
[32] Section 744.102(9), F.S.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SJR 1218

INTRODUCER: Senator Altman

SUBJECT: Religious Freedom

DATE: April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Anderson	Maclure	JU	**Pre-meeting**
2.			CF	
3.			ED	
4.			BC	
5.				
6.				

I. Summary:

Senate Joint Resolution 1218 proposes an amendment to the Florida Constitution to provide that a person may not be prohibited from participating in a public program because of the person's free choice in using program benefits at a religious provider. In addition, the proposed amendment strikes constitutional language that prohibits public revenue from directly or indirectly supporting sectarian institutions. This provision is commonly known as a Blaine Amendment.

This joint resolution amends article I, section 3, of the Florida Constitution.

II. Present Situation:

The First Amendment to the U.S. Constitution states:

> Congress shall make no law respecting an ***establishment of religion***, or prohibiting the ***free exercise thereof***; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[1]

Similarly, article I, section 3 of the Florida Constitution states:

> There shall be no law respecting the ***establishment of religion*** or prohibiting or penalizing the ***free exercise thereof***. Religious freedom shall not justify practices

[1] Emphasis added.

> inconsistent with public morals, peace or safety. ***No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.***[2]

The U.S. Constitution and the Florida Constitution both contain an Establishment Clause. The Establishment Clauses are based on the clause including the words "establishment of religion." The last sentence of section 3 of article I of the Florida Constitution is known as the "Blaine Amendment" or "no-aid" provision.[3] The U.S. Constitution does not contain a similar provision.

Free Exercise Clauses

Both the U.S. Constitution and the Florida Constitution contain Free Exercise Clauses. The Free Exercise Clauses are based on the clause including the words "free exercise." "Florida courts have generally interpreted Florida's Free Exercise Clause as coequal to the federal clause."[4] "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[5]

Under the Free Exercise Clauses:

> a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.[6]

A law is *not* neutral if it discriminates against religious practice on its face or "if the object of a law is to infringe upon or restrict practices because of their religious motivation."[7]

The following are examples of Free Exercise Clause violations:

- An ordinance that prohibited the ritual slaughter of animals as part of the Santaria religion;[8]
- Laws that disqualify members of the clergy from holding a public office;[9]
- An ordinance that prohibited preaching in a public park by Jehovah's witnesses while allowing preaching during a Catholic mass or a protestant service;[10] and
- A state statute that treated some religious denominations more favorably than others.[11]

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[2] Emphasis added.
[3] *Bush v. Holmes*, 886 So. 2d 340, 344, 348-49 (Fla. 1st DCA 2004) ("*Holmes II*").
[4] *Id.* at 365 (citing *Toca v. State*, 834 So. 2d 204, 208 (Fla. 2d DCA 2002)).
[5] *Church of the Lukimi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).
[6] *Id.* at 531-32 (citation omitted).
[7] *Id.* at 533.
[8] *Lukimi*, 508 U.S. 520.
[9] *McDaniel v. Paty*, 435 U.S. 618 (1978).
[10] *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

However, under the Free Exercise Clause of the First Amendment, a state *may* exclude individuals and entities from a generally available government benefit on the basis of religion.[12]

Blaine Amendments

"Florida's no-aid provision was adopted into the 1868 Florida Constitution during the historical period in which so-called 'Blaine Amendments' were commonly enacted into state constitutions."[13] The U.S. Constitution does not contain a similar provision.

Blaine Amendments are provisions in many state constitutions that prohibit the use of state funds at "sectarian" schools. The provisions are named for Congressman James G. Blaine, who proposed such an amendment to the U.S. Constitution while he was Speaker of the U.S. House of Representatives in 1875.

The amendment passed overwhelmingly (180-7) in the House, but failed narrowly (by 4 votes) in the U.S. Senate. Supporters of the amendment then turned their attention to the individual states, where they had much more success. In some states, Blaine Amendments were adopted by the usual constitutional amendment process. In the case of states just entering the Union, they were forced to adopt similar language as a requirement for gaining statehood.[14]

According to the Florida First District Court of Appeal:

> [w]hether the Blaine-era amendments are based on religious bigotry is a disputed and controversial issue among historians and legal scholars. Certain commentators contend that the original Blaine-era no-aid provisions were based in part on anti-Catholic religious bigotry. Other commentators argue, however, that anti-Catholic bigotry did not play a significant role in the development of Blaine-era no-aid provisions in state constitutions.[15]

In contrast, a plurality opinion of the U.S. Supreme Court, authored by Justice Thomas, asserts that Blaine Amendments were motivated by an anti-Catholic bias.[16] He went on to note that the exclusion of religious schools from generally available public aid programs "would raise serious questions under the Free Exercise Clause."[17]

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[11] *Larson v. Valente*, 456 U.S. 228 (1982).
[12] *Locke v. Davey*, 540 U.S. 712, 722 (2004).
[13] *Holmes II,* 886 So. 2d at 348-49.
[14] J. Scott Slater, *Florida's "Blaine Amendment" and Its Effect on Educational Opportunities*, 33 STETSON L. REV. 581, 591 (Winter 2004).
[15] *Holmes II*, 886 So. 2d at note 9 (citations omitted).
[16] *Mitchell v. Helms* 530 U.S. 793, 828-829 (2000). Justice Thomas wrote:

> In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.

Id. (citations omitted).
[17] *Id.* at 835 n.19.

Florida's Blaine Amendment or no-aid provision imposes "further restrictions on the state's involvement with religious institutions than the Establishment Clause" of the U.S. Constitution.[18] The constitutional prohibition in the no-aid provision involves three elements:

- The prohibited state action must involve the use of state tax revenues;
- The prohibited use of state revenues is broadly defined, in that state revenues cannot be used "directly or indirectly in aid of" the prohibited beneficiaries; and
- The prohibited beneficiaries of the use of state revenues are "any church, sect or religious denomination" or "any sectarian institution."[19]

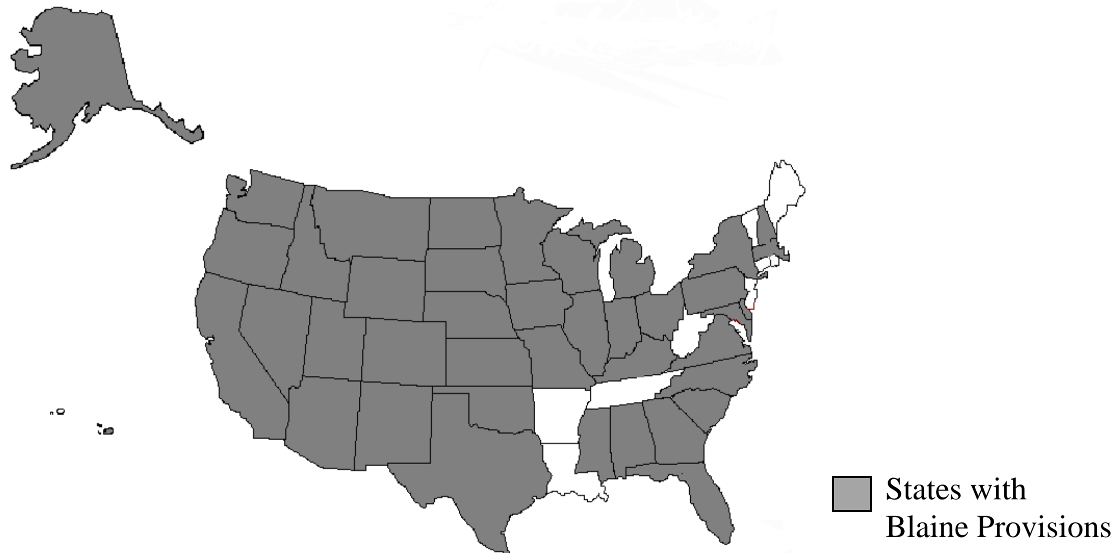
Florida's Blaine Amendment became widely known after the First District Court of Appeal's decision in *Bush v. Holmes*, to invalidate the Opportunity Scholarship Program (OSP).[20]

In a recent application of the Blaine Amendment, a watchdog organization filed suit against the secretary of the Department of Corrections (DOC) to prevent the secretary from expending funds to support faith-based substance abuse transitional housing programs provided by institutions to inmates pursuant to the institutions' contracts with DOC.[21] The trial court entered a judgment on the pleadings in favor of the secretary. On appeal, the First District Court of Appeal recognized that a state constitutional provision, like Florida's no-aid provision, can bar state financial aid to religious institutions without violating either the Establishment Clause or Free Exercise Clause, and reversed the trial court decision and remanded for further factual findings.[22] The Court certified a question to the Florida Supreme Court as one of great public importance under rule 9.330, Florida Rules of Appellate Procedure.[23] The certified question was, "Whether the no-aid provision in Article I, Section 3 of the Florida Constitution prohibits the State from contracting for the provision of necessary social services by religious or sectarian entities?"[24] The Supreme Court did not accept the certified question.[25]

Blaine Amendments in Other Jurisdictions

Not all states adopted Blaine Amendments, and today, approximately 37 states have some version of the provision in their state constitutions.[26] Commentators differ regarding the existence of the true number of Blaine Amendments, or the number of provisions that are actually enforced. The following figure illustrates those states with a Blaine Amendment in the state constitution or some other form of Blaine provision:[27]

[18] *Holmes II*, at 344.
[19] *Id.* at 352.
[20] *Id.* at 340. The Florida Supreme Court also invalidated the Opportunity Scholarship Program but for violating the uniformity requirement of section 1 of article IX of the Florida Constitution. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).
[21] *Council for Secular Humanism, Inc. v. McNeil*, 44 So. 3d 112 (Fla.1st DCA 2010).
[22] *Id.* at 121.
[23] *Id.*
[24] *Id.*
[25] *McNeil v. Council for Secular Humanism, Inc.*, 41 So. 3d 215 (Fla. 2010).
[26] The Becket Fund for Religious Liberty, *Blaine Amendments: States*, *available at* http://www.blaineamendments.org/states/states.html (last visited Mar. 31, 2011).
[27] *Id.*



This year, Georgia legislators filed a resolution to remove the Blaine Amendment from that state's constitution.[28]

Constitutional Amendment Process

Article XI of the Florida Constitution sets forth various methods for proposing amendments to the constitution, along with the methods for approval or rejection of proposals. One method by which constitutional amendments may be proposed is by joint resolution agreed to by three-fifths of the membership of each house of the Legislature.[29]Any such proposal must be submitted to the electors, either at the next general election held more than 90 days after the joint resolution is filed with the Secretary of State, or, if pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision, at an earlier special election held more than 90 days after such filing.[30] If the proposed amendment is approved by a vote of at least 60 percent of the electors voting on the measure, it becomes effective as an amendment to the Florida Constitution on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment.[31]

III. Effect of Proposed Changes:

Senate Joint Resolution 1218 proposes an amendment to section 3, article I of the Florida Constitution to provide that a person cannot be prohibited from participating in a public program because of the person's free choice in using program benefits at a religious provider. In effect,

[28] *See* Georgia House Resolution 425 (2011).
[29] FLA. CONST. art. XI, s. 1.
[30] FLA. CONST. art. XI, s. 5(a).
[31] FLA. CONST. art. XI, s. 5(e).

the state is precluded from excluding individuals and entities from a generally available public benefit on the basis of religion.

The resolution, if adopted by the voters, would remove the Blaine Amendment provision from the state constitution. This removes the limitation on the power of the state and its political subdivisions to spend funds "directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."

The joint resolution is silent regarding an effective date for the constitutional amendment. Therefore, in accordance with section 5, article XI, of the Florida Constitution, it would take effect on the first Tuesday after the first Monday in January following the election at which it was approved by the electorate.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Establishment Clause and Blaine Amendment

The Establishment Clause "prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion."[32] The test to determine whether government aid violates the Establishment Clause of the U.S. Constitution is whether the aid:

- Results in governmental indoctrination;
- Defines its recipients by reference to religion or is neutral with respect to religion; or
- Creates an excessive entanglement.[33]

The conditions under which government may aid a religious institution under the Establishment Clause of the U.S. Constitution were identified by the U.S. Supreme Court in *Zelman v. Simmons-Harris*.[34] The *Zelman* Court stated:

[32] *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-649 (2002).
[33] *Agostini v. Felton*, 521 U.S. 203, 234 (1997).
[34] *Zelman*, 536 U.S. at 652.

> that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to [a] religious [institution] wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.[35]

Accordingly, neutrality must be a key feature of government aid programs that benefit a religion. Aid is neutral if the aid has been directed to a religion by a private choice, rather than a government choice. Aid is neutral if "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."[36]

Courts have found that the following types of aid did not violate the Establishment Clause of the U.S. Constitution:

- Annual subsidies directly to qualifying colleges and universities in Maryland, including religiously affiliated institutions;[37]
- Bussing services for both public and private school children;[38]
- The provision of secular textbooks for both public and private school students;[39]
- Construction grants to colleges and universities regardless of affiliation with or sponsorship by a religious body;[40]
- The provision of grants to religious and other institutions to provide counseling on teenage sexuality;[41] and
- Payment of tuition to private religious schools for children in Cleveland, Ohio, who attended poor quality public schools.[42]

Without knowing exactly how the joint resolution may potentially be challenged if adopted, it is instructional to generally assess how the establishment clause applies to education cases. Initially, a provision must comply with facial constitutionality. In analyzing whether a statute is constitutional on its face, the court will not consider a statute's application in practice or through factual findings.[43] The Florida Supreme Court

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[35] *Id.*
[36] *Zelman*, 536 U.S. at 653-54 (quoting *Agostini*, 521 U.S. at 231).
[37] *Roemer v. Maryland Bd. of Pub. Works*, 426 U.S. 736 (1976).
[38] *Everson v. Board of Education*, 330 U.S. 1 (1947).
[39] *Board of Education v. Allen*, 392 U.S. 236 (1968).
[40] *Tilton v. Richardson*, 403 U.S. 672 (1971).
[41] *Bowen v. Kendrick*, 487 U.S. 589 (1988).
[42] *Zelman*, 536 U.S. at 639.
[43] *Bowen*, 487 U.S. at 600-01 (1988). *See also Reno v. Flores*, 507 U.S. 292, 301 (1993), which provides that a facial challenge is assessed without reference to factual findings or evidence of particular applications. To prevail on a facial challenge, a petitioner must establish that no set of circumstances exists under which the challenged act would be valid.

reviewed the First District Court of Appeal's holding that the state's Opportunity Scholarship Program, which provided education vouchers for children to leave failing public schools and attend private schools, violated the "no aid" provision of the state constitution. The Florida Supreme Court, in invalidating the program on other grounds, ruled that it would:

> . . . neither approve nor disapprove the First District's determination that the OSP violates the "no aid" provision in article I, section 3 of the Florida Constitution, an issue we decline to reach."[44]

Because the court decided the case on uniformity grounds, it also did not reach the question of whether the program violated the federal establishment clause.

In upholding an Ohio school voucher program, the U.S. Supreme Court ruled that Ohio did not violate the federal Establishment Clause, as the program took a neutral approach toward religion and individuals had the option to exercise their own free choice regarding private providers.[45] Rather than focusing on the volume of available religious providers, which in this case represented a full 82 percent of participating schools, the Court deemed critical the extent to which the program had the effect of advancing or inhibiting religion.[46] In the absence of demonstrated governmental preference for religious support, the mere incidental advancement of religion, the Court opined, is not constitutionally deficient.[47]

The United States Court of Appeals for the District of Columbia circuit reiterated this principle in *American Jewish Congress v. Corporation for National and Community Service.*[48] Here, the court upheld the AmeriCorps Education Awards Program, a nationwide community service program that provided placement of participants in schools and granted an award to those who completed qualifying service hours. The program did not exclude providers on the basis of religious affiliation or instruction. Some participants were placed in sectarian schools, and some taught religious instruction as part of their coursework. While the program did not expressly restrict instruction to non-secular subjects, instructors received no incentive for teaching religious courses, and these hours did not count toward qualifying service hours.[49] As program challengers failed to demonstrate favoritism toward religious institutions or teachings, the court held, there was no imprimatur of government endorsement.[50]

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[44] *Bush v. Holmes*, 919 So. 2d 392, 413 (Fla. 2006). Here, the court struck down the program on the basis that it violated s. 1(a), art. IX, of the Florida Constitution, as it jeopardized the requirement that the state provide for a uniform system of free public schools: "The OSP contravenes this . . . provision because it allows some children to receive a publicly funded education through an alternative system of private schools . . . not subject to the uniformity requirements of the public school system. The diversion of money not only reduces public funds for a public education but also uses public funds to provide an alternative education in private schools…not subject to the 'uniformity' requirement for public schools." *Id.* at 412.
[45] *Zelman,* 536 U.S. at 639.
[46] *Id.* at 640.
[47] *Id.*
[48] *American Jewish Congress v. Corporation for National and Community Service,* 399 F.3d 351 (D.C. Cir. 2005).
[49] *Id.*
[50] *Id.* at 357.

The Ninth Circuit Court of Appeals did find such an imprimatur, however, in a challenge to a state program establishing a privately funded student tuition organization (STO), where those contributing to the program received a dollar-for-dollar credit on taxes.[51] Although the statute at issue did not directly specify that funding would be provided to religious institutions, in practice, the overwhelming presence of sectarian STOs in the program, and the unrestricted grant of money to these STOs (which then distributed the money solely to religious schools), combined to leave parents with little choice in the selection of providers. Therefore, although the stated purpose of the program was individual choice in education, an on-its-face neutral purpose, its impact was to further religion through education. In support of its invalidation of the STO program, the court cited the U.S. Supreme Court in *McCreary County, Kentucky v. ACLU of Kentucky* and recognized that, ". . .although a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective."[52]

This joint resolution provides both for the removal of the Blaine Amendment from the state constitution and the introduction of new language upholding independent choice. Not all state constitutions contain a Blaine Amendment now, so its deletion here is, in all likelihood, permissible. Without the benefit of having a program in place to review, it is difficult to analyze the new language in this joint resolution for constitutional impact. However, this provision would likely survive a challenge on its face.

The state spending will continue to be limited to within the parameters of the Establishment clauses, and the constitutionality of the spending will be likely turn on whether it:

- Results in governmental indoctrination;
- Defines its recipients by reference to religion; or
- Creates an excessive entanglement.[53]

Joint Resolutions

In order for the Legislature to submit SJR 1218 to the voters for approval, the joint resolution must be agreed to by three-fifths of the membership of each house.[54] If SJR 1218 is agreed to by the Legislature, it will be submitted to the voters at the next general election held more than 90 days after the amendment is filed with the Department of State.[55] As such, SJR 1218 would be submitted to the voters at the 2012 General Election. In order for SJR 1218 to take effect, it must be approved by at least 60 percent of the voters voting on the measure.[56]

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[51] *Winn v. Arizona Christian School Tuition Organization*, 562 F.3d 1002 (9th Cir. 2009).
[52] *McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844, 864 (2005).
[53] *Agostini v. Felton*, 521 U.S. 203, 234 (1997).
[54] FLA. CONST. art. XI, s. 1.
[55] FLA. CONST. art. XI, s. 5(a).
[56] FLA. CONST. art. XI, s. 5(e).

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Private religious institutions could benefit from receiving public funds.

C. Government Sector Impact:

The measure may insulate government programs providing funds to sectarian institutions from lawsuits alleging that the programs violate the Blaine Amendment. The measure may also result in the use of more sectarian institutions to provide government services.

Each constitutional amendment is required to be published in a newspaper of general circulation in each county, once in the sixth week and once in the tenth week preceding the general election.[57] Costs for advertising vary depending upon the length of the amendment. The Department of State executes the publication of the Joint Resolution if placed on the ballot. The cost varies depending on the length of the full text. The Florida Department of State estimates that required publication of a proposed constitutional amendment costs $106.14 per word. These funds must be spent regardless of whether the amendment passes, and would be payable in FY 2012-2013 from the General Revenue Fund.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

None.

B. Amendments:

None.

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

[57] FLA. CONST., art. XI, s. 5(d).

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SJR 1954

INTRODUCER: Community Affairs Committee and Senator Garcia

SUBJECT: Home Rule Charter of Miami-Dade County

DATE: April 11, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gizzi	Yeatman	CA	**Fav/CS**
2.	Munroe	Maclure	JU	**Pre-meeting**
3.			RC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... [X] Statement of Substantial Changes
B. AMENDMENTS........................ [ ] Technical amendments were recommended
[ ] Amendments were recommended
[ ] Significant amendments were recommended

I. Summary:

Senate Joint Resolution 1954 proposes an amendment to the Florida Constitution, to authorize amendments or revisions to the home rule charter of Miami-Dade County by a special law approved by a vote of the electors, and provides requirements for a bill proposing such a special law.

This joint resolution will require approval by a three-fifths vote of the membership of each house of the Legislature for passage.

This joint resolution amends Article VIII, section 6, of the Florida Constitution.

II. Present Situation:

Counties

Article VIII, section 1 of the Florida Constitution requires the state to be divided into political subdivisions known as counties, which shall provide state services at the local level. There are

two types of counties that are recognized under the Florida Constitution: 1) counties that are not operating under a county charter, and 2) counties that are operating under a county charter.[1]

A.) Non-Charter Counties

Non-charter county governments only have such powers of self-government as is provided by general or special law.[2] In addition, non-charter counties may enact ordinances not inconsistent with general or special law. A county ordinance in a non-charter county which is in conflict with a municipal ordinance is not effective within the municipality to the extent of such conflict.

B.) Charter Counties

Charter counties have greater powers of self-government than non-charter counties. Counties operating under a charter have all powers of self-government not inconsistent with general law or with special law approved by the vote of the electorate.[3] Although a non-charter county can be established through general law, a charter county can only be established by a charter adopted, amended, or repealed through a special election by the vote of the electors in that county.[4] In a charter county, the charter shall provide which shall prevail in the event of a conflict between a county and municipal ordinance. Special acts that do not require referendum approval do not apply to charter counties.

Miami-Dade Home Rule Charter[5]

In 1955, the voters of Dade County were authorized by the Legislature under an amendment to Article VIII, section 11, of the 1885 Florida Constitution to enact the first home rule charter in Florida.[6]

Article VIII, section 6(e), of the Florida Constitution, states that the provisions of the Metropolitan Dade (or Miami-Dade) County Home Rule Charter adopted by the electors of Miami-Dade County pursuant to Article VIII, section 11 of the Constitution of 1885 are valid and any subsequent amendments to the charter, authorized by Article VIII, section 11 of the Constitution of 1885 are valid.[7]

[1] *See* FLA. CONST. art. VIII, s. 1(f)-(g).
[2] FLA. CONST. art. VIII, s. 1(f).
[3] FLA. CONST. art. VIII, s. 1(g).
[4] *See* FLA. CONST. art. VIII, s. 1(c). See generally, David G. Tucker, *A Primer on Counties and Municipalities, Part 1*, 81 FLA. B.J. 49, 49-50 (Mar. 2007) (procedures for enacting and implementing a county charter are outlined in ss. 125.60-125.64 and 125.80-125.88, F.S.).
[5] Section 125.011(1), F.S., defines the term "county" to mean:

> any county operating under a home rule charter adopted pursuant to ss. 10, 11, and 24, Art. VIII of the Constitution of 1885, as preserved by Art. VIII, s. 6(e) of the Constitution of 1968, which county, by resolution of its board of county commissioners, elects to exercise the powers herein conferred. Use of the word "county" within the above provisions shall include "board of county commissioners" of such county.

The constitutional sections that are contained in s. 125.011(1), F.S., refer to Key West/Monroe County, Miami-Dade County, and Hillsborough County, respectively.
[6] Memorandum to Rip Colvin, Legislative Committee on Intergovernmental Relations (LCIR), from Carolyn Horwich, Staff Attorney (April 20, 2006).
[7] FLA. CONST. art. VIII, s. 6(e).

A.) Unique Powers

Article VIII, section 11 of the Constitution of 1885 granted the electors of Miami-Dade County the authority to adopt a home rule charter government in Miami-Dade County, of which the Board of County Commissioners of Miami-Dade County is the governing body. In contrast to charter governments created pursuant to Article VIII, section 1 (g) of the State Constitution, Miami-Dade County is granted unique powers that include:

- Merging, consolidating, abolishing, and changing the boundaries of municipal, county, or district governments whose jurisdictions lie wholly within Miami-Dade County;
- Providing a method for establishing new municipal corporations, special taxing units, and other governmental units in Miami-Dade County;
- Providing an exclusive method for a municipal corporation to make, amend, or repeal its own charter, which, once adopted, cannot be changed or repealed by the Legislature;
- Abolishing the offices of sheriff, tax collector, property appraiser, supervisor of elections and clerk of the circuit court and providing for the consolidation and transfer of their functions; and
- Changing the name of Miami-Dade County.

In addition, Article VIII, section 11(5), of the Florida Constitution of 1885 does not limit or restrict the power of the Legislature to enact general laws that apply to Miami-Dade County and any one or more counties in Florida, or to any municipality in Miami-Dade County and one or more municipalities in Florida. However, Miami-Dade County ordinances control in the event of conflict with special or general law only applicable to Miami-Dade County. Hence, the Legislature is prohibited by Article VIII, section 11(5), of the Florida Constitution of 1885, as amended, from enacting special laws that apply only to Miami-Dade County, even if such a special act were approved by referendum.

B.) Special Provisions

The Miami-Dade County Home Rule Charter ("Charter") was officially adopted on May 21, 1957. The Charter authorizes the Board of County Commission to create new municipalities; change municipal boundaries; and to establish, merge and abolish special purpose districts. The Charter also abolishes the constitutional office of the Sheriff and authorizes the Board of County Commission to "exercise all powers and privileges granted to municipalities, counties and county officers by the Constitution and laws of the state."[8]

C.) Court Interpretations

Florida courts have consistently invalidated the applicability of special acts passed by the Legislature which attempt to supersede the home rule powers of Miami-Dade County. The Florida Supreme Court has held that the constitutional provisions granting home rule authority to Miami-Dade County transferred to the county "the powers formerly vested in the State Legislature with respect to the affairs, property and government of Dade County and all the municipalities within its territorial limits." *See State v. Dade County.*[9]

[8] Section 1.01(21), *Miami-Dade County Home Rule Charter.*

[9] 142 So. 2d 79, 85 (Fla. 1961).

In the case of *Chase v. Cowart*,[10] the Florida Supreme Court was asked to determine whether the Miami-Dade County Budget Commission had been abolished by the electors of Miami-Dade County through the enactment of its home rule charter. The Commission was originally established by the Florida Legislature with authority over the fiscal affairs of county boards and county officers of Miami-Dade County and whose jurisdiction fell entirely within Miami-Dade County.[11]

In deciding the issue, the Court weighed the meaning of subsections (5), (6), (7), and (9), section 11, Article VIII, of the Florida Constitution of 1885, as amended, which preserve to the Legislature the authority to enact general laws that apply to Miami-Dade County and any one or more counties. The Court also analyzed subsection (1)(c), section 11, Article VIII, of the Florida Constitution of 1885, which provides an express grant of power authorizing the voters of Miami-Dade County to adopt a charter, the provisions of which may abolish any board or governmental unit whose jurisdiction lies wholly within Miami-Dade County, whether created by the Constitution, the Legislature, or otherwise.

After conducting its analysis, the Court held that the electors of Miami-Dade County, through the enactment of its home rule charter, abolished the Budget Commission. The court reasoned that the limitations of subsections (5) and (9) do not prohibit the abolishment of the Budget Commission adopted by the Legislature in 1957 because of the charter provision allowing abolishment of any board or governmental unit whose jurisdiction lies completely within Miami-Dade County.[12] The court's rationale is based heavily on its findings regarding the exception to the limitations of subsections (5) and (9) on the county's home rule charter authority that states, "except as expressly authorized herein."[13] The Court specifically stated that section 11(1)(c) is:

> clearly an express grant of power which authorizes the voters of Dade County to adopt a charter, the provisions of which may abolish any board or governmental unit, whose jurisdiction lies wholly in Miami-Dade County, whether created by the Constitution or by the Legislature or otherwise. We think it crystal clear that the words 'except as expressly authorized or provided' as found in subsections (5) and (9) relates directly to the specific grants of power contained in the various sub-subsections of subsection (1).[14]

The Court further stated that its reasoning did not weigh on the analysis of whether the law creating the Budget Commission was a general law, general law of local application, or a special act.[15]

In *City of Sweetwater v. Dade County*,[16] the Third District Court of Appeal held that general law provisions governing the annexation of land into municipalities did not apply within Miami-Dade County since municipal boundary changes is "one of the areas of autonomy conferred on

[10] 102 So. 2d 147 (Fla. 1958).
[11] *Id.* at 151.
[12] *Id.* at152-53.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 154.
[16] 343 So. 2d 953 (3rd DCA 1977).

Dade County" by its Home Rule Charter.[17] In reaching this holding, the Third District Court of Appeal upheld the trial court's ruling which relied on the autonomy granted to Miami-Dade County under Article VII, section 11(1), of the Florida Constitution of 1885, as amended:

> Subsections 1(a) through (i) of the Home Rule Charter Amendment constitute those organic areas of autonomy and authority in local affairs conferred upon Dade County by the Florida Constitution and may not be diminished and curtailed by general laws of the State enacted after 1956.[18]

Based on this information, the Third District Court of Appeal determined "that the method provided by the Home Rule Charter . . . is effective and exclusive, notwithstanding the existence from time to time of a general state law which makes provision for some other method."[19]

III. Effect of Proposed Changes:

This joint resolution would allow the Miami-Dade Home Rule Charter to be amended or revised by special law approved by the electors of Miami-Dade County, notwithstanding any provision of Article VII, section 11, of the Florida Constitution of 1885.

If such amendments or revisions are approved by the electors of Miami-Dade County, they shall be deemed an amendment or revision of the charter by the electors of Miami-Dade County.

A bill proposing such a special law must be approved at a meeting of the local legislative delegation and filed by a member of that delegation.

This joint resolution also conforms references in the Florida Constitution to reflect the county's current name, which is Miami-Dade County, and not Dade County.

An effective date for the amendment is not specified. Therefore, the amendment, if approved by the voters, will take effect on the first Tuesday after the first Monday in January following the election at which it is approved.[20]

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

[17] *Id.* at 954.
[18] *Id.* (citations omitted).
[19] *Id.*
[20] FLA. CONST. art. XI, s. 5(e).

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Constitutional Amendments
Section 1, Article XI, of the Florida Constitution, authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by three-fifths vote of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State, or at a special election held for that purpose.

Section 5(d), Article XI, of the Florida Constitution, requires proposed amendments or constitutional revisions to be published in a newspaper of general circulation in each county where a newspaper is published. The amendment or revision must be published once in the tenth week and again in the sixth week immediately preceding the week the election is held. The Division of Elections within the Department of State estimated that the average cost per word to advertise an amendment to the State Constitution is $106.14 for this fiscal year.

Section 5(e), Article XI, of the Florida Constitution, requires a 60 percent voter approval for a constitutional amendment to take effect. An approved amendment becomes effective on the first Tuesday after the first Monday in January following the election at which it is approved, or on such other date as may be specified in the amendment or revision.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Upon voter approval, this joint resolution would allow Miami-Dade County Home Rule Charter amendments or revisions to be made by special law approved by a vote of the electors. A bill proposing such a special law must be approved at a meeting of the local legislative delegation and filed by a member of that delegation.

Each constitutional amendment is required to be published in a newspaper of general circulation in each county, once in the sixth week and once in the tenth week preceding

the general election.[21] Costs for advertising vary depending upon the length of the amendment. The Division of Elections within the Department of State estimated that the average cost per word to advertise an amendment to the State Constitution is $106.14 for this fiscal year.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

CS by Community Affairs on March 28, 2011:
Makes a technical amendment to clarify that the joint resolution is amending Article VIII, section 6 of the Florida Constitution.

B. Amendments:

None.

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

[21] FLA. CONST. art. XI, s. 5(d).

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 1448

INTRODUCER: Community Affairs Committee, and Senators Garcia and Lynn

SUBJECT: Sale or Lease of a Public Hospital

DATE: April 11, 2011 REVISED: ________ ________ ________ ________

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Stovall	HR	**Favorable**
2.	Gizzi	Yeatman	CA	**Fav/CS**
3.	Munroe	Maclure	JU	**Pre-meeting**
4.			BC	
5.			RC	
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... [X] Statement of Substantial Changes
B. AMENDMENTS........................ [ ] Technical amendments were recommended
[ ] Amendments were recommended
[ ] Significant amendments were recommended

I. Summary:

The committee substitute requires any sale or lease of a public hospital that is owned by a county, district, or municipality to be approved by a majority vote of the registered voters within that county, district, or municipality or by a circuit court prior to the sale or lease. The bill also provides that prior to the sale or lease, the governing board of the public hospital must publicly notice meetings earlier in the process. If the governing board decides to accept a proposal to purchase or lease the hospital, the sale or lease of the public hospital must be for a "fair market value," which is defined in the bill, and the board's decision must be in writing and state the findings and basis that support the board's decision to sell or lease the hospital. The bill delineates additional information that must be included in the governing board's findings and requires the board to publish all findings and documents to allow time for public comment about the proposed sale or lease.

The bill directs the governing board to file a petition with the circuit court where a majority of the physical assets of the hospital are located requesting the approval of the sale or lease of a public hospital. The bill provides jurisdiction to the circuit court to approve the sale or lease of a county, district, or municipal hospital. The circuit court must issue and publish an order requiring

all interested parties to attend a hearing on the proposed sale or lease and shall issue a final judgment after such hearing making certain determinations prescribed in the bill.

This bill amends sections 155.40 and 395.3036, Florida Statutes.

II. Present Situation:

Sale or Lease of Public Hospitals

County, district, and municipal hospitals may be created by special enabling acts, rather than by general acts under Florida law.[1] The special act may specify the hospital's ability or inability to levy taxes to support the maintenance of the hospital, the framework for the governing board, and whether or not the governing board has the ability to issue bonds. There are currently 31 hospital districts in Florida under which public hospitals operate.[2]

The process for the sale of a public hospital is established by s. 155.40, F.S. Currently, the governing board of a public hospital has the authority to negotiate the sale or lease of the hospital. The hospital can be sold or leased to a for-profit or not-for-profit Florida corporation, and such sale or lease must be in the best interest of the public. The board is required to publicly advertise the meeting at which the proposed sale or lease will be discussed in accordance with s. 286.0105, F.S., and the offer to accept proposals from all interested and qualified purchasers in accordance with s. 255.0525, F.S.

Section 155.40(2), F.S., requires any lease, contract, or agreement to:

- Provide that the articles of incorporation of the corporation are subject to approval of the board of directors or board of trustees of the hospital.
- Require that any not-for-profit corporation become qualified under s. 501(c)(3) of the U.S. Internal Revenue Code.
- Provide for the orderly transition of the operation and management of the facilities.
- Provide for the return of the facility to the county, municipality, or district upon the termination of the lease, contract, or agreement.
- Provide for the continued treatment of indigent patients pursuant to the Florida Health Care Responsibility Act[3] and ch. 87-92, Laws of Florida.

For the sale or lease to be considered "a complete sale of the public agency's interest in the hospital" under s. 155.40(8)(a), F.S., the purchasing private entity must:

- Acquire 100 percent ownership of the hospital enterprise.

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[1] Section 155.04, F.S., allows a county, upon receipt of a petition signed by at least 5 percent of resident freeholders, to levy an ad valorem tax or issue bonds to pay for the establishment and maintenance of a hospital. Section 155.05, F.S., gives a county the ability to establish a hospital without raising bonds or an ad valorem tax, utilizing available discretionary funds. However, an ad valorem tax can be levied for the ongoing maintenance of the hospital.
[2] Information provided by the Agency for Health Care Administration via email on March 17, 2011.
[3] Sections 154.301-154.316, F.S.

- Purchase the physical plant of the hospital facility and have complete responsibility for the operation and maintenance of the facility, regardless of the underlying ownership of the real property.
- Not allow the public agency to retain control over decision-making or policymaking for the hospital.
- Not receive public funding, other than by contract for services rendered to patients for whom the public agency seller has the responsibility to pay for hospital or medical care.
- Not receive substantial investment or loans from the seller.
- Not be created by the public agency seller.
- Primarily operate for its own financial interests and not those of the public agency seller.

A complete sale of the public agency's interest under s. 155.40(8)(b), F.S., shall not be construed as:

- A transfer of governmental function from the county, district, or municipality to the private corporation or entity.
- A financial interest of the public agency in the private corporation or other private entity purchaser.
- Making the private corporation or other private entity purchaser an "agency" as that term is used in statute.
- Making the private entity an integral part of the public agency's decision-making process.
- Indicating that the private entity is "acting on behalf of a public agency," as that term is used in statute.

If the corporation that operates a public hospital receives more than $100,000 in revenues from the county, district, or municipality, it must account for the manner in which the funds are expended.[4] The funds are to be expended by being subject to annual appropriations by the county, district, or municipality, or if there is a contract for 12 months or longer to provide revenues to the hospital, then the governing board of the county, district, or municipality must be able to modify the contract upon 12 months notice to the hospital.[5]

Office of the Attorney General (Department of Legal Affairs)

The Attorney General (AG) is the statewide elected official directed by the Florida Constitution[6] to serve as the chief legal officer for the State of Florida. The AG is the agency head of the Office of the Attorney General (OAG), within the Department of Legal Affairs, and is responsible for protecting Florida consumers from various types of fraud and enforcing the state's antitrust laws. Additionally, the AG protects constituents in cases of Medicaid fraud, defends the state in civil litigation cases, and represents the people of Florida when criminals appeal their convictions in state and federal courts.[7]

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[4] Section 155.40(5), F.S.
[5] *Id.*
[6] *See* FLA. CONST. art. IV., s. 4.
[7] Office of the Attorney General of Florida, *The Role and Function of the Attorney General*, http://myfloridalegal.com/pages.nsf/Main/F06F66DA272F37C885256CCB0051916F (last visited Mar. 18, 2011).

Recent Leases or Sales of Public Hospitals

The public hospital Bert Fish Medical Center entered into a controversial $80 million lease agreement with Adventist Health System, which was nullified by Circuit Court Judge Richard Graham because of 21 closed-door meetings that occurred during the negotiation process and violated Florida's Sunshine Law under s. 286.011, F.S.[8]

Other recent leases or sales or proposed leases or sales of public hospitals have been scrutinized, especially for the effect such sales or leases would have on taxpayers. For example, Helen Ellis Hospital was merged with Adventist Health in 2010, and currently there are proposals that would turn public hospital systems in Miami-Dade County and Broward County into private hospitals.[9]

III. Effect of Proposed Changes:

Section 1 amends s. 155.40, F.S., to make the following changes:

Amends subsection (1): The bill requires any sale or lease of a public hospital (owned by a county, district, or municipality) to be approved by a majority vote of the registered voters within that county, district, or municipality or by a circuit court prior to the sale or lease.

Amends subsection (4): Prior to the sale or lease, the governing board of the public hospital must determine whether there are qualified purchasers or lessees of the hospital by publicly advertising the meeting at which the proposed sale or lease will be considered by the governing board or publicly advertising the offer to accept proposals. However, the bill amends s. 155.40, F.S., to no longer allow the board to make such a determination by negotiation of the terms of the sale or lease with a for-profit or not-for-profit Florida corporation.

If the governing board decides to accept a proposal to purchase or lease the hospital, the sale or lease of the public hospital must be for a "fair market value," which is defined in the bill as "the price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's length transaction."

Creates subsection (5): The board's decision to accept a proposal to purchase or lease the hospital must be in writing and state the findings and basis that support its decision to sell or lease the hospital. The findings must state whether the proposal:

- Represents the fair market value of the hospital.
- Affects whether there will be a reduction or elimination of ad valorem or other tax revenues to support the hospital.
- Ensures that the quality of health care will continue to be provided to residents of the affected community, especially the indigent, the uninsured, and the underinsured.

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[8] Linda Shrieves, *Judge rules Bert Fish must cut ties with Florida Hospital*, Orlando Sentinel, February 24, 2011, *available at* http://articles.orlandosentinel.com/2011-02-24/health/os-bert-fish-decision-20110224_1_sunshine-laws-open-meetings-hospital-board (last visited Mar. 19, 2011).

[9] Anne Geggis, *Bills reflect problems at Bert Fish*, Daytona Beach News-Journal, March 8, 2011, *available at* http://www.news-journalonline.com/news/local/southeast-volusia/2011/03/08/bills-reflect-problems-at-bert-fish.html (last visited Mar. 19, 2011).

- Is otherwise in compliance with paragraph (9)(a) as created in the bill, which specifies a procedure for publication of a court's order for a hearing to approve the sale or lease of a public hospital in the event of opposition to the sale or lease.

The findings must be accompanied by all information and documents relevant to the governing board's determination, including, but not limited to:

- The name and addresses of all parties to the transaction;
- The location of the hospital and all related facilities;
- A description of the terms of all proposed agreements;
- A copy of the proposed sale or lease agreement and related agreements, including leases, management contracts, service contracts, and memoranda of understanding;
- The estimated total value associated with the proposed agreement, the proposed acquisition price, and other consideration;
- Any valuations of the hospital's assets prepared three years immediately preceding the proposed transaction date;
- A financial or economic analysis and report from any financial expert or consultant retained by the governing board;
- A fairness evaluation by an independent expert in such transactions; and
- Copies of all other proposals and bids the governing board may have received or considered in compliance with subsection (4).

Creates subsection (6): Within 120 days before the anticipated closing date of the proposed transaction, the governing board shall make publicly available all findings and documents required under subsection (5) and publish a notice of the proposed transaction in one or more newspapers of general circulation in the county in which the majority of the physical assets of the hospital are located. The notice must include the names of the private parties involved and the means by which a person may submit written comments about the proposed transaction to the governing board and may obtain copies of the findings and documents required under subsection (5).

Creates subsection (7): Any interested person may submit a written statement in opposition of the sale or lease of the hospital within 20 days after publication of the public notice. If a written statement of opposition is submitted, the governing board or proposed purchaser or lessee may submit a written response no later than 10 days after the due date for the written statement of opposition.

Creates subsection (8): A governing board of a county, district, or municipal hospital may not sell or lease a public hospital facility without first receiving approval by a majority vote of the registered voters in the county, district, or municipality or, in alternative, approval by a circuit court. In order for the governing board to receive approval from the circuit court to sell or lease the hospital, it must file a petition in a circuit court in which a majority of the physical assets of the hospital are located at least 30 days after publication of the notice of the proposed transaction. The petition must include all findings and documents required under subsection (5) and include certification by the governing board that it is in compliance with all requirements of this section.

Creates subsection (9): Once the petition is filed, the circuit court shall issue an order requiring all interested parties to appear at the designated time and place and show why the petition should not be granted. Before setting the hearing date, the clerk shall publish a copy of the order in one or more newspapers of general circulation in the county where a majority of the physical assets of the hospital are located, at least once each week for two consecutive weeks. The first publication must be at least 20 days before the date set for the hearing. Such publication shall make all interested parties as parties defendant to the action. Any interested party may become a party to the action by moving against or pleading to the petition at or before the hearing date.

At the hearing, the court shall determine all questions of law and fact and make such orders necessary to properly consider and determine the action and render a final judgment.

Creates subsection (10): After the hearing, the court shall render a final judgment approving or denying the proposed transaction. In reaching its decision, the court must determine whether:

- The proposed sale or lease is permitted by law;
- The proposed sale or lease unreasonably excludes potential purchasers or lessees on the basis of being a for-profit or not-for-profit Florida corporation;
- The governing board of the hospital publicly advertised the meeting at which the proposed transaction was considered by the board in compliance with s. 286.0105, F.S.;
- The governing board of the hospital publicly advertised the offer to accept proposals in compliance with s. 255.0525, F.S.;
- The governing board of the hospital exercised due diligence in deciding to dispose of hospital assets, selecting the transacting entity, and negotiating the terms and conditions of the disposition;
- Any conflict of interest was disclosed;
- The seller or lessor will receive fair market value for the assets;
- The acquiring entity made an enforceable commitment to provide health care to the indigent, the uninsured, and the underinsured and to provide benefits to the affected community to promote improved health care; and
- The proposed transaction will result in a reduction or elimination of ad valorem or other taxes used to support the hospital.

Creates subsection (11): Any party to the action has the right to appeal the circuit court's decision in the appellate district where the petition for approval was filed, by filing a notice of appeal or petition for review within 30 days after the date of the final judgment. On appeal, the reviewing court shall affirm the circuit court's judgment unless the decision is arbitrary, capricious, or not in compliance with this section.

Creates subsection (12): The governing board shall pay all costs associated herein. In instances where an interested party contests the action, the court may assign costs to the parties.

Creates subsection (13): This section does not apply to any sale or lease of a public hospital that is completed before March 9, 2011, nor does it apply to the renewal or extension of any lease that, on March 9, 2011, contained an option to renew or extend that lease upon its expiration.

Section 2 amends s. 395.3036, F.S., to fix a cross-reference to reflect changes made by this bill.

Section 3 provides that this act shall take effect January 1, 2012.

Other Potential Implications:

The bill provides a mechanism for interested parties to participate in the approval of the sale or lease of a public hospital before a circuit court. The bill requires the circuit court where the petition for the approval of the sale or lease of the public hospital is filed to issue an order requiring all interested parties to appear to show why the petition should not be granted. Before the date set for the hearing, the clerk must publish a copy of the order in one or more newspapers of general circulation in the county in which the hospital's assets are located. All interested parties are made parties defendant to the action and the court has jurisdiction of the parties for purposes of the petition to approve the sale or lease of a public hospital. Although lines 183-85 appear to require interested parties to take an additional affirmative step to become a party to the action, "[a]ny interested party may become a party to the action by moving against or pleading to the petition at or before the time set for the hearing."The bill is unclear on what specific factors an interested must raise in order to not have a sale or lease of a public hospital approved by a court.

It is also unclear under the bill who the "interested parties" are for purposes of the court's review of the petition. By comparison, s. 75.06, F.S., relating to actions to validate bonds of state agencies, commissions, or departments, "by [a publication of the order for the bond validation hearing] *all property owners, taxpayers, citizens, and others having or claiming any right, title, or interest in the county, municipality or district, or the taxable property therein, are made parties defendant to the action* and the court has jurisdiction of them to the same extent as if named as defendants in the complaint and personally served with process."

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill will provide more disclosure of the sale or lease process of a public hospital by requiring the governing board of the hospital to make available to the public its facts and findings that support its decision to sell or lease the hospital and by requiring publication of a notice of the sale or lease by the governing board. Additionally, the bill ensures more oversight over the sale or lease process by requiring the circuit court to determine whether the public has been put on notice as to any meetings at which the proposed sale or lease is to be considered or as to any offer to accept the proposal for sale or lease prior to the circuit court's final judgment approving the sale.

C. Trust Funds Restrictions:

None.
Other Constitutional Issues:

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill will allow interested parties to provide written statements of opposition to a governing board's determination to accept a proposal for the sale or lease of a public hospital and will allow any interested person to become a party to the action by moving against or pleading to a governing board's petition for approval on the sale or lease of a public hospital in circuit court.

The bill further allows any party to the hearing on the sale or lease of the public hospital to seek judicial review of the circuit court's final judgment in the appellate district where the petition for approval was filed.

C. Government Sector Impact.

This bill will require the sale or lease of a public hospital that is owned by a county, district, or municipality to be approved by a majority vote of the registered voters within that county, district, or municipality or by a circuit court in which a majority of the physical assets of a public hospital are located.

This bill will require a governing board to make and publish certain findings that support a board's decision to accept a proposal for the sale or lease of a public hospital. The bill will also require the circuit court clerk to publish a copy of the order requiring all parties to appear to the hearing on the governing board's petition to approve the sale or lease of a public hospital.

This bill directs the governing board of the public hospital to pay all costs associated herein. However, in instances where an interested party contests the action, the court may assign costs to the parties.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Community Affairs on April 4, 2011:
The committee substitute provides that the sale or lease of a public hospital shall be subject to approval by a majority vote of the registered voters within that county, district, or municipality or by the circuit court (instead of the Attorney General's Office), and makes conforming and technical changes therein.

B. Amendments:

None.

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

333814

LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Flores) recommended the following:

1 **Senate Amendment (with title amendment)**
2
3 Delete line 302
4 and insert:
5 governmental owner or operator. The contract must also provide
6 that those limited portions of the college, university, or
7 medical school which are directly providing services pursuant to
8 the contract and which are considered an agency of the state for
9 purposes of this section are acting on behalf of a public agency
10 as defined in s. 119.011(2). As used in this paragraph, the
11
12 ================ T I T L E A M E N D M E N T ================
13 And the title is amended as follows:

333814

14 Delete line 22
15 and insert:
16 providing that the portion of the not-for-profit
17 entity deemed to be an agent of the state for purpose
18 of indemnity is also an agency of the state for
19 purpose of public-records laws; providing definitions;
20 requiring that each patient, or

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 1676

INTRODUCER: Senator Thrasher

SUBJECT: Sovereign Immunity

DATE: April 11, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Stovall	HR	**Favorable**
2.	Munroe	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

I. Summary:

The bill extends the waiver of sovereign immunity to any Florida not-for-profit college or university that owns or operates an accredited medical school or any of its employees or agents that have agreed in an affiliation agreement or other contract to provide patient services as agents of a public teaching hospital. The bill provides that the medical school or any of its employees or agents that have agreed in an affiliation agreement or other contract to provide patient services as agents of a public teaching hospital, are agents of the state and are immune from liability for torts in the same manner and to the same extent as the teaching hospital and its governmental owner or operator while acting within the scope of and pursuant to guidelines in the contract.

The bill also creates non-statutory provisions of law for legislative findings regarding the role of and the need for teaching hospitals and graduate medical education for Florida residents. The bill provides a legislative declaration that there is an overwhelming public necessity for the bill and that there is no alternative method of meeting such public necessity.

The bill takes effect upon becoming a law and applies to all claims accruing on or after that date.

This bill amends sections 766.1115 and 768.28, Florida Statutes.

II. Present Situation:

Sovereign Immunity

The term "sovereign immunity" originally referred to the English common law concept that the government may not be sued because "the King can do no wrong." Sovereign immunity bars lawsuits against the state or its political subdivisions for the torts of officers, employees, or agents of such governments unless the immunity is expressly waived.

Article X, s. 13, of the Florida Constitution recognizes the concept of sovereign immunity and gives the Legislature the right to waive such immunity in part or in full by general law. Section 768.28, F.S., contains the limited waiver of sovereign immunity applicable to the state.

Under this statute, officers, employees, and agents of the state will not be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Instead, the state steps in as the party litigant and defends against the claim. Subsection (5) limits the recovery of any one person to $100,000 for one incidence and limits all recovery related to one incidence to a total of $200,000.[1] For purposes of this bill analysis, when the term "sovereign immunity" is used, it means the application of sovereign immunity and the limited waiver of sovereign immunity as provided in s. 768.28, F.S.

Where the state's sovereign immunity applies, s 768.28(9), F.S., provides that the officers, employees, and agents of the state that were involved in the commission of the tort are not personally liable to an injured party.[2] Sovereign immunity extends to all subdivisions of the state, including counties and school boards and any agents or employees of these governmental entities.[3] The waiver of sovereign immunity may be extended to parties by contract or agency.

Whether sovereign immunity applies turns on the degree of control of the agent of the state retained by the state.[4] In *Stoll v. Noel*, the Florida Supreme Court explained that independent contractor physicians may be agents of the state for purposes of sovereign immunity:

> One who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also independent contractor.[5]

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[1] Section 1, ch. 2010-26, Laws of Florida, amended s. 768.28(5), F.S., effective October 1, 2011, to increase the limits to $200,000 for one person for one incidence and $300,000 for all recovery related to one incidence, to apply to claims arising on or after that effective date.

[2] Section 768.28(9)(a), F.S., provides that no officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, *unless* such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

[3] Section 768.28(2), F.S.

[4] *Stoll v. Noel*, 694 So. 2d 701, 703 (Fla. 1997).

The Court examined the employment contract between the physicians and the state to determine whether the state's right to control was sufficient to create an agency relationship and held that it did.[6] The Court explained:

> Whether [Children's Medical Services (CMS)] physician consultants are agents of the state turns on the degree of control retained or exercised by CMS. This Court has held that the right to control depends upon the terms of the employment contract. ("The [principal's] right to control depends upon the terms of the contract of employment...."). CMS requires each consultant, as a condition of participating in the CMS program, to agree to abide by the terms published in its HRS[7] Manual and CMS Consultants Guide which contain CMS policies and rules governing its relationship with the consultants. The Consultant's Guide states that all services provided to CMS patients must be authorized in advance by the clinic medical director. The language of the HRS Manual ascribes to CMS responsibility to supervise and direct the medical care of all CMS patients and supervisory authority over all personnel. The manual also grants to the CMS medical director absolute authority over payment for treatments proposed by consultants. The HRS Manual and the Consultant's Guide demonstrate that CMS has final authority over all care and treatment provided to CMS patients, and it can refuse to allow a physician consultant's recommended course of treatment of any CMS patient for either medical or budgetary reasons.
>
> Our conclusion is buttressed by HRS's acknowledgment that the manual creates an agency relationship between CMS and its physician consultants, and despite its potential liability in this case, HRS has acknowledged full financial responsibility for the physicians' actions. HRS's interpretation of its manual is entitled to judicial deference and great weight.[8]

The Court held that the physicians were agents of the state and were entitled to the waiver of sovereign immunity.[9]

The sovereign immunity recovery caps do not prevent a plaintiff from obtaining a judgment in excess of the caps, but the plaintiff cannot recover the excess damages without further action of the Legislature.[10]

In *Gerard v. Department of Transportation*, 472 So .2d 1170 (Fla. 1985), the Florida Supreme Court held that the recovery caps within s 768.28(5), F.S., did not prevent a plaintiff from seeking a judgment exceeding the recovery caps. However, the Court noted that:

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[5] *Id*. (quoting the Restatement (Second) of Agency § 14N (1957)).
[6] *Id.*
[7] Florida Department of Health and Rehabilitative Services.
[8] *Stoll,* 694 So. 2d at 703.(internal citations omitted).
[9] *Id.* at 704.
[10] Section 768.28(5), F.S.

> [e]ven if he is able to obtain a judgment against the Department of Transportation in excess of the settlement amount and goes to the [L]egislature to seek a claims bill with the judgment in hand, this does not mean that the liability of the Department has been conclusively established. The [L]egislature will still conduct its own independent hearing to determine whether public funds should be expended, much like a non-jury trial. After all this, the [L]egislature, in its discretion, may still decline to grant him any relief.[11]

The Florida Supreme Court has noted that a primary effect of the waiver of sovereign immunity is to "permit suits that had previously been prohibited. The right of the [L]egislature to waive sovereign immunity and to place conditions on the waiver is plenary under Article X, Section 13, Florida Constitution."[12]

Chapter 766, F.S., specifies requirements on medical malpractice actions. Section 766.1115, F.S., provides that certain health care providers who contract with the state are considered agents of the state, and thus entitled to the protection of sovereign immunity. The protection only applies where the contract and other requirements are met by health care providers under s. 766.1115, F.S.

Section 768.28(9)(b)2., F.S., defines the term "officer, employee, or agent" for purposes of the sovereign immunity statute. Several identified groups are included in the definition, including health care providers when providing services pursuant to s. 766.1115, F.S.

Florida law confers sovereign immunity to a number of persons who perform public services, including:

- Persons or organizations providing shelter space without compensation during an emergency.[13]
- A health care entity providing services as part of a school nurse services contract.[14]
- Members of the Florida Health Services Corps who provide medical care to indigent persons in medically underserved areas.[15]
- A person under contract to review materials, make site visits, or provide expert testimony regarding complaints or applications received by the Department of Health or the Department of Business and Professional Regulation.[16]
- Physicians retained by the Florida State Boxing Commission.[17]
- Health care providers under contract to provide uncompensated care to indigent state residents.[18]
- Health care providers or vendors under contract with the Department of Corrections to provide inmate care.[19]

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[11] *Gerard v. Department of Transportation*, 472 So. 2d 1170, 1173 (Fla. 1985).
[12] *Smith v. Department of Insurance*, 507 So. 2d 1080, 1089 (Fla. 1987).
[13] *See* s. 252.51, F.S.
[14] *See* s. 381.0056(10), F.S.
[15] *See* s. 381.0302(11), F.S.
[16] *See* ss 455.221(3) and 456.009(3), F.S.
[17] *See* s. 548.046(1), F.S.
[18] *See* s. 768.28(9)(b), F.S.

- An operator, dispatcher, or other person or entity providing security or maintenance for rail services in the South Florida Rail Corridor, under contract with the Tri-County Commuter Rail Authority of the Department of Transportation.[20]
- Professional firms that provide monitoring and inspection services of work required for state roadway, bridge or other transportation facility projects.[21]
- A provider or vendor under contract with the Department of Juvenile Justice to provide juvenile and family services.[22]
- Health care practitioners under contract with state universities to provide medical services to student athletes.[23]

III. Effect of Proposed Changes:

Section 1 creates 16 subsections of non-statutory law providing extensive legislative findings and intent to demonstrate that that there is an overwhelming public necessity for the sovereign immunity liability protection in the bill and that there is no alternative method of meeting such public necessity.

Section 2 amends s. 766.1115, F.S., to provide that any affiliation agreement or contract entered into by a medical school to provide comprehensive health care services to patients at public hospitals, which agreement or contract is subject to the waiver of sovereign immunity provisions in s. 768.28, F.S., is exempt from the provisions of s. 766.1115, F.S. – The Access to Health Care Act – which was created with legislative intent to ensure that health care professionals who contract to provide free quality medical services to underserved populations of the state as agents of the state are provided the waiver of sovereign immunity.

Section 3 amends the definition of "officer, employee, or agent" in s. 768.28(9)(b), F.S., to include a Florida not-for-profit college, university, or medical school and its employees, under certain circumstances.

The bill creates s. 768.28(10)(f), F.S., to provide that any Florida not-for-profit college or university that owns or operates an accredited medical school or any of its employees or agents that have agreed in an affiliation agreement or other contract to provide patient services[24] as agents of a teaching hospital,[25] which is owned or operated by the state, a county, a municipality, a public health trust, a special taxing district, any other governmental entity having health care

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[19] *See* s. 768.28(10)(a), F.S.
[20] *See* s. 768.28(10)(d), F.S.
[21] *See* s. 768.28(10)(e), F.S.
[22] *See* s. 768.28(11)(a), F.S.
[23] *See* s. 768.28(12)(a), F.S.
[24] The bill defines "patient services" as any comprehensive health care services; the training or supervision of medical students, interns, residents, or fellows; access to or participation in medical research protocols; or any related executive, managerial, or administrative services provided according to an affiliation agreement or other contract with the teaching hospital or its governmental owner or operator.
[25] Section 408.07(45), F.S., defines "teaching hospital" as any Florida hospital officially affiliated with an accredited Florida medical school which exhibits activity in the area of graduate medical education as reflected by at least seven different graduate medical education programs accredited by the Accreditation Council for Graduate Medical Education or the Council on Postdoctoral Training of the American Osteopathic Association and the presence of 100 or more full-time equivalent resident physicians.

responsibilities, or a not-for-profit entity that operates such facilities as an agent of that governmental entity under a lease or other contract, are agents of the state and are immune from liability for torts in the same manner and to the same extent as a teaching hospital and its governmental owner or operator while acting within the scope of and pursuant to guidelines established in the contract.

Currently, the six teaching hospitals to which this bill would appear to apply are: Jackson Memorial in Miami, Mount Sinai Medical Center in Miami Beach, Shands Healthcare at the University of Florida in Gainesville, Shands Jacksonville Medical Center, Orlando Health in Orlando, and Tampa General Hospital.

The bill requires that the contract to provide patient services must provide for indemnification of the state by the agent for any liability incurred up to the limits set forth in ch. 768, F.S., to the extent caused by the negligence of the college, university, or medical school or its employees or agents. Subsection 728.28(5), F.S., limits the recovery of any one person to $100,000 for one incident and limits all recovery related to one incident to a total of $200,000.[26][27]

The bill provides that an employee or agent of a college, university, or its medical school[28] is not personally liable in tort and may not be named as a party defendant in any action arising from the provision of any such patient services except as provided in s. 768.28(9)(a), F.S.[29]

The bill requires that the public teaching hospital, the medical school, or its employees or agents must provide written notice to each patient, or the patient's legal representative, that the medical school and its employees are agents of the state and that the exclusive remedy for injury or damage suffered as a result of any act or omission of the public teaching hospital, the medical school, or an employee or agent of the medical school while acting within the scope of her or his duties pursuant to the affiliation agreement or other contract is by commencement of an action pursuant to s. 768.28, F.S. In order for the hospital, the medical school, or its employees or agents to fulfill this requirement, the patient or his or her legal representative must acknowledge in writing his or her receipt of the written notice.

The bill provides that an employee providing patient services under s. 768.28(10)(f), F.S., is not made an employee for purposes of the state's workers' compensation statute by virtue of s. 768.28(10)(f), F.S

Section 4 provides that the bill takes effect upon becoming a law and applies to all claims accruing on or after that date.

[26] Section 1, ch. 2010-26, Laws of Florida, amended s. 768.28(5), F.S. See *supra* note 1. (To provide effective October 1, 2011, to increase the limits to $200,000 for one person for one incident and $300,000 for all recovery related to one incident, to apply to claims arising on or after that effective date).
[27] Section 1, ch. 2010-26, Laws of Florida, amended s. 768.28(5), F.S.
[28] The bill defines "employee or agent of a college, university, or medical school" as an officer, a member of the faculty, a health care practitioner or licensee defined in s. 456.001, F.S., or any other person who is directly or vicariously liable.
[29] Section 768.28(2), F.S. See s*upra* note 2.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

By designating certain entities as agents of the state, the bill could render those entities subject to provisions of Article I, Section 24, of the Florida Constitution relating to access to public records and meetings. (See section VII. Related Issues.)

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

If immunity from liability is legislatively accorded to a private entity, a potential constitutional challenge would be that the law violates the right of access to the courts. Article I, s. 21, of the Florida Constitution provides that the courts shall be open to all for redress for an injury. To impose a barrier or limitation on litigant's right to file certain actions, an extension of immunity from liability would have to meet the test announced by the Florida Supreme Court in *Kluger v. White*.[30] Under the test, the Legislature would have to provide a reasonable alternative remedy or commensurate benefit, or make a legislative showing of overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity.

However, a substitute remedy does not need to be supplied by legislation that reduces but does not destroy a cause of action. When the Legislature extends sovereign immunity to a private entity, the cause of action is not constitutionally suspect as a violation of the access to courts provision of the State Constitution because the cause of action is not completely destroyed, although recovery for negligence may be more difficult.[31]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The fiscal impact on the private sector is indeterminate.

[30] 281 So. 2d 1 (Fla. 1973)
[31] *See Id.* at 4.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill does not address what will happen in cases in which a patient is unable to provide a written acknowledgment of having received the required notice (e.g., a patient who presents at the hospital emergency room seriously injured, unconscious, or otherwise incapacitated, and no legal representative is available).

On lines 275-289, it is not clear whether the college or university, the medical school, the employees or agents, or all of the above must enter into the affiliation agreement or contract with the governmental entity in order to invoke the provisions of the bill regarding immunity from liability for torts.

Public Records

The Florida Supreme Court has addressed the issue of when a private entity under contract with a public agency falls under the purview of the public records and meetings provisions. The Court looked to a number of factors that indicate a significant level of involvement by the public agency:

> The factors considered include, but are not limited to: 1) the level of public funding; 2) commingling of funds; 3) whether the activity was conducted on publicly owned property; 4) whether services contracted for are an integral part of the public agency's chosen decision-making process; 5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform; 6) the extent of the public agency's involvement with, regulation of, or control over the private entity; 7) whether the private entity was created by the public agency; 8) whether the public agency has a substantial financial interest in the private entity; and 9) for who's benefit the private entity is functioning.[32]

This bill provides that "any Florida not-for-profit college or university that owns or operates an accredited medical school or any of its employees or agents" that have an affiliation agreement or other contract to provide patient services as agents of a teaching hospital "which is owned or operated by the state, a county, a municipality, a public health trust, a special taxing district, any other governmental entity having health care responsibilities, or a not-for-profit entity that operates such facilities as an agent of that governmental entity under a lease" are agents of the state.

[32] *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group*, 596 So. 2d 1029, 1031 (Fla. 1992) (internal citations omitted)).

As noted previously, the bill is not clear whether the college or university, the medical school, the employees or agents, or all of the above, must enter into the affiliation agreement or contract with the governmental entity in order to invoke the provisions of the bill regarding immunity from liability for torts.

However, since one or more private entities (colleges, universities, medical schools, or employees or agents) will contract with the governmental entity under the bill, it could be argued that those private entities that *do* enter into the contract could be subject to the public records and meetings laws under *Schwab*. If the issue is litigated, the court would have to determine whether the factors set forth in *Schwab* apply. If the court were to find that the public records or meetings laws applied to the private entities, it would have to determine whether a statutory public records or meetings exemption applied.

One court noted a difficulty in determining which records are public records when a private corporation acts on behalf of the state:

> In holding that [a private corporation] is subject to the public records act because it is acting on behalf of the [government entity], we emphasize that we are not ruling that all of its records are public. Some of its records may be subject to statutory exemptions or to valid claims of privacy. Likewise, we cannot rule that every function of this corporation is performed on behalf of the [government entity]. While we have seen little evidence of functions that might fall outside the realm of public access, the trial court is free to review specific activities of the corporation on remand to determine whether they involve nongovernmental functions which fall outside the public disclosure requirements.[33]

Related Legislation

Similar provisions are in CS/CS/SB 1972 extending the waiver of sovereign immunity to a nonprofit independent college or university located and chartered in Florida which owns or operates an accredited medical school and its employees and agents when the employees or agents of the medical school are providing patient services at a teaching hospital that has an affiliation agreement or other contract with the medical school.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

None.

B. Amendments:

None.

[33] *Sarasota Herald-Tribune Co. v. Community Health Corp., Inc.,* 582 So. 2d 730, 734 (Fla. 2d DCA 1991) (footnote omitted).

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

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LEGISLATIVE ACTION

Senate	.	House
	.	
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	.	
	.	

The Committee on Judiciary (Simmons) recommended the following:

1 **Senate Amendment (with title amendment)**
2
3 Between lines 311 and 312
4 insert:
5 (l) Conditions the exercise of the powers provided in
6 paragraphs (c), (i), and (j) on approval pursuant to a
7 referendum as described in this paragraph.
8 1. Within 45 days following the date the governing body of
9 the municipality or county enacts an ordinance pursuant to this
10 subsection defining the boundaries of the proposed improvement
11 district, the city clerk or the supervisor of elections,
12 whichever is appropriate, shall certify such ordinance or
13 petition and compile a list of the names and last known

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14 addresses of the freeholders in the proposed local government
15 neighborhood improvement district from the tax assessment roll
16 of the county applicable as of December 31 in the year preceding
17 the year in which the ordinance was enacted. Except as otherwise
18 provided in this paragraph, the list shall constitute the
19 registration list for the purposes of the freeholders’
20 referendum required under this paragraph.
21 2. Within 45 days after compilation of the freeholders’
22 registration list pursuant to subparagraph 1., the city clerk or
23 the supervisor of elections shall notify each such freeholder of
24 the general provisions of this paragraph, including the taxing
25 authority and the date of the upcoming referendum, and the
26 method provided for submitting corrections to the registration
27 list if the status of the freeholder has changed since the
28 compilation of the tax rolls. Notification shall be by United
29 States mail and, in addition thereto, by publication one time in
30 a newspaper of general circulation in the county or municipality
31 in which the district is located.
32 3. Any freeholder whose name does not appear on the tax
33 rolls compiled pursuant to subparagraph 1. may register to vote
34 with the city clerk or the supervisor of elections. The
35 registration list shall remain open for 75 days after enactment
36 of the ordinance defining the local government neighborhood
37 improvement district.
38 4. Within 15 days after the closing of the registration
39 list, the city clerk or the supervisor of elections shall send a
40 ballot to each registered freeholder at his or her last known
41 mailing address by first-class United States mail. The ballot
42 shall include:

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43 a. A description of the general provisions of this
44 paragraph applicable to local government neighborhood
45 improvement districts;
46 b. The assessed value of the freeholder's property;
47 c. The percent of the freeholder's interest in such
48 property; and
49 d. Immediately following the information, the following:
50
51 "Do you favor authorizing the .... Local Government
52 Neighborhood Improvement District to levy up to 2
53 mills of ad valorem taxes by such proposed district?
54
55 ....Yes, for authorizing the levy of up to 2 mills of
56 ad valorem taxes by such proposed district.
57
58 ....No, against authorizing the levy of up to 2 mills
59 of ad valorem taxes by such proposed district."
60
61 "Do you favor authorizing the .... Local Government
62 Neighborhood Improvement District to borrow money,
63 including the issuance of bonds, as provided by s.
64 163.506(1)(i)?
65
66 ....Yes, for authorizing the borrowing of money for
67 district purposes.
68
69 ....No, against authorizing the borrowing of money for
70 district purposes."
71

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72 "Do you favor authorizing the .... Local Government
73 Neighborhood Improvement District to impose a special
74 assessment of not greater than $1,500 for each
75 individual parcel of land per year to pay for the
76 expenses of operating the neighborhood improvement
77 district and for approved capital improvements?
78
79 ....Yes, for the special assessment.
80
81 ....No, against the special assessment.
82
83 5. Ballots shall be returned by United States mail or by
84 personal delivery.
85 6. All ballots received within 120 days after enactment of
86 the ordinance shall be tabulated by the city clerk or the
87 supervisor of elections, who shall certify the results thereof
88 to the city council or county commission no later than 5 days
89 after the 120-day period.
90 7. The freeholders shall be deemed to have approved of the
91 provisions of this paragraph at such time as the city clerk or
92 the supervisor of elections certifies to the governing body of
93 the municipality or county that approval has been given by
94 freeholders representing in excess of 50 percent of the assessed
95 value of the property within the local government neighborhood
96 improvement district.
97 8. The city clerk or the supervisor of elections, whichever
98 is appropriate, shall enclose with each ballot sent pursuant to
99 this paragraph two envelopes: a secrecy envelope, into which the
100 freeholder shall enclose the marked ballot; and a mailing

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101 envelope, into which the freeholder shall then place the secrecy
102 envelope, which shall be addressed to the city clerk or the
103 supervisor of elections. The back side of the mailing envelope
104 shall bear a certificate in substantially the following form:
105
106 NOTE: PLEASE READ INSTRUCTIONS CAREFULLY BEFORE MARKING BALLOT
107 AND COMPLETING VOTER'S CERTIFICATE.
108
109 VOTER'S CERTIFICATE
110
111 I, ..., am a duly qualified and registered freeholder of
112 the proposed...(name)... local government neighborhood
113 improvement district; and I am entitled to vote this ballot. I
114 do solemnly swear or affirm that I have not and will not vote
115 more than one ballot in this election. I understand that failure
116 to sign this certificate and have my signature witnessed will
117 invalidate my ballot.
118
119 ...(Voter's Signature)
120
121 NOTE: YOUR SIGNATURE MUST BE WITNESSED BY ONE WITNESS 18 YEARS
122 OF AGE OR OLDER AS PROVIDED IN THE INSTRUCTION SHEET.
123 I swear or affirm that the elector signed this voter's
124 certificate in my presence.
125
126 ...(Signature of Witness)...
127 ...(Address)......(City/State)...
128
129 9. The certificate shall be arranged on the back of the

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130 mailing envelope so that the lines for the signatures of the
131 freeholder and the attesting witness are across the seal of the
132 envelope; however, no statement shall appear on the envelope
133 which indicates that a signature of the freeholder or witness
134 must cross the seal of the envelope. The freeholder and the
135 attesting witness shall execute the certificate on the envelope.
136 10. The city clerk or the supervisor of elections shall
137 enclose with each ballot sent to an freeholder pursuant to this
138 paragraph separate printed instructions in substantially the
139 following form:
140
141 READ THESE INSTRUCTIONS CAREFULLY BEFORE MARKING BALLOT.
142
143 a. VERY IMPORTANT. In order to ensure that your ballot will
144 be counted, it should be completed and returned as soon as
145 possible so that it can reach the city clerk or the supervisor
146 of elections no later than 7 p.m. on the (final day of the 120-
147 day period given here).
148 b. Mark your ballot in secret as instructed on the ballot.
149 c. Place your marked ballot in the enclosed secrecy
150 envelope.
151 d. Insert the secrecy envelope into the enclosed mailing
152 envelope, which is addressed to the city clerk or the supervisor
153 of elections.
154 e. Seal the mailing envelope and completely fill out the
155 Voter's Certificate on the back of the mailing envelope.
156 f. VERY IMPORTANT. Sign your name on the line provided for
157 "(Voter's Signature)."
158 g. VERY IMPORTANT. In order for your ballot to be counted,

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159 it must include the signature and address of a witness 18 years
160 of age or older affixed to the voter's certificate.
161 h. Mail, deliver, or have delivered the completed mailing
162 envelope. Be sure there is sufficient postage if mailed.
163
164 ================ T I T L E A M E N D M E N T ================
165 And the title is amended as follows:
166
167 Delete line 33
168 and insert:
169 assessments; conditioning the exercise of power by the
170 local government neighborhood improvement district to
171 borrow money, issue bonds, collect special
172 assessments, and to levy ad valorem taxes upon real
173 and tangible personal property within the district
174 upon the approval of a referendum by the freeholders
175 of the district; removing provisions allowing an

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 1010

INTRODUCER: Senator Simmons

SUBJECT: Neighborhood Improvement Districts

DATE: April 11, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gizzi	Yeatman	CA	**Favorable**
2.	Munroe	Maclure	JU	**Pre-meeting**
			BC	
4.				
5.				
6.				

I. Summary:

This bill renames the Safe Neighborhoods Act as the "Neighborhoods Improvement Act" and makes conforming changes to reflect new legislative intent. This bill also authorizes local government neighborhood improvement districts (NIDs) to borrow money, issue bonds, collect special assessments, charge user fees, and levy ad valorem taxes upon real and tangible personal property within the district by resolution of the governing body, and if required by the Florida Constitution, obtain the affirmative vote of the district electors.

The bill allows special NIDs, community redevelopment NIDs, and property owners' association NIDs to make and collect special assessments for improvements and reasonable operating expenses subject to referendum approval. The bill also allows NIDs to contract with county or municipal government for legal advice, and to plan for certain public improvements.

This bill substantially amends the following sections of the Florida Statutes: 163.501, 163.502, 163.503, 163.5035, 163.504, 163.5055, 163.506, 163.508, 163.511, 163.512, 163.514, 163.5151, and 163.516.

This bill repeals the following sections of the Florida Statutes: 163.513, 163.517, 163.519, 163.521, 163.5215, 163.522, 163.523, 163.524, and 163.526.

II. Present Situation:

Neighborhood Improvement Districts

Part IV of ch. 163, F.S., is known as the "Safe Neighborhoods Act." The intent of this Act is to:

- Guide and accomplish the coordinated, balanced, and harmonious development of safe neighborhoods;
- Promote the health, safety, and general welfare of these areas and their inhabitants, visitors, property owners, and workers;
- Establish, maintain, and preserve property values and foster the development of attractive neighborhoods and business environments;
- Prevent overcrowding and congestion;
- Improve or redirect traffic and provide pedestrian safety; and
- Reduce crime rates.

Section 163.503(1) defines the term "neighborhood improvement district" to mean:

> A district located in an area in which more than 75 percent of the land is used for residential purposes, or in an area in which more than 75 percent of the land is used for commercial, office, business, or industrial purposes, excluding the land area used for public facilities, and where there is a plan to reduce crime through the implementation of crime prevention through environmental design, environmental security or defensible space techniques, or through community policing innovations. . . .

The Safe Neighborhoods Act allows county or municipal governing bodies to create Neighborhood Improvement Districts (NIDs) through the adoption of a planning ordinance. Under current law, there are four types of NIDs: local government NIDs, property owners' association NIDs, special NIDs, and community redevelopment NIDs.[1] Each NID that is established is required to register within 30 days with both the Department of Community Affairs and the Department of Legal Affairs and provide the name, location, size, type of NID, and such other information that the departments may require.[2] To date, there are approximately 25 NIDs in the state of Florida.[3]

Although NIDs have various powers, they do not have bond authority. Of the 25 neighborhood improvement districts in the state of Florida, eight NIDs reported that they do not have *any* type of revenue source, and some have reported that they are inactive due to such lack of funding.[4]

In 2006, the Florida Attorney General issued Advisory Legal Opinion 2006-49, stating that an NID created by ordinance pursuant to s. 163.511, F.S., does not have the authority to borrow money to carry out the purposes of the district.[5] The Attorney General's Office reasoned that a statutorily created entity is limited to such powers expressly granted by law or reasonably implied to carry out its expressly granted power. The opinion further stated that "[w]hen the Legislature has directed how a thing shall be done, that is in effect a prohibition against its being done any other way."

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[1] *See* ss. 163.506-163.512, F.S.
[2] Section 163.5055, F.S.
[3] Florida Department of Community Affairs, *SB 1010 Agency Analysis,* 2 (March 11, 2011) (on file with the Senate Committee on Community Affairs).
[4] *Id.*
[5] Op. Atty Gen. Fla. 2006-49 (2006).

Duties of the Department of Legal Affairs.—The Safe Neighborhoods Act is administered by the Department of Legal Affairs, whose duties include, but are not limited to, the authority to:

- Develop program design and criteria for funding NIDs;
- Develop application and review procedures;
- Review and evaluate applications for planning and technical assistance;
- Utilize staff to provide crime prevention through community policing innovations, environmental design, environmental security, and defensible space training; and
- Review and approve or disapprove safe neighborhood improvement plans prior to the adoption by the local governing body.[6]

Safe Neighborhoods Program.—Section 163.517, F.S., provides for the creation of the Safe Neighborhoods Program. The purpose of this program is to "provide planning grants and technical assistance on a 100-percent matching basis to neighborhood improvement districts." Under this section, planning grants are to be awarded as follows:

- Property owners' association NIDs may receive up to $20,000.
- Local government NIDs may receive up to $100,000.
- Special NIDs may receive up to $50,000.
- Community redevelopment NIDs may receive up to $50,000.

Grants are awarded to eligible applicants based on evaluation of specified criteria provided in subsections (2) and (3) of s. 163.517, F.S.

According the State Attorney General's Office, funding under the Safe Neighborhood Program has not been provided to NIDs since 1993.[7]

Safe Neighborhood Improvement Plan.—All NIDs are currently required to prepare a safe neighborhood improvement plan that addresses the statutory criteria provided in s. 163.516, F.S. The safe neighborhood improvement plan must be consistent with the adopted county or municipal comprehensive plan and must be "sufficiently complete to indicate such land acquisition, demolition and removal of structures, street modifications, redevelopment, and rehabilitation as may be proposed to be carried out in the district."[8] Additionally, the NID must provide some method for and measurement of the reduction of crime within the district.[9]

Neighborhood Preservation and Enhancement Program.—The governing body of a municipality or county may authorize participation in the Neighborhood Preservation and Enhancement Program through the adoption of a local ordinance. Neighborhood Preservation and Enhancement Districts shall be created by the residents of a particular neighborhood or through county or municipal initiative by identifying those areas that are in need of enhancement. Neighborhood Preservation and Enhancement plans shall be enforced through an agency created by the local government which may be composed of the local code department or any other agency that will provide adequate enforcement of the plan.

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[6] *See* s. 163.519(1)-(11), F.S.
[7] Conversation with legislative affairs staff at the Office of the State Attorney General (March 22, 2011).
[8] Section 163.516(3), F.S.
[9] *Id.*

After the boundaries and size of the Neighborhood Preservation and Enhancement District have been defined, the residents therein shall create a Neighborhood Council, consisting of five elected members who shall have the authority to receive grants from the Safe Neighborhoods Program under s. 163.517, F.S. The established Neighborhood Council and local government designated enforcement agency shall have such powers and duties as provided under s. 163.526, F.S.

Neighborhood Improvement Districts inside Enterprise Zones.—The local governing body of any municipality or county, in which the boundaries of an enterprise zone, in whole or in part, include a NID, may request the Department of Legal Affairs to submit provisions to fund capital improvements within its budget request to the Legislature.[10] Local governments must demonstrate the ability to implement the project within two years after the date of appropriation. All requests received for capital improvement functions must be ranked by the Department of Legal Affairs based on the following:

- The necessity of the improvements to overall implementation of the safe neighborhood plan;
- The degree to which the improvements help the plan achieve crime prevention through community policing innovations, environmental design, environmental security, and defensible space objectives;
- The effect of the improvements on residents of low or moderate income; and
- The fiscal inability of a local government to perform the improvements without state assistance.[11]

Community Organization Involvement.—Section 163.523, F.S., authorizes local governments to cooperate and seek the involvement of certain community organizations to assist in the creation of safe neighborhood improvements districts. Except for the preparation of safe neighborhood improvement plans, NIDs may contract with such community organizations to carry out any activities therein and may compensate such organizations for the value of their services in an amount not to exceed 1 percent of the total annual budget of the NID.

III. Effect of Proposed Changes:

Section 1 amends s. 163.501, F.S., to rename part IV of ch. 163, F.S., as the "Neighborhoods Improvement Act."

Section 2 amends s. 163.502, F.S., to amend the legislative findings and purposes for this Act to include "lack of adequate public improvements such as streets, street lights, street furniture, street landscaping, sidewalks, traffic signals, way-finding signs, mass transit, stormwater systems, and other public utilities and improvements."

Section 3 amends s. 163.503, F.S., to amend the definition for "neighborhood improvement district," and to delete the definitions for the following terms: "environmental security," "crime prevention through environmental design," "defensible space," "enterprise zone," and "community policing innovation."

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[10] Section 163.521, F.S.
[11] *Id.*

Section 4 amends s. 163.5035, F.S., to delete the term “safe” in the title of this section.

Section 5 amends s.163.504, F.S., to delete provisions relating to the Safe Neighborhoods Program and safe neighborhood improvement plans.

Section 6 amends s. 163.5055, F.S., to provide that neighborhood improvement districts shall be required to notify (rather than register with) the Department of Community Affairs and to delete obsolete provisions.

Section 7 amends s. 163.506, F.S., to authorize local government neighborhood improvement districts to borrow money, contract loans, and issue bonds, certificates, warrants, notices, or other evidence of indebtedness to finance the undertaking of any capital or other projects for purposes permitted under the Florida Constitution and this part.[12] This section also authorizes the district to pledge the funds, credit, property, and taxing power of the improvement district for payment of such debts and bonds. Bonds issued under this part shall be authorized by a resolution of the governing board of the district, and if so required by the Florida Constitution, by affirmative vote of the electors of the district.[13] The bill provides criteria and governing board authority regarding the issuance, sale, and distribution of bonds and allows for the establishment and administration of sinking funds for the payment, purchase, or redemption of any outstanding bond indebtedness of the district.

The bill also allows the governing body of the district to levy ad valorem taxes upon real and tangible personal property within the district, as it deems necessary to make payment, including principal and interest, upon the general obligation and ad valorem bond indebtedness of the district or into any sinking fund so created.

The bill authorizes a commercial local government NID to make and collect special assessments to pay for capital improvements within the district and for reasonable operating expenses of the district, including those in the district budget. Such special assessments may not exceed $1,500 for each individual parcel of land per year.

The bill further allows the district to charge, collect, and enforce fees and other user charges.

This section deletes provisions in statute that allow a majority of the local governing body of a city or county to appoint a board of directors as an alternative to designating the local governing body as the board of directors of the local government NID.

[12] Some of the powers are already implied in NIDs who may be authorized to levy an ad valorem tax on real and personal property up to 2 mils annually in existing law; authorize the use of special assessments to support planning and implementation of district improvements under s. 163.514(16), F.S. See s. 163.511, F.S. See also FLA CONST. art. VII, s. 12 which authorizes counties, school districts, municipalities, special districts, and local governmental bodies with taxing powers to issue bonds, certificates of indebtedness or any form of tax anticipation certificates, payable from ad valorem taxation and maturing more than twelve month after issuance only: (a) to finance or refinance capital improvements authorized by law and when approved by electors who are local property owners not wholly exempt from taxation or, (b) to refund outstanding bonds and interest and redemption premium at a lower average interest cost rate.

[13] See Art. VII, s. 12 of the State Constitution which imposes a limitation on local governments’ power to incur debt (such as the issuance of bonds by requiring approval by vote of the electors who are owners of freehold therein not wholly exempt from taxation.

This section specifies differences between residential local government NIDs and commercial local government NIDs.

Section 8 amends s. 163.508, F.S., to delete provisions relating to the Safe Neighborhoods Program and safe neighborhood improvement plans. This section also allows property owners' association NIDs to request grants from any source and requires the property owners' association in a property owners' association NID to be a not for profit corporation.

Section 9 amends s. 163.511, F.S., to make conforming changes and to revise the method of appointing and removing directors of a special NID.

Section 10 amends s. 163.512, F.S., to make conforming changes and to delete provisions allowing the use of the community redevelopment trust fund to be used to further crime prevention through community policing innovations, environmental design, environmental security, and defensible space techniques. The trust fund may continue to be used for implementing the district's improvement plan as provided in the section.

Section 11 repeals s. 163.513, F.S., which relates to crime prevention through community policing innovations, environmental design, environmental security, and defensible space functions of neighborhood improvement districts.

Section 12 amends s. 163.514, F.S., to amend the powers provided to NIDs to:
- Delete references to the power to contract with experts on crime prevention through community policing innovations, environmental design, environmental security, and defensible space, or other experts.
- Allow NIDs to contract for the services of planners, engineers, attorneys, and other consultants.
- Allow NIDs to contract with county or municipal government for legal advice.
- Allow NIDs to plan, design, construct, operate, provide, and maintain street lighting, parks, streets, drainage, utilities, swales, parking facilities, transit, landscaping, and open areas.
- Allow special NIDs, community redevelopment NIDs, and property owners' association NIDs to make and collect special assessments, subject to referendum approval, for improvements and reasonable operating expenses.

Section 13 amends s. 163.5151, F.S., to state that each "local government" and special NID levying an ad valorem tax on real or personal property shall establish its budget pursuant to ch. 200, F.S.

Section 14 amends s. 163.516, F.S., so that certain information is no longer required to be included in neighborhood improvement plans.

Section 15 repeals s. 163.517, F.S., relating to the Safe Neighborhoods Program.

Section 16 repeals s. 163.519, F.S., relating to the duties of the Department of Legal Affairs.

Section 17 repeals s. 163.521, F.S., addressing NIDs inside enterprise zones.

Section 18 repeals s. 163.5215, F.S., which states that the provisions of this part shall not be construed to modify, limit, expand, or supersede any existing laws relating to the closing or abandonment of public roads, the denial of access to areas for public ingress or egress, or the use of public facilities.

Section 19 repeals s. 163.522, F.S., relating to state redevelopment programs.

Section 20 repeals s. 163.523, F.S., relating to safe neighborhood districts and the cooperation and involvement of community organizations.

Section 21 repeals s. 163.524, F.S., relating to the Neighborhood Preservation and Enhancement Program.

Section 22 repeals s. 163.526, F.S., relating to neighborhood councils and local government designated agencies.

Section 23 provides that this act shall take effect July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

This bill will allow local government neighborhood improvement districts (NIDs) to collect special assessments, charge user fees, and levy ad valorem taxes upon real and personal property within the district by resolution of the district's governing body, and if so required by the Florida Constitution, obtain the affirmative vote of the district electors.

This bill will allow special NIDs, community redevelopment NIDs, and property owners' association NIDs to make and collect special assessments for improvements and reasonable operating expenses subject to the referendum approval.

B. Private Sector Impact:

Individuals residing and business located in NIDs may be subject to special assessments, ad valorem taxes, and user fees as provided in this bill.

C. Government Sector Impact:

This bill will allow local government NIDs to borrow money, issue bonds, collect special assessments, charge user fees, and levy ad valorem taxes upon real and tangible personal property within the district by resolution of the governing body, and if required by the Florida Constitution, obtain the affirmative vote of the district electors.

The bill will allow special NIDs, community redevelopment NIDs, and property owners' association NIDs to make and collect special assessments for improvements and reasonable operating expenses subject to referendum approval.

The bill will also allow NIDs to contract with the county or municipal government for legal advice.

VI. Technical Deficiencies:

None.

VII. Related Issues:

In order to provide a uniform notification process to the Department of Community Affairs' Special District Information Program and to eliminate duplication, the Department of Community Affairs recommends deleting lines 220-223 of the bill and inserting the following:

> Pursuant to Section 189.418(1), F.S., and the Department of Legal Affairs by providing ~~these departments~~ the Department of Legal Affairs with the district's name, location, size, and type, and such other information as the ~~departments~~ Department of Legal Affairs may request ~~require~~.[14]

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

None.

B. Amendments:

None.

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

[14] Florida Department of Community Affairs, *SB 1010 Agency Analysis,* 5-6 (March 11, 2011) (on file with the Senate Committee on Community Affairs).