The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

JUDICIARY
Senator Flores, Chair
Senator Joyner, Vice Chair

MEETING DATE: Tuesday, February 8, 2011
TIME: 9:00 —11:00 a.m.
PLACE: *Toni Jennings Committee Room,* 110 Senate Office Building

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

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	**SB 170** Bennett (Compare H 443)	Electronic Filing of Court Documents; Provides legislative intent. Requires that each state attorney and public defender implement a system by which the state attorney and public defender can electronically file court documents with the clerk of the court. Requires that the Florida Prosecuting Attorneys Association and the Florida Public Defender Association report to the President of the Senate and the Speaker of the House of Representatives by a specified date on the progress made in implementing the electronic filing system, etc. JU 02/08/2011 Fav/CS BC	Fav/CS Yeas 4 Nays 0
2	**SM 358** Evers	Exercise of Federal Power; Urges the Congress of the United States to honor the provisions of the Constitution of the United States and United States Supreme Court case law which limit the scope and exercise of federal power. JU 02/08/2011 Favorable GO RC	Favorable Yeas 4 Nays 0
3	**SB 426** Latvala (Identical H 291)	Residential Tenancies; Authorizes certified process servers to serve writs of possession in actions for possession of residential property. Conforms provisions. JU 02/08/2011 Fav/CS CA RC	Fav/CS Yeas 4 Nays 0

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 170
INTRODUCER:	Senator Bennett
SUBJECT:	Electronic Filing of Court Documents
DATE:	February 7, 2011 REVISED:

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

I. Summary:

This bill expresses the intent of the Legislature that each state attorney and public defender implement a system by which the state attorney and public defender can electronically file court documents with the clerk of court. The bill further requires that the Florida Prosecuting Attorneys Association and the Florida Public Defender Association report to the President of the Senate and the Speaker of the House of Representatives by March 1, 2012, on the progress made in implementing the electronic filing system.

This bill creates sections 27.341 and 27.5112, Florida Statutes.

II. Present Situation:

Electronic Filing of Court Documents

In 2009, the Legislature passed and the Governor signed into law Senate Bill 1718 (2009 Regular Session).[1] This bill required each clerk of the court to implement a statewide, uniform electronic filing process for court documents using standards to be specified by the Supreme Court.[2] The Legislature's expressed intent for requiring the implementation of electronic filing was "to reduce judicial costs in the office of the clerk and the judiciary, increase timeliness in the processing of cases, and provide the judiciary with case-related information to allow for improved judicial case management."[3]

[1] Chapter 2009-61, Laws of Fla.
[2] *Id* at s. 16.
[3] *Id.*

The federal court system already uses an electronic filing system called PACER (Public Access to Court Electronic Records).[4] Additionally, there are 13 state courts and the District of Columbia using statewide electronic filing systems.[5] Those courts are: Alabama, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, New Jersey, New York, North Carolina, North Dakota, Ohio, Texas, and Washington.[6]

Supreme Court Standards

In response to SB 1718, the Florida Supreme Court promulgated statewide standards for electronic filing on July 1, 2009.[7] The Court specified that electronic filing would be implemented through "a single statewide Internet portal for electronic access to and transmission of court records to and from all Florida courts."[8] All electronic filing systems were required to be compatible with the Florida Courts E-Portal developed by the Florida Courts Technology Commission.[9] The Court specified that electronic court records submitted to the portal must be "capable of being printed as paper, or transferred to archival media, without loss of content or material alteration of appearance"; such records "shall constitute the official record and are equivalent to court records filed in paper."[10]

Status of Implementation

Proviso language from the fiscal year 2010-11 General Appropriations Act required the state courts system to "accelerate the implementation of the electronic filing requirements … by implementing five of the ten trial court divisions by January 1, 2011."[11] The electronic filing system is called the Florida Courts E-Filing Portal and can be found at www.myflcourtaccess.com. The portal is currently functional, with nine counties signed on for the initial program.[12] Clerks in these counties are currently working with volunteer attorneys to use the portal on a pilot basis before the portal opens to all attorneys.[13] A second set of counties was recently approved to be added over time.[14] By motion of the Florida E-Filing Authority, an entity made up of eight circuit court clerks and the Clerk of the Supreme Court that provides

[4] PACER, *PACER Home*, http://www.pacer.gov/ (last visited Feb. 4, 2011).
[5] American Bar Association, *Electronic Filing Resource Page*, http://www.abanet.org/tech/ltrc/research/efiling/home.html (last visited Feb. 1, 2011).
[6] *Id.*
[7] *In Re: Statewide Standards for Electronic Access to the Courts*, AOSC09-30 (Fla. July 1, 2009).
[8] *Id.* at 3.
[9] *Id.*
[10] Florida Supreme Court, *Standards for Electronic Access to the Courts*, 6 (June 2009).
[11] Chapter 2010-152, s. 7, Laws of Fla., proviso accompany specific appropriation 3238.
[12] The nine counties currently signed on to use the e-filing program are: Lake, Columbia, Duval, Gulf, Holmes, Lee, Miami-Dade, Putnam, and Walton. Gary Blankenship, *E-filing open for business: The new service is being phased in slowly*, THE FLORIDA BAR NEWS, Jan. 15, 2011, *available at* http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/0a29309ae461bfdc85257810006684b5!OpenDocument (last visited Jan. 31, 2011).
[13] *E-filing is underway*, THE FLORIDA BAR NEWS, Feb. 1, 2011, *available at* http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/a3867c4f16e4e48c852578220047644a!OpenDocument (last visited Feb. 1, 2011).
[14] New counties are: Broward, Orange, Marion, Collier, Franklin, Jackson, and Leon. *Id.*

governance for the e-filing portal,[15] the portal is currently programmed for the following five civil divisions: circuit civil, county civil, family, probate, and juvenile dependency.[16] Although the portal is not yet programmed for electronic filing for criminal divisions, to date 28 counties have been granted approval by the Florida Courts Technology Commission[17] to implement electronic filing in criminal divisions, and an additional six counties have applied and are pending approval.[18] Some of these counties have requested approval for electronic filing in criminal divisions for systems they are currently using on the local level, while others may have requested approval in anticipation of the statewide portal's expansion into all divisions.

Other Electronic Filing Efforts

Distinct from the statewide portal, there have been other electronic filing efforts in Florida for several years. For example, the Manatee County Clerk of Court received approval from the Supreme Court in 2005 to utilize electronic filing in all cases.[19] Electronic filing is mandatory in Manatee County for foreclosure actions and is encouraged for other actions.[20] On the appellate level, the First District Court of Appeal (First DCA) began implementing an electronic filing program in 2009 at the direction of the Legislature.[21] When the program first began, attorneys had the option of filing documents electronically or in paper. However, effective September 1, 2010, all attorneys were required and non-attorneys were encouraged to file all pleadings electronically.[22] The Public Defender for the Second Judicial Circuit handles appeals in the jurisdiction of the First DCA;[23] attorneys in the appellate division currently file electronically in accordance with the court's requirements.

III. Effect of Proposed Changes:

This bill expresses the intent of the Legislature that the offices of the state attorney and the public defender implement a system to file court documents with the clerk of court. The Florida Prosecuting Attorneys Association is required by the bill to file a report with the President of the Senate and the Speaker of the House of Representatives by March 1, 2012, describing the progress that each office has made to implement an electronic filing system. For any office of the state attorney that has not fully implemented an electronic filing system by that date, the report must also include a description of the additional activities that are needed to complete the system

[15] Florida E-Filing Authority, *E-Filing Authority Home*, http://www.flclerks.com/eFiling_authority.html (last visited Feb. 1, 2011).
[16] Minutes for the Florida E-Filing Authority meeting (Dec. 8, 2010) (on file with the Senate Committee on Judiciary).
[17] The Florida Courts Technology Commission has been tasked with evaluating electronic filing applications "to determine whether they comply with the technology policies established by the supreme court." *In Re: Amendments to the Florida Rules of Judicial Administration—Rule 2.236*, 41 So. 3d 128,133 (Fla. 2010).
[18] Counties granted approval for at least one criminal division: Alachua, Broward, Calhoun, Clay, Dixie, Duval, Flagler, Gadsden, Glades, Gulf, Holmes, Jackson, Lake, Lee, Leon, Manatee, Monroe, Okaloosa, Orange, Palm Beach, Polk, Putnam, Santa Rosa, Sarasota, Seminole, St. Johns, St. Lucie, and Volusia; counties pending approval for at least one criminal division: Bay, Brevard, Citrus, Pinellas, Sumter, and Taylor. Florida State Courts, *Electronic Initiatives as of January 21, 2011*, http://www.flcourts.org/gen_public/technology/bin/efilingchart.pdf (last visited Feb. 2, 2011).
[19] Manatee County Clerk of the Circuit Court, *E-File and E-Case Initiation*, http://www.manateeclerk.com/Services/EFiling.aspx (last visited Feb. 2, 2011).
[20] *Id.*
[21] Chapter 2009-61, s. 17, Laws of Fla.
[22] *In Re: Electronic Filing of Pleadings in the First District Court of Appeal*, AO10-3 (Fla. 1st DCA 2010).
[23] Florida State Courts, *Florida's District Courts*, http://www.flcourts.org/courts/dca/dca.shtml (last visited Feb. 2, 2011).

and the additional timeframe anticipated. The bill provides identical requirements for the Florida Public Defender Association on behalf of each office of the public defender.

The bill language does not specify whether offices of the state attorney and public defender are being directed to electronically file court documents through the statewide portal or other means, such as filing directly with clerks in their circuits. The bill does not appear to require state attorneys or public defenders to design entirely new systems; rather it may be possible for them to revise their existing data or case management systems to allow for electronic filing. The extent of necessary changes will likely vary among the offices depending on the existing information technology already in place.

This bill provides that it takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, Section 18(a) of the Florida Constitution states that no county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the Legislature has determined that such law fulfills an important state interest and meets one of a number of enumerated exceptions. If none of the constitutional exceptions apply, and if the bill becomes law, cities and counties are not bound by the law unless the Legislature has determined that the bill fulfills an important state interest and approves the bill by a two-thirds vote of the membership of each house.[24]

Counties are required by Article V, Section 14 of the Florida Constitution to fund the cost of communications services for public defenders' offices and state attorneys' offices. The Legislature by general law has prescribed that communications services include "[a]ll computer networks, systems and equipment."[25] Senate Bill 170 expresses the intent of the Legislature that offices of the state attorney and offices of the public defender implement systems to electronically file court documents. Counties would be required to provide any funds associated with implementation of the electronic filing system. However, an expenditure in compliance with this bill does not appear to constitute a mandate because it relates to an existing constitutional duty on the part of the counties.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

[24] FLA. CONST. art. VII, s. 18(a).
[25] Section 29.008(2)(f), F.S.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

This bill contemplates that each state attorney and public defender will implement a system for electronic filing. As referenced in the Municipality/County Mandates Restrictions section of this bill analysis, any funding necessary to implement the system would be provided by the county. The bill expresses the legislative expectation that once electronic filing is implemented, it will reduce costs associated with paper filing, increase timeliness in the processing of cases, and provide the judiciary and the clerk of court with case-related information to allow for improved judicial case management. As noted previously, the extent of necessary updates will vary among offices depending on the existing information technology already in place. If any office is unable to implement electronic filing because the financial burden is too great for a particular county, that fact could be relayed to the Legislature in the progress report due on March 1, 2012, as specified in the bill.

The Office of the State Courts Administrator (OSCA) reported that there is no impact to OSCA.[26]

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.

[26] Office of the State Courts Administrator, *Judicial Impact Statement: SB 170* (Jan. 19, 2011) (on file with the Senate Committee on Judiciary).

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

656138

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
02/08/2011	.	
	.	
	.	
	.	

The Committee on Judiciary (Thrasher) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Section 27.341, Florida Statutes, is created to read:

27.341 Electronic filing and receipt of court documents.—

(1)(a) Each office of the state attorney shall develop the technological capability and implement a process by which the state attorney can electronically file court documents with the clerk of the court and receive court documents from the clerk of the court. It is the expectation of the Legislature that the

656138

electronic filing and receipt of court documents will reduce costs for the office of the state attorney, the clerk of the court, and the judiciary; will increase timeliness in the processing of cases; and will provide the judiciary and the clerk of the court with case-related information to allow for improved judicial case management.

(b) As used in this section, the term "court documents" includes, but is not limited to, pleadings, motions, briefs, and their respective attachments, orders, judgments, opinions, decrees, and transcripts.

(2) It is further the expectation of the Legislature that, when developing the capability and implementing the process, each office of the state attorney consult with the office of the public defender for the same circuit served by the office of the state attorney, the clerks of court for the circuit, the Florida Court Technology Commission, and any authority that governs the operation of a statewide portal for the electronic filing and receipt of court documents.

(3) The Florida Prosecuting Attorneys Association shall file a report with the President of the Senate and the Speaker of the House of Representatives by March 1, 2012, describing the progress that each office of the state attorney has made to implement an electronic filing and receipt system. For any office of the state attorney that has not fully implemented an electronic filing and receipt system by March 1, 2012, the report must also include a description of the additional activities that are needed to complete the system for that office and the projected time necessary to complete the additional activities.


656138

Section 2. Section 27.5112, Florida Statutes, is created to read:

27.5112 Electronic filing and receipt of court documents.—

(1)(a) Each office of the public defender shall develop the technological capability and implement a process by which the public defender can electronically file court documents with the clerk of the court and receive court documents from the clerk of the court. It is the expectation of the Legislature that the electronic filing and receipt of court documents will reduce costs for the office of the public defender, the clerk of the court, and the judiciary; will increase timeliness in the processing of cases; and will provide the judiciary and the clerk of the court with case-related information to allow for improved judicial case management.

(b) As used in this section, the term "court documents" includes, but is not limited to, pleadings, motions, briefs, and their respective attachments, orders, judgments, opinions, decrees, and transcripts.

(2) It is further the expectation of the Legislature that, in developing the capability and implementing the process , each office of the public defender consult with the office of the state attorney for the same circuit served by the office of the public defender, the clerks of court for the circuit, the Florida Court Technology Commission, and any authority that governs the operation of a statewide portal for the electronic filing and receipt of court documents.

(3) The Florida Public Defender Association shall file a report with the President of the Senate and the Speaker of the House of Representatives by March 1, 2012, describing the

656138

progress that each office of the public defender has made to implement an electronic filing and receipt system. For any office of the public defender that has not fully implemented an electronic filing and receipt system by March 1, 2012, the report must also include a description of the additional activities that are needed to complete the system for that office and the projected time necessary to complete the additional activities.

Section 3. This act shall take effect upon becoming a law.

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

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to electronic filing and receipt of court documents; creating ss. 27.341 and 27.5112, F.S.; requiring each state attorney and public defender to implement a system by which the state attorney and public defender can electronically file court documents with the clerk of the court and receive court documents from the clerk of the court; providing legislative expectations that the state attorneys and public defenders consult with specified entities; defining the term "court documents"; requiring that the Florida Prosecuting Attorneys Association and the Florida Public Defender Association report to the President of the Senate and

656138

the Speaker of the House of Representatives by a specified date on the progress made in implementing the electronic filing and receipt system; 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:	SM 358
INTRODUCER:	Senator Evers
SUBJECT:	Exercise of Federal Power
DATE:	February 7, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Treadwell	Maclure	JU	**Favorable**
2.			GO	
3.			RC	
4.				
5.				
6.				

I. Summary:

This Senate Memorial urges the United States Congress to honor the provisions of the United States Constitution and federal case law which limit the scope and exercise of federal power.

More specifically, the memorial demands that Congress cease and desist from issuing mandates that are beyond the scope of its constitutionally delegated powers. The memorial also provides that all compulsory federal legislation that directs states to comply under threat of civil or criminal penalties or sanctions or requires states to pass legislation or lose federal funding should be prohibited or repealed.

Copies of the memorial are to be provided to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives, the presiding officers of each state legislature of the United States, and each member of the Florida delegation to the United States Congress.

II. Present Situation:

Tenth Amendment and State Sovereignty

By the provisions of the United States 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.[1] All attributes of government that have not been relinquished by the adoption of the United States Constitution and its

[1] 48A FLA. JUR 2D, *State of Florida* s. 13 (2010).

amendments have been reserved to the states.[2] The Tenth Amendment to the United States 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 enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.[3]

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.'"[4] Under the federalist system of government in the United States, states may enact more rigorous restraints on government intrusion than the federal charter imposes.[5] However, a state may not adopt more restrictions on the fundamental rights of a citizen than the United States Constitution allows.[6]

The United States 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.[7] 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.[8] 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.[9]

State Sovereignty Movement

A state sovereignty movement has emerged in the United States over the past couple of years. The premise of this movement is the belief that the balance of power has tilted too far in favor of the federal government. Proponents of this movement urge legislators and citizens to support resolutions or state constitutional amendments 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. The resolutions often mandate that the state government will hold the federal government accountable to the United States Constitution to protect state residents from federal abuse.

---

[2] *Id.*
[3] *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)).
[4] *Id.*
[5] 48A FLA. JUR 2D, *State of Florida* s. 13 (2010).
[6] *Id*. (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985)).
[7] *New York v. United States*, 505 U.S. at 156.
[8] *Id.; see also Baggs v. City of South Pasadena*, 947 F. Supp. 1580 (M.D. Fla. 1996).
[9] *New York v. United States*, 505 U.S. at 156.

In late June 2009, the Tennessee governor became the first governor to sign such a resolution.[10] Following Tennessee, Alaska's governor signed a similar resolution passed by the Alaska House and Senate in July 2009.[11] An advocacy organization supporting state sovereignty reports that 21 states introduced similar resolutions asserting state sovereignty in 2010.[12] Of those joint resolutions filed, three were signed by the governors of Alabama, Utah, and Wyoming.[13]

In lieu of a resolution asserting state sovereignty, some state legislators have filed bills proposing binding legislation supporting state sovereignty. For example, a New Hampshire legislator has filed a bill to create a "joint committee on the constitutionality of acts, orders, laws, statutes, regulations, and rules of the government of the United States of America in order to protect state sovereignty."[14] Some state legislators have filed legislation for a constitutional amendment asserting state sovereignty.[15] To date, it does not appear that a state constitutional amendment has been adopted.

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 of the Act.[16] 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.[17]

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

[10] Tennessee HJR 108 (2009).
[11] Alaska HJR 27 (2009).
[12] Tenth Amendment Center, *2010 Resolutions*, *available at* http://www.tenthamendmentcenter.com/nullification/10th-amendment-resolutions/ (last visited Jan. 31, 2011).
[13] Alabama SJR 27 (2010); Utah SCR 3 (2010); and Wyoming HJ 0002 (2010).
[14] New Hampshire HB 1343 (2010). A Missouri legislator has filed a bill creating a "Tenth Amendment Commission." The commission refers cases to the Attorney General when the federal government enacts laws requiring the state or a state officer to enact or enforce a provision of federal law believed to be unconstitutional. See Missouri SB 587 (2010).
[15] *See* Oklahoma HJR 1063 (2010).
[16] *State of Florida v. United States Department of Health and Human Services*, Case No. 3:10-CV-91-RV/EMT (N.D. Fla. 2010).
[17] *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).

power.[18] However, two federal district courts have upheld the constitutionality of the provisions of the Act.[19]

III. Effect of Proposed Changes:

This Senate Memorial urges the United States Congress to honor the provisions of the United States Constitution and federal case law which limit the scope and exercise of federal power.

The memorial recognizes Florida's sovereignty under the Tenth Amendment to the United States Constitution over all powers not otherwise enumerated and granted to the federal government and demands that the federal government, as an agent of the State of Florida, cease and desist from issuing mandates that are beyond the scope of those constitutionally delegated powers.

The memorial provides that all compulsory federal legislation that directs states to comply under threat of civil or criminal penalties or sanctions or that requires states to pass legislation or lose federal funding should be prohibited or repealed.

Copies of the memorial are to be provided to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives, the presiding officers of each state legislature of the United States, and each member of the Florida delegation to the United States Congress.

The memorial is not subject to approval or veto by the Governor. The presiding officers of each house sign the memorial.

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.

---

[18] *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).
[19] *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).

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:	SB 426
INTRODUCER:	Senator Latvala
SUBJECT:	Residential Tenancies
DATE:	February 7, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Treadwell	Maclure	JU	**Pre-meeting**
2.			CA	
3.			RC	
4.				
5.				
6.				

I. Summary:

The bill authorizes certified process servers to serve writs of possession in actions for possession of residential property. More specifically, upon the entry of a judgment in favor of a landlord in a possession action and issuance of the writ by the clerk of court, the landlord may elect to use a certified process server to serve the writ rather than the sheriff.

This bill substantially amends sections 48.27 and 83.62, Florida Statutes.

II. Present Situation:

Florida Residential Landlord and Tenant Act

Part II of chapter 83, F.S., titled the "Florida Residential Landlord and Tenant Act" (act), governs the relationship between landlords and tenants under a residential lease agreement.[1] A rental agreement includes any written or oral agreement regarding the duration and conditions of a tenant's occupation of a dwelling unit.[2] The provisions of this act specifically address the

[1] Part II of ch. 83, F.S.

[2] Section 83.43(7), F.S. (A rental agreement "means any written agreement, … or oral agreement for a duration of less than 1 year, providing for use and occupancy of premises.")

payment of rent,[3] duration of leases,[4] security deposits,[5] landlord maintenance obligations,[6] termination of rental agreements,[7] and landlord remedies.[8]

Landlord Remedies for Breach of Lease

Current law provides the landlord with choices of remedies for breaches of the rental agreement by the tenant.[9] The remedies provided in statute apply to the following situations:

- The tenant has breached the lease for the dwelling unit and the landlord has obtained a writ of possession;
- The tenant has surrendered possession of the dwelling unit to the landlord; or
- The tenant has abandoned the dwelling unit.

The statute permits the landlord to:

- Treat the lease as terminated and retake possession for his or her own account, thereby terminating any further liability of the tenant; or
- Retake possession of the dwelling unit for the account of the tenant, holding the tenant liable for the difference between rent stipulated to be paid under the lease agreement and what, in good faith, the landlord is able to recover from a reletting; or
- Stand by and do nothing, holding the lessee liable for the rent as it comes due.[10]

Right of Action for Possession

A landlord may recover possession of a dwelling unit if the tenant does not vacate the premises after the rental agreement is terminated.[11] However, under current law, a landlord is not authorized to recover possession except under the following circumstances:

- In an action for possession, in which the landlord, the landlord's attorney, or agent files a specified complaint alleging certain facts authorizing recovery in the proper county court where the dwelling unit is located;[12]
- In other civil actions in which right of possession is to be determined;
- Possession of the dwelling unit has been surrendered by the tenant to the landlord;
- The dwelling unit has been abandoned by the tenant; or
- The only remaining tenant in the dwelling unit has been deceased for at least 60 days with his or her personal property still remaining on the premises and rent remains unpaid,

[3] Section 83.46, F.S.
[4] *Id.*
[5] Section 83.49, F.S.
[6] Section 83.51, F.S.
[7] *See* ss. 83.56 and 83.575, F.S.
[8] *See* ss. 83.58 and 83.595, F.S.
[9] Section 83.595, F.S.
[10] *Id.*
[11] Section 83.59(1), F. S.
[12] Section 83.59(2), F.S.

and the landlord has not received notice of a probate estate or personal representative thereof.[13]

Writs of Possession

After judgment is awarded in favor of the landlord in an action for possession of the property, the clerk must issue a writ of possession to the sheriff describing the premises and commanding the sheriff to put the landlord in possession after 24 hours' notice conspicuously posted on the premises.[14] After the 24-hour period elapses from the posting of the writ, the landlord or the landlord's agent may remove any personal property found on the premises.[15] The landlord may request that the sheriff stand by to keep the peace while the landlord changes the locks and removes the personal property from the premises.[16] Neither the sheriff nor the landlord is liable to the tenant or any other party for the loss, destruction, or damage to the property after it has been removed.[17]

Overview of Service of Process

Service of process is the formal delivery of a writ, summons, or other legal process or notice.[18] As a general rule, "statutes governing service of process are to be strictly construed to insure that a defendant receives notice of the proceedings."[19] Currently, under Florida law process may be served by a sheriff, a person appointed by the sheriff in the sheriff's county ("special process server"), or a certified process server appointed by the chief judge of the circuit court.[20] All process must be served by the sheriff of the county where the person to be served is found, except initial nonenforceable civil process, criminal witness subpoenas, and criminal summonses, which may be served by a special or certified process server.[21] Any person authorized by the Florida Rules of Procedure may also serve civil witness subpoenas.[22] However, at present, there is no statutory authority or rule of procedure that allows anyone other than a sheriff or a sheriff's deputy to serve writs of possession in actions for possession of real property.

---

[13] Section 83.59(3), F.S.
[14] Section 83.62(1), F.S.
[15] Section 83.62(2), F.S.
[16] *Id*.
[17] *Id*.
[18] "The term 'process' is not limited to 'summons.' In its broadest sense[,] it is equivalent to, or synonymous with, 'procedure,' or 'proceeding.'" BLACK'S LAW DICTIONARY (9th ed. 2009). Thus, service of process may trigger the constitutional issue of procedural due process, which requires notice and the opportunity to be heard. *See, e.g.*, *Minda v. Ponce*, 918 So. 2d 417, 422 (Fla. 2d DCA 2006) (citing *Schnicke v. Schnicke*, 533 So. 2d 337, 337-38 (Fla. 5th DCA 1988)).
[19] *Abbate v. Provident Nat'l Bank*, 631 So. 2d 312, 313 (Fla. 5th DCA 1994) (citing *Henzel v. Noel*, 598 So. 2d 220, 221 (Fla. 5th DCA 1992)).
[20] *Id*.
[21] Section 48.021(1), F.S. Service of process may be categorized as enforceable or nonenforceable. *See* Florida Senate, Committee on Justice Appropriations, *Sheriff Costs – Service of Process*, Interim Project Report 2006-144, at 1 (Aug. 2005). "Enforceable service of process involves a court order requiring the sheriff to take action (i.e., eviction, seizure of property)." *Id*. On the other hand, "[n]onenforceable service of process is designed to place another party on notice that he or she must take action (i.e., summons to appear, witness subpoena)." *Id*.
[22] Section 48.021(1), F.S. Rule 1.070, Florida Rules of Civil Procedure, provides that service of process may be made by a person appointed by court order, known as an elisor.

Certified Process Servers

A certified process server must be appointed by the chief judge of the judicial circuit in which he or she shall be allowed to serve process.[23] The chief judge of each circuit has discretion as to whether or not to appoint certified process servers. According to s. 48.29(3), F.S., a person applying with the chief judge to become a certified process server must:

- Be at least 18 years of age;
- Have no mental or legal disability;
- Be a permanent resident of the state;
- Submit to a background investigation;
- Certify that he or she has no pending criminal case, no record of any felony conviction, nor a record of conviction of a misdemeanor involving moral turpitude of dishonesty within the past 5 years;
- If prescribed by the chief judge of the circuit, submit to an examination testing his or her knowledge of the laws and rules regarding the service of process;
- Execute a bond in the amount of $5,000, which shall be renewable annually, for the benefit of any person injured by any malfeasance, misfeasance, neglect of duty, or incompetence of the applicant, in connection with his or her duties as a process server; and
- Take an oath that he or she will honestly, diligently, and faithfully exercise the duties of a certified process server.[24]

Once the process server is certified, he or she may serve nonenforceable civil process, as well as criminal witness subpoenas and criminal summonses, on a person found within the circuit where the server is certified.[25] Florida law does not provide a fee schedule establishing the fees allowed to be charged by certified process servers. Rather, current law generally provides that a "certified process server may charge a fee for his or her services."[26]

Fees and Costs Associated with Writs of Possession

Under Florida law, county sheriffs of the state must charge fixed, nonrefundable fees for the service of process in civil actions as established by a statutory schedule.[27] All fees collected under the statutory provisions for sheriffs' fees for service of process are to be paid monthly into the county's fine and forfeiture fund.[28] Current law provides that the sheriff's office may charge $40 for docketing and indexing each writ of execution, regardless of the number of persons involved, and $50 for each levy.[29] In addition to these fees, the sheriff is authorized to charge a

[23] Section 48.27, F.S.
[24] Section 48.29(3), F.S.
[25] Section 48.27(2), F.S.
[26] Section 48.29(8), F.S.
[27] Section 30.231(1), F.S.
[28] Section 30.231(5), F.S.
[29] Section 30.231(1)(d), F.S. A levy is considered made when any property or any portion of the property listed or unlisted in the instructions for levy is seized, or upon demand of the sheriff the writ is satisfied by the defendant in lieu of seizure.

reasonable hourly rate, and the person requesting the sheriff to stand by to keep the peace in an action for possession of property is responsible for paying the hourly rate.[30]

III. Effect of Proposed Changes:

The bill authorizes certified process servers to serve writs of possession in actions for possession of real property. Currently, there is no statute or rule that allows anyone other than a sheriff or deputy to serve writs of possession in possession actions. The bill specifies that, upon the entry of a judgment in favor of a landlord in an eviction action and issuance of the writ by the clerk of court, the landlord may elect to use a certified process server to serve the writ. The bill also makes conforming changes in the Florida Residential Landlord and Tenant Act (specifically s. 83.62, F.S.) to authorize service of the writ of possession by certified process servers.

The bill provides that "a *person* may select from the list for the circuit where the process is to be served one or more certified process servers." It may be unclear by use of the term "person" whether the clerk or the landlord selects the process server from the list. If it is the intent of the Legislature to authorize the landlord to select the process server, it may wish to substitute the term "landlord" for the term "person."

Under current statute and practice, the clerk issues the writ of possession to the sheriff, and the sheriff serves the writ by conspicuously posting the writ on the premises. After 24 hours have passed from the posting of the writ, the landlord may take possession of the property with the sheriff standing by to keep the peace.[31] Under the bill, it appears that if the landlord elects to use a certified process server, the writ is issued to the process server rather than the sheriff. Because the sheriff will remain under the obligation to stand by to keep the peace after the 24-hour period has passed, the Legislature may wish to consider providing some form of notice from either the clerk or the private process server to the sheriff. The clerk could provide a copy of the writ directly to the sheriff's office, or the private process server could be required to provide written notice to the sheriff's office indicating the date and time that the writ of possession was posted.

Section 48.021, F.S., generally governs service of process and provides that all process must be served by the sheriff except for those types of process expressly referenced within the statute. The Legislature may wish to consider expressly providing that writs of possession may be served by certified process servers in this statute to ensure that it is consistent with the bill's grant of authority to certified process servers in s. 48.27, F.S.

[30] Section 83.62(2), F.S.
[31] Section 83.62(1), F.S.

Other Potential Implications:

It is the long-standing practice of Florida that enforceable civil process is served by the sheriff. Allowing a certified process server to serve the writ of possession is a significant departure from this practice.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Section 18(b), Art. VII, State Constitution, provides that except upon approval by two-thirds of the members of each house, the Legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would reduce the authority that municipalities or counties have to raise revenues in the aggregate, as such authority exists on February 1, 1989. Because sheriffs retain the authority to serve writs of possession under the bill, it does not appear that the authority of the local government to raise revenues has been affected by the provisions of the bill.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

See "Government Sector Impact" below.

B. Private Sector Impact:

In counties experiencing high volumes of cases involving possession of real property, landlords who elect to use a certified process server to deliver the writ of possession may experience a reduction in the amount of time that elapses between court approval of the writ and the actual service of the writ. Dependent upon the actual fee charged by certified process servers for serving the writ of possession, landlords could experience higher costs associated with the execution of the writ if they elect to use a certified process server.

C. Government Sector Impact:

The bill will allow landlords in successful eviction actions to elect to use certified process servers rather than the sheriff's office to serve writs of possession. All fees collected under the statutory provisions for sheriffs' fees for service of process are paid monthly into the county's fine and forfeiture fund. County revenues could be decreased contingent upon the number of landlords who elect to use certified process servers rather than the

sheriff to serve the writs. However, sheriffs will continue to receive fees for assisting with repossession of the property 24 hours after the posting of the writ.

Clerks of court may experience some expense associated with revisions to the writ of possession form if changes are necessary as a result of allowing certified process servers to serve the writ.

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.

744044

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
02/08/2011	.	
	.	
	.	
	.	

The Committee on Judiciary (Bogdanoff) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Subsection (1) of section 48.021, Florida Statutes, is amended to read:

48.021 Process; by whom served.—

(1) All process shall be served by the sheriff of the county where the person to be served is found, except initial nonenforceable civil process, criminal witness subpoenas, and criminal summonses may be served by a special process server appointed by the sheriff as provided for in this section or by a

744044

certified process server as provided for in ss. 48.25-48.31. Civil witness subpoenas may be served by any person authorized by rules of civil procedure. A writ of possession in an action for possession of real property under s. 83.62 may be served by a certified process server as provided in s. 48.27.

Section 2. Subsection (2) of section 48.27, Florida Statutes, is amended to read:

48.27 Certified process servers.—

(2)(a) The addition of a person's name to the list authorizes him or her to serve initial nonenforceable civil process on a person found within the circuit where the process server is certified when a civil action has been filed against such person in the circuit court or in a county court in the state. Upon filing an action in circuit or county court, a person may select from the list for the circuit where the process is to be served one or more certified process servers to serve initial nonenforceable civil process.

(b) The addition of a person's name to the list authorizes him or her to serve criminal witness subpoenas and criminal summonses on a person found within the circuit where the process server is certified. The state in any proceeding or investigation by a grand jury or any party in a criminal action, prosecution, or proceeding may select from the list for the circuit where the process is to be served one or more certified process servers to serve the subpoena or summons.

(c) The addition of a person's name to the list also authorizes him or her to serve a writ of possession in an action for possession of real property under s. 83.62 on a person found within the circuit where the process server is certified.

744044

Section 3. Section 83.62, Florida Statutes, is amended to read:

83.62 Restoration of possession to landlord.—

(1) In an action for possession, after entry of judgment in favor of the landlord, the clerk shall issue a writ to the sheriff, or other person selected by the landlord and authorized by s. 48.27 to serve process, describing the premises and commanding the sheriff to put the landlord in possession after 24 hours' notice conspicuously posted on the premises. Upon entry of judgment in favor of the landlord and issuance of a writ by the clerk, the landlord may select from the list for the circuit where the process is to be served one or more certified process servers to serve the writ. Upon the posting of the writ on the premises, the certified process server shall, within 12 hours of the posting of the writ, provide written notice to the sheriff including the date and time the writ was posted on the premises.

(2) At the time the ~~sheriff executes the~~ writ of possession is executed or at any time thereafter, the landlord or the landlord's agent may remove any personal property found on the premises to or near the property line. Subsequent to executing the writ of possession, the landlord may request the sheriff to stand by to keep the peace while the landlord changes the locks and removes the personal property from the premises. When such a request is made, the sheriff may charge a reasonable hourly rate, and the person requesting the sheriff to stand by to keep the peace shall be responsible for paying the reasonable hourly rate set by the sheriff. Neither the sheriff nor the landlord or the landlord's agent shall be liable to the tenant or any other

744044

party for the loss, destruction, or damage to the property after it has been removed.

Section 4. This act shall take effect July 1, 2011.

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

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to service of process; amending ss. 48.021 and 48.27, F.S.; authorizing certified process servers to serve writs of possession in actions for possession of residential property; amending s. 83.62, F.S.; authorizing a landlord to select a certified process server to serve a writ of possession; requiring a certified process server to provide notice of the posting of the writ to the sheriff; conforming provisions; providing an effective date.