The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

JUDICIARY
Senator Flores, Chair
Senator Joyner, Vice Chair

MEETING DATE: Monday, March 14, 2011
TIME: 1:00 —3:00 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	**SM 954** Flores (Identical HM 557)	Parental Rights Amendment; Urges the Congress of the United States to propose to the states for ratification an amendment to the United States Constitution relating to parental rights. JU 03/09/2011 Not Considered JU 03/14/2011 CF 03/14/2011 If received GO	
	Consideration of proposed committee bill:		
2	**SPB 7066**	Unauthorized Aliens; Requires every employer to use the federal program for electronic verification of employment eligibility in order to verify the employment eligibility of each employee hired on or after a specified date. Requires the Attorney General to request from the Department of Homeland Security a list of employers who are registered with the E-Verify Program and to post that list to the Attorney General's website. Provides that an employer who does not use the program to verify the employment eligibility of the employee is subject to loss of its license, etc.	
3	**SB 318** Siplin (Identical H 55)	Postsecondary Student Fees; Provides an exemption from payment of nonresident tuition at a state university or a Florida College System institution for an undocumented student who meets specified requirements. Requires the Board of Governors of the State University System to adopt regulations and the State Board of Education to adopt rules. JU 03/14/2011 HE CJ BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
4	**SB 262** Ring (Identical H 129)	Intimidation of a Judge; Subjects a person who intimidates or threatens a judge or a member of the judge's immediate family to criminal penalties under certain circumstances. Defines the terms "intimidation or threats" and "judge." JU 03/14/2011 CJ BC	
5	**SB 670** Joyner (Identical H 815)	Powers of Attorney; Provides for a durable power of attorney. Specifies the qualifications for an agent. Provides requirements for the execution of a power of attorney. Provides for the validity of powers of attorney created by a certain date or in another jurisdiction. Provides for the validity of a military power of attorney. Provides for the validity of a photocopy or electronic copy of a power of attorney. Provides for the meaning and effectiveness of a power of attorney, etc. JU 03/14/2011 BI RC	
6	**CS/SB 400** Criminal Justice / Wise (Similar H 81)	Treatment-based Drug Court Programs; Requires all offenders sentenced to a postadjudicatory drug court program who are drug court participants and who are the subject of a violation of probation or community control hearing under specified provisions to have the violation of probation or community control heard by the judge presiding over the drug court program. Increases the number of Criminal Punishment Code scoresheet total sentence points that a defendant may have and be eligible for a postadjudicatory treatment-based drug court program, etc. CJ 02/22/2011 Fav/CS JU 03/14/2011 BC	
7	**SB 866** Bogdanoff (Identical H 567)	Judgment Interest; Requires quarterly adjustments to the rate of interest payable on judgments. Revises the calculation of the interest rate. Conforms provisions to changes made by the act. JU 03/14/2011 GO BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
8	**SB 930** Lynn (Similar H 647)	Protection of Volunteers; Clarifies that in order to fall under the protection of the Florida Volunteer Protection Act, a person performing a service for a nonprofit organization may not receive compensation from the nonprofit organization for that service, regardless of whether the person is receiving compensation from another source. JU 03/14/2011 CF GO	
9	**CS/SB 146** Criminal Justice / Smith (Similar H 449, Compare H 1369, S 134)	Criminal Justice; Cites this act as the "Jim King Keep Florida Working Act." Requires state agencies and regulatory boards to prepare reports that identify and evaluate restrictions on licensing and employment for ex-offenders. Prohibits state agencies from denying an application for a license, permit, certificate, or employment based on a person's lack of civil rights. Clarifies under what circumstances a person may legally deny the existence of an expunged criminal history record, etc. GO 02/08/2011 Favorable CJ 03/09/2011 Fav/CS JU 03/14/2011	
10	**SB 344** Rich (Identical H 125)	Sexual Activities Involving Animals; Provides definitions. Prohibits knowing sexual conduct or sexual contact with an animal. Prohibits specified related activities. Provides penalties. Provides that the act does not apply to certain husbandry, conformation judging, and veterinary practices. CJ 02/22/2011 Favorable AG 03/07/2011 Favorable JU 03/14/2011	

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 954
INTRODUCER:	Senator Flores and others
SUBJECT:	Parental Rights Amendment
DATE:	March 8, 2011
REVISED:	

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

I. Summary:

This Senate Memorial petitions the United States Congress present to the states for ratification an amendment to the United States Constitution establishing an enumerated fundamental parental right.

Although the right of parents to direct the upbringing and education of their children has long been recognized by the United States Supreme Court, this memorial, if the amendment therein proposed were to be enacted, would solidify the fundamental parental right as a constitutionally enumerated right. By enumerating a fundamental parental right, rather than relying on doctrine of the United States Supreme Court, this amendment seeks to ensure that the fundamental parental right is preserved as it now stands and protected from future revision or interpretation due to shifting ideologies of the United States Supreme Court.

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, and each member of the Florida delegation to the United States Congress.

II. Present Situation:

Fundamental Rights, Penumbras, and Non-Enumerated Rights

There are certain rights that the United States Supreme Court has deemed "fundamental" to every American citizen. In the broadest view, those fundamental rights are enumerated in the Bill of Rights. However, the Court has found that fundamental rights are not limited to those specifically enumerated in the United States Constitution. There are other, non-enumerated,

fundamental rights that emanate from the "penumbras" of the enumerated rights. In *Griswold v. Connecticut*, the Court held that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[1] Many long-established and highly regarded fundamental rights are founded in penumbras formed by emanations from enumerated rights, and the Court, generally, treats these like any other fundamental rights.

The association of people, the right to educate a child in a school of the parents' choice, and the right to study any subject that one chooses are all rights not mentioned in the Constitution or the Bill of Rights. However, the First Amendment has been interpreted to include those rights. Likewise, the right to educate one's child as one chooses is not specifically enumerated in the Constitution or Bill of Rights. Rather, it stems from the force of the First and Fourteenth Amendments.[2] In *Griswold*, the Court stated, "Without those peripheral rights the specific rights would be less secure."[3]

These penumbral rights are often derived from history and tradition. This derivation from history and tradition, while logical, creates a more malleable right than could be achieved by enumeration. Because of these characteristics, non-enumerated rights, by their very nature, are subject to revision based on the ebb and flow of differing American and legal ideologies.

Case Law Concerning Parental Rights

In *Wisconsin v. Yoder*, the United States Supreme Court first recognized a fundamental right to parent one's child.[4] There, the Court stated:

> this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.[5]

The Court recognized the state's role as *parens patriae* ("parent of his or her country") to save children from abusive or unfit parents, but recognized that this state interest must be balanced with an understanding that, absent such abuse or danger, parents do traditionally retain certain fundamental rights to direct the upbringing of their children.[6] However, the Court's decision in *Yoder* was somewhat limited by the fact that the Court based its holding on a combination of a fundamental parental right and the right to free exercise of religion.

[1] *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).
[2] *Id*. at 482.
[3] *Id*. at 482-83.
[4] *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).
[5] *Id*.
[6] *Id*. at 230.

In *Troxel v. Granville*, the Court further defined, and definitively established, a fundamental parental right.[7] The Court stated, "The liberty interest at issue in this case-the interest of parents in the care, custody, and control of their children-is perhaps the oldest of the fundamental liberty interests recognized by this Court."[8] The Court recognized a cardinal tenant that the parents' function and freedom "include preparation for obligations the state can neither supply nor hinder."[9] In defining the extent and boundaries of the fundamental parental right, the *Troxel* Court noted that as long as a parent is fit and sufficiently cares for his or her children, the state will have no reason to inject itself into the private realm, nor shall it further question a parent's ability to make decisions in the best interest of the child.[10]

Yet, even with such seemingly established precedent, Justice Souter noted in his concurrence to the *Troxel* decision, "Our cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child."[11] The lack of exact boundaries pointed to by Justice Souter highlights the possibility that the fundamental parental right, as it now stands, is subject to shifting views, legal interpretations, and ideologies. Currently, there exists a fundamental parental right; however, it may be argued that the right and its exact parameters have not been solidified as firmly as they might be if the fundamental parental right were to become an enumerated right.

Methods of Proposing Amendments to the 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."[12] 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 convention in three-fourths of the states.[13]

III. Effect of Proposed Changes:

This Senate Memorial petitions the United States Congress to propose and submit to the states for ratification an amendment to the United States Constitution enumerating a fundamental parental right. In accompanying "whereas clauses," the memorial expresses an intent to ensure that the fundamental parental right recognized in case law by the United States Supreme Court is preserved as it now stands and protected from future revision or interpretation due to shifting ideologies of the United States Supreme Court. The memorial contemplates the creation of a new article of the United States Constitution.

Section 1 of the proposed amendment states that the liberty of parents to direct the upbringing and education of their children is a fundamental right. This provision would have the effect of

[7] See *Troxel v. Granville*, 530 U.S. 57 (2000).
[8] *Id*. at 65.
[9] *Id*. at 65-66.
[10] *Id*. at 68-69.
[11] *Id*. at 78.
[12] U.S. CONST. art. V.
[13] *Id*.

making the fundamental parental right a constitutionally enumerated right. This designation would afford the right the greatest degree of protection from infringement and put the fundamental parental right on the same level with rights such as freedom of speech and the right to bear arms.

Section 2 of the proposed amendment provides that no state, nor the United States itself, may infringe on this right without a showing that such infringement is the only way of achieving a governmental interest of the highest order. This section essentially codifies the standard of strict scrutiny that courts impose when determining whether or not a law that infringes on a fundamental right is constitutional. As a matter of course, most laws or governmental actions analyzed under strict scrutiny will fail on constitutional grounds and be struck down by the courts.

Section 3 of the proposed amendment further solidifies the sanctity of the fundamental parental right. It ensures that no court can apply any international law, nor may the United States adopt any treaty, which would supersede, modify, interpret, or apply to the rights guaranteed by this article. Courts will sometimes interpret the Constitution or laws of the United States by looking to the traditions and laws of other countries as the applicable "history or tradition" on which the United States' Constitution or law is based. This final provision of the proposed amendment would ensure that the above practice is not permitted.

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, and each member of the Florida delegation to the United States Congress.

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.)

None.

B. Amendments:

None.

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:	SPB 7066
INTRODUCER:	For consideration by the Judiciary Committee
SUBJECT:	Unauthorized Aliens
DATE:	March 11, 2011 REVISED:

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

I. Summary:

This proposed committee bill prescribes multiple requirements relating to unauthorized aliens, including:

- Requiring employers, effective January 1, 2012, to verify the employment eligibility of new employees using the federal E-Verify Program, and authorizing the suspension of an employer's license for failure to comply;
- Directing the Department of Corrections to pursue an agreement with the U.S. Department of Homeland Security for the training of department employees as jail enforcement officers to help enforce federal immigration law, pursuant to section 287(g) of the federal Immigration and Nationality Act ("287(g) agreement");
- Requiring the Department of Law Enforcement to take all steps necessary to maintain its 287(g) agreement with the U.S. Department of Homeland Security, under which department employees are trained as task force officers;
- Encouraging sheriffs to pursue 287(g) agreements;
- Codifying state and local law enforcement participation in a federal program (Secure Communities Program) in which the fingerprints of an arrested person are checked against federal databases to determine the person's immigration status;
- Authorizing the Department of Corrections to release certain criminal aliens convicted of nonviolent offenses to the custody of the federal government as part of the Rapid REPAT Program; and
- Requiring the Agency for Workforce Innovation to quantify the costs to the state related to unauthorized immigration and to seek financial renumeration from the federal government.

This bill creates the following sections of the Florida Statutes: 448.30, 448.31, and 945.80. The bill also creates an undesignated section of the Florida Statutes.

II. Present Situation:

Background on Unauthorized Immigration[1]

Immigration into the United States is largely governed by the Immigration and Nationality Act ("INA").[2] The INA utilizes several federal agencies, including the Department of Justice, Department of Homeland Security (DHS), and Department of State to administer and enforce federal immigration policies.[3] An alien is a person present in the United States who is not a citizen of the United States.[4] The INA provides for the conditions whereby an alien may be admitted to and remain in the United States[5] and provides a registration system to monitor the entry and movement of aliens in the United States.[6] An alien may be subject to removal for certain actions, including entering the United States without inspection, presenting fraudulent documents at a port of entry, health reasons, violating the conditions of admission, or engaging in certain other proscribed conduct.[7]

Various categories of legal immigration status exist that include students, workers, tourists, research professors, diplomats, and others.[8] These categories are based on the type and duration of permission granted to be present in the United States, and expire based on those conditions. All lawfully present aliens must have appropriate documentation based on status.[9]

It has been reported that an estimated 825,000 unauthorized immigrants were present in Florida in 2010, representing 4.5 percent of Florida's population of 18,492,000 – a decline from 1.05 million unauthorized immigrants in 2007.[10] Nevertheless, Florida continued to rank third among states in the size of its unauthorized immigrant population.[11] Of Florida's 9,064,000 total work force, 600,000 are unauthorized immigrants, which represents 6.6 percent of the work force (above the national average of 5.2 percent).[12]

[1] Significant portions of the "Present Situation" section of this bill analysis are from the staff analysis of PCB JDC 11-01, prepared by the House Committee on Judiciary (Mar. 3, 2011; used with permission).
[2] 8 U.S.C. s. 1101, et seq.
[3] *See*, *e.g.*, *id* ss. 1103-1104.
[4] *Id.* s. 1101(a)(3).
[5] *Id*. ss. 1181-1182, 1184.
[6] *Id.* ss. 1201(b), 1301-1306.
[7] *Id*. ss. 1225, 1227, 1228, 1229, 1229c, 1231.
[8] *Id*. ss. 201- 210.
[9] *Id*. s. 221.
[10] Jeffrey S. Passel and D'Vera Cohn. "Unauthorized Immigrant Population: National and State Trends, 2010." Washington, DC: Pew Hispanic Center (February 1, 2011).
[11] *Id.*
[12] *Id.*

Enforcement of Immigration Laws

State and local law enforcement officers do not inherently have the authority to enforce federal immigration laws. The INA authorizes areas of cooperation in enforcement between federal, state, and local government authorities.[13]

The Secretary of DHS, acting through the Assistant Secretary of Immigration and Customs Enforcement ("ICE"), may enter into written agreements with a state or any political subdivision of a state so that qualified personnel can perform certain functions of an immigration officer.[14] ICE trains and cross-designates state and local officers to enforce immigration laws as authorized through section 287(g) of the Immigration and Nationality Act. An officer who is trained and cross-designated through the 287(g) program can interview and initiate removal proceedings of aliens processed through the officer's detention facility. Local law enforcement agencies without a 287(g) officer must notify ICE of a foreign-born detainee, and an ICE officer must conduct an interview to determine the alienage of the suspect and initiate removal proceedings, if appropriate. Since January 2006, the 287(g) program has been credited with identifying more than 79,000 individuals, mostly in jails, who are suspected of being in the country illegally.[15]

Florida currently has four law enforcement agencies that participate in the 287(g) program: the Florida Department of Law Enforcement (FDLE), and the sheriff's offices of Bay, Collier, and Duval counties.

Within the Department of Homeland Security is the Law Enforcement Support Center ("LESC"), administered by ICE, answering queries from state and local officials regarding immigration status. A law enforcement agency can check the immigration status of an arrestee or prisoner through LESC twenty-four hours a day, seven days a week. Significant statistics from LESC for FY 2008:

- The number of requests for information sent to LESC increased from 4,000 in FY 1996 to 807,106 in FY 2008.
- During FY 2008, special agents at LESC placed 16,423 detainers on foreign nationals wanted by ICE for criminal and immigration violations.
- The records of more than 250,000 previously deported aggravated felons, immigration fugitives and wanted criminals are now in the NCIC system.
- Special agents at LESC confirmed 8,440 NCIC hits during FY 2008.[16]

[13] *See id.* s. 1357(g)(1)-(9) (permitting the Department of Homeland Security to enter into agreements whereby appropriately trained and supervised state and local officials can perform certain immigration responsibilities); *id*. s. 1373 (establishing parameters for information-sharing between state and local officials and federal immigration officials); *id.* s. 1252c (authorizing state and local law enforcement officials to arrest aliens unlawfully present in the United States who have previously been convicted of a felony and deported).

[14] Section 287(g) of the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1357(g) (1996), as amended by the Homeland Security Act of 2002, Public Law 107-296.

[15] Details taken from information provided on the website of ICE, http://www.ice.gov/news/library/factsheets/287g.htm (last visited March 8, 2011).

[16] Details taken from information provided on the website of ICE, http://www.ice.gov/news/library/factsheets/lesc.htm (last visited March 8, 2011).

Employment & E-Verify

The federal Immigration Reform and Control Act of 1986 (IRCA)[17] made it illegal for any U.S. employer to knowingly:

- Hire, recruit or refer for a fee an alien knowing he or she is unauthorized to work;
- Continue to employ an alien knowing he or she has become unauthorized; or
- Hire, recruit or refer for a fee, any person (citizen or alien) without following the record keeping requirements of the Act.[18]

The law established a procedure that employers must follow to verify that employees are authorized to work in the United States.[19] The procedure requires employees to present documents that establish both the worker's identity and eligibility to work, and requires employers to complete an "I-9" form for each new employee hired.[20] The IRCA provides sanctions to be implemented against employers who knowingly employ aliens who are not authorized to work.[21] Federal law contains no criminal sanction for working without authorization, although document fraud is a civil violation.[22] The United States Citizenship and Immigration Services (USCIS – formerly the INS and now part of the Department of Homeland Security) enforces these provisions.[23]

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[24] which, among other things, created various employment eligibility verification programs, including the Basic Pilot program. Originally, the Basic Pilot program (now referred to as E-Verify) was available in five of the seven States that had the highest populations of unauthorized aliens and initially authorized for only four years. However, Congress has consistently extended the program's life. It expanded the program in 2003, making it available in all fifty States. In 2008, the federal government began requiring any entity that maintained or applied for federal contracts to use E-Verify.[25]

E-Verify allows employers to ensure that they are hiring authorized workers by electronically comparing the identification and authorization information that employees provide with information contained in federal Social Security Administration (SSA) and Department of Homeland Security (DHS) databases. To participate in E-Verify, the employer must sign a memorandum of understanding that governs the system's operation. After enrolling in E-Verify, employers must still complete the I-9 verification process.

[17] Public Law 99-603, 100 Stat. 3359.
[18] 8 U.S.C. s. 1324a.
[19] *Id*.
[20] *Id*.
[21] *Id*. s. 1324a(a)(1)-(2).
[22] *Id*. s. 1324c.
[23] *Id*. s. 1324a.
[24] Public Law 104-208.
[25] History taken from information provided on the website of the Department of Homeland Security, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=84979589cdb76210VgnVCM100000b92ca60aRCRD&vgnextchannel=84979589cdb76210VgnVCM100000b92ca60aRCRD (last visited March 8, 2011).

If the information that the employer submits matches the records in the federal databases, E-Verify immediately notifies the employer that the individual is employment authorized. If the information the employee has provided does not match the information in the federal databases, E-Verify issues a tentative nonconfirmation. Before issuing a tentative nonconfirmation, however, E-Verify will ask the employer to confirm that the information submitted is accurate to avoid inaccurate results based on typographical errors.

If a tentative nonconfirmation is issued, the employee is notified and given an opportunity to contact SSA or DHS to resolve any potential problem. Until there is a final determination, the employer may not terminate the employee for being unauthorized. Upon receipt of a final nonconfirmation, an employer must terminate the employee per the E-Verify memorandum of understanding. Other information regarding E-Verify:

- Free to employers; must register and agree to an MOU.
- Used by more than 243,000 employers.
- On average, 1,000 new employers enroll each week with the program.
- In FY 2010, the E-verify Program ran more than 16 million queries.[26]

E-Verify was the subject of an independent evaluation in 2009. This study concluded that E-Verify was 95.9 percent accurate in its initial determination regarding employment authorization.[27] E-Verify participants reported minimal costs to participate and were generally satisfied with the program.[28]

Law Enforcement and Corrections

Unauthorized Aliens in Prisons

Information is not available to determine the total number of criminal aliens who are in jails and prisons in the United States. However, ICE estimates that 300,000 to 450,000 criminal aliens who are potentially removable are detained each year nationwide at federal, state, and local prisons and jails. These include illegal aliens in the United States who are convicted of any crime and lawful permanent residents who are convicted of a removable offense.

Unauthorized Aliens in Florida Prisons

Florida Model Jail Standard 4.01 provides in part "[w]hen a foreign citizen is received/admitted to a detention facility for any reason, the detention facility shall make notification using the guidelines as set forth by the U.S. Department of State."[29] Generally, when a person is booked

[26] Program description taken from information provided on the website of the Department of Homeland Security, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=a16988e60a405110VgnVCM1000004718190aRCRD&vgnextchannel=a16988e60a405110VgnVCM1000004718190aRCRD (last visited March 8, 2011).
[27] United States Citizenship and Immigration Services; 2009 Westat Report at 116, http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf (last visited March 8, 2011).
[28] 2009 Westat Report at 169.
[29] http://www.flsheriffs.org/our_program/florida-model-jail-standards/?index.cfm/referer/content.contentList/ID/408/ (last visited March 8, 2011).

into a local jail, jail officials use the information given by the detainee to help determine the person's citizenship status. If a detainee admits he or she is not a U.S. citizen, or if there is reason to believe a detainee is not a U.S. citizen, jail officials attempt to determine the detainee's citizenship status by submitting the detainee's identification information through LESC.

ICE agents working in Florida prison reception centers investigate newly admitted inmates to identify those who may be aliens. If ICE notifies the Department of Corrections that they want to take an alien inmate into custody, the inmate is released into ICE custody when his or her sentence is completed. ICE may refuse to take custody of an alien inmate in some cases, such as when the alien is from a country to which he or she cannot be deported. Most alien inmates who complete their sentences in Florida prisons are released to ICE for further immigration processing, including possible deportation. These inmates are deported promptly after release from prison if they have been ordered out of the country and have no further appeals of their final deportation order.

The chart below shows the number of alien inmates released from Florida custody to ICE from 2000 through 2007:

YEAR OF RELEASE	EXPIRATION OF SENTENCE	COMMUNITY SUPERVISION	TOTAL
2000	433	169	602
2001	730	326	1,056
2002	793	323	1,116
2003	798	383	1,181
2004	752	348	1,100
2005	746	326	1,072
2006	754	354	1,108
2007	799	321	1,120
2008	885	337	1,222
TOTAL	**6,690**	**2,887**	**9,577**

Confirmed Aliens in Florida Prisons as of November 30, 2010[30]

PRIMARY OFFENSE	NUMBER OF CONFIRMED ALIENS	Percent
MURDER/MANSLAUGHTER	1,278	22.66
SEXUAL/LEWD BEHAVIOR	1,000	17.73
ROBBERY	433	7.68
VIOLENT, OTHER	765	13.56
BURGLARY	733	12.99
PROPERTY THEFT/FRAUD/DAMAGE	220	3.90
DRUGS	976	17.30
WEAPONS	86	1.52

[30] Supplied by the Florida Department of Corrections.

OTHER	150	2.66
TOTAL	**5,641**	**100.00**

ICE Cooperative Programs

Immigration and Customs Enforcement (ICE), which is the investigative arm of the Department of Homeland Security,[31] administers a number of programs that involve cooperation between federal immigration officers and state and local law enforcement. Florida currently participates in some of these programs aimed at identifying unauthorized immigrants in the state who have committed crimes.

The umbrella program that encompasses all other cooperative law enforcement programs is called ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS). ACCESS was developed to promote the various programs or tools that ICE offers to assist state, local, and tribal law enforcement agencies. Under this initiative, ICE works closely with other law enforcement agencies to identify an agency's specific needs or the local community's unique concerns. In developing an ACCESS partnership agreement, ICE representatives will meet with the requesting agency to assess local needs and draft appropriate plans of action. Based upon these assessments, ICE and the requesting agency will determine which type of partnership is most beneficial and sustainable before entering into an official agreement.[32]

The section 287(g) program, the Secure Communities Program,[33] the Criminal Alien Program,[34] and the Law Enforcement Support Center are all ACCESS initiatives currently operating in Florida.

Section 287(g)

For a discussion of s. 287(g) agreements, see the discussion of **Enforcement of Immigration Laws** above.

Secure Communities

The Secure Communities program assists in the identification and removal of criminal aliens held in local and state correctional facilities by using technology to share national, state, and local law enforcement data, such as fingerprint-based biometric information sharing, among agencies. Fingerprinting technology is used during the booking process to quickly and accurately

[31] U.S. Immigration and Customs Enforcement, *ICE Overview*, *available at* http://www.ice.gov/about/overview/ (last visited Mar. 11, 2011).
[32] U.S. Immigration and Customs Enforcement, *ICE ACCESS*, *available at* http://www.ice.gov/access/ (last visited Mar. 10, 2011).
[33] U.S. Immigration and Customs Enforcement, *Secure Communities Activated Jurisdictions*, *available at* http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf (last visited Mar. 10, 2011).
[34] Department of Homeland Security Office of Inspector General, *U.S. Immigration and Customs Enforcement Identification of Criminal Aliens in Federal and State Custody Eligible for Removal from the United States*, (Jan. 2009), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_11-26_Jan11.pdf (last visited Mar. 10, 2011).

determine the immigration status of individuals arrested. The program focuses first on those who have been charged with or convicted of the most dangerous crimes. Fingerprints for all arrested individuals are submitted during the booking process and are checked against FBI criminal history records and DHS records.[35] As of June 22, 2010, ICE was using this information sharing capability in all Florida jurisdictions.[36]

Criminal Alien Program

The Criminal Alien Program (CAP) identifies, processes and removes criminal aliens incarcerated in federal, state, and local prisons and jails throughout the U.S. and in Florida. It was created to prevent criminal aliens from being released into the general public. The program secures a final removal order, prior to the termination of criminal aliens' sentences whenever possible. CAP deports criminals after their sentence is served and applies to aliens who have been convicted of any crime.[37] CAP agents work in state field offices and screen removable criminals through an electronic records check and interview process. Correctional facilities are requested to contact ICE prior to release of a criminal alien to allow ICE time to assume custody.[38]

Law Enforcement Support Center

Also within the Department of Homeland Security is the Law Enforcement Support Center (LESC), administered by ICE, answering queries from state and local officials regarding immigration status. A law enforcement agency can check the immigration status of an arrestee or prisoner through LESC twenty-four hours a day, seven days a week. Significant statistics from LESC for FY 2008:

- The number of requests for information sent to LESC increased from 4,000 in FY 1996 to 807,106 in FY 2008.
- During FY 2008, special agents at LESC placed 16,423 detainers on foreign nationals wanted by ICE for criminal and immigration violations.
- The records of more than 250,000 previously deported aggravated felons, immigration fugitives and wanted criminals are now in the NCIC system.
- Special agents at LESC confirmed 8,440 NCIC hits during FY 2008.[39]

[35] U.S. Immigration and Customs Enforcement, *Secure Communities, available at* http://www.ice.gov/secure_communities/ (last visited Mar. 10, 2011).
[36] U.S. Immigration and Customs Enforcement, *Secure Communities Activated Jurisdictions, available at* http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf (last visited Mar. 10, 2011).
[37] U.S. Immigration and Customs Enforcement, *Criminal Alien Program, available at http://www.ice.gov/criminal-alien-program/* (last visited Mar. 10, 2011).
[38] Department of Homeland Security Office of Inspector General, *U.S. Immigration and Customs Enforcement Identification of Criminal Aliens in Federal and State Custody Eligible for Removal from the United States*, 3 (Jan. 2009), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_11-26_Jan11.pdf (last visited Mar. 10, 2011).
[39] Details taken from information provided on the website of ICE, http://www.ice.gov/news/library/factsheets/lesc.htm (last visited Mar. 8, 2011).

Rapid REPAT

The ICE Rapid Removal of Eligible Parolees Accepted for Transfer (REPAT) program, in which Florida does not currently participate, is designed to expedite the deportation process of criminal aliens by allowing selected criminal aliens incarcerated in U.S. prisons and jails to accept early release in exchange for voluntarily returning to their country of origin.[40]

Rapid REPAT is a law enforcement tool that ensures that all criminal aliens serving a time in prison are identified and processed for removal prior to their release. The identification and processing of incarcerated criminal aliens prior to release reduces the burden on the taxpayer and ensures that criminal aliens are promptly removed from the U.S. upon completion of their criminal sentence. This program allows ICE to more effectively identify and quickly remove criminal aliens from the United States. ICE Rapid REPAT also allows ICE and participating states to reduce costs associated with detention space.[41]

Key Elements of Rapid REPAT:

- In states where Rapid REPAT is implemented, certain aliens who are incarcerated in state prison and who have been convicted of non-violent offenses may receive conditional release if they have a final order of removal and agree not to return to the United States;
- Eligible aliens agree to waive appeal rights associated with their state conviction(s) and must have final removal orders; and
- If aliens re-enter the United States, state statutes must provide for revocation of parole and confinement for the remainder of the alien's original sentence. Additionally, aliens may be prosecuted under federal statutes that provide for up to 20 years in prison for illegally reentering the United States.[42]

III. Effect of Proposed Changes:

This proposed committee bill prescribes multiple requirements relating to unauthorized aliens.

Mandatory Participation by Employers in E-Verify (Sections 1-3)

The bill requires every employer who hires a new employee on or after January 1, 2012, to register with the federal E-Verify Program and to verify the employment eligibility of the newly hired employee. An "employer" includes any person or agency employing one or more employees in this state. The employer must maintain a record of the verification for the longer of three years or the duration of the employment.

An employer who does not comply with the requirement is subject to having the employer's licenses suspended during the period of noncompliance. The bill specifies that suspension of a license must comply with a provision of the Administrative Procedure Act (APA), s. 120.60(5), F.S., which requires notice to the licensee. The bill's definition of "license" includes licenses

[40] U.S. Immigration and Customs Enforcement, *Rapid REPAT, available at* http://www.ice.gov/rapid-repat/ (last visited Mar. 11, 2011).
[41] *Id.*
[42] *Id.*

issued by agencies not subject to the APA (e.g., municipalities). Thus, the Legislature may wish to specify the manner in which licenses are to be suspended in those cases.

Under the bill, if an employer terminates an employee upon a determination that the employee is not work-eligible, the employer is not liable for wrongful termination, provided the employer complies with the E-Verify regulations.
The bill directs the Attorney General to request quarterly from the federal government a list of Florida employers registered with the E-Verify Program and to make the list available on the Attorney General's website.

These E-Verify requirements are proposed for codification in a new section of the Florida Statutes, s. 448.31, F.S. The bill also creates a corresponding definitions section, s. 448.30, F.S. In addition, the bill directs the Division of Statutory Revision to publish the two new sections as part III of ch. 448, F.S., titled "Unauthorized Aliens." Chapter 448, F.S., relates to general labor regulations.

Law Enforcement and Criminal Justice Cooperation with Federal Government (Section 4)

The bill expresses the intent of the Legislature that law enforcement and criminal justice agencies in the state work cooperatively with the Federal Government to:

- Identify unauthorized immigrants and enforce state and federal immigration laws, and
- To maximize opportunities to transfer custody and detention of unauthorized immigrants who are accused or convicted of crimes from state and local governments to the federal government.

Delegated Enforcement Authority (287(g) Agreements)

The bill calls for increased state participation in delegated authority from the federal government to enforce immigration laws under s. 287(g) of the federal Immigration and Nationality Act. Specifically, the bill:

- Directs the Department of Corrections to pursue an agreement with the Department of Homeland Security to have departmental employees or contractors trained as jail enforcement officers. If the department has not executed an agreement with the Department of Homeland Security by November 1, 2011, it must identify, in a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives, the obstacles to entering into the agreement. The department also must report annually on activities taken under the agreement.
- Provides statutory guidance related to the Department of Law Enforcement's existing 287(g) agreement with the federal government to have employees trained as task force officers. The department must report annually on activities under the agreement.
- Requires county sheriffs to explore the feasibility of signing 287(g) agreements with the Department of Homeland Security to have employees trained as either jail enforcement officers or task force officers. The bill specifies that if a sheriff determines that an agreement is feasible, he or she shall make such a request to the department.

Identification of Aliens upon Arrest (Secure Communities Program)

The bill codifies the current participation by the Department of Law Enforcement and all 67 county sheriffs in the Secure Communities Program operated by U.S. Immigration and Customs Enforcement (ICE). It does so by:

- Requiring the Department of Law Enforcement to take all steps necessary to maintain its agreement with ICE, under which fingerprints submitted to the department by local law enforcement agencies upon the arrest of any individual are automatically checked against federal databases to assess the immigration status of the arrested person.
- Requiring arresting agencies to participate in the submission of fingerprints through the program. Because the bill codifies this requirement, it appears that it would become a violation of state law if a sheriff, for example, refused to participate in the program.

Under the Secure Communities Program, ICE is automatically notified when fingerprint data establishes that a person is an unauthorized alien. The bill requires an arresting agency to affirmatively notify the U.S. Department of Homeland Security if the agency learns – independent of the fingerprint process – that an arrestee is not lawfully present in the United States (e.g., if an arrestee volunteered the information).

Removal and Deportation of Criminal Aliens (Section 5)

The bill authorizes the Department of Corrections to participate in the Rapid REPAT Program administered by U.S. Immigration and Customs Enforcement (ICE), under which nonviolent criminal aliens may be released from the state prison system to the custody and control of ICE. In addition to the prisoner being convicted of a nonviolent offense, the department must have received from ICE a final order of removal, and the secretary must determine that removal is appropriate. The bill specifies that a prisoner would not be eligible for release and repatriation if he or she would not meet the criteria for control release in Florida.[43] The bill does not require that the person have served a particular portion of his or her sentence.

Under the terms of the proposed statute, if the prisoner returns to the United States unlawfully, his or her release is revoked, and the department shall seek the prisoner's return to Florida to complete the remainder of his or her sentence. The department shall notify each prisoner who is eligible for removal of this condition.

[43] **Note**: Due to a drafting error by professional staff of the Senate Committee on Judiciary, the cross-reference to the control release statute (see line 238) inadvertently omits a category of prisoners who are ineligible for control release under s. 947.146(3)(b), F.S. Because prisoners in this category would not likely qualify as "nonviolent," which is a condition precedent for release under the Rapid REPAT Program, the cross-reference should be corrected to make it abundantly clear that such prisoners are not eligible for release under either control release or the Rapid REPAT Program. Section 947.146, F.S., creates the Control Release Authority (CRA), which is composed of members of the Parole Commission. The CRA is required to implement a system for determining the number and type of inmates who must be released into the community under control release in order to maintain the state prison system between 99 and 100 percent of its total capacity.

Study on Costs of Unauthorized Immigration; Request for Federal Reimbursement (Section 6)

The bill directs the Agency for Workforce Innovation (AWI or agency) to conduct a study that quantifies the costs to the state attributable to unauthorized immigration. The shall prepare the report in consultation with the Legislature's Office of Economic and Demographic Research, and submit it to the Governor, the President of the Senate, and the Speaker of the House of Representatives by December 1, 2011. Based on the quantified costs and within a month after submitting the report, AWI shall request from the appropriate federal agency or official:

- reimbursement to the state of the quantified costs; or
- a corresponding reduction or forgiveness of any moneys owed to the federal government by the state due to borrowing to fund unemployment compensation claims.

Due to the increasing unemployment rate in the state, the Unemployment Compensation Trust Fund has been paying out more funds than it has been collecting. The trust fund fell into deficit in August 2009, and since that time the state has requested more than $2 billion in federal advances in order to continue to fund unemployment compensation claims.[44]

Effective Date (Section 7)

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:

States are generally able to legislate in areas not controlled by federal law. "Congress has the power under the Supremacy Clause of Article VI of the [United States] Constitution to preempt state law."[45] Provisions comparable to those included in this proposed committee bill have been passed in other states and have faced legal challenges under the

[44] As of February 17, 2011. See U.S. Department of Treasury, Bureau of Public Debt, Treasury Direct, *Title XII Advance Activities Schedule*, http://www.treasurydirect.gov/govt/reports/tfmp/tfmp_advactivitiessched.htm (last visited Feb. 21, 2011).
[45] *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 509 (1989).

federal preemption doctrine. For instance, a challenge to the employment verification provision in Arizona's 2007 law is currently pending before the U.S. Supreme Court.[46]

In determining whether a state law is preempted, "the purpose of Congress is the ultimate touchstone."[47] In the Immigration Reform and Control Act of 1986, Congress provided, "[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."[48]

The provision in the bill requiring employers to register with E-Verify authorizes sanctions in the form of license suspension. The U.S. Court of Appeals for the Ninth Circuit upheld against a preemption challenge a similar portion of an Arizona law requiring employers to use the federal Internet verification and authorizing licensure sanctions.[49] The Ninth Circuit reasoned that Arizona's revocation of business licenses fits squarely within the exception under the Immigration Reform and Control Act. In addition, the court rejected the plaintiff's argument that the law was impliedly preempted because the federal statute created E-Verify as a voluntary pilot program and Arizona made it mandatory. The court explained that, although Congress did not mandate E-Verify, it plainly envisioned and endorsed its increased usage through expansion of the pilot program.[50] As noted, the U.S. Supreme Court granted certiorari to consider the question of preemption.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The mandatory use of E-Verify by all employers may have an economic impact on private employers. However, there is no fee for the use of the E-Verify Program, and employers are currently required to verify the immigration status of new employees.

Employers who fail to comply with the proposed committee bill's requirement to register with E-Verify and verify the employment eligibility of people hired on or after January 1, 2012, are subject to suspension of their licenses.

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[46] See *Chamber of Commerce of the United States, et. al. v. Whiting* (Case No. 09-115; argued before the U.S. Supreme Court on December 8, 2010).
[47] *Altria Group, Inc. v. Good*, 129 S.Ct. 538, 543 (2008).
[48] *See* 8 U.S.C. s. 1324a(h)(2) (unlawful employment of aliens).
[49] *Chicanos Por La Causa, Inc., v. Napolitano,* 558 F.3d 856 (9th Cir. 2009), *cert granted, Chamber of Commerce of U.S. v. Candelaria,* 130 S.Ct. 3498 (2010).
[50] *Chicanos Por La Causa*, 558 F.3d at 865-67.

C. Government Sector Impact:

The bill directs each county sheriff to explore the feasibility of entering into an agreement with the U.S. Department of Homeland Security to have law enforcement officers trained to help enforce federal immigration law. Costs related to evaluating the feasibility should not be significant. Although the bill requires the sheriff to request an agreement with the federal government if the sheriff concludes that such a relationship is feasible, the bill does not specifically require the sheriff to execute an agreement, and U.S. Immigration and Customs Enforcement (ICE) may decline to participate. A sheriff's office that chooses to enter into such an agreement may experience workload costs while any participating officers are not performing regular assignments during the period they are being trained by ICE.

The Department of Corrections may experience some administrative costs in identifying new and existing inmates who are eligible for release and transfer to federal custody under the Rapid REPAT Program. However, these costs may likely be offset by savings to the state associated with reduced detention space and costs in the state prison system.

The bill requires the Agency for Workforce Innovation (AWI or the agency) to conduct a study of the fiscal impacts of unauthorized immigration on the state. In addition, the bill requires AWI to request from the federal government reimbursement of those quantified cost or corresponding relief from moneys owed to the federal government from borrowing related to the payment of unemployment compensation.

The agency will incur costs related to preparation of the required study. To the extent the state is successful in securing federal reimbursement or other remuneration for costs related to unauthorized immigration, the state may benefit fiscally.

The mandatory use of E-Verify by all employers may have an economic impact on governmental employers.

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.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Flores) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. The Division of Statutory Revision shall designate ss. 448.30 and 448.31, Florida Statutes, as created by this act, as part III of chapter 448, Florida Statutes, titled "UNAUTHORIZED IMMIGRANTS."

Section 2. Section 448.30, Florida Statutes, is created to read:

448.30 Definitions.—As used in this part, the term:

(1) "Agency" means a department, board, bureau, district, commission, authority, or other similar body of this state or a

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county, municipality, special district, or other political subdivision of this state which issues a license for purposes of operating a business in this state or in any jurisdiction within this state.

(2) "Employee" means any person, other than an independent contractor, who, for consideration, provides labor or services to an employer in this state.

(3) "Employer" means a person or agency that employs one or more employees in this state. In the case of an independent contractor, the term means the independent contractor and does not mean the person or agency that uses the contract labor.

(4) "E-Verify Program" means the program for electronic verification of employment eligibility which is operated by the United States Department of Homeland Security, or any successor program.

(5) "Independent contractor" means a person that carries on an independent business, contracts to do a piece of work according to its own means and methods, and is subject to control only as to results.

(6) "License" means any license, permit, certificate, approval, registration, charter, or similar form of authorization that is required by law and issued by any agency for the purpose of operating a business in this state. The term includes, but is not limited to, articles of incorporation, a certificate of partnership, a partnership registration, articles of organization, and a transaction privilege tax license.

Section 3. Section 448.31, Florida Statutes, is created to read:

448.31 Verification of employment eligibility.—

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(1) An employer who hires a new employee on or after July 1, 2012, shall:

(a) Register with the E-Verify Program;

(b) Upon acceptance on or after that date of an offer of employment by the new employee, verify the employment eligibility of the employee through, and in accordance with the requirements of, the E-Verify Program; and

(c) Maintain a record of the verification for 3 years after the date of hire or one year after the date employment ends, whichever is longer.

(2)(a) The requirements of subsection (1) do not apply if the new employee presents to the employer one of the following documents as part of the I-9 process for verifying employment eligibility under federal law:

1. An unexpired United States passport or United States passport card;

2. An unexpired driver's license that is issued by a state or outlying possession of the United States and that contains a photograph of the employee;

3. An unexpired foreign passport that contains a United States visa evidencing applicable work authorization and a corresponding unexpired Form I-94; or

4. A secure national identification card, or similar document issued pursuant to federal law.

(b) The employer shall maintain, for 3 years after the date of hire or one year after the date employment ends, whichever is longer, a record of the type of document the employee presented, including a legible photocopy of the document. Photocopies may only be used for the verification process and must be retained

with the federal Form I-9.

(3) The Attorney General shall quarterly request from the United States Department of Homeland Security a list of employers in this state who are registered with the E-Verify Program. The Attorney General shall make the list available on the website for the Office of the Attorney General but shall include a conspicuous notation that employers who comply with subsection (2) are exempt from the requirement to register with the E-Verify Program.

(4) An employer who fails to comply with this section is subject to the suspension of any license held by the employer through the period of noncompliance. The suspension of a license pursuant to this subsection must comply with the provisions of s. 120.60(5).

(5) An employer who terminates an employee in accordance with federal regulations upon a final determination of ineligibility for employment through the E-Verify Program is not liable for wrongful termination.

Section 4. Law enforcement and criminal justice agency coordination with Federal Government on unauthorized immigration.—

(1) LEGISLATIVE INTENT.—It is the intent of the Legislature that law enforcement and criminal justice agencies in this state work cooperatively with the Federal Government in the identification of unauthorized immigrants and the enforcement of state and federal immigration laws. It further is the intent of the Legislature to maximize opportunities to transfer responsibility for the custody and detention of unauthorized immigrants who are accused or convicted of crimes from state and

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local governments to the Federal Government in order to ensure the safety of the residents of this state and to reduce costs to the criminal justice system, while also protecting the due process rights of individuals accused or convicted of crimes.

(2) DELEGATED ENFORCEMENT AUTHORITY.—

(a)1. The Department of Corrections shall request from the United States Department of Homeland Security approval to enter into a memorandum of agreement to have employees or contractors of the Department of Corrections trained by the Department of Homeland Security as jail enforcement officers under s. 287(g) of the federal Immigration and Nationality Act. The Department of Corrections shall take all actions necessary to maintain the agreement.

2. The Department of Corrections shall report by November 1, 2011, to the Governor, the President of the Senate, and the Speaker of the House of Representatives on the status of implementation of this paragraph. If the department has not entered into a memorandum of agreement with the Department of Homeland Security by that date, the department shall identify in the report any barriers to full implementation of this paragraph.

3. By February 1 of each year, the Department of Corrections shall report to the Governor, the President of the Senate, and the Speaker of the House of Representatives on the enforcement activities conducted under this paragraph, including, but not limited to, the number of inmates identified as being unauthorized immigrants, placed in federal custody, or deported.

(b)1. The Department of Law Enforcement shall request from

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the United States Department of Homeland Security approval to enter into a memorandum of agreement to have employees of the Department of Law Enforcement trained by the Department of Homeland Security as task force officers under s. 287(g) of the federal Immigration and Nationality Act. The Department of Law Enforcement shall take all actions necessary to maintain the agreement.

2. By February 1 of each year, the Department of Law Enforcement shall report to the Governor, the President of the Senate, and the Speaker of the House of Representatives on the enforcement activities conducted under this paragraph.

(c) The sheriff of each county shall evaluate the feasibility of entering into a memorandum of agreement with the United States Department of Homeland Security to have employees of the sheriff trained by the Department of Homeland Security as jail enforcement officers or task force officers under s. 287(g) of the federal Immigration and Nationality Act. The Department of Law Enforcement, upon request by a sheriff, shall assist the sheriff with the feasibility evaluation. If the sheriff determines that entering into an agreement is feasible, the sheriff shall make a request for an agreement to the Department of Homeland Security.

(3) IDENTIFICATION UPON ARREST.—

(a) When a person is confined in a jail, prison, or other criminal detention facility, the arresting agency shall make a reasonable effort to determine the nationality of the person and whether the person is present in the United States lawfully, including, but not limited to, participating in the submission of fingerprints pursuant to the agreement under paragraph (b).

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If the arresting agency establishes, independent of the submission of fingerprints, that the person is not lawfully present in the United States, the agency shall notify the United States Department of Homeland Security.

(b) The Department of Law Enforcement shall enter into, and take all actions necessary to maintain, a memorandum of agreement with the Department of Homeland Security to implement a program through which fingerprints submitted by local law enforcement agencies during the arrest and booking process are checked against federal databases in order to assess the immigration status of individuals in custody.

(c) This subsection may not be construed to deny a person bond or to prevent release of a person from confinement if the person is otherwise eligible for release. However, for the purpose of the bail determination required by s. 903.046, Florida Statutes, a determination that the person is not present in the United States lawfully raises a presumption that there is a risk of flight to avoid prosecution.

Section 5. Section 945.80, Florida Statutes, is created to read:

945.80 Removal and deportation of criminal aliens.—

(1) Notwithstanding any law to the contrary, and pursuant to s. 241(a)(4)(B)(ii) of the federal Immigration and Nationality Act, the secretary of the department shall release a prisoner to the custody and control of the United States Immigration and Customs Enforcement if:

(a) The prisoner was convicted of a nonviolent offense;

(b) The department has received a final order of removal for the prisoner from the United States Immigration and Customs

Enforcement; and

(c) The secretary determines that removal is appropriate and in the best interest of the state.

A person is ineligible for release under this section if he or she would be ineligible for control release under s. 947.146(3)(a)-(m).

(2)(a) The department shall identify, during the inmate-reception process and among the existing inmate population, prisoners who are eligible for removal under this section and determine whether removal is appropriate and in the best interest of the state.

(b) The department shall coordinate with federal authorities to determine the eligibility of a prisoner for removal and to obtain a final order of removal.

(3) Upon approval for removal of the prisoner under this section, the department shall establish a release date for the prisoner to be transferred to federal custody. The department shall maintain exclusive control of and responsibility for the custody and transportation of the prisoner until the prisoner is physically transferred to federal custody.

(4)(a) If a prisoner who is released under this section returns unlawfully to the United States, upon notice from any state or federal law enforcement agency that the prisoner is incarcerated, the secretary shall revoke the release of the prisoner and seek the return of the prisoner to the custody of the department in order to serve the remainder of the sentence imposed by the court. The prisoner is not eligible for probation or community control with respect to any sentence affected by

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the release under this section.

(b) The department shall notify each prisoner who is eligible for removal of the provisions of this subsection.

(5) The secretary of the department may enter into an agreement with the United States Department of Homeland Security regarding the rapid repatriation of removable custodial aliens from the United States pursuant to this section.

(6) The department shall compile statistics on implementation of this section, including, but not limited to:

(a) The number of prisoners who are transferred to federal custody;

(b) The number of prisoners who reenter the United States; and

(c) The annual cost-avoidance achieved.

(7) To the extent practicable, this section applies to all prisoners actually in confinement on, and all prisoners taken into confinement after, July 1, 2011.

Section 6. (1) The Legislature finds that the costs incurred by the state related to unauthorized immigration are exacerbated by the failure of the Federal Government to enforce immigration laws adequately and to adopt and implement comprehensive reforms to immigration laws in order to control and contain unauthorized immigration more effectively.

(2)(a) The Agency for Workforce Innovation, in consultation with the Office of Economic and Demographic Research, shall prepare a report by December 1, 2011, quantifying the costs to the state which are attributable to unauthorized immigration. The agency shall submit the report to the Governor, the President of the Senate, and the Speaker of the House of

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Representatives by that date.

(b) Before January 1, 2012, the director of the Agency for Workforce Innovation shall, in consultation with the Office of the Governor, submit to the appropriate federal agency or official a request, based on the total costs quantified under paragraph (a), for reimbursement to the state of those costs or a corresponding reduction in or forgiveness of any debt, interest payments, or other moneys owed by the state to the Federal Government as a result of borrowing from the Federal Government to fund unemployment compensation claims.

Section 7. 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 unauthorized immigrants; directing the Division of Statutory Revision to designate specified new statutory sections as part III of ch. 448, F.S., and name the part "Unauthorized Immigrants"; creating s. 448.30, F.S.; defining terms; creating s. 448.31, F.S.; requiring every employer to use the federal program for electronic verification of employment eligibility in order to verify the employment eligibility of each employee hired on or after a specified date; providing an exception in the case of employees who present specified documents to the employer; requiring the Attorney General to request from the Department of Homeland Security a

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list of employers who are registered with the E-Verify Program and to post that list to the Attorney General's website; providing that an employer who does not comply with the employment requirements is subject to loss of its license to do business in this state; providing that an employer who terminates an employee under certain conditions is not liable for wrongful termination; providing legislative intent for law enforcement and criminal justice agencies to coordinate with the Federal Government on the identification of unauthorized immigrants and enforcement of immigration laws; directing the Department of Corrections and the Department of Law Enforcement to pursue and maintain agreements with the United States Department of Homeland Security for the training of certain personnel related to the enforcement of immigration laws; requiring reports on activity under the agreements; directing sheriffs to evaluate the feasibility of entering into such agreements; directing arresting agencies to make reasonable efforts to determine whether arrestees are present in the United States lawfully; requiring the Department of Law Enforcement to enter into and maintain an agreement with the United States Department of Homeland Security for checking fingerprints of arrestees against federal databases to determine immigration status; providing for a presumption as to risk of flight in order to avoid prosecution; creating s. 945.80, F.S.; requiring the Department of Corrections to release nonviolent inmates to the custody of the United States Immigration and Customs Enforcement under certain circumstances; requiring the department to identify inmates who are eligible for removal and deportation; establishing certain procedures for the transfer of

an inmate to federal custody; providing for a released inmate to serve the remainder of his or her sentence upon unlawfully returning to the United States; authorizing the secretary of the department to enter into an agreement with the Department of Homeland Security regarding the rapid repatriation of removable custodial aliens; requiring the department to compile statistics; providing for applicability; providing legislative findings related to costs incurred by the state from unauthorized immigration; requiring the Agency for Workforce Innovation to prepare a report quantifying the costs; requiring the director of the agency to submit to the Federal Government a request for reimbursement of the costs or a reduction in moneys owed to the Federal Government as a result of borrowing to fund unemployment compensation claims; 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 318
INTRODUCER:	Senator Siplin
SUBJECT:	Postsecondary Student Fees
DATE:	March 11, 2011
REVISED:	

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

I. Summary:

This bill provides that beginning with the 2011 fall term, an undocumented student, other than a nonimmigrant alien, is exempt from paying nonresident tuition at a state university or Florida College System institution if the student meets the following requirements:

- Attended high school in Florida for 3 or more years;
- Graduated from a Florida high school or attained high school equivalency;
- Registered as an entering student or is currently enrolled at a state university or Florida College System institution;
- Files an affidavit stating that the student has filed an application to legalize his or her immigration status or will do so as soon as he or she is eligible.

The bill also directs the Board of Governors to adopt regulations and the State Board of Education to adopt rules to implement the nonresident tuition exemption.

This bill creates section 1009.215, Florida Statutes.

II. Present Situation:

Resident Status for Tuition Purposes

Section 1009.21, F.S., addresses the determination of residency status for tuition purposes at state universities and public colleges. The following definitions are provided in statute:

- Dependent child: any person, whether living with a parent or not, who is eligible to be claimed by a parent as a dependent pursuant to the federal income tax code;[1]
- Resident for tuition purposes: a person who qualifies for the in-state tuition rate;[2]
- Parent: the natural or adoptive parent or legal guardian of a dependent child;[3]
- Legal resident or resident: a person who has maintained his or her residence in this state for the preceding year, has bought and occupied a home as his or her residence, or has established a domicile.[4]

To meet the residency requirement, a person, or a dependent child's parent or parents, must have established and maintained legal residence in-state for at least 12 consecutive months immediately preceding the student's enrollment in an institution of higher education.[5] Additionally, the applicant is required to make a statement regarding length of residency in-state, and establish a bona fide domicile, for him or herself, or for a parent if the applicant is a dependent child.[6] The purpose of the statement is to demonstrate that the in-state residency is not intended to be temporary and for the sole purpose of qualifying for in-state tuition. The law also recognizes residency where a dependent child lives with an adult relative other than a parent in certain circumstances.[7]

Additionally, specific classes of military persons and their spouses and dependent children classified as qualifying for residents for tuition purposes include:

- Active duty members of the Armed Services or the Florida National Guard residing or stationed in-state who qualify for the tuition assistance program;[8]
- Active duty members of the Armed Services attending a public community college or state university within 50 miles of the military establishment where they are stationed, if the military establishment is within a county contiguous to Florida;[9]
- Active duty members of the Canadian military residing or stationed in-state under the North American Air Defense agreement attending a community college or state university within 50 miles of the military establishment where stationed;[10]
- Active duty members of a foreign nation's military who are serving as liaison officers residing or stationed in this state, attending a community college or state university within 50 miles of the military establishment where stationed.[11]

[1] Section 1009.21(1)(a), F.S.
[2] Section 1009.21(1)(g), F.S.
[3] Section 1009.21(1)(f), F.S.
[4] Section 1009.21(1)(d); Section222.17(1), F.S., provides a method for manifesting and evidencing domicile by filing with the circuit court clerk of the county of residence a sworn statement showing an intent to maintain a permanent home in that county.
[5] Section 1009.21(2)(a)1., F.S.
[6] Section 1009.21(2)(a)2., F.S.
[7] Section 1009.21(2)(b), F.S.
[8] Sections 250.10(7) and (8), F.S., authorizes the Adjutant General to establish education assistance and tuition exemption programs for members in good standing of the active Florida National Guard, provided that certain conditions are met.
[9] Section 1009.21(10)(b), F.S.
[10] Section 1009.21(10)(j), F.S.
[11] Section 1009.21(10)(k), F.S.

Undocumented Alien Students

Undocumented aliens, with certain exceptions as provided in federal law, may not establish legal residence in the state for tuition purposes because their residency in the state is in violation of federal law, as they have not been properly admitted into the United States. Undocumented aliens are accordingly classified as nonresidents for tuition purposes. The state may not bar undocumented aliens from attending elementary, middle, or secondary schools.[12]

Due to the undocumented status of these individuals, the state is unable to reliably estimate their numbers. Moreover, Florida school districts are precluded from collecting data on undocumented aliens who are attending public schools pursuant to a consent decree.[13]

Although the United States Supreme Court has held that states must provide public education to all students equally regardless of immigration status at the elementary, middle, and secondary levels,[14] the Court has not directly addressed the issue of undocumented immigrant access to higher education.[15] The Court has struck down a Maryland state policy on Supremacy Clause grounds because it denied in-state tuition to non-immigrant aliens holding G-4 visas even if such aliens were state residents who would have otherwise qualified for in-state tuition.[16] The Maryland law was preempted because it conflicted with federal law allowing G-4 aliens to establish residency in the United States[17] However, it is important to note that this case involved aliens who were lawfully present in the United States and thus may not extend to unauthorized student aliens.[18]

Nonimmigrant aliens, as defined in 8 U.S.C. s. 1101(a)(15), are aliens lawfully admitted into the United States but whose duration of stay is set forth in the applicable visa under which admittance is granted. Most nonimmigrant visas, but not all, require the holder of the visa to intend to return to the nonimmigrant's country of residence upon expiration of the visa. Students under an F visa or an M visa are required to intend to return to their country of residence. If a nonimmigrant stays beyond the limitation of the visa, the nonimmigrant is no longer lawfully within the U.S. and is subject to deportation.

Postsecondary Benefits

Federal law says that a state may provide that an undocumented alien is eligible for any state or local public benefit that he or she would not otherwise be eligible for only through the enactment of a state law that affirmatively provides for such eligibility.[19] However, federal law also

[12] *See Plyler v. Doe*, 457 U.S. 202 (1982), in which the U.S. Supreme Court held unconstitutional on equal protection grounds a Texas statute that withheld school funding for children who were not legally admitted into the United States and permitted local school districts to deny their enrollment.
[13] *See League of United Latin American Citizens v. Florida Board of Education*, Case No. 90-1913 (S.D. Fla. 1990).
[14] *Plyler*, 457 U.S. 202 (1982).
[15] Congressional Research Service, *Unauthorized Alien Students, Higher Education, and In-State Tuition Rates: A Legal Analysis*, 1 (2010).
[16] *Toll v. Moreno,* 458 U.S. 1 (1982).
[17] *Id.*
[18] Congressional Research Service, *Unauthorized Alien Students, Higher Education, and In-State Tuition Rates: A Legal Analysis*, 2 (2010).
[19] 8 U.S.C. s. 1621(d).

prohibits any alien who is unlawfully present in the United States from receiving any postsecondary education benefit on the basis of residence in a state unless a U.S. citizen or national is eligible for such benefit in the same amount, duration, and scope.[20] Over the years, a number of states have enacted laws providing postsecondary educational benefits to undocumented students. The U.S. Congress has also considered legislation promoting higher education for unauthorized aliens.

The DREAM Act

The Development, Relief, and Education for Alien Minors Act, also commonly referred to as the DREAM Act, was first introduced in Congress in 2001 and has been subsequently introduced in various forms.[21] The DREAM Act restores the state option to determine residency for purposes of higher education benefits. It also provides conditional legal status to an undocumented alien who meets certain criteria. Under the act there is a path to permanent citizenship for those going to college or serving in the military.[22] Versions of this legislation have been introduced for a number of years, but it has not become law.

State Laws Providing In-State Tuition for Undocumented Students

A number of states have passed legislation to provide in-state tuition to undocumented students, including Texas, California, Utah, New York, Washington, Oklahoma, Illinois, New Mexico, Kansas, Nebraska, and Wisconsin.[23] The laws in Kansas and California have been challenged based on the argument that they violate the federal law prohibiting educational benefits based on residency for undocumented students.[24]

In 2005, a federal court in Kansas considered whether a state law making undocumented students eligible for in-state tuition violated federal law and discriminated against U.S. citizens paying out- of-state tuition.[25] The Kansas law created an opportunity for undocumented aliens to be eligible for in-state tuition if they attended a Kansas high school for three years, received a diploma or equivalent, were not residents of another state, and signed an agreement to seek legal immigration status.[26] The Kansas law specified that it applied to "any individual" meeting the designated criteria "regardless of whether the person is or is not a citizen of the United States of America."[27] The plaintiffs in the case were students at Kansas universities who were U.S. citizens but were classified as nonresidents of Kansas for tuition purposes.[28] The court dismissed the case on the basis that the individuals bringing the suit did not have standing because the federal law in question did not provide for a private right of action[29] and because the Kansas law

[20] 8 U.S.C. s. 1623.
[21] National Immigration Law Center, *DREAM Act: Summary* (2010), *available at* http://www.nilc.org/immlawpolicy/dream/dream-bills-summary-2010-09-20.pdf (last visited Mar. 3, 2011).
[22] National Conference of State Legislatures, *In-State Tuition and Unauthorized Immigrant Students* (2010), *available at* http://www.ncsl.org/default.aspx?tabid=13100 (last visited Mar. 3, 2011).
[23] *Id.*
[24] 8 U.S.C. s. 1623.
[25] *Day v. Sebelius*, 376 F. Supp. 2d. 1022 (D. Kan. 2005).
[26] K.S.A. s. 76-731a.
[27] K.S.A. s. 76-731a(b)(2).
[28] *Day*, 376 F. Supp. 2d. at 1025.
[29] *Id.* at 1036-37.

was not discriminatory.[30] The dismissal was subsequently affirmed by the 10th Circuit,[31] and the U.S. Supreme Court denied certiorari.[32]

In 2010, the California Supreme Court decided a case challenging a similar state law.[33] Much like the Kansas case, the challenge to the California law was filed on the basis that it violated 8 U.S.C. s. 1623. The California law provided any student meeting the following criteria would be exempt from paying nonresident tuition: 1) three years of high school in the state; 2) graduation from state high school or equivalent; 3) enrollment at a state institution; and 4) an affidavit of intent to legalize immigration status if the student is undocumented.[34] The court held that the law was not preempted because it was not based on residency, but instead on other criteria that U.S. citizens who were not California residents could also meet.[35]

III. Effect of Proposed Changes:

This bill creates an exemption for an undocumented student who is currently unable to qualify as a resident for tuition purposes if he or she meets the following criteria:

- Attended high school in Florida for 3 or more years;
- Graduated from a Florida high school or attained high school equivalency;
- Registered as an entering student or is currently enrolled at a state university or Florida College System institution;
- Files an affidavit stating that the student has filed an application to legalize his or her immigration status or will do so as soon as he or she is eligible.

The bill also directs the Board of Governors to adopt regulations and the State Board of Education to adopt rules to implement the nonresident tuition exemption.

The bill provides and 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.

[30] *Id.* at 1039.
[31] *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007).
[32] *Day v. Bond*, 554 U.S. 918 (2008).
[33] *Martinez v. Regents of the University of California*, 241 P.3d 855 (Cal. 2010).
[34] CAL. EDUCATION CODE ch. 814, s 2.
[35] *Martinez*, 241 P.3d at 863.

D. Other Constitutional Issues:

The supremacy clause of the U.S. Constitution preempts state laws that impermissibly interfere with federal law.[36] The two major categories of preemption are express preemption and implied preemption. Within implied preemption, there are also the subcategories of field preemption and conflict preemption.[37] Field preemption applies where the scheme of federal law is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[38] Conflict preemption occurs where "compliance with both federal and state regulations is a physical impossibility."[39]

The U.S. Supreme Court has held that the power to regulate immigration is unquestionably an exclusive federal power, but also noted that "the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted."[40] This bill does not appear to present a field preemption issue because although it deals with aliens, it does not regulate immigration. However, it could be argued that the bill conflicts with federal law prohibiting state postsecondary education benefits based on residency for undocumented students if the same benefits are not available to U.S. citizens who are not residents of that state.[41] The bill could be viewed as conflicting with the federal provision because it specifies that the nonresident exemption created by the bill only applies to undocumented students, thus making it unavailable to U.S. citizens who are not Florida residents. It could also be argued that it would not be preempted because citizens of other states who attend a Florida college or university can become residents for tuition purpose under other sections of Florida law.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Undocumented students who currently do not qualify as residents for tuition purposes will be eligible for the reduced in-state tuition rate if they meet the criteria specified in the bill to qualify for the exemption. Because of their undocumented status and the fact that Florida public schools are precluded from asking about immigration status, it is not clear how many students would potentially benefit from the exemption. The current average tuition rate for students attending state universities is $112.10 per credit hour for

[36] U.S. CONST. art. 5, cl. 2.
[37] Erwin Chemerinsky, CONSTITUTIONAL LAW, 367 (2d ed. 2005).
[38] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).
[39] *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).
[40] *DeCanas v. Bica*, 424 U.S. 351, 355 (1976).
[41] 8 U.S.C. s. 1623.

residents and $581.13 for nonresidents.[42] Additionally, affected students may incur certain costs in order to meet the bill's affidavit requirements.

C. Government Sector Impact:

The fiscal impact of the bill is indeterminate, as the state does not have reliable figures indicating the number of students who would qualify for the exemption. Given the indeterminate number of eligible students, the fiscal impact and additional regulatory burden on community colleges and state universities in collecting and processing affidavits and confirming other eligibility requirements in not readily ascertainable.

The bill would result in the state foregoing the difference between resident and nonresident tuition for students who qualify for this exemption and would not have otherwise been eligible for the resident tuition rate.

The Board of Governors will be required to engage in cross-sector work with the State Board of Education and Department of Education staff in order to ensure that the regulations and rules required by the bill are similar.[43]

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.

[42] State University System of Florida Board of Governors, *Tuition & Fees 2010-11, available at* http://www.flbog.edu/about/budget/current.php (last visited Mar. 3, 2011).
[43] Board of Governors, *Senate Bill 318 Legislative Bill Analysis* (Feb. 16, 2011) (on file with the Senate Committee on Judiciary).

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 262
INTRODUCER:	Senators Ring and Dockery
SUBJECT:	Intimidation of a Judge
DATE:	March 11, 2011
REVISED:	

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

I. Summary:

The bill criminalizes any attempt to alter or affect a decision or ruling, through intimidation or threats to a judge, by anyone having a significant interest in a legal or administrative proceeding. The bill defines "intimidation or threats" to include indirect or veiled threats, fabrication of situations that require judicial recusal, and contacts under false pretenses that might reasonably cause a judge to feel threatened.

The bill makes the intimidation or threat a misdemeanor if the underlying proceeding is a misdemeanor or civil proceeding, or if the offender is acting on behalf of another person who is a party to the proceeding. It makes the intimidation or threat a felony of the third degree if the underlying proceeding is a felony.

The bill creates an undesignated section of the Florida Statutes.

II. Present Situation:

Rising Threats and Violence Against Judges

Security for judges and their families is among the challenges and concerns facing the judicial system today. A May 2009 Washington Post article reported that "threats and harassing communications against federal-court personnel have more than doubled in the past six years, from 592 to 1,278."[1] The article emphasizes the severity of the problem, stating that a 24-hour

[1] Jerry Markon, *Threats against judges, prosecutors escalate*, The Seattle Times, http://seattletimes.nwsource.com/html/nationworld/2009259159_judges25.html.

"threat management" center recently opened in Virginia and is staffed by about 25 U.S. marshals who analyze threats against judges.[2] Although the article primarily deals with incidents involving federal judges, it recognizes that "state court officials are seeing the same trend."[3] The Florida Legislature has recognized the risk of threats or violence against judges, as well.[4] In creating a public records exemption for identifying and locating information pertaining to current and former U.S. attorneys and judges, the Legislature found that:

> the duties of these current and former attorneys and judges do not create good will among the accused, the convicted, their associates, and families, and make those federal attorneys and judges potential targets for acts of revenge. Further, their duties make their spouses and children potential targets for acts of revenge.[5]

In the last six years, the United States has seen many incidents of violence against judges or other court officers. Among those incidents, in 2005 the husband and mother of a U.S. District judge were murdered. Shortly thereafter, a rape suspect in Atlanta killed a judge, court stenographer, and a deputy. In 2008 numerous pipe bombs exploded outside a federal courthouse in San Diego. Another defendant with a razor blade choked a federal prosecutor during sentencing.[6] Because of the severity of these incidents, judges and other court officers have developed protocols and procedures to protect themselves from these situations.

Current Law on Influence and Threats in Judicial Proceedings

There are laws providing for punishment and prosecution of incidents comparable to the ones described above. One example is a Florida statute that criminalizes corruption by threat against a public servant. Section 838.021, F.S., makes it unlawful to harm or threaten to harm any public servant, his or her immediate family, or any other person with whose welfare the public servant is interested with intent to:

- Influence the performance of any act or omission that the person believes to be within the official discretion of the public servant;
- Cause or induce the public servant to use or exert, or procure the use or exertion of, any influence upon or with any other public servant regarding an act that the person believes to be within the official discretion of the public servant, in violation of a public duty.

Harm to a public official is punishable as a second-degree felony, and threatening harm is punishable as a third-degree felony.[7]

Similarly, a federal statute makes it a crime to influence, impede, or retaliate against a federal official by threatening or injuring one of a judge's family members.[8]

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[2] *Id*.
[3] *Id*.
[4] *See, e.g.*, ch. 2004-95, L.O.F.
[5] Chapter 2004-95, L.O.F., s. 2.
[6] Markon, *supra* note 1
[7] Section 838.021(3), F.S.
[8] 18 U.S.C.A. s. 115.

Additionally, in the regulatory context, the Florida Bar Rules provide that a "lawyer shall not seek to influence a judge … or other decision maker except as permitted by law or the rules of court."[9] The same rule also states that a lawyer shall not communicate or cause another to communicate as to the merits of the cause with a judge or an official before whom the proceeding is pending except in certain specifically authorized, enumerated situations.[10]

The above-cited statutes and rule address overt actions that seek to improperly threaten or influence a judge. However, less obvious incidents or attempts to intimidate or threaten a judge may not be prosecuted because they do not fit within the ambit of an existing criminal statute. In these less-overt situations, judges may still feel that their personal safety or their professional credibility as a judge has been attacked. Additionally, a judge may feel pressured to recuse himself or herself from a case based on a person's contacts or other interactions with the judge.

III. Effect of Proposed Changes:

The bill makes it a crime for anyone who has a significant interest in a legal or administrative proceeding to attempt to alter or affect a decision or ruling through intimidation or threats. The bill defines "intimidation or threats" as actions or words that:

- Directly or indirectly threaten physical force, economic loss, damage to property, damage to career, or damage to the reputation of a judge or a member of the judge's immediate family;
- Are intended to create a situation requiring recusal or disqualification of a judge; or
- Consist of contacts or attempts to contact or that create a pattern of contact with a judge or a member of the judge's immediate family under false pretenses which would reasonably cause a judge or a member of the judge's immediate family to fear for his or her safety.[11]

The bill makes the above conduct a misdemeanor of the first degree if the underlying proceeding is a civil or administrative proceeding or the prosecution of a misdemeanor, or if the offender is acting on behalf of another person who is a party to the proceeding. However, the bill makes such conduct a felony of the third degree if the underlying proceeding is the prosecution of a felony.

By defining "intimidation or threats" to include indirect or veiled threats, fabrication of situations that require judicial recusal, and contacts under false pretenses that reasonably cause a judge to feel threatened, this bill may cover situations not covered by current criminal statutes. It creates a crime that prosecutors may use to address situations where improper conduct has occurred, but where such conduct does not rise to the level of overt threats.

[9] Fla. Bar R. 4-3.5.
[10] *Id*.
[11] This list is non-exclusive.

The bill also defines "judge" as any judge or justice authorized by the State Constitution, an administrative hearing officer, an administrative law judge, a magistrate, or an officer of the state acting in an adjudicatory capacity.

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.

D. Other Constitutional Issues:

The Florida Supreme Court in *State v. Wershow* held that a statute that criminalized "any malpractice in office not otherwise especially provided" was unconstitutionally vague, as it did not sufficiently convey a definite warning as to the proscribed conduct that men of common understanding could comprehend.[12] Article I, Section 9 of the Florida Constitution provides that "No person shall be deprived of life, liberty or property without due process of law."[13] The Florida Supreme Court has interpreted due process, as established by Article I, section 9 of the Florida Constitution and the Fifth and Fourteenth Amendments of the Constitution of the United States, to require that "the Legislature, in the promulgation of a penal statute, uses language sufficiently definite to apprise those to whom it applies what conduct on their part is prohibited."[14] Further, the Court went on to state that it is unconstitutional for the Legislature to employ vague language that would force a person of common intelligence to guess as to the statute's meaning and then be subject to arrest and punishment if the guess is wrong.[15]

Under the test that the Florida Supreme Court has set to determine whether a statute is unconstitutionally vague, the bill might be subject to a constitutional challenge on the ground that the third enumerated definition of "intimidation or threats" may not convey a definite warning as to the proscribed conduct. The bill language proscribes words that:

> Consist of contacts or attempts to contact or that create a pattern of contact with a judge or a member of the judge's immediate family

[12] *State v. Wershow*, 343 So. 2d 605, 610 (Fla. 1977).
[13] FLA. CONST. art. I, s. 9.
[14] *Wershow*, at 608.
[15] *Id*.

> under false pretenses which would reasonably cause a judge or a member of the judge's immediate family to fear for his or her safety.

Due to the breadth of conduct this language encompasses, a defendant may argue that the language is vague to the extent that it causes a person of common intelligence to speculate as to its meaning and thereby fails to apprise those to whom it applies what conduct is prohibited. If the court were to agree with such an argument, it is possible that at least the individual provision could be struck. However, the Court in *State v. Wershow* also held that, in order for legislation to be constitutional, objective guidelines and standards must appear expressly in the law or be within the realm of reasonable inference from the language of the law.[16] If a court were to find that the third definition of "intimidation or threats" provides objective guidelines that are within the realm of reasonable inference from the language of the law, then it might uphold the provision.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

A violation of the offense created by the bill, depending upon the circumstances of the case, is either a first-degree misdemeanor or a third-degree felony, punishable as provided in ss. 775.082, 775.083, or 775.084, F.S. Section 775.083, F.S., authorizes a fine not exceeding $1,000 for conviction of a first-degree misdemeanor and $5,000 for a third-degree felony.

C. Government Sector Impact:

The Criminal Justice Impact Conference estimated that the bill would have an insignificant prison bed impact.

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.

[16] *Wershow*, at 609.

B. Amendments:

None.

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 670
INTRODUCER:	Senator Joyner
SUBJECT:	Powers of Attorney
DATE:	March 11, 2011
REVISED:	

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

I. Summary:

The bill seeks to conform Florida's power of attorney law under chapter 709, Florida Statutes, to the Uniform Power of Attorney Act,[1] with some modifications to achieve greater consistency among state laws.

The bill creates part I of ch. 709, F.S., consisting of ss. 709.02-709.07, F.S., titled "Powers of Appointment." The bill creates part II of ch. 709, F.S., consisting of ss. 709.2101-709.2402, F.S., titled "Powers of Attorney."

The revised power of attorney law applies only to powers of attorney created by an individual. Powers of attorney validly executed under Florida law before the effective date of the new Florida powers of attorney law will remain valid. If the power of attorney is a durable one (one which is not terminated by the principal's incapacity) or a springing one (one which does not take effect until the principal loses capacity), it will remain durable or springing under the new law. To be effective in Florida, powers created on or after the effective date of the new power of attorney law must be exercisable as of the time they are executed. The meaning and effectiveness of a power of attorney is governed by part II of ch. 709, F.S., if the power of attorney is used in Florida or states that it is to be governed by Florida law. A power of attorney executed in another state that does not comply with the execution requirement of this part (part II of ch. 709, F.S.) is valid in Florida if the execution of the power of attorney complied with the law of the state of execution.

[1] See National Conference of Commissioners on Uniform State Laws, "A Few Facts About the Uniform Power of Attorney Act," *available at* http://www.nccusl.org/Act.aspx?title=Power%20of%20Attorney (last visited Mar. 9, 2011).

Powers of attorney that are executed after the effective date of part II of ch. 709, F.S., may not create springing powers, with an exception for military powers. Qualified agents as defined in the bill are entitled to reasonable compensation. The revised power of attorney provides requirements for written notice with special notice for financial institutions, and special rules for banking and investment transactions; provides default duties for the agent; creates co-agents and successor agents; prohibits blanket or default powers granted to an agent; prescribes requirements for the rejection by a third person of power of attorney; prescribes requirements for an agent's liability under power of attorney; and provides grounds for judicial relief and dealing with conflicts of interest.

This bill creates the following sections of the Florida Statutes: 709.2101, 709.2102, 709.2103, 709.2104, 709.2105, 709.2106, 709.2107, 709.2108, 709.2109, 709.2110, 709.2111, 709.2112, 709.2113, 709.2114, 709.2115, 709.2116, 709.2117, 709.2118, 709.2119, 709.2120, 709.2121, 709.2201, 709.2202, 709.2203, 709.2208, 709.2301, 709.2302, 709.2303, 709.2401, and 709.2402.

The bill amends section 736.0602, Florida Statutes. The bill repeals the following sections of the Florida Statutes: 709.01, 709.015, 709.08, and 709.11.

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

II. Present Situation:

A power of attorney is a legal document that delegates authority from one person to another.[2] The person who creates a power of attorney is the principal, and the person to whom the authority to act is delegated is an agent of the principal. The power of attorney is an important document because it allows one person to legally act for another, and it benefits and binds the principal as if the principal had done the act himself or herself. A durable power of attorney is power of attorney that continues to be legally effective if the principal becomes incapacitated.[3] Durable powers of attorney are often used in estate planning as an alternative to guardianship if a principal becomes incapacitated.[4]

In 2006, the Uniform Law Commission of the National Conference of Commissioners on Uniform State Laws completed a Uniform Power of Attorney Act.[5] Since that time, nine states (Colorado, Idaho, Indiana, Maine, Maryland, Nevada, New Mexico, Virginia, and Wisconsin) and one United States territory (U.S. Virgin Islands) have adopted the Uniform Power of Attorney Act.[6]

A committee was formed in Florida to evaluate the Uniform Power of Attorney Act for possible enactment in Florida.[7] The committee included attorneys with practices in various disciplines,

[2] Chapter 709, F.S.
[3] Section 709.08, F.S.
[4] Real Property, Probate and Trust Law Section of the Florida Bar, White Paper: Chapter 709, F.S. (2011) (on file with the Senate Committee on Judiciary).
[5] See National Conference of Commissioners on Uniform State Laws, *supra* note 1.
[6] *Id.*
[7] Real Property, Probate and Trust Law Section of the Florida Bar, *supra* note 4.

including estate planning, estate and trust litigation, elder law, and family law, and attorneys who work for financial institutions, who represent the Florida Bankers Association and attorneys whose practice is comprised of real estate title insurance.[8] The committee recommended significant revisions to ch. 709, F.S., to propose the creation of a new part I to reinstate without substantive change those current provisions of ch. 709, F.S., relating to "powers of appointment" and a new part II of ch. 709, F.S., relating to "powers of attorney."[9]

III. Effect of Proposed Changes:

The bill seeks to conform Florida's power of attorney law under ch. 709, F.S., to the Uniform Power of Attorney Act, with some modifications to achieve greater consistency among state laws. The bill creates part I of ch. 709, F.S., consisting of ss. 709.02-709.07, F.S., titled "Powers of Appointment." The bill creates part II of ch. 709, F.S., consisting of ss. 709.2101-709.2402, F.S., titled "Powers of Attorney."

The revised power of attorney law applies only to powers of attorney created by an individual.[10] Powers of attorney validly executed under Florida law before the effective date of the new Florida powers of attorney law will remain valid. If the power of attorney is a durable one (one which is not terminated by the principal's incapacity) or a springing one (one which does not take effect until the principal loses capacity), it will remain durable or springing under the new law. To be effective in Florida, powers created on or after the effective date of the new power of attorney law must be exercisable as of the time they are executed.[11] The meaning and effectiveness of a power of attorney is governed by part II of ch. 709, F.S., if the power of attorney is used in Florida or states that it is to be governed by Florida law.[12] A power of attorney executed in another state that does not comply with the execution requirement of this part (part II of ch. 709, F.S.) is valid in Florida if the execution of the power of attorney complied with the law of the state of execution.[13] The revised power of attorney law provides: requirements for written notice with special notice for financial institutions;[14] special rules for banking and investment transactions;[15] and default duties for the agent.[16] The revised power of attorney law: creates co-agents and successor agents;[17] prohibits blanket or default powers granted to an agent;[18] outlines requirements for the rejection by a third person of power of attorney;[19] specifies requirements for an agent's liability under power of attorney;[20] and provides grounds for judicial relief and dealing with conflicts of interest.[21]

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[8] *Id.*
[9] *Id.*
[10] Section 709.2103, F.S.
[11] Section 709.2108(1), F.S.
[12] Section 709.2107, F.S.
[13] This concept of portability makes powers of attorneys portable between states. See Real Property, Probate and Trust Law Section of the Florida Bar, *supra* note 4.
[14] Section 709.2121, F.S.
[15] Section 709.2208(1) and (2), F.S.
[16] Section 709.2114, F.S.
[17] Section 709.2111, F.S.
[18] Section 709.2201, F.S.
[19] Section 709.2120, F.S.
[20] Section 709.2117, F.S.
[21] Section 709.2116, F.S.

Powers of attorney that are executed after the effective date of part II of ch. 709, F.S., may not create springing powers, with an exception for military powers.[22]

Section-by-Section Analysis

Section 1. The bill creates part I of ch. 709, F.S., consisting of ss. 709.02-709.07, F.S., titled "Powers of Appointment."

Section 2. The bill creates part II of ch. 709, F.S., consisting of ss. 709.2101-709.2402, F.S., titled "Powers of Attorney."

Section 3. Section 709.2101, F.S., provides for the "Florida Power of Attorney Act."

Section 4. Section 709.2102, F.S., provides definitions.

"Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise, and the term includes an original agent, co-agent, and successor agent.

"Durable" means, with respect to a power of attorney, not terminated by the principal's incapacity.

"Electronic" means technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

"Financial institution has the same meaning as in s. 655.005, F.S., relating financial institutions.

"Incapacity" means the inability of an individual to take those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income.[23]

"Knowledge" means a person has actual knowledge of the fact, has received a notice or notification of the fact, or has reason to know the fact from all other facts and circumstances known to the person at the time in question. With respect to an organization operating through employees, the organization has notice of or knowledge of a fact involving the power of attorney only from the earlier of the time the information was received by an employee having responsibility to act on matters involving the power of attorney or the time the information would have been brought to the employee's attention if the organization had exercised reasonable diligence. The term is substantively identical to the definition of the term in the Florida Probate Code.[24]

[22] See s. 709.2108(1) and s. 709.2106(4), F.S. as discussed in Real Property, Probate and Trust Law Section of the Florida Bar, *supra* note 4.
[23] See s. 744.102(12)(a), F.S., which provides a comparable definition for an "incapacitated person" as it relates to the management of property.
[24] See s. 736.0104, F.S.

"Power of Attorney" means a writing that grants authority to an agent to act in the place of the principal, whether or not that the term is used in that writing. An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit and binds the principal and the principal's successors in interest as if the principal had performed the act.

"Principal" means an individual who grants authority to an agent in a power of attorney.

"Sign" means having present intent to authenticate or adopt a record to: execute or adopt a tangible symbol; or attach to, or logically associate with the record an electronic sound, symbol, or process.

"Third person" means any person other than the principal or the agent in the agent's capacity as agent.

Section 5. Section 709.2103, F.S., provides that this part (part II of ch. 709, F.S.) applies to all powers of attorney except:

- A proxy or other delegation to exercise voting rights or management rights with respect to an entity;
- A power created on a form prescribed by a government or its subdivision for a governmental purpose;
- A power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction; and
- A power created by a person other than an individual.

Section 6. Section 709.2104, F.S., provides that except as otherwise provided under this part (part II of ch. 709, F.S.), a power of attorney is durable if it contains the words: "This durable power of attorney is not terminated by subsequent incapacity of the principal except as provided in chapter 709, Florida Statutes," or similar words that show the principal's intent that the authority conferred is exercisable notwithstanding the principal's subsequent incapacity.

Section 7. Section 709.2105, F.S., specifies qualifications of the agent and requirements for the execution of a power of attorney. The agent must be a natural person who is 18 years of age or older or a financial institution that has trust powers, has a place of business in Florida, and is authorized to conduct trust business in Florida.

A power of attorney must be signed by the principal and by two subscribing witnesses and be acknowledged by the principal before a notary public or otherwise provided for the conveyance of real estate.[25]

Section 8. Section 709.2106, F.S., specifies that a power of attorney executed on or after October 1, 2011, is valid if its execution complies with s. 709.2103, F.S. A power of attorney executed before October 1, 2011 is valid if its execution complied with Florida law at the time of

[25] See s. 695.03, F.S.

execution. Additionally if the power of attorney is a durable power of attorney or a springing power of attorney it will remain durable or springing under this act (part II of ch. 709, F.S.).

A power of attorney executed in another state which does not comply with the execution requirement of this part (part II of ch. 709, F.S.) is valid in Florida if the execution of the power of attorney complied with the law of the state of execution.[26] A third person who is requested to accept a power of attorney that is valid in Florida solely because of the requirement of s. 709.2106(3), F.S., (that the execution of the power of attorney complied with the law of the state of execution) may in good faith request, and rely upon, without further investigation, an opinion of counsel as to any matter of law concerning the power of attorney, including the due execution and validity of the power of attorney. An opinion of counsel requested under s. 709.2106(3), F.S., must be provided at the principal's expense. A third person may accept a power of attorney that is valid in Florida solely because of s. 709.2106(3), F.S., if the agent does not provide the requested opinion of counsel, and in such case, a third person has no liability for refusing to accept the power of attorney. Subsection 709.2106(3), F.S., does not affect any other right of a third person who is requested to accept the power of attorney under this part (part II of ch. 709, F.S.), or any other provisions of applicable law.

Section 709.2106(4), F.S., provides that a military power of attorney is valid if it is executed in accordance with federal law, as amended. A deployment-contingent power of attorney may be signed in advance, and is effective upon deployment of the principal, and shall be afforded full force and effect by Florida courts.

Section 9. Section 709.2107, F.S., provides that the meaning and effectiveness of a power of attorney is governed by part II of ch. 709, F.S., if it is used in Florida or the power of attorney states that it is to be governed by the laws of Florida.

Section 10. Section 709.2108, F.S., specifies that except as provided in s. 709.2108(2), F.S., a power of attorney is exercisable when executed. Section 709.2108(2), F.S., provides that if a power of attorney executed before October 1, 2011, is conditioned on the principal's lack of capacity to manage property and the power of attorney has not become exercisable before that date, the power of attorney is exercisable upon delivery of the affidavit of a Florida-licensed medical or osteopathic physician. The affidavit must state that the physician believes that the principal lacks the capacity to manage property.

Except as provided in s. 709.2108(2), F.S., or s. 709.2106(4) F.S., a power of attorney is ineffective if the power of attorney provides that it is to become effective at a future date or upon the occurrence of a future event or contingency.

Section 11. Section 709.2109, F.S., provides requirements for the termination or suspension of a power of attorney or an agent's authority. A power of attorney terminates when:

- The principal dies;
- The principal becomes incapacitated, if the power is not durable;

[26] This concept of portability makes powers of attorneys portable between states. See Real Property, Probate and Trust Law Section of the Florida Bar, White Paper: Chapter 709, F.S. (2011) (on file with the Senate Committee on Judiciary).

- The principal is adjudicated totally or partially incapacitated by a court, unless the court determines that certain authority granted by the power of attorney is to be exercisable by the agent;
- The principal revokes the power of attorney;
- The power of attorney provides that it terminates;
- The purpose of the power of attorney is accomplished; or
- The agent's authority terminates and the power of attorney does not provide for another agent to act under the power of attorney.

An agent's authority is exercisable until the authority terminates. An agent's authority terminates when:

- The agent dies, becomes incapacitated, resigns, or is removed by a court;
- An action is filed for the dissolution or annulment of the agent's marriage to the principal or for their legal separation, unless the power of attorney otherwise provides; or
- The power of attorney terminates.

The authority granted under a power of attorney is suspended until the petition to initiate judicial proceedings to determine the principal's incapacity, or for the appointment of a guardian advocate, is dismissed or withdrawn or the court enters an order authorizing the agent to exercise one or more powers granted under the power of attorney. The agent may petition the court in which a proceeding is pending, in the event of an emergency, for authorization to exercise a power granted under the power of attorney. The petition must set forth the nature of the emergency, the property or matter involved, and the power to be exercised by the agent.

Notwithstanding s. 709.2109, F.S., unless otherwise ordered by the court, a proceeding to determine incapacity does not affect the authority of the agent to make health care decisions for the principal, including those provided in ch. 765, F.S., which deal with health care advance directives. If a health care advance directive has been executed by the principal, the terms of the directive control if the directive and the power of attorney are in conflict unless the power of attorney is later executed and expressly states otherwise.

Termination or suspension of an agent's authority or of a power of attorney is ineffective as to the agent who, without knowledge of the termination or suspension, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

Section 12. Section 709.2110, F.S., specifies requirements for the revocation of a power of attorney. A principal may revoke a power of attorney by expressing the revocation in a subsequently executed power of attorney or other writing signed by the principal. The principal may give notice of the revocation to an agent who has accepted authority under the revoked power of attorney. The execution of a power of attorney does not revoke a power of attorney previously executed by the principal except as provided in this section

Section 13. Section 709.2111, F.S., specifies requirements for co-agents and successor agents under a power of attorney. Unless the power of attorney states otherwise, each co-agent may

exercise its authority independently. A principal may designate one of more successor agents to act if an agent dies, becomes incapacitated, is not qualified to serve, or declines to serve.

Except as otherwise provided in the power of attorney or s. 709.2111(4), F.S., an agent who does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions or omissions of the other agent.

Under s. 709.2111(4), F.S., an agent who has actual knowledge of a breach or imminent breach of fiduciary duty by another agent must take reasonable actions appropriate in the circumstances to safeguard the principal's best interests. If the principal is not incapacitated, giving notice to the principal is sufficient. An agent who fails to take action is liable to the principal for reasonably foreseeable damages that the principal could have avoided if the agent had taken such action. A successor agent does not have a duty to review the conduct or decisions of a predecessor agent. Except as provided in s. 709.2111(4), F.S., a successor agent does not have a duty to institute any proceeding against a predecessor agent or file a claim against a predecessor agent's estate, for acts or omissions of the predecessor agent as an agent of the principal. If a power of attorney requires two or more persons as co-agents to act together, one or more of the agents may delegate to a co-agent the authority to conduct banking transactions as provided in s. 709.2208(1), F.S., whether the authority to conduct banking transactions is specifically enumerated or incorporated by reference to that section in the power of attorney.

Section 14. Section 709.2112, F.S., specifies requirements for the reimbursement and compensation of agents. Unless otherwise stated in the power of attorney, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal. Unless otherwise stated in the power of attorney, a qualified agent is entitled to compensation that is reasonable under the circumstances. Notwithstanding any provision in the power of attorney, an agent may not be paid compensation unless the agent is a qualified agent. A "qualified agent" is an agent who is the spouse of the principal, an heir of the principal, a financial institution that has trust powers and a place of business in Florida, an attorney or certified public accountant licensed in Florida, or a natural person who has never been an agent for more than three principals at the same time.

Section 15. Section 709.2113, F.S., provides that, except as provided in the power of attorney, a person accepts appointment as an agent by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance. The scope of an agent's acceptance is limited to those aspects of the power of attorney for which the agent's assertions or conduct reasonably manifests acceptance.

Section 16. Section 709.2114, F.S., specifies the duties of an agent. An agent is a fiduciary, must act only within the scope of authority granted in the power of attorney and may not act contrary to the principal's reasonable expectations actually known by the agent. The agent must act in good faith and not in a manner contrary to the principal's best interests with specified exceptions. The agent must attempt to preserve the principal's estate plan, to the extent actually known to the agent, if preserving the plan is consistent with the principal's best interests based on specified factors. The agent is prohibited from delegating authority except as provided in law for the delegation of investment functions. The agent must keep records on behalf of the principal, as

well as create and maintain an accurate inventory of the principal's safe-deposit box, if applicable.

Except as otherwise provided in the power of attorney, the agent who has accepted appointment must act loyally for the sole benefit of the principal; act so as to not create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interests; and cooperate with a person who has authority to make health care decisions for the principal to carry out the principal's reasonable expectations and otherwise act in the principal's best interests. An agent who acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan. If an agent has special skills or expertise or was selected based on the agent's representation that the agent has such skills or expertise, then those special skills must be considered in determining whether the agent acted with care, competence, and diligence under the circumstances. Absent a breach of duty to the principal, an agent is not liable for a decline in the value of the principal's property. An agent must disclose specified information and documents within 60 days of the request or ask for additional time to comply with the request.

Section 17. Section 709.2115, F.S., provides requirements for the exoneration of an agent. A power of attorney may provide for exoneration of the agent for acts or decisions made in good faith and under the power of attorney except to the extent the provision:

- Relieves the agent of liability for breach of a duty committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the principal's best interest; or
- Was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

Section 18. Section 709.2116, F.S., provides that a court may construe or enforce a power of attorney, review the agent's conduct, terminate the agent's authority, remove the agent, and grant other appropriate relief. The following may petition the court: the principal or agent; a guardian, conservator, trustee, or other fiduciary acting for the principal or principal's estate; a person authorized to make health care decisions for the principal if the principal's health care is affected by the agent's actions; any other interested person; a governmental agency that has regulatory authority to protect the welfare of the principal; or a person asked to honor the power of attorney.

The court may award reasonable attorney's fees and costs in any proceeding commenced by the filing of a petition under this section. If an agent's exercise of power is challenged on the grounds that the exercise of power was affected by a conflict of interest and evidence is presented that the agent (or affiliate) had a personal interest in exercise of the power, then the agent or affiliate has the burden of proving, by clear and convincing evidence, that the agent acted solely in the interest of the principal or in good faith in the principal's best interest, and the conflict of interest was expressly authorized in the power of attorney. A provision authorizing an agent to engage in a transaction affected by a conflict of interest which is inserted into a power of attorney as the result of the abuse of a fiduciary or confidential relationship with the principal by the agent or the agent's affiliate is invalid.

The section recognizes and defines affiliates of the agent who may be involved in potential conflicts of interest in the exercise of the agent's powers. Affiliates of an agent include: the

agent's spouse; the agent's descendant, siblings, parents, or their spouses; a corporation or entity that owns a significant interest in the agent; or the agent acting in a fiduciary capacity for someone other than the principal.

Section 19. Section 709.2117, F.S., outlines an agent's liability for violations of applicable law to the principal or the principal's successors in interest. The agent may be required to restore the value of the principal's property to what it would be if the violation had not occurred and to reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid from the principal's funds on the agent's behalf in defense of the agent's actions.

Section 20. Section 709.2118, F.S., provides requirements for and methods for an agent's resignation.

Section 21. Section 709.2119, F.S., provides that a third person who in good faith accepts a power of attorney that appears to be executed in accordance with Florida law may rely upon the power of attorney and enforce an authorized transaction against the principal's property as if the power of attorney, the agent's authority, and authority of the officer executing for or behalf of a financial institution that has trust powers and acting as an agent were genuine, valid, and still in effect. A third person does not accept a power of attorney in good faith if the person has notice that the power of attorney or the purported agent's authority is void, invalid, or terminated.

A third person may require an agent to execute an affidavit stating where the principal is domiciled; that the principal is not deceased; that there has been no revocation, or partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the power of attorney; that the power of attorney has not been suspended by the initiation of proceedings to determine incapacity or the appointment of a guardian for the principal; and the reasons for the unavailability of the predecessor agents if the affiant is a successor agent. A third person may require an officer of a financial institution acting as agent to provide an affidavit that meets the requirements of the section. The form of affidavit executed by an agent is provided.

Section 22. Section 709.2120, F.S., requires a third person to accept or reject a power of attorney within a reasonable time and to state in writing the reason for the rejection. Four days, excluding Saturdays, Sundays, and legal holidays, are presumed to be a reasonable time for a financial institution to accept or reject a power of attorney for banking or security transactions. A third person may not require an additional or different form of power of attorney for authority granted in the power of attorney presented. A third person is not required to accept a power of attorney if:

- The third person is not otherwise required to engage in a transaction with the principal in the same circumstances;
- The third person has knowledge of the termination or suspension of the agent's authority or of the power of attorney before exercising the power;
- A timely request by the third person for an affidavit, English transaction, or opinion of counsel is refused by the agent;
- The third person believes in good faith that the power is not valid or that the agent lacks authority to perform the act requested with exceptions; or

- The third person makes, or has knowledge that another person has made, a report to the local adult protective services office alleging that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or others acting for or with the agent;

A third person who refuses to accept a power of attorney, in violation of s. 709.2120, F.S., is subject to:

- A court order mandating acceptance of the power of attorney; and
- Liability for damages, including reasonable attorney's fees and costs incurred in an action that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.

Section 23. Section 709.2121, F.S., provides requirements for notice. A notice, including a notice of revocation, notice of partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the power of attorney, notice of death of the principal, notice of suspension by initiation of proceedings to determine incapacity or to appoint a guardian, or other notice, is not effective until written notice is provided to the agent or any third persons relying upon a power of attorney. Notice is legally effective only if it is in writing and must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document on the agent or affected third person. Notice to a financial institution has additional requirements and must contain the name, address, and the last four digits of the principal's taxpayer identification number and be directed to an officer or manager of the financial institution in Florida. Notice if effective when given, except notice to a financial institution, brokerage company, or title company is not effective until 5 days, excluding Saturdays, Sundays, and legal holidays, after it is received.

Section 24. Section 709.2201, F.S., outlines an agent's authority to exercise only authority specifically granted to the agent to the agent in the power of attorney except as provided in other applicable law. General provisions in a power of attorney which do not identify the specific authority granted are not an express grant of specific authority and do not grant any authority to the agent. Court approval is not required for any action of the agent in furtherance of an express grant of a specific authority. Authorization to an agent in a power of attorney may include authority to:

- Execute stock powers or similar documents on behalf of the principal and delegate to a transfer agent or similar person the authority to register any stocks, bonds, or other securities into or out of the principal's or nominee's name.
- Convey or mortgage homestead property with some requirements for joinder of the principal's spouse or the spouse's guardian if the principal is married.

If such authority is specifically granted in a durable power of attorney, the agent may make all health care decisions on behalf of the principal, including health care advance directives specified in ch. 765, F.S. An agent may not: perform duties under a contract that requires the exercise of personal services of the principal; make any affidavit as to the personal knowledge of the principal; vote in any public election on behalf of the principal; execute or revoke any will or

codicil for the principal; or exercise powers and authority granted to the principal as trustee or as court-appointed fiduciary.

If the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls. Authority granted in a power of attorney is exercisable with respect to property the principal has when the power of attorney is executed and to property the principal later acquires, whether or not the property is located in Florida and whether or not the authority is exercised or the power of attorney is executed in Florida. Acts by the agent under the power of attorney have the same effect and inure to the benefit of and bind the principal and his or her successors in interest as if the principal had performed the act.

Section 25. Under s. 709.2202, F.S., notwithstanding s. 709.2201, F.S., an agent may exercise the following authority only if the principal signed or initialed next to each specific enumeration of the authority, the exercise of the authority is consistent with the agent's duties under s. 709.2114, F.S., and the exercise is not otherwise prohibited by another agreement or instrument:

- Create an inter vivos trust;
- Amend, modify, revoke, or terminate a trust created by or on behalf of the principal and only if the trust instrument explicitly authorizes such acts by the settlor's agent;
- Make a gift with specified limitations;
- Create or change a beneficiary designation;
- Waive the principal's right to be a beneficiary of a joint and survivor annuity, including survivor benefits under a retirement plan; or
- Disclaim property and powers of appointment.

Notwithstanding a grant of authority to do an act authorized under this section, unless the power of attorney otherwise provides, an agent who is not an ancestor, spouse or descendant of the principal may not exercise authority to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise

Unless the power of attorney otherwise provides, a provision in a power of attorney granting general authority with respect to gift authorizes the agent to only:

- Make outright to, or for the benefit of, a person a gift of any of the principal's property in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion without regard to whether the federal gift tax exclusion applies to the gift, or if the principal's spouse agrees to consent to a split gift in an amount per donee not to exceed twice the annual federal gift tax exclusion limit; and
- Consent to the splitting of a gift made by the principal's spouse in an amount per donee not to exceed the aggregate annual gift tax exclusions for both spouses.

Section 709.2202(4), F.S., specifies additional acts that do not require specific authority (making a deposit to or withdrawal from an insurance policy, retirement account, individual retirement account, benefit plan, bank account, or any other account held jointly or otherwise held in

survivorship or payable on death) if the agent is authorized to conduct banking transactions. A bank or other financial institution does not have a duty to inquire as to the appropriateness of the agent's exercise of that authority and is not liable to the principal or any other person for actions taken in good faith reliance on the appropriateness of the agent's actions. The agent's fiduciary duties to the principal with respect to the exercise of the power of attorney under the acts specified in s. 709.2202(4), F.S., are not eliminated.

Section 709.2202, F.S., does not apply to a power of attorney executed before October 1, 2011.

Section 26. Section 709.2208(1), F.S., provides that a power of attorney that includes a statement that the agent has "authority to conduct banking transactions as provided in s. 709.2208(1), F.S.," grants general authority to the agent to engage in specified transactions with financial institutions without additional specific enumeration in the power of attorney which include but are not limited to authority to:

- Establish, continue, modify, or terminate an account or other banking arrangement with a financial institution;
- Contract for services available from a financial institution;
- Withdraw, by check, order, electronic funds transfer, or otherwise, money or property of the principal deposited with or left in the custody of a financial institution;
- Receive statements of accounts, vouchers, notices, and similar documents from a financial institution and act with respect to them;
- Purchase cashier's checks, official checks, counter checks, bank drafts, money orders, and similar instruments;
- Endorse and negotiate checks, cashier's checks, official checks, drafts, and other negotiable paper of the principal or payable to the principal or the principal's order, transfer money, and accept a draft drawn by a person upon the principal and pay it when due;
- Apply for, receive, and uses debit cards, electronic transaction authorizations, and traveler's checks from a financial institution;
- Use, charge, or draw upon any line of credit, credit card, or other credit established by the principal with a financial institution; and
- Consent to an extension of time of payment with respect to commercial paper or a financial transaction with a financial institution.

Section 709.2208(2), F.S., provides that a power of attorney that includes a statement that the agent has "authority to conduct investment transactions as provided in s. 709.2208(2), F.S.," grants general authority to the agent with respect to securities held by financial institutions to take specified actions without additional specific enumeration in the power of attorney which include but are not limited to authority to:

- Buy, sell, and exchange investment instruments;
- Establish, continue, modify, or terminate an account with respect to investment instruments;
- Pledge investment instruments as security to borrow, pay, renew, or extend the time of payment of a debt of the principal;

- Receive certificates and other evidences of ownership with respect to investment instruments;
- Exercise voting rights with respect to investment instruments in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote; and
- Sell commodity futures contracts and call and put options on stocks and stock indexes.

"Investment instruments" is defined for purposes of s. 709.2208(2), F.S., and expressly excludes commodity futures contracts and call and put options on stocks and stock indexes.

Section 27. Section 709.2301, F.S., provides that the common law of agency and principles of equity supplement this part (part II of ch. 709, F.S.), except as modified by this part (part II of ch. 709, F.S.) or other state law.

Section 28. Section 709.2302, F.S., provides that this part(part II of ch. 709, F.S.) does not supersede any other law applicable to financial institutions or other entities, and that law controls if inconsistent with this part (part II of ch. 709, F.S.).

Section 29. Section 709.2303, F.S., provides that the remedies under this part (part II of ch. 709, F.S.) are not exclusive and do not abrogate any right or remedy under any other law than part II (part II of ch. 709, F.S.).

Section 30. Section 709.2401, F.S., provides that this part (part II of ch. 709, F.S.) modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, but does not modify, limit, or supersede s. 101 (c) of that federal act or authorize electronic delivery of any of the notices described in s. 103(b) of that federal act.

Section 31. Section 709.2402 provides that, except as otherwise provided in part II (part II of ch. 709, F.S.), part II:

- Applies to a power of attorney created before, on, or after October 1, 2011, and to acts of the agent occurring on or after that date.
- An act of the agent occurring before October 1, 2011, is not affected by (part II, of ch. 709, F.S.).

Section 32. Section 736.0602, F.S., is amended to correct a statutory cross-reference to s. 709.2202, F.S.

Section 33. The bill repeals s. 709.01, F.S., relating to the authority of a power of attorney when the principal is dead; s. 709.015, F.S., relating to the authority of an agent under a power of attorney when the principal is listed as missing; s. 709.08, F.S., relating to a durable power of attorney; and s. 709.11, F.S., relating to a deployment-contingent power of attorney.

Section 34. 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.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

Line 214 of the bill contains a statutory cross-reference to "s. 709.2103" but should refer to "s. 709.2105," which relates to the execution of a power of attorney.

Lines 258-270 of the bill require a Florida-licensed medical physician or osteopathic physician to provide an affidavit attesting to a principal's incapacity for a springing power of attorney to take effect at the time of the principal's incapacity to become exercisable. It is unclear whether the physician who provides an affidavit of the principal's incapacity for a springing power of attorney that was executed before October 1, 2011, to become exercisable (take effect) must be a Florida-licensed medical or osteopathic physician, because the affidavit must state "where" the physician is licensed to practice medicine or osteopathic medicine. If the physicians must be Florida licensed, the following language is suggested: delete lines 264-267 and insert: "<u>care of the principal and who is licensed to practice medicine or osteopathic medicine pursuant to chapter 458 or chapter 459 as of the date of the affidavit. The affidavit executed by the physician must state that the physician is licensed to practice medicine or osteopathic medicine pursuant to chapter 458 or 459, that the physician is the primary</u>".

The suggested written affidavit in the bill on lines 613-658 contains scrivener's errors which should be corrected as conforming changes to the bill.

Section 709.2121, F.S. (lines 752-775 of SB 670) is created in the bill to provide requirements for notice. A notice, including a notice of revocation, notice of partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the power of attorney, notice of death of the principal, notice of suspension by initiation of proceedings to determine incapacity or to appoint a guardian, or other notice, is not effective until *written notice* is provided to the agent or any third persons relying upon a power of attorney. Notice is legally *effective only if it is in writing*. References to notice do not need to be modified to require that they be written. To be consistent, the reference to a "written notice" on line 681should be modified to remove "written."

On lines 783- 787, a scrivener's error needs correction.

It is unclear whether the statutory cross-reference to "s. 709.2206, F.S.," on line 1014 of the bill should be corrected to "s. 709.2202, F.S." which, in part, refers to an agent's authority to amend, modify, revoke, or terminate a trust.

VII. Related Issues:

On lines 428-440 of the bill, the mandatory duty "to preserve the principal's estate plan" is new to Florida law.[27] Under the Uniform Powers of Attorney Act, it was a default duty rather than a mandatory one.[28] The duty applies only to the extent the principal's estate plan is actually known by the agent and only when the preservation of the principal's estate plan is in the principal's best interest based on all relevant factors. The agent may not actually know the principal's estate plan but has a fiduciary duty to apply the relevant factors listed in the bill as to whether preservation of the estate is consistent with the principal's best interest. Members of the committee that drafted the proposed powers of attorney legislation suggest that lines 428-431 of the bill should be revised to clarify that the agent must attempt to preserve the principal's estate plan, as the plan is known to the agent, and as the agent applies the factors to determine whether the preservation is consistent with the principal's best interest.

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.

[27] See discussion of the duty to preserve the principal's estate plan in White Paper, Real Property, Probate and Trust Law Section of the Florida Bar, *supra* note 4.
[28] *Id.*

397560

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Joyner) recommended the following:

Senate Amendment

Delete line 214
and insert:
2011, is valid if its execution complies with s. 709.2105.

466064

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Joyner) recommended the following:

Senate Amendment

Delete lines 264 - 267

and insert:

care of the principal and who is licensed to practice medicine or osteopathic medicine pursuant to chapter 458 or chapter 459 as of the date of the affidavit. The affidavit executed by the physician must state that the physician is licensed to practice medicine or osteopathic medicine pursuant to chapter 458 or chapter 459, that the physician is the primary

448108

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Joyner) recommended the following:

Senate Amendment

Delete lines 428 - 431

and insert:

4. Must attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

678806

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Joyner) recommended the following:

Senate Amendment

Delete lines 625 - 636
and insert:
3. To the best of Affiant's knowledge after diligent search and inquiry:
a. The Principal is not deceased;
b. Affiant's authority has not been suspended by initiation of proceedings to determine incapacity or to appoint a guardian or a guardian advocate; and
c. There has been no revocation, or partial or complete termination, of the power of attorney or of Affiant's authority.
4. Affiant is acting within the scope of authority granted

678806

in the power of attorney.

5. Affiant is the successor to ...(insert name of

539098

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Joyner) recommended the following:

Senate Amendment

Delete line 681

and insert:

before the receipt of notice as provided in s. 709.2121.

759928

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Joyner) recommended the following:

Senate Amendment

Delete lines 783 - 787
and insert:
specific authority. General provisions in a power of attorney which do not identify the specific authority granted, such as provisions purporting to give the agent authority to do all acts that the principal can do, are not express grants of specific authority and do not grant any authority to the agent. Court

576654

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Joyner) recommended the following:

Senate Amendment

Delete line 1014

and insert:

709.2202 ~~709.08~~.

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 400
INTRODUCER:	Criminal Justice Committee, Senator Wise, and others
SUBJECT:	Treatment-based Drug Court Programs
DATE:	March 11, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	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 expands postadjudicatory treatment-based drug court programs as a sentencing option by increasing the total number of sentencing points an offender may have accumulated and still qualify for the program, and by providing that an offender who violates his or her probation or community control for any reason may be admitted to the program.

This bill could have a positive fiscal impact on the Department of Corrections resulting from fewer new commitments to state prison.

This bill substantially amends the following sections of the Florida Statutes: 397.334, 921.0026, 948.01, 948.06, and 948.20.

II. Present Situation:

Postadjudicatory drug courts are designed to divert drug-addicted offenders from the prison system by providing supervised community treatment services in lieu of incarceration.

Drug Court Overview

Section 397.334, F.S., authorizes the establishment of drug courts, and s. 948.08, Florida Statutes, mandates the type of offenders that *pretrial* drug courts may serve.

In 2009, *postadjudicatory* drug courts were targeted by the Legislature for definition and expansion. The expansion was largely due to the documented success of the programs in diverting offenders from prison. In March of 2009, the Office of Program Policy Analysis and Government Accountability (OPPAGA) reported that, based on available data, Florida's postadjudicatory drug courts appeared to reduce prison admissions among offenders who successfully complete the program.

OPPAGA analyzed prison admissions for a group of 674 offenders who graduated from post-adjudicatory drug courts in 2004 and compared their subsequent prison admissions to a similar group of 8,443 offenders who were sentenced to drug offender probation. Over a three-year period, offenders who successfully completed drug court were 80 percent less likely to go to prison than the matched comparison group. Forty-nine percent of those who did not graduate from the program were incarcerated during the three-year follow-up period.[1]

According to the report, both the programs' treatment and supervision components are significant factors in reducing prison admissions.[2]

Ideally, drug courts operate as special court dockets that hear cases involving drug addicted offenders. Judges order participating offenders to attend community treatment programs under close supervision by the court. The participant undergoes an intensive regimen of substance abuse treatment, case management, drug testing, and monitoring. Although treatment is tailored to each offender's individual substance abuse treatment needs, drug court programs generally require at least one year of intensive individual and/or group substance abuse treatment.

Section 397.334, F.S., sets forth the following strategy and principles for the operation of Florida's drug courts:

> (4) The treatment-based drug court programs shall include therapeutic jurisprudence principles and adhere to the following 10 key components, recognized by the Drug Courts Program Office of the Office of Justice Programs of the United States Department of Justice and adopted by the Florida Supreme Court Treatment-Based Drug Court Steering Committee:
> (a) Drug court programs integrate alcohol and other drug treatment services with justice system case processing.
> (b) Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.
> (c) Eligible participants are identified early and promptly placed in the drug court program.
> (d) Drug court programs provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.

[1] OPPAGA Report 09-13, March 2009, *State's Drug Courts Could Expand to Target Prison-bound Adult Offenders.*
[2] *Id.*

(e) Abstinence is monitored by frequent testing for alcohol and other drugs.
(f) A coordinated strategy governs drug court program responses to participants' compliance.
(g) Ongoing judicial interaction with each drug court program participant is essential.
(h) Monitoring and evaluation measure the achievement of program goals and gauge program effectiveness.
(i) Continuing interdisciplinary education promotes effective drug court program planning, implementation, and operations.
(j) Forging partnerships among drug court programs, public agencies, and community-based organizations generates local support and enhances drug court program effectiveness.

Participants in drug court must comply with more demanding requirements than those offenders serving regular probation. In addition to reporting to court several times each month, drug court participants receive regular drug testing, individual and group substance abuse treatment and counseling, and are monitored by both a probation officer and drug court case manager. Most drug courts also provide ancillary services such as mental health treatment, trauma and family therapy, and job skills training to increase the probability of participants' success.

Drug courts generally use graduated sanctions when offenders violate program requirements by such actions as testing positive on drug tests, missing treatment sessions, or failing to report to court. These sanctions may include mandatory community service, extended probation, or jail time.

Sentencing Points as Sentencing Mechanism
The Criminal Punishment Code applies to defendants whose non-capital felony offenses were committed on or after October 1, 1998.[3] Each non-capital felony offense is assigned a level ranking that reflects its seriousness.[4] There are ten levels, and Level 10 is the most serious level.[5] The primary offense, additional offenses, and prior offenses are assigned level rankings.[6] Points accrue based on the offense level. The higher the level, the greater the number of points. The primary offense accrues more points than an additional or prior offense of the same felony degree. Points may also accrue or be multiplied based on factors such as victim injury, legal status, community sanctions, and motor vehicle theft among others.

The total sentence points scored is entered into a mathematical computation that determines the lowest permissible sentence. If the total sentence points equals or is less than 44 points, the lowest permissible sentence is a nonstate prison sanction (usually community supervision), though the sentencing range is the minimum sanction up to the maximum penalty provided in s. 775.082, F.S. If the total sentence points exceeds 44 points, a prison sentence is the lowest permissible sentence, though the judge may sentence up to the maximum penalty provided in

[3] s. 921.002, F.S.
[4] The level ranking is assigned either by specifically listing the offense in the appropriate level in the offense severity ranking chart of the Code, s. 921.0022, F.S., or, if unlisted, being assigned a level ranking pursuant to s. 921.0023, F.S., based on the felony degree of the offense.
[5] s. 921.0022, F.S.
[6] s. 921.0024, F.S. All information regarding the Code is from this statute, unless otherwise indicated.

s. 775.082, F.S.[7] Sentence length (in months) for the lowest permissible sentence is determined by subtracting 28 points from the total sentence points and decreasing the remaining total by 25 percent.

A sentence may be "mitigated," which means that the length of a state prison sentence may be reduced or a nonprison sanction may be imposed even if the offender scores a prison sentence, if the court finds any permissible mitigating factor. Section 921.0026, F.S., contains a list of mitigating factors. This is called a "downward departure" sentence.

A mitigating factor was added with the passage of the postadjudicatory drug court expansion in 2009:

> 921.0026 Mitigating circumstances.—
> (2) Mitigating circumstances under which a departure from the lowest permissible sentence is reasonably justified include, but are not limited to:
> (m) The defendant's offense is a nonviolent felony, the defendant's Criminal Punishment Code scoresheet total sentence points under s. 921.0024 are 52 points or fewer, and the court determines that the defendant is amenable to the services of a postadjudicatory treatment-based drug court program and is otherwise qualified to participate in the program as part of the sentence. For purposes of this paragraph, the term "nonviolent felony" has the same meaning as provided in s. 948.08(6).[8]

An offender cannot appeal a sentence within the permissible range (lowest permissible sentence to the maximum penalty), but can appeal an illegal sentence. The state attorney can appeal a downward departure sentence.

Postadjudicatory Drug Court Expansion in 2009
As previously noted, in 2009 the parameters under which an offender could be sentenced to complete a postadjudicatory drug court program were both statutorily defined and expanded beyond "traditional" local criteria. The target population consisted of felony defendants or offenders who have a substance abuse or addiction problem that is amenable to treatment. Entry into the postadjudicatory drug court program was also expanded to include offenders who violate their probation or community control solely due to a failed or suspect drug test.

Whether having violated community supervision or before the court for sentencing on a substantive law violation, the candidate for the expanded postadjudicatory drug court program may not score more than 52 sentencing points, must be before the court for sentencing on a nonviolent felony, and must show by a drug screening and the court's assessment that he or she is amenable to substance abuse or addiction treatment. The defendant or offender must agree to enter the program.[9] The recommendation of the state attorney and victim, if any, must be

[7] If the sentence scored exceeds the maximum penalty in s. 775.082, F.S., the scored sentence is both the minimum sentence and the maximum penalty.
[8] Section 921.0026(2)(m), F.S.
[9] Sections 397.334, 921.0026(m), 948.01(7), 948.06(2)(i), 948.20, and F.S.

considered by the court.[10] Successful completion of the program is a condition of a probation or community control sentence.[11]

The drug court assumes jurisdiction of the case until such time as the offender successfully completes the program, is terminated from the program, or until the sentence is completed.[12]

Measuring Success of the 2009 Postadjudicatory Drug Court Expansion
It should be remembered that the statutory revisions which expanded the availability of postadjudicatory drug court to a larger pool of offenders have statewide application. However, the research and administrative focus has been on the areas of the state where the Legislature expected the expansion to have the most positive effect on prison costs and where extra funding was directed for the programs.

The Legislature appropriated $19 million federal Byrne grant money, over a two-year period, to the Office of the State Courts Administrator (OSCA) to pay for additional postadjudicatory drug court coordinators, data collection and reporting, service providers, program administration, Department of Corrections costs and to compensate prosecutors and public defenders who handle these drug court cases within 8 counties.[13]

The number of participating counties was reduced from 9 to 8 following Duval county's withdrawal from the program in May 2010. Currently the participants are:

- 1st Circuit; Escambia County
- 5th Circuit; Marion County
- 6th Circuit; Pinellas County
- 7th Circuit; Volusia County
- 9th Circuit; Orange County
- 10th Circuit; Polk County
- 13th Circuit; Hillsborough County
- 17th Circuit; Broward County

The 2009 legislation required the Office of Program Policy Analysis and Governmental Accountability (OPPAGA) to evaluate the effectiveness of postadjudicatory drug court programs and issue a report by October 1, 2010. Since the expansion programs became operational in early 2010, OPPAGA had a limited amount of data to review before its report was due.

OPPAGA found that expansion drug courts are generally meeting Florida drug court standards. Of the standards that were measurable at the time of the OPPAGA report, it was concluded that all of the programs are providing services along with the frequent judicial contact as expected for

[10] Section 397.334(3), F.S.
[11] Section 948.01(7), F.S.
[12] Section 948.01(7), 948.06(2)(i), F.S.
[13] 3 of the 8 state attorneys and 3 of the 8 participating public defenders accepted the grant money.

drug court programs, and early identification and placement of offenders in the program is the norm.[14]

Expansion drug courts, as currently implemented, are unlikely to significantly reduce state prison costs. According to the October 2010 OPPAGA report, without changes, the anticipated cost savings to the state are not likely to be met for three main reasons:

1) *Because of the interplay of several factors, the initial estimate of potential prison inmates who might be diverted from prison to postadjudicatory drug court was overly ambitious, which has translated to overstated estimated savings to date.*
Estimated savings were calculated using data that included the historical drug crime-related prison admissions, by jurisdiction, in order to determine which counties and circuits should yield the largest pool of potential candidates for postadjudicatory drug court. Based upon this data, the jurisdictions were chosen for the focus of the drug court expansion and receipt of the federal grant money. Losing Duval County as a participant adversely effected the program's savings outcome to date because the anticipated number of offenders from that county (200) were included in the potential defendants or offenders diverted. Also, Duval County has not been replaced with another county participant.[15]

   Additionally, the program was slower to become operational than originally anticipated. This resulted in fewer cases being processed and a smaller number of offenders being sentenced to the expanded program, to date, than originally planned.[16]

   There has been some reported resistance to implementing the program under the expanded participant parameters set forth in the 2009 statutes. Specifically, offenders who may meet the statutory criteria for admission to the program are apparently not always being considered for it.[17] According to the OPPAGA report, the state attorney's office in each of the 8 counties screen the cases to determine whether the defendant meets the court's eligibility criteria.[18] It is possible that some offenders are rejected during the screening process or that the courts have standards for candidates that are more restrictive than anticipated.[19]

   There is also anecdotal evidence that some eligible defendants and offenders may be choosing not to participate in the prison-diversion program. These variables were not taken into consideration, or perhaps were not quantifiable, when cost savings were estimated by the Office of Economic and Demographic Research, Office of the State Courts Administrator and other participants in the planning and implementation process.[20]

[14] "Without Changes, Expansion Drug Courts Unlikely to Realize Expected Cost Savings," Office of Program Policy Analysis and Governmental Accountability Report No. 10-54, October 2010, pgs. 2-3.
[15] Briefing document for Legislative Budget Commission presentation by State Court System, July 2009; Adult Post-Adjudicatory Drug Court Expansion Program, Status Update (draft on file with Florida Senate Criminal Justice Committee) dated February 14, 2011, OSCA.
[16] Adult Post-Adjudicatory Drug Court Expansion Program, Status Update (draft on file with Florida Senate Criminal Justice Committee) dated February 14, 2011, OSCA.
[17] *Id.* at pgs. 4-5.
[18] *Id.* at pg. 2.
[19] *Id.* at pg. 4. OPPAGA indicates that the postadjudicatory eligibility criteria set forth, for the first time, in the Florida Statutes in 2009 varied from the "traditional" criteria that had been implemented at the local level.
[20] Briefing document for Legislative Budget Commission presentation by State Court System, July 2009.

2) *Current eligibility criteria restrict admissions.*
Although OSCA reports 811 admissions statewide through January 2011, this is well below the expected number of admissions and below the program capacity.[21] OPPAGA indicates that restricting the admissions in violation of probation or community control cases to only those where the *sole violation* is a failed substance abuse test has omitted a large pool of offenders. This is so because 74 percent of all violations for a failed drug test occur with *other technical violations*.[22] Reaching this pool of offenders would require a change in statutory eligibility criteria.

Also, although the 2009 criteria does not exclude offenders with a felony history of violent offenses, they have "traditionally" been excluded from drug courts due to federal grant restrictions. The Byrne grant funds that have been appropriated to expand postadjudicatory drug court do not carry those restrictions, however, the courts and perhaps other practitioners have been reluctant to include this pool of offenders in the postadjudicatory drug court program.[23]

3) *The postadjudicatory drug courts are serving offenders who were not intended by the Legislature to be a part of the program.*
Under the Florida Criminal Punishment Code, an offender or defendant who scores less than 44 total sentencing points is unlikely to be sentenced to a term in prison absent special circumstances.[24] When the points are equal to or exceed 44, the lowest permissible sentence is a term of incarceration, absent mitigating factors or other appropriate sentencing alternatives.

The 2009 postadjudicatory drug court expansion provided statutory authority to admit offenders with sentencing points of 52 or less into the program as a condition of community supervision, in lieu of a prison sentence. The goal was to *divert* qualified offenders *who, without the alternative sentencing, might otherwise have gone to prison* to a program that both showed a quantifiable success rate and that costs far less than incarceration.[25] It appears, however, that -- by a 2-to-1 margin -- the offenders who are receiving postadjudicatory drug court sentences score from 1 to 43 points.[26] Serving this particular pool of offenders is not achieving the anticipated cost savings the Legislature intended.

[21] "Without Changes, Expansion Drug Courts Unlikely to Realize Expected Cost Savings," Office of Program Policy Analysis and Governmental Accountability Report No. 10-54, October 2010, pgs. 3-4; Status Update (draft on file with Florida Senate Criminal Justice Committee) dated February 14, 2011, OSCA.
[22] Based upon Department of Corrections data as reported by OPPAGA, "Without Changes, Expansion Drug Courts Unlikely to Realize Expected Cost Savings," Office of Program Policy Analysis and Governmental Accountability Report No. 10-54, October 2010, pg. 4.
[23] *Id.* at pgs. 4-5.
[24] *Id.* at pg. 6.
[25] *Id.* at pgs. 5-6; OPPAGA Report 09-13, March 2009, *State's Drug Courts Could Expand to Target Prison-bound Adult Offenders.*
[26] *Id.* at pg. 6. Of the 323 offenders in the program at the time of the report, 216 scored less than 44 points.

OPPAGA suggests the following changes in the postadjudicatory drug court program:

- Expand the admission criteria to include all technical violations of community supervision if there is a nexus to substance abuse and give courts discretion, statutorily, to include offenders with prior violent offenses.
- Include additional counties in the expansion program.
- Require the expansion drug courts to serve predominantly prison-bound offenders and consider shifting funding from counties that do not comply.

OPPAGA also suggests that the federal grant dollars could be shifted to other prison-diversion programs rather than have the funds revert to the federal government.[27]

III. Effect of Proposed Changes:

This bill provides for additional sentencing options for a statutorily restricted population of defendants and community supervision offenders who might successfully, and safely, be diverted from the prison system into existing postadjudicatory drug court programs. The target population consists of offenders who have a substance abuse or addiction problem that is amenable to treatment and who are currently in the criminal justice system because of a nonviolent felony offense.

Entry into the postadjudicatory drug court program is also expanded to include offenders who violate their probation or community control for any reason.

Whether having violated community supervision or before the court for sentencing on a substantive law violation, the candidate for a postadjudicatory drug court program may not score more than 60 sentencing points, shall be before the court for sentencing on a nonviolent felony, and must show by a drug screening and the court's assessment that he or she is amenable to substance abuse or addiction treatment. The defendant or offender must agree to enter the program. The state attorney and victim, if any, must be consulted. Successful completion of the program is a condition of a probation or community control sentence.

The bill becomes effective July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

[27] *Id.* at pgs. 6-7.

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 has not yet met to consider the potential fiscal impact of this 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.)

CS by Criminal Justice on February 22, 2011:
Deletes the provision in the bill that would have given the court discretion to allow offenders who have a prior violent felony conviction into the postadjudicatory drug court program.

B. Amendments:

None.

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 866
INTRODUCER:	Senator Bogdanoff
SUBJECT:	Judgment Interest
DATE:	March 11, 2011
REVISED:	

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

I. Summary:

This bill requires the Chief Financial Officer to adjust the statutory rate of interest payable on judgments or decrees on a quarterly basis by averaging the discount rate of the Federal Reserve Bank of New York for the preceding 12 months, then adding 300 basis points to the averaged federal discount rate. Currently, the rate is calculated annually, without quarterly adjustment, and includes an addition of 500 basis points to the averaged federal discount rate.

This bill substantially amends sections 55.03 and 717.1341, Florida Statutes.

II. Present Situation:

Prejudgment and Post-judgment Interest

Interest can accrue on both prejudgment and post-judgment awards. Prejudgment interest is awarded for the time between the loss of a vested property right and the time that judgment is entered. The purpose is to compensate the prevailing party for loss of use of his or her money from the date that it is determined he or she is entitled to a sum of money to the time when final judgment is entered.[1] Post-judgment interest, on the other hand, is awarded for the period between the final judgment and the time when the entire sum of the money is collected.[2] The purpose of post-judgment interest is two-fold: to encourage parties to pay damages quickly and

[1] Jorge A. Lopez, *Prejudgment and Postjudgment Interest: What's in a Name?*, 76 FLORIDA BAR JOURNAL 20 (Mar. 2002) (citing *Alvarado v. Rice*, 614 So. 2d 498 (Fla. 1993); *Becker Holding Corp. v. Becker*, 78 F.3d 514, 516-17 (11th Cir. 1996); *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212 (Fla. 1985); *Kissimmee Util. Auth. v. Better Plastics, Inc*., 526 So. 2d. 46 (Fla. 1988)).

[2] Lopez, *supra* note 1 (citing *Becker*, 78 F.3d at 516).

to compensate the prevailing party for the inability to use the awarded money while the appeal is pending, which can take years.[3] Prejudgment interest is generally only allowed on liquidated damages (those agreed to ahead of time by the parties).[4] In other cases, the general rule is that interest typically begins to accrue when the judgment is entered.[5] "Prejudgment and post-judgment interest serve exactly the same purpose, albeit for different time periods: they make the plaintiff whole for having been deprived of the use of the principal loss amount."[6]

Judgment Interest Rates

Under current Florida law, on December 1 of each year, the Chief Financial Officer is required to set the rate of interest payable on judgments or decrees for the year beginning January 1 by averaging the discount rate of the Federal Reserve Bank of New York for the preceding year, then adding 500 basis points to the averaged federal discount rate.[7] A basis point is one one-hundredth of a percentage point, used to express the movement of interest rates or index pricing.[8] Interest rates are adjusted annually to reflect current market conditions, which vary over time. The interest rate established in statute does not affect a rate of interest established by written contract or obligation.[9] Florida statute additionally specifies that in all cases where interest accrues without a special contract for the rate, the statutory rate will be applied.[10] Thus, the statutory interest rate applies to both prejudgment and post-judgment interest absent a different rate previously agreed upon by the parties.[11] Although the interest rate is adjusted annually, the rate at the time the judgment is obtained remains consistent until it is fully paid.[12] The judgment interest rate for 2011 is 6 percent.[13]

III. Effect of Proposed Changes:

The bill provides for quarterly adjustments to the statutory judgment interest rate, as opposed to the annual adjustment currently in place. The bill specifies that the additional rate adjustments will be calculated on April 1, July 1, and October 1 of each year. This change will result in interest rates reflecting more current market conditions, as conditions will be evaluated more frequently. Additionally, the bill lowers the number of basis points to be added to the averaged federal discount rate from 500 to 300, which may result in lower percentages. The bill also makes a conforming change to s. 717.1341, F.S., regarding invalid claims, recovery of property, and interest penalties. The section currently refers to annual adjustments to the interest rate.

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

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[3] *Id.*
[4] Lopez, *supra* note 1 (citing *Hurley v. Slingerland*, 480 So. 2d 104 (Fla. 4th DCA 1985)).
[5] *Haskell v. Forest Land and Timber Co., Inc.*, 426 So. 2d 1251, 1253 (Fla. 1st DCA 1983).
[6] *Becker*, 78 F.3d at 516.
[7] Section 55.03(1), F.S.
[8] Federal Reserve Bank of New York, *Maiden Lane Glossary*, *available at* http://www.newyorkfed.org/markets/ml_glossary.html (last visited Mar. 4, 2011).
[9] Section 55.03(1), F.S.
[10] Section 687.01, F.S.
[11] *See Amerace Corp. v. Stallings*, 823 So. 2d 110, 120 (Fla. 2002) (Pariente, J. dissenting).
[12] Section 55.03(3), F.S.
[13] Florida Department of Financial Services, *Statutory Interest Rates Pursuant to Section 55.03, Florida Statutes* (2011), *available at* http://www.myfloridacfo.com/aadir/interest.htm (last visited Mar. 4, 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:

Non-prevailing parties may pay lower interest rates on judgments and will also potentially see rates fluctuate more frequently.

C. Government Sector Impact:

The Department of Financial Services (DFS or department) will be required to make arrangements to calculate judgment interest rates more frequently. The department reports that the current annual process requires 15 hours of staff time to prepare and review calculations and to mail notifications. If calculations are done quarterly, DFS expects staff time to increase to 60 hours per year for calculations and mailings along with an additional 250 hours of staff time to make necessary programming changes to the Florida Accounting Information Resource (FLAIR). There will also be some cost associated with additional postage and mailing materials for notices. The department estimates a small fiscal impact associated with making these adjustments.[14]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[14] Department of Financial Services, *Senate Bill 866 Fiscal Analysis* (Feb. 23, 2011) (on file with the Senate Committee on Judiciary).

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.

915130

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Bogdanoff) recommended the following:

Senate Amendment (with title amendment)

Delete lines 14 - 31
and insert:

(1) On the first day of the month of each calendar quarter ~~December 1 of each year~~, the Chief Financial Officer shall set the rate of interest that shall be payable on judgments or decrees for the calendar quarter ~~year beginning January 1~~ by averaging the discount rate of the Federal Reserve Bank of New York for the preceding 12 months ~~year~~, then adding 300 ~~500~~ basis points to the averaged federal discount rate. The Chief

915130

Financial Officer shall inform the clerk of the courts and chief judge for each judicial circuit of the rate that has been established ~~for the upcoming year~~. ~~The interest rate established by the Chief Financial Officer shall take effect on January 1 of each following year.~~ Judgments obtained on or after January 1, 1995, shall use the previous statutory rate for time periods before January 1, 1995, for which interest is due and shall apply the rate set by the Chief Financial Officer for time periods after January 1, 1995, for which interest is due. Nothing contained herein shall affect a rate of interest established by written contract or obligation.

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

And the title is amended as follows:

Delete line 5

and insert:

calculation of the interest rate; removing provisions relating to the date the interest rate established by the Chief Financial Officer is to take effect; 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:	SB 930
INTRODUCER:	Senators Lynn and Rich
SUBJECT:	Protection of Volunteers
DATE:	March 11, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Maclure	JU	**Pre-meeting**
2.			CF	
3.			GO	
4.				
5.				
6.				

I. Summary:

The bill amends the Florida Volunteer Protection Act (Act) to specify that, as long as a volunteer is not being compensated by the nonprofit organization for whom he or she is volunteering, liability for the volunteer's acts still may be shifted to the nonprofit organization, provided the other criteria of the Act are satisfied. In addition, if the volunteer is being compensated by another source, both the liability of the volunteer and any liability imputed to the source of the compensation may be shifted to the nonprofit organization.

Specifically, under the bill, any person who volunteers any service for any nonprofit organization, including an officer or director of such organization, without compensation *from the nonprofit organization, regardless of whether the person is receiving compensation from another source*, except reimbursement for actual expenses, shall be considered an agent of such nonprofit organization when acting within the scope of any official duties performed under such volunteer services.

The bill also provides that the volunteer and *the source that provides compensation* may not incur any civil liability for any act or omission by such person which results in personal injury or property damage if other specified criteria in the Act are also met.

This bill amends section 768.1355, Florida Statutes.

II. Present Situation:

The "Florida Volunteer Protection Act" provides that any person who volunteers to perform any service for any nonprofit organization, including an officer or director of such organization,

without compensation, except reimbursement for actual expenses, shall be considered an agent of such nonprofit organization when acting within the scope of any official duties performed under the volunteer services.[1] Such person may not incur civil liability for any act or omission by the person which results in personal injury or property damage under specified circumstances. The volunteer is immune from civil liability for acts or omissions he or she performed without compensation and that were performed within his or her official duties for any nonprofit organization which result in personal injury or property damage if:

- The volunteer was acting in good faith within the scope of any official duties performed under such volunteer service and the volunteer was acting as an ordinary reasonably prudent person would have acted under the same or similar circumstances; and
- The injury or damage was not caused by any wanton or willful misconduct on the part of the volunteer in the performance of such duties.

For purposes of the Florida Volunteer Protection Act, "nonprofit organization" means any organization that is exempt from federal taxation under federal law[2] or any federal, state, or local governmental entity. "Compensation," for purposes of the act, does not include a stipend as provided by the Domestic Service Volunteer Act of 1973 or other financial assistance, valued at less than two-thirds of the federal hourly minimum wage standard, paid to a person who would otherwise be financially unable to provide the volunteer service.

The intent of the Florida Volunteer Protection Act is not to immunize volunteers from liability but to shift liability from the volunteer to the nonprofit organization only in circumstances where the volunteer is *exercising ordinary reasonably prudent care and meets the other criteria* specified in s. 768.1355, F.S.[3] The act is written in the conjunctive, not disjunctive, so that each requirement in the statute must be present for the volunteer to be afforded immunity.[4]

III. Effect of Proposed Changes:

The bill revises the statutory criteria under the Florida Volunteer Protection Act (Act) applicable to compensation that a volunteer receives and the source of the volunteer's compensation in order to shift liability from the volunteer, and any liability imputed to the source that provides compensation to volunteer under the bill, to the nonprofit organization.

Under the bill, any person who volunteers any service for any nonprofit organization, including an officer or director of such organization, without compensation *from the nonprofit organization, regardless of whether the person is receiving compensation from another source*, except reimbursement for actual expenses, shall be considered an agent of such nonprofit organization when acting within the scope of any official duties performed under such volunteer services.

[1] Section 768.1355, F.S.
[2] 26 U.S.C. s. 501.
[3] *Campbell v. Kessler as Personal Representative of the Estate of Reuben D. Berger*, 848 So. 2d 369, 371-72 (Fla. 4th DCA 2003).
[4] *Id.*

The bill also provides that the volunteer and *the source that provides compensation* may not incur any civil liability for any act or omission by such person which results in personal injury or property damage if other specified criteria in Act are also met.

Other Potential Implications:

In some situations, a volunteer who receives compensation from another may create an agency relationship between the source of the compensation and the volunteer so that source of the compensation may be held vicariously liable, or liable under some other theory, for imputed negligence for the acts of the volunteer. "Vicarious liability" allows an injured party to seek redress from another who is not the party primarily responsible.[5]

The factors required to establish an agency relationship are: (1) acknowledgement by the principal that the agent will act for the principal; (2) the agent's acceptance of the undertaking; and (3) control by the principal over the actions of the agent.[6] If an agency relationship is created between the volunteer and the source that provides the compensation, on a case-by-case basis, it may be unclear, for purposes of the Florida Volunteer Protection Act, whether the volunteer will be acting as agent of the nonprofit organization or the source that provides the compensation.

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:

A volunteer who receives compensation from another source, and the "source that provides compensation," may shift liability from the volunteer and any liability imputed to the source of the compensation received by the volunteer to the nonprofit organization, if the volunteer otherwise meets the statutory criteria for immunity under the Florida Volunteer Protection Act.

[5] See *American Home Assurance Co. v. National Railroad Passenger Corp.*, 908 So. 2d 459 (Fla. 2005).
[6] See *Goldschmidt v. Holman*, 571 So. 2d 422 (Fla. 1990).

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.

370002

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Thrasher) recommended the following:

Senate Amendment (with title amendment)

Delete lines 24 - 25
and insert:

performed under such volunteer services. Such person, and the source that provides compensation, if the volunteer is not acting as an agent of the source, shall incur no civil

========== T I T L E A M E N D M E N T ==========
And the title is amended as follows:

Delete line 9

370002

and insert:

compensation from another source; providing an exception; providing 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:	CS/SB 146
INTRODUCER:	Criminal Justice Committee, Senator Smith, and others
SUBJECT:	Ex-Offenders/Licensing and Employment
DATE:	March 11, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	Roberts	GO	**Favorable**
2.	Clodfelter	Cannon	CJ	**Fav/CS**
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:

The bill makes changes to Florida's laws relating to the restoration of civil rights, restrictions on the employment of ex-offenders, and sealing and expunging criminal records. Specifically, the bill:

- Provides that restoration of civil rights cannot be required as a condition of eligibility for public employment or to obtain a license, permit, or certificate;
- Requires state agencies and regulatory boards to submit to the Governor and certain legislative officers a report that outlines current disqualifying policies on the employment or licensure of ex-offenders and possible alternatives that are compatible with protecting public safety;
- Provides that an ex-offender may lawfully deny or fail to acknowledge any arrests or subsequent dispositions covered by a sealed or expunged record and that a person cannot be liable for perjury for doing so on an employment application;
- Permits the subject of an expunged record to receive the contents of that record without a court order; and
- Allows for a second sealing of a criminal record.

This bill substantially amends the following sections of the Florida Statutes: 112.011, 943.0585, and 943.059.

II. Present Situation:

Restoration of Civil Rights

Section 112.011(1)(a), F.S., provides that a criminal conviction does not automatically disqualify a person from eligibility for public employment. However, a person who has been convicted of a felony or first-degree misdemeanor may be denied employment if the crime is directly related to the position sought. This section does not refer to restoration of civil rights.

Section 112.011(1)(b), F.S., relates to the impact of a prior criminal conviction on obtaining a license, permit, or certificate from a public agency to engage in an occupation, trade, vocation, profession, or business. If a person has had his or her civil rights restored, the status of having a prior conviction is not necessarily a disqualification. However, the conviction may be disqualifying if the specific crime for which the person was convicted was a felony or first-degree misdemeanor that is directly related to the position for which the license, permit, or certificate is required. In addition, some licensing boards have interpreted this statute to imply a requirement for restoration of civil rights.[1]

Counties and municipalities that are hiring for positions deemed to be critical to security or public safety, law enforcement agencies, and correctional agencies are exempted from the provisions of s. 112.011(1), F.S.[2] Fire departments are also prohibited from hiring firefighters with a prior felony conviction sooner than four years after expiration of the sentence unless the applicant has been pardoned or had his or her civil rights restored.

According to a report prepared in 2007 by the Public Safety Unit of the Office of Policy and Budget within the Executive Office of the Governor (EOG), the overwhelming majority of licenses that were denied in the two years prior to the report were due to statutory restrictions relating to criminal convictions and not for a requirement for civil rights restoration.[3] More than 4,000 licenses were denied during the prior year, but only 14 were denied due to a lack of restoration of civil rights. These denials were by the Department of Health's (DOH) Board of Nursing (12 denials)[4] and the Department of Business and Professional Regulation's (DBPR) Construction Industry Licensing Board (two denials).[5] There is no way to estimate how many

[1] In the space of two months, three District Courts of Appeal overturned licensing board decisions to deny licenses based upon interpreting s. 112.011(1)(b), F.S., to require restoration of civil rights. *See Yeoman v. Construction Industry Licensing Bd.*, 919 So. 2d 542 (Fla. 1st DCA 2005); *Scherer v. Dep't of Business and Professional Regulation*, 919 So. 2d 662 (Fla. 5th DCA 2006); *Vetter v. Dep't of Business and Professional Regulation, Electrical Contractors' Licensing Bd.*, 920 So. 2d 44 (Fla. 2d DCA 2005).

[2] Section 112.011(2), F.S.

[3] Public Safety Unit, Office of Policy and Budget, Executive Office of the Governor, *Report on the Survey of License and Employment Restrictions in State Agencies* (Oct. 2007).

[4] The Board of Nursing removed its discretionary requirement of civil rights restoration in November 2007.

[5] Section 489.115(6), F.S., was amended by Senate Bill 404 in 2007 to provide that the Construction Industry Licensing Board cannot deny a contractor's license based solely upon a felony conviction or the applicant's failure to provide proof of restoration of civil rights. If the applicant was convicted of a felony, licensure denial may be based upon the severity of the

persons were deterred from applying for licensing because of an actual or perceived requirement for civil rights restoration.

The EOG's review found that the DOH and the Department of Highway Safety and Motor Vehicles restrict some licenses based upon a requirement for restoration of civil rights.[6] Outside of the Governor's agencies, the Department of Agriculture and Consumer Services and the Department of Financial Services have both statutorily mandated and non-mandated requirements for restoration of civil rights.

The civil rights of a convicted felon are suspended until restored by pardon or restoration of civil rights. The Florida Constitution specifies only the loss of the right to vote and the right to hold public office as consequences of a felony conviction. Other civil rights that are lost in accordance with statute include the right to serve on a jury, to possess a firearm, and to engage in certain regulated occupations or businesses.[7]

The power to restore civil rights is granted by the Florida Constitution to the Governor with the consent of at least two Cabinet members pursuant to Article IV, Section 8(a), of the Florida Constitution. In April 2007, the Governor and Cabinet changed the Rules of Executive Clemency so that more convicted felons who have completed their sentences are eligible for restoration of civil rights. Between July 1, 2007, and September 30, 2008, 123,232 felons had their rights restored.[8] This contrasts with 11,002 restorations during Fiscal Year 2005-2006, the last full fiscal year before the clemency rules were amended.[9] Many offenses for which restoration of rights was either excluded or delayed for a period of years are now eligible for restoration after verification that all qualifying conditions have been met.

Eligibility for restoration of civil rights requires that the felon have completed all sentences, that all conditions of supervision have been satisfied or expired, and that there is no outstanding victim restitution. Thereafter, felons fall into one of three categories based upon the Clemency Board's assessment of the seriousness of the offense:

- Immediately eligible for automatic approval of restoration;
- Immediately eligible for restoration without a hearing; or
- Eligible for restoration without a hearing after 15 years.

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crime, the relationship of the crime to contracting, or the potential for public harm. The Board is also required to consider the length of time since the commission of the crime and the rehabilitation of the applicant.

[6] It appears that there are also statutorily mandated requirements for civil rights restoration related to the Department of Revenue (s. 206.026, F.S. – terminal supplier, importer, exporter, blender, carrier, terminal operator, or wholesaler fueler license); and the DBPR (s. 447.04, F.S. – labor union business agent license; s. 550.1815, F.S. – horseracing, dogracing, or jai alai fronton permit).

[7] Section 944.292, F.S., provides: "[u]pon conviction of a felony as defined in s. 10, Art. X of the State Constitution, the civil rights of the person convicted shall be suspended in Florida until such rights are restored by a full pardon, conditional pardon, or restoration of civil rights granted pursuant to s. 8, Art. IV of the State Constitution."

[8] Florida Parole Commission, *Annual Report 2007-2008*, 21 (Dec. 31, 2008), *available at* https://fpc.state.fl.us/PDFs/FPCannualreport200708.pdf (last visited Apr. 10, 2010).

[9] Comm. on Criminal Justice, The Florida Senate, *Rules for Restoration of Civil Rights for Felons and Impacts on Obtaining Occupational Licenses and Other Opportunities*, 6 (Interim Report 2008-114) (Dec. 2007), *available at* http://www.flsenate.gov/data/Publications/2008/Senate/reports/interim_reports/pdf/2008-114cj.pdf (last visited Apr. 10, 2010).

The Florida Parole Commission acts as the agent of the Clemency Board in verifying eligibility, and has prioritized processing of the automatic approval cases for which it conducts a less extensive review. A more extensive investigation is conducted for those who are immediately eligible for restoration without a hearing. Due to the large number of persons who are eligible for automatic approval, persons who are immediately eligible for restoration without a hearing may face a delay of several years before their rights are restored.

The Florida Department of Law Enforcement's criminal history database includes records of more than 800,000 persons who have been convicted of a felony in Florida. This is not an accurate reflection of the number of Florida residents who have lost their civil rights, because it includes persons who have died or left the state and does not include persons who were convicted in other jurisdictions. However, it illustrates the magnitude of the population that is affected by loss of civil rights.

There were 102,138 inmates in the custody of the Florida Department of Corrections as of December 31, 2010.[10] Almost 90 percent of these inmates will be released one day. During fiscal year 2008-2009, 37,391 inmates were released from prison,[11] and the current recommitment rate indicates that almost one-third of them will be recommitted within three years.[12]

The federal Second Chance Act of 2007 (act) is designed to help inmates safely and successfully transition back into the community. Among its many initiatives, the act authorizes the U.S. Justice Department's National Institute of Justice and the Bureau of Justice Statistics to conduct reentry-related research. The National Institute of Justice has found that one year after release, up to 60 percent of former inmates are not employed. The act also establishes a national resource center to collect and disseminate best practices and provide training on and support for reentry efforts. It also provides an initiative to provide specific information on health, employment, personal finance, release requirements, and community resources to each inmate released.

Restrictions on the Employment of Ex-Offenders

State agencies restrict occupational licenses and employment to ex-offenders based upon statute, administrative rule, or agency policy. The nature and variety of occupational licenses and employment with state agencies dictates that different standards will apply to different types of employees and licensees.

Restrictions based on agency policy that are not adopted as rules could be problematic. Chapter 120, F.S., specifies that a "rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any

[10] Florida Department of Corrections, *Quick Facts about the Department of Corrections, available at* *http://www.dc.state.fl.us/oth/Quickfacts.html* (last visited Mar. 10, 2011).
[11] Florida Department of Corrections Annual Report FY 2008-2009, p. 14. The number reported in the text of this analysis does not include inmates released by reason of death.
[12] Transcript of remarks by Secretary Walter A. McNeil at the Restoration of Rights Summit in Tallahassee, Florida, June 17, 2008, viewed on September 24, 2008 at http://free-rein.us/McNeil_Restoration_of_Rights_Summit_speech_06_18_08.pdf. Also, "2009 Florida Prison Recidivism Study," Florida Department of Corrections, May 2010, p. 7.

information not specifically required by statute or by an existing rule.[13] Rulemaking is not a matter of agency discretion – each agency statement defined as a rule must be adopted through the rulemaking procedure provided in ch. 120, F.S., as soon as feasible and practicable.[14] Agencies should not impose employment or licensing restrictions on applicants that are not based on statute or rules adopted pursuant to statutory authority.

The Governor's Ex-Offender Task Force (Task Force) was established in 2005 to "help improve the effectiveness of the State of Florida in facilitating the re-entry of ex-offenders into their communities so as to reduce the incidence of recidivism."[15] The Task Force estimated that almost 40 percent of the 7.6 million jobs in Florida are subject to criminal background checks or restrictions based on criminal history. The restrictions include requiring restoration of civil rights, disqualification based on commission of specific crimes, or requiring the passing of a background check under ch. 435, F.S. Less defined restrictions require assessment of whether the applicant has good moral character or has committed an act or crime of moral turpitude. The Task Force found that convicted felons face significant barriers to employment because of these restrictions.

After the Task Force found that many state laws and policies imposed restrictions on the employment of ex-offenders, and that no comprehensive review of those restrictions had been undertaken, executive agencies were instructed to produce for the Task Force a report detailing all employment restrictions and disqualifications based on criminal records.[16] The Task Force released its Final Report to the Governor in November 2006, and recommended that employment restrictions be studied, specifically the "feasibility of a single background check act that would streamline, organize, and cohere employment restrictions based on the nature of the job."[17]

In October 2007, the Governor's Office made a presentation to the Senate Criminal Justice Committee addressing licensing and employment restrictions, based on surveys of non-Cabinet agencies. Nine agencies reported licensing restrictions, citing criminal history or restoration of civil rights as the legal basis for the restrictions. The presentation noted that pursuant to s. 112.011, F.S., an agency *may* deny employment by reason of the prior conviction for a crime if the crime was a felony or first-degree misdemeanor and *directly related* to the position of employment sought.

Pursuant to s. 112.011(1)(a), F.S., a person may not be disqualified from employment by the state, any of its agencies or political subdivisions, or any municipality solely because of a prior conviction for a crime, except for those drug offenses specified in s. 775.16, F.S. However, a person may be denied employment by those entities by reason of the prior conviction for a crime if the crime was a felony or first-degree misdemeanor and directly related to the position of employment sought. Specific restrictions for licenses and employment are found throughout the

[13] Section 120.52(15), F.S.
[14] Section 120.54(1)(a), F.S.
[15] Executive Order No. 05-28.
[16] Executive Order No. 06-89.
[17] Governor's Ex-Offender Task Force, *Final Report to Governor Jeb Bush*, 27 (Nov. 2006), *available at* http://www.aecf.org/upload/PublicationFiles/Final%20Report%20of%20Florida%20Ex-Offender%20Task%20Force.pdf (last visited Apr. 10, 2010).

Florida Statutes, as detailed in the Governor's Survey of License and Employment Restrictions in State Agencies, presented to the Senate Criminal Justice Committee in October 2007.

Sealing and Expunction of Criminal History Records

Sections 943.0585 and 943.059, F.S., set forth procedures for sealing and expunging criminal history records. The courts have jurisdiction over their own judicial records containing criminal history information and over their procedures for maintaining and destroying those records. The department can administratively expunge non-judicial records of arrest that are made contrary to law or by mistake.

When a record is expunged, it is physically destroyed and no longer exists if it is in the custody of a criminal justice agency other than the FDLE.[18] Criminal justice agencies are allowed to make a notation indicating compliance with an expunction order. The department, on the other hand, is required to retain expunged records. When a record is sealed, it is not destroyed, but access is limited to the subject of the record, his or her attorney, law enforcement agencies for their respective criminal justice purposes, and certain other specified agencies for their respective licensing and employment purposes.

Records that have been sealed or expunged are confidential and exempt from the public records law. It is a first-degree misdemeanor to divulge their existence, except to specified entities for licensing or employment purposes.[19]

Persons who have had their criminal history records sealed or expunged may lawfully deny or fail to acknowledge the arrests covered by their record, except when they are applying for certain types of employment,[20] petitioning the court for a record sealing or expunction, or are a defendant in a criminal prosecution.[21]

In 1992, the Legislature amended the sealing and expunction statute to require a person seeking a sealing or expunction to first obtain a certificate of eligibility from FDLE and then, if the person meets the statutory criteria based on the department's criminal history check and receives a certificate, he or she can petition the court for a record sealing or expunction.[22] It is then up to the court to decide whether the sealing or expunction is appropriate.

A criminal history record may be expunged by a court if the petitioner has obtained a certificate of eligibility and swears that he or she:

- Has not previously been adjudicated guilty of any offense or adjudicated delinquent for certain offenses.

[18] Section 943.0585(4), F.S.
[19] Section 943.0585(4)(c), F.S.
[20] These types of employment include: law enforcement, the Florida Bar, working with children, the developmentally disabled, or the elderly through the Department of Children and Family Services, the Department of Juvenile Justice, the Department of Education, any district school board, or local governmental entity licensing child care facilities, or a Florida seaport.
[21] Section 943.0585(4)(a), F.S.
[22] Section 943.0585(2), F.S.

- Has not been adjudicated guilty or delinquent for any of the charges he or she is currently trying to have sealed or expunged.
- Has not obtained a prior sealing or expunction.
- Is eligible to the best of his or her knowledge and has no other pending expunction or sealing petitions before the court.[23]

In addition, the record must have been sealed for 10 years before it can be expunged, unless charges were not filed or were dismissed by the prosecutor or court.[24] The same criteria apply for sealing a criminal history record under s. 943.059, F.S. Any person knowingly providing false information on the sworn statement commits a felony of the third degree.[25]

The Legislature also prohibits criminal history records relating to certain offenses in which a defendant (adult or juvenile) has been found guilty or has pled guilty or nolo contendere, regardless of whether adjudication was withheld, from being sealed or expunged.[26]

III. Effect of Proposed Changes:

Section 1: Title

Section 1 provides that the act may be cited as the "Jim King Keep Florida Working Act."

Section 2: Restrictions on the Employment of Ex-Offenders

Each state agency, including professional and occupational regulatory boards, will submit a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives by December 31, 2011, and every eight years thereafter. This report will include policies imposed by the agency or board that disqualify a person who has been convicted of a crime from employment or licensure. The report will also contain a review of these restrictions and their availability to prospective employees. The report will take into account these disqualifications and consider less restrictive ways to protect public safety while offering employment opportunities for ex-offenders. If any restriction is based on language referring to "good moral character" or "moral turpitude," the report may propose restrictions that more precisely describe the basis for employment decision making.

Section 3: Restoration of Civil Rights

Section 112.011(1)(b), F.S., is rewritten to exclude any reference to restoration of civil rights. The bill amends the original language to allow a government entity to deny an application for a

[23] Section 943.0585(1)(b), F.S.
[24] Section 943.0585(2)(h), F.S.
[25] Section 943.0585(1), F.S.
[26] These offenses include the following: sexual misconduct with developmentally disabled clients, mental health patients, or forensic clients; luring or enticing a child; sexual battery; procuring a person under 18 years for prostitution; lewd, lascivious, or indecent assault upon a child; lewd or lascivious offenses committed on an elderly or disabled person; communications fraud; sexual performance by a child; unlawful distribution of obscene materials to a minor; unlawful activities involving computer pornography; selling or buying minors for the purpose of engaging in sexually explicit conduct; offenses by public officers and employees; drug trafficking; and other dangerous crimes such as arson, aggravated assault or battery, kidnapping, murder, robbery, home invasion robbery, carjacking, stalking, domestic violence, and burglary.

license, permit, or certificate to engage in an occupation, trade, vocation, profession, or business if the applicant was convicted of a felony or first-degree misdemeanor relevant to the standards normally associated with, or determined by the regulatory authority to be necessary for the protection of the public or other parties for which the license, permit, or certificate is required.

Paragraph (c) is added to expressly preclude disqualification of a person from receiving a license, permit, or certificate or from obtaining public employment on the grounds that his or her civil rights have not been restored. This applies notwithstanding any provision in another section of Florida Statutes, though it does not apply to applications for a license to carry a concealed weapon. However, the exemptions within the section of law for county and municipal positions, which are deemed to be critical to security or public safety, law enforcement agencies, correctional agencies, and fire departments are retained.

The effect of these revisions to s. 112.011(1), F.S., is that the restoration of civil rights will no longer be used as a measure of fitness for public employment and licensure. This recognizes that restoration of civil rights is dependent upon completion of sentence, not upon a demonstration of rehabilitation or suitability for employment. Public safety may be increased by precluding consideration of restoration of civil rights as a validation that a person is fit for employment regardless of the specifics of his or her criminal background.

In addition, otherwise qualified persons will not be precluded from employment if they have a prior conviction for a crime that is not related to the position or permit which they seek. These increased employment opportunities should have some impact in reducing recidivism, thus reducing the direct costs of crime as well as costs of re-incarceration. With the link between civil rights restoration and ex-offender employment eligibility separated, regulatory agencies and licensing boards may be more likely to establish criteria significant to their specific trades that can more effectively satisfy public safety concerns.

Sections 4 and 5: Sealing and Expunction of Criminal History Records

The bill makes the following changes to the statutes governing the sealing and expunction of criminal records:

- Requires the clerk of court to place on his or her website information on the availability of criminal history record sealing and expunction, including a link to the Florida Department of Law Enforcement's website for sealing and expunction applications and information;
- Clarifies how a potential applicant can answer a "conviction" question on a job or licensing application concerning sealed or expunged records by specifying that a person may lawfully deny or fail to acknowledge the arrests and subsequent dispositions covered by the sealed or expunged record;
- Clarifies that no person can be liable for perjury when denying or failing to acknowledge the arrests and subsequent dispositions, including when asked on an employment application;
- Permits the contents of an expunged record to be disclosed to the subject of the record without requiring him or her to obtain a court order; and
- Allows for a second sealing of a criminal record if the subject of the record has been crime-free for five years (meaning no subsequent arrests have occurred since the date of the court order for the initial criminal history record expunction or sealing). The current requirements

and other provisions in the sealing and expunction statutes would continue to apply when seeking a second sealing under the bill.

Section 6: 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:

The Florida Department of Law Enforcement estimated that $498,525 in annual revenue would be generated from the certificate of eligibility fees. This was based on an estimated 6,647 new applications the department anticipates it will receive ($75 per application x 6,647 additional applications each year).[27]

B. Private Sector Impact:

The bill may have a positive fiscal impact by providing more job opportunities for convicted felons. That could reduce recidivism, thus reducing the direct costs of crime as well as costs of re-incarceration.

C. Government Sector Impact:

The Florida Department of Law Enforcement anticipates that additional resources will be required to handle the increased workload generated by the provision in the bill which allows persons to apply for a second criminal history records sealing. FDLE indicates that such costs may be $145,006 in Fiscal Year 2011-12, and $101,210 in Fiscal Years 2012-13, and 2013-14.[28]

[27] Florida Dep't of Law Enforcement, *Senate Bill 146 Relating to Ex-offenders/Licensing and Employment/Sealed Records*, (Feb. 2, 2011) (on file with the Senate Committee on Judiciary).
[28] *Id.*

VI. Technical Deficiencies:

The bill allows for a second sealing of a criminal record if the subject of the record has been crime-free for five years. The bill adds this exception several places in s. 943.059, F.S. (see lines 476, 519, and 552); however, the exception is not added to substantially similar sections of law within s. 943.0585, F.S. (see lines 184, 258, and 304). It is unclear if the exception needs to be added to s. 943.0585, F.S., which relates to court-ordered expunction of criminal history records.

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 9, 2011:

Removes an amendment to s. 768.096, F.S., that would have required an employer to review and consider the results of a criminal history background investigation and take certain steps consistent with the findings of the investigation in order to satisfy a statutory presumption against civil liability for negligent hiring.

B. Amendments:

None.

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 344
INTRODUCER:	Senator Rich
SUBJECT:	Sexual Activities Involving Animals
DATE:	March 11, 2011 REVISED:

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

I. Summary:

The bill prohibits, as a first-degree misdemeanor, knowingly engaging in sexual conduct or contact with an animal. It also prohibits, with the same penalty, knowingly:

- aiding or abetting another in committing the conduct or contact;
- permitting the acts to be conducted on one's premises; or
- organizing, promoting, participating as an observer in, or performing services to facilitate the acts for commercial or recreational purposes.

Accepted animal husbandry practices, conformation judging practices, and accepted veterinary medical practices are specifically exempted from prosecution under the bill.

This bill creates section 828.126, Florida Statutes.

II. Present Situation:

Despite the efforts of prosecutors in the State of Florida, persons who are actually caught in the act of sexual intercourse with an animal cannot generally be charged with or convicted of a sex-related crime. There have been several recently reported incidents of the abuse of animals in this particular way.

Reported incidents in Florida include:

- In Leon County, in 2005, a man was convicted of a misdemeanor disorderly conduct charge for sexually battering his own guide dog.

- In April 2004, a Marion County man pled no contest to animal cruelty after his fiancée caught him sexually battering her 1-year-old female dog. The dog was physically injured in the process. The Sheriff's Office reports indicated that the man told deputies that this type of behavior had been a "life-long problem."[1]
- A West Palm Beach man was caught sexually battering a neighbor's dog in January 2004. The dog was alleged to have been yelping in pain. The man was charged with animal cruelty and indecent exposure. The perpetrator is a registered sex offender.
- A family's pregnant goat was sexually battered and asphyxiated in January 2008, in a small Panhandle town. Although there was a suspect in the case, prosecutors were unable to charge him in the mistreatment and death of the goat because DNA tests were inconclusive.[2]
- Martin County Sheriff's deputies were called to investigate an animal in distress and found a man sexually battering a 4-month-old puppy. Reports indicate that when the deputy approached the man, she saw him in the act as the puppy whined and tried to break free.

Because there are no sex crime statutes in Florida that would seem to apply in cases like those mentioned above, law enforcement officers and prosecutors must charge defendants with far less serious crimes, such as disorderly conduct, or crimes that may not seem to reflect fully the circumstances of the case, such as indecent exposure. Also, because of the elements of animal cruelty offenses, these acts and behaviors cannot always be prosecuted as such. There must be evidence of injury or evidence of excessive or repeated infliction of pain to the animal in order to prove felony animal cruelty.[3]

In other states, situations like those set forth above have resulted in the passage of laws designed to more accurately capture these behaviors within the criminal law as the particularized crimes that they are. Georgia, Louisiana, Mississippi, North Carolina, Virginia, and South Carolina are among the states in the Southeast that have enacted felony bestiality statutes.[4]

III. Effect of Proposed Changes:

The bill creates s. 828.126, F.S., which makes knowingly engaging in sexual conduct or contact with an animal a first-degree misdemeanor. This section also prohibits, with the same penalty, knowingly:

- aiding or abetting another in committing the conduct or contact;
- permitting the acts to be conducted on one's premises; or
- organizing, promoting, participating as an observer in, or performing services to facilitate the acts for commercial or recreational purposes.

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[1] Rick Cundiff, *Man gets probation, psychological testing for sex abuse of dog*, OCALA STAR-BANNER, Apr. 15, 2004, *at* http://www.ocala.com/article/20040415/NEWS/204150320.

[2] Marc Caputo, *Beastly crime gives rise to unusual bill*, MIAMI HERALD, Jan. 4, 2008 (on file with the Senate Committee on Judiciary).

[3] Section 828.12(2), F.S., is the felony animal cruelty statute. It states: "A person who intentionally commits an act to any animal which results in the cruel death, or excessive or repeated infliction of unnecessary pain or suffering, or causes the same to be done, is guilty of a felony of the third degree, punishable as provided in s. 775.082 or by a fine of not more than $10,000, or both."

[4] See GA. CODE ANN. s. 16-6-6, LA. REV. STAT. ANN. s. 14:89, MISS. CODE ANN. s. 97-29-59, N.C. GEN. STAT. s. 14-177, VA. CODE ANN. s. 18.2-361, and S.C. CODE ANN. s. 16-15-120.

In this manner, the bill provides a way for law enforcement and prosecutors to more accurately charge and prosecute the deviant behaviors described in the measure.

The bill specifically exempts from its provisions accepted animal husbandry, conformation judging, and accepted veterinary medical practices.

The bill prescribes 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.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Under the bill, the offense is a first-degree misdemeanor, which could result in one year or less in county jail.[5] Thus, the bill may have a fiscal impact at the county level. However, the impact is not anticipated to be significant.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[5] *See* s. 775.082(4)(a), 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.)

None.

B. Amendments:

None.