

STORAGE NAME: h1027s1.cp
DATE: April 16, 1997

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME AND PUNISHMENT
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: CS/HB 1027

RELATING TO: Sexual Offenders

SPONSOR(S): Representative Crist

STATUTE(S) AFFECTED: 775.084, 775.081, 921.001, 948.001, 948.03.

COMPANION BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME AND PUNISHMENT YEAS 9 NAYS 1
- (2) CRIMINAL JUSTICE APPROPRIATIONS
- (3)
- (4)
- (5)

I. SUMMARY:

CS/HB 1027 creates "habitualization" mechanisms for repeat and habitual sex offenders to impose enhanced penalties and to impose minimum mandatory sentences. A definition of "repeat sex offender" and "habitual sex offender" is created depending on the offense committed, the number of previous enumerated criminal convictions, and the status of the offender at the time he committed his offense. The court, in a separate hearing, will determine whether a defendant qualifies to be a repeat or habitual sex offender.

CS/HB 1027, also, limits direct appeals and collateral reviews of repeat or habitual sex offender sentences and limits claims that may be raised on appeal. It also authorizes the state to appeal the court's failure to sentence an offender as a habitual sex offender if the offender qualifies to be sentenced as such. Downward departures in sentencing are prohibited.

Standard conditions of sex offender probation are also amended to include a mandatory 10 p.m. to 6 a.m. or other 8-hour curfew; submission to at least one polygraph test per year; a prohibition on the possession or use of a computer with Internet access; and submission to antiandrogen therapy (chemical castration) if it is recommended by a sex offender therapist or physician, among other conditions.

II. **SUBSTANTIVE RESEARCH:**

A. PRESENT SITUATION:

Sexual Battery

Current law punishes sexual battery against a victim over 12-years of age as a second-degree felony. See Section 794.011(5), F.S.

The offense is punishable as a first-degree felony where:

- the victim is physically unable to resist due to mental, physical or chemical vulnerabilities, or

- where the victim is coerced to submit by threat of serious personal injury to herself or a family member, or

- the offender is a law enforcement officer. See Section 794.011(4), F.S.

Sexual battery is punishable as a life felony where the victim is coerced to submit under threat of a deadly weapon or the application of physical force likely to cause serious personal injury. See Section 794.011(3), F.S.

Sexual battery is punishable as a capital felony where the victim is less than 12-years of age, unless the offender is under 18-years of age, in which case, it is punishable as a life felony. See Section 794.011(2)(a) & (b), F.S.

Section 800.04(3) (lewd and lascivious assault), also, punishes sexual contact with any child under 16-years of age as a second-degree felony, regardless of that child's consent.

The Sexual Predator Act

The Florida Sexual Predator Act, Section 775.21, F.S. (1996 Supp.), provides that an offender should be designated as a "sexual predator" for certain statutorily designated sexual offenses. The sexual predator is required to register directly with the Florida Department of Law Enforcement (FDLE) and provide certain information, such as address and conviction, and be fingerprinted.

The Sexual Predator Act, also, provides that, upon notification of the presence of a sexual predator whose current offense was committed on or after October 1, 1996, the sheriff of the county, or the police chief of the municipality, where the sexual predator resides shall notify the community and the public of the "presence" of the sexual predator in a manner deemed appropriate by the sheriff or chief of police. This information must include the predator's name, photograph, current address, circumstances of the offense and age of the victim.

Failure to register or to provide location information after registration constitutes a third-degree felony.

Habitualization Statutes

Enhanced sentences and/or minimum mandatory prison sentences may be provided under Section 775.084, F.S. depending upon a defendant's prior felony record. This statute is not applicable to the laws proscribing the possession of controlled substances or possession of controlled substances with intent to sell.

The court may find a defendant to be an "habitual felony offender" if he has previously been convicted of:

- * 2 or more felonies,
- * one of which was within 5-years of this offense.

Section 775.084 gives the court discretion to sentence a defendant as an "habitual violent felony offender" if he has previously been convicted of one prior felony within 5-years of this offense, and that conviction was for:

- a. Arson;
- b. Sexual battery;
- c. Robbery;
- d. Kidnapping;
- e. Aggravated child abuse;
- f. Aggravated abuse of an elderly person or disable adult;
- g. Aggravated assault;
- h. Murder;
- i. Manslaughter;
- j. Aggravated manslaughter of an elderly person or disabled adult.
- k. Aggravated manslaughter of a child;
- l. Unlawful throwing, placing or discharging of a destructive device or bomb;
- m. Armed burglary;
- n. Aggravated battery; or
- o. Aggravated stalking.

Section 775.084 requires the court to sentence a defendant as a "violent career criminal" if he has previously been convicted three times as an adult for one of the following:

- * Any forcible felony.
- * Aggravated stalking.
- * Aggravated child abuse.
- * Aggravated abuse of an elderly person.
- * Lewd, lascivious, or indecent conduct.
- * Escape.
- * A felony violation of Chapter 790 involving the use or possession of a firearm.

Like the "habitual offender", this section requires the last offense to have occurred within the last 5-years.

B. EFFECT OF PROPOSED CHANGES:

New Class of Offenders

CS/HB 1027 would create "Habitualization" mechanisms for "repeat sex offenders" and "habitual sex offenders" to impose enhanced penalties and minimum mandatory sentences.

The court may designate a defendant a "repeat sex offender" if it finds that:

- * the defendant has been previously convicted in Florida of a violation of *1 or more* of the following statutes; Sections 794.011 (sexual battery), 800.04(3) (lewd and lascivious assault), or other qualified offenses;
- * the new offense is a violation of Section 794.011(2), (3), (4), (8)(b) (sexual battery) or 800.04(3) (lewd or lascivious assault);
- * the new offense was committed within 10-years of the enumerated prior offense.

The court may sentence the "repeat sex offender", as follows:

- * In the case of a life or first-degree felony, for life;
- * In the case of a second-degree felony, for a term of years not exceeding 30-years, with a mandatory-minimum term of 15-years, followed by 5-years sexual offender probation;
- * In the case of a third-degree felony, for a term of years not exceed 10-years.

The court must designate a defendant an "habitual sex offender" if it finds that:

- * the defendant has *2 or more* convictions for violations of the following statutes: Section 794.011 (sexual battery) or 800.04(3) (lewd or lascivious assault), or other qualified offenses.
- * the new offense is a violation of Section 794.011(2), (3), (4), (8)(b) (sexual battery) or 800.04(3) (lewd or lascivious assault);
- * the new offense was committed within 10-years of the enumerated prior offense.

The court must sentence the "habitual sex offender", as follows:

- * In the case of a life felony, first-degree felony, or second-degree felony, for life.
- * In the case of a third-degree felony, for a term of years not exceeding 20 years with a mandatory-minimum term of 15-years, followed by a minimum of 5-years sex offender probation.

CS/HB 1027 requires the court to make the determination "at any time it appears to the court that the defendant is eligible for sentencing as a repeat or habitual sex offender.

New Restrictions on Appellate Review

CS/HB 1027 denies collateral or postconviction relief for claims which do not constitute an illegal sentence or are considered fundamental error. In any event, it clarifies legislative intent that no claim should be filed more than 2-years after the judgement and conviction become final, unless the defendant can show the claim was not previously discoverable with the exercise of due diligence. It, also, clarifies legislative intent that the state shall not pay for any appellate or collateral review of repeat or habitual sex offender sentences, unless constitutionally or statutorily mandated.

CS/HB 1027 denies "any form of discretionary early release", other than by pardon or clemency or medical hardship.

New Penalties for Existing Offenses

CS/HB 1027 provides a 10-year mandatory-minimum prison sentence for Section 794.011(3), F.S. (sexual battery with a deadly weapon or with physical force likely to cause serious personal injury)

CS/HB 1027 provides a 10-year mandatory-minimum prison sentence for Section 800.04(3) (lewd and lascivious -- sexual contact with consent) when the victim is under 14-years of age, if the defendant is 24 years of age, or older.

CS/HB 1027 prohibits downward departures for repeat and sex battery offenders by reason that the offender requires or is requesting mental treatment or sex offender counseling.

- * Note -- CS/HB 1027 expressly denies any intent to require repeat or habitual sex offender sentencing in place of the death penalty.

Probation

CS/HB 1027 defines "sexual offender probation" as intensive supervision by trained probation officers working under reduced caseloads. It further makes all conditions of sex offender probation mandatory. It creates new conditions, as follows:

- * a curfew between the hours of 10 p.m. and 6 a.m., or some other 8-hour period;
- * electronic monitoring, as determined necessary by the probation officer;
- * one polygraph examination per year to answer questions regarding compliance with the terms of probation (note: defendant can not be compelled to answer questions about new or other offenses);
- * an HIV test (only if offense included sexual contact) with results made available to victim;
- * submission to warrantless search by the probation officer of controllee's person, residence, or vehicle;

- * submission to chemical castration (depo-provera) if previously supervised for sex offense within last 10-years, if so recommended by a therapist or physician, if such treatment is available.
- * registration with the local sheriff's office in the county of permanent residence.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes. Department of Corrections will have to provide trained probation officers in sufficient quantities to supervise no more than 45 sex offender controllee's. Local sheriff's offices will have to provide administrative procedure to register released sex offenders in their county.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. SECTION-BY-SECTION RESEARCH:

Section 1

This section provides the name of the act.

Section 2

Creates new class of offenders known as repeat and habitual sex offenders, sets penalties for offenders, restricts appellate review, proscribes discretionary early release, requires court to make determination of repeat or habitual sex offender status if defendant appears eligible.

Section 3

Sets new minimum-mandatory sentences for existing sex offenses.

Section 4

Proscribes downward departures for certain reasons.

Section 5

Defines "sex offender probation", makes all conditions mandatory, adds new conditions of probation to include: curfew, electronic monitoring, polygraphs, HIV testing, warrantless searches, proscribing internet access, chemical castration, registration with sheriff.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See Fiscal Comments, below.

2. Recurring Effects:

See Fiscal Comments, below.

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments, below.

4. Total Revenues and Expenditures:

See Fiscal Comments, below.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See Fiscal Comments, below.

2. Recurring Effects:

See Fiscal Comments, below.

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments, below.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None anticipated.

2. Direct Private Sector Benefits:

None anticipated.

3. Effects on Competition, Private Enterprise and Employment Markets:

None anticipated.

D. FISCAL COMMENTS:

The Criminal Justice Estimating Conference estimates that the bill will increase prison populations. Much of the increase would be due to the mandatory minimums established by the bill. However, the estimate assumes that a minimum mandatory sentence will be imposed in every case and that defendants will not plea to lesser charges. See Appendix 'A.'

The Department of Corrections will be further impacted in that it will have to provide additional trained probation officers to allow for the reduced caseload (45 per officer). See Appendix 'B.'

If chemical castration is recommended, and the offender can not afford to pay, the state will have to pay \$160 to \$700 per month for treatment.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

To the extent, if any, that the bill limits the court's ability to review whether a defendant received effective assistance of counsel, there may be a constitutional issue. See **Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984)**; and **Article I, Section 16, the Florida Constitution**. Moreover, the Florida Constitution has a provision guaranteeing access to courts, not found in the United States Constitution. See **Article I, Section 21, the Florida Constitution**. Nonetheless, should this provision be deemed unconstitutional by the courts, it would not affect any other provision of the bill.

This bill's attempt to restrict an offender's access to the internet will likely be declared unconstitutional by the courts in cases where the offender's offense was not committed in connection with the internet. Due process requires a nexus between the condition of probation and the offense. See **McCarthren v. State, 635 So. 2 d 1005 (Fla. 5th DCA 1994)**. Nonetheless, should this provision be deemed unconstitutional by the courts, it would not affect any other provision of the bill.

The bill's attempt to limit all review after two years from the final judgement becoming final is constitutional and parallels a similar requirement provided in Rule 3.850 (post-conviction relief), Florida Rules of Criminal Procedure.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

STORAGE NAME: h1027s1.cp

DATE: April 16, 1997

PAGE 12

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

Prepared by:

Legislative Research Director:

Jamie Spivey

J. Willis Renuart