

STORAGE NAME: h0273.cp
DATE: March 10, 1997

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
LAW ENFORCEMENT AND PUBLIC SAFETY
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT**

BILL #: HB 273

RELATING TO: Sexually Transmissible Diseases

SPONSOR(S): Representative Sindler

STATUTE(S) AFFECTED: s. 384.24, F.S., s. 384.34, F.S., s. 796.08, F.S., s. 775.0877, F.S.

COMPANION BILL(S): SB 312, SB 478

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

- (1) CRIME AND PUNISHMENT
- (2)
- (3)
- (4)
- (5)

I. SUMMARY:

Currently, it is a first degree misdemeanor for any person, who knows he/she is infected with human immunodeficiency virus (HIV) to have sexual intercourse with another person without disclosing the presence of the infection to the other person. This bill would increase the penalty for this offense to a third degree felony. Louisiana has a similar law which has survived numerous constitutional challenges.

It is a third degree felony for a person to commit prostitution when such person, prior to committing the crime, tests positive for HIV and knows that he/she tested positive and can possibly communicate the virus to another person through sexual activity. This bill would make an **offer** to commit prostitution, under the same circumstances described above, a third degree felony.

Both of these new felonies would be treated as Level 1 offenses under the sentencing guidelines. A defendant with no prior criminal convictions, facing one of these offenses alone, would not be eligible for a state prison sentence. However, that result could change if victim injury points are added into the equation determining the defendant's sentence points. Since the potential for injury under these circumstances can range from no injury at all, to eventual death, determining the proper number of victim injury points will need to be addressed by the courts if a particular number of points are not specifically provided for in the bill.

The need to prevent the spread of HIV has prompted several states to enact legislation dealing with persons who expose unsuspecting partners to the risk of HIV infection. Prosecuting offenders under conventional laws has proven difficult since the intent is more accurately characterized as total disregard for the life threatening risk, rather than a direct intention to cause harm. This bill does not focus on the defendant's intention to cause harm, but rather on the intentional exposure of another person to the risk of infection. In effect the bill charges all HIV infected persons, who have knowledge of their infection, with a duty to disclose the fact of their infection prior to engaging in sexual intercourse, the failure to comply with that duty, results in a third degree felony.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

1. Sexual Intercourse Without Disclosure of the Presence of HIV

Under current law, it is a first degree misdemeanor under s. 384.34, F.S., for any person, who knows he/she is infected with human immunodeficiency virus (HIV) to have sexual intercourse with another person without disclosing presence of the infection to the other person.

A first degree misdemeanor is punishable by up to one year incarceration, and/or a \$1,000 fine, or both. See s. 775.082, F.S., and s. 775.083, F.S.

2. Prostitution and HIV

Under s. 796.08(5), F.S., it is a third degree felony for a person to commit prostitution, or procure another for prostitution by engaging in sexual activity likely to transmit HIV, when such person, prior to committing the crime, tests positive for HIV and knows that he/she tested positive and can possibly communicate the virus to another person through sexual activity. A person can be convicted and sentenced separately for this felony, and the underlying offense of prostitution or procurement of prostitution under this section. The present law does not cover "offers to commit" prostitution.

Prostitution is defined under s. 796.07(1)(a), F.S., as:

. . . the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses.

"Sexual activity" as that term is used above is defined under s. 796.07(1)(d), F.S., as:

. . . oral, anal, or vaginal penetration by, or union with, the sexual organ of another; anal or vaginal penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation; however, the term does not include acts done for bona fide medical purposes.

3. Similar Louisiana Law Survives Constitutional Challenges

A Louisiana law is similar to sections 1 and 2 of the bill. The Louisiana law applies to the acquired immunodeficiency syndrome (AIDS) virus, and provides in pertinent part as follows:

No person shall intentionally expose another to any acquired immunodeficiency syndrome (AIDS) virus through sexual contact without the knowing consent of the victim.

The penalty for this felony level offense is up to 10 years in prison and/or a \$5,000 fine.

This law was challenged on several constitutional grounds in State v. Gambrella, 633 So.2d 595 (App. 1st Cir. 1993) *writ denied* 640 So.2d 1341 (La. 1994). The most

noteworthy among these were challenges based on violations of the eight amendment prohibition against cruel or unusual punishment, and the right to privacy.

In claiming the law violated the right to privacy, the defendant argued that the law interfered with the right of an HIV infected person to engage in sexual activity. The court, however, quickly pointed out that the right to privacy is not absolute, and is qualified by the rights of others. *Id.* at 604. The court further noted:

No one can seriously doubt that the state has a compelling interest in discouraging the spread of the HIV virus. Forcing an infected person to inform all of his sexual partners so the partner can make an informed decision prior to engaging in sexual activity furthers the state's interest in preventing the spread of the virus. *Id.* at 604.

With regard to Gambrella's claim that his 10 year prison sentence was excessive under the eighth amendment, the Court stated:

Considering [the] defendant's blatant disregard for the welfare of the women he was involved with sexually, the sentence chosen by the court is not grossly disproportionate to the crime or the needless imposition of pain and suffering.

The defendant in Gambrella also raised challenges based on equal protection, vagueness grounds, and being overbroad. All of these challenges were held to be without merit.

B. EFFECT OF PROPOSED CHANGES:

1. Sexual Intercourse Without Disclosure of the Presence of HIV

This bill would increase the penalty, under s. 384.34, F.S., to a third degree felony for any person, who knows he/she is infected with human immunodeficiency virus (HIV) and has sexual intercourse with another person without disclosing presence of the infection to the other person.

2. Offers to Commit Prostitution While Infected With HIV

This bill would make an **offer** to commit prostitution, under the same circumstances as outlined above under s. 796.08(5), F.S., a third degree felony. The most significant effect of this change to existing law is that it would trigger the arrest and prosecution for a felony offense under s. 796.08(5), F.S., **before** the completed crime of prostitution occurs.

3. Unlisted Third Degree Felonies

Offenses falling within the scope of this bill would be subject to penalties under the sentencing guidelines. The bill does not designate a particular ranking for either of these third degree felonies on the *Offense Severity Ranking Chart* of the guidelines. Unranked third degree felonies are treated as Level 1 felony offenses under s. 921.0013, F.S. A defendant with no prior criminal convictions, facing one of these offenses alone, would not be eligible for a state prison sentence. (See discussion below concerning victim injury issues).

In some cases, a judge could depart from the sentencing guidelines and impose a sentence of up to 5 years in prison. See s. 784.03, 775.082, F.S. However, such a departure is restricted to circumstances described in statutes and case law, and is the exception rather than the rule. See s. 921.0016, F.S.

4. Victim Injury Issues

Under the sentencing guidelines, points are added into the equation when a victim is physically injured during the course of a crime. Under the current guidelines victim injury points are scored as follows:

▶ Death	120
▶ Severe	40
▶ Moderate	18
▶ Slight	4
▶ Sex penetration	80
▶ Sex contact	40

In the case of felonies involving the possible transmission of HIV to an unsuspecting partner, some significant issues will arise. First, since the potential for injury under these circumstances can range from no injury at all, to eventual death, determining the proper number of victim injury points will need to be addressed by the courts if a particular number of points are not specifically provided for in the bill. Second, due to delays in determining whether victims exposed to HIV actually become infected, assessing victim injury points at the time of sentencing may be tenuous and inaccurate.

As noted in the previous section, these unranked third degree felonies will not subject an offender to incarceration in state prison. However, if victim injury points were added into the calculation, that outcome could change. For these offenses, 37 victim injury points added to a defendant's score at sentencing would subject him/her to a guideline prison sentence at the discretion of the court. On the other hand, 49 victim injury points added to an offender's sentence would require the court to impose a state prison sentence.

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.

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

No.

(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?

Not applicable.

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

Not applicable.

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

Not applicable.

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?

Not applicable.

4. Individual Freedom:

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

Not applicable.

- 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?

Not applicable.

- (2) Who makes the decisions?

Not applicable.

- (3) Are private alternatives permitted?

Not applicable.

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

Not applicable.

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

Not applicable.

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

Not applicable.

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?

Not applicable.

(2) service providers?

Not applicable.

(3) government employees/agencies?

Not applicable.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. - Adds s. 384.24(2), F.S., to create a separate paragraph concerning engaging in sexual intercourse without disclosing the presence of HIV to the other person.

Section 2. - Amends s. 384.34, F.S., to make a third degree felony for violations of s. 384.24(2).

Section 3. - Amends s. 796.08, F.S., to make offers to commit prostitution a third degree felony.

Section 4. - Reenacts s. 775.0877, F.S., for purposes of incorporating the amendment to S. 796.08.

Section 5. - Provides an effective date.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

Indeterminate.

2. Recurring Effects:

Indeterminate.

3. Long Run Effects Other Than Normal Growth:

Indeterminate.

4. Total Revenues and Expenditures:

Indeterminate.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

None.

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

None.

D. FISCAL COMMENTS:

Section 921.001(9)(b), F.S. 1996, requires that any legislation that creates a felony must provide that the change result in a net zero sum impact in the overall prison population, as determined by the Criminal Justice Estimating Conference, unless the legislation contains a funding source sufficient in its base or rate to accommodate the change, or a provision to specifically abrogate the application of the law.

As of the date of this writing, the Criminal Justice Estimating Conference has not yet determined the fiscal impact of this bill. A hearing is tentatively set for March 14, 1997.

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 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:

The need to prevent the spread of HIV has prompted several states to enact legislation dealing with persons who expose unsuspecting partners to the risk of HIV infection. Prosecuting offenders under conventional laws has proven difficult since the intent is more accurately characterized as total disregard for the life threatening risk, rather than a direct intention to cause harm. In this regard, this bill's amendment to s.384.24, F.S., is virtually identical in nature to the Louisiana law. Like Louisiana's law, this bill does not focus on the defendant's intention to cause harm, but rather on the intentional exposure of another person to the risk of infection. In effect the bill charges all HIV infected persons, who have knowledge of their infection, with a duty to disclose the fact of their infection prior to engaging in sexual intercourse, the failure to comply with that duty, results in a third degree felony.

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VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

Prepared by:

Legislative Research Director:

DAVID DE LA PAZ

WILLIS RENUART