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

BILL #: CS/HB 83

RELATING TO: Sexual Battery/Chemical Castration

SPONSOR(S): Committee of Crime and Punishment, and Representatives Ogles, Ball and others

STATUTE(S) AFFECTED: Section 794.011, F.S.

COMPANION BILL(S):

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

- (1) CRIME & PUNISHMENT YEAS 7 NAYS 0
- (2) CRIMINAL JUSTICE APPROPRIATIONS
- (3)
- (4)
- (5)

I. SUMMARY:

This bill provides that a court may, in its discretion, sentence a defendant to treatment with medroxyprogesterone acetate (MPA) upon a first conviction of Sexual Battery, and requires mandatory MPA treatment upon any subsequent conviction for Sexual Battery. A defendant may elect physical castration in lieu of MPA treatment. The MPA treatment is in addition to any penalty imposed, and not in lieu of, or for purposes of reducing the penalty to be prescribed. An order of the court sentencing a defendant to MPA treatment would be contingent on a determination by a qualified medical expert that the defendant is an appropriate candidate for treatment. Treatments would be limited to the maximum period of incarceration under Section 1 (2). The bill also allows a court to impose MPA treatments for a period of years up to life, regardless of the applicable maximum period of incarceration, upon a proper showing through expert medical testimony that a defendant is an appropriate candidate for extended treatment. The bill delegates the responsibility of administering MPA treatment to the Department of Corrections. For defendants sentenced to prison, treatment would begin one week prior to the defendant's release from prison. The bill creates a second degree felony for the failure or refusal of a defendant to appear for MPA treatment.

In order to comply with the Federal Food, Drug and Cosmetic Act, a physician would need to prescribe MPA for an offender for a period of time deemed necessary by the physician.

Compelling sex offenders to undergo MPA treatments raises issues to be considered in light of the Eighth Amendment's prohibition against cruel or unusual punishment. Factors to consider in evaluating this bill in terms of the eighth amendment are: 1) whether the punishment, i.e., MPA injections, are "inherently cruel"; 2) whether the punishment is commensurate to the crime for which it is imposed, and 3) whether the punishment is excessive in relation to the accomplishment of the state's aims.

MPA's effectiveness in reducing recidivism rates among those groups tested is substantial. There have been numerous studies which demonstrate the effectiveness of MPA treatment in the United States and Europe. MPA is proven effective in treating a particular type of sex offender known as the "paraphiliac."

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Sexual Battery

Section 794.011(1)(h), F.S., defines *sexual battery* as the oral, anal, or vaginal penetration by, or union with, the sexual organ of another, or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose.

Criminal penalties for sexual battery offenses vary based on factors including the age of the victim, the offender's age, and the nature of the offense. Capitol sexual battery is punishable by life in prison without possibility of parole. Other categories of sexual batteries are punishable as follows for first time offenders:

- For sexual battery as a life felony up to 15 years in prison;
- For sexual battery as a first degree felony up to 12 years in prison;
- For sexual battery as a second degree felony up to 13 years in prison.

[Note: when sentencing an offender for an offense involving sexual contact or sexual penetration, if the victim sustained physical injuries in addition to the sexual penetration or sexual contact, the court must assess additional victim injury points and the length of the prison sentence described above would increase.]

Chemical Castration

“Chemical castration” refers to hormonal treatment that is intended to lower testosterone levels like physical castration but in a reversible way. Medroxyprogesterone Acetate (MPA) is a synthetic progesterone manufactured under the trade-name Depo-Provera. A progesterone is a class of female hormones. Fitzgerald, “Chemical Castration: MPA Treatment of the Sexual Offender.” 18 AM. Jour. of Crim. Law 1, 2 (Fall 1990). Depo-Provera temporarily diminishes penile erections and ejaculations, and decreases sperm production. “Comments, Chemical Castration: An Alternative to Incarceration.” 31 Dusquense Law Review 307, 311(Winter 1993). It also reduces compulsive erotic fantasy and lowers the male sex drive. Without it, sex offenders report inability to control their sexually offensive behavior. Id. at 310-311. The affects of MPA are temporary. Erections, ejaculatory abilities, and sex drive are restored within 7 -10 days of ceasing treatment. Id. at 311. However, even with MPA treatment, a defendant is still able to have erections and ejaculations. Fitzgerald, supra at 7.

Chemical Castration Bill Passes In California

Assembly Bill 3339 dealing with chemical castration of certain sex offenders passed the California Legislature last year. Generally the bill provides that any person convicted of a specified sex offense against a victim under 13 years old “may upon parole, undergo medroxyprogesterone acetate treatment or its chemical equivalent, in addition to any other punishment prescribed for that offense or any other provision of law, at the discretion of the court.” Such treatment is mandatory for anyone convicted for a second offense. Generally, the bill applies to offenses that can be described as sexual batteries involving force, or threats of force, and lewd and lascivious assaults on children involving force or threats of

force. The bill also provides that the defendant can choose a permanent surgical alternative instead of MPA treatments.

B. EFFECT OF PROPOSED CHANGES:

This bill authorizes the court to require a defendant convicted of sexual battery under F.S. 794.011, to submit to chemical hormone treatments for a period of time that can extend far beyond the period of incarceration actually imposed. The bill will most directly and dramatically impact the Department of Corrections by extending the period of supervision for sexual battery convicts for the purpose of monitoring compliance with court ordered treatment. The treatments would not commence for incarcerated defendants until one week prior to their release from prison.

Under the bill, after a defendant completed a sentence that was less than the allowable maximum period of incarceration, the Department of Corrections would retain the responsibility of monitoring a defendant's continued compliance with court ordered treatments that extend beyond the term of the sentence actually imposed, and in some cases for lifetime of the defendant. Before a court could order a defendant's MPA treatments to extend beyond the maximum period of incarceration, a hearing would be held to establish, through expert medical testimony, that a particular defendant is an appropriate candidate for extended treatments.

The bill makes it a felony of the second degree to refuse or fail to appear for MPA treatments.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

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?

The bill creates a new responsibility for the Department of Corrections. According to estimates of the Department of Corrections, an average of 32 offenders would qualify for **mandatory** MPA treatment each year. The number of offenders that would be sentenced to treatment at the discretion of the court is undetermined. The Department of Corrections currently does not have the infrastructure necessary to administer these treatments. One method of providing these services would be through contracts with community health providers.

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

To the extent that the bill imposes a government service to defendants sentenced to MPA treatments, this question should be answered in the affirmative.

- a. 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?

Not applicable.

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

Not applicable.

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

Not applicable.

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

Not applicable.

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

Not applicable.

3. Personal Responsibility:

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

Not applicable.

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

The bill does not contain a provision which requires a defendant to pay for any portion of the treatment.

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?

As previously discussed, the very nature of MPA treatments is to diminish, but not incapacitate, the male sex drive and sexual function. In the process of curbing the sex drive of sex offenders to prevent them from continuing unlawful sexual behavior, the offenders' desire to engage in consensual sexual activity would be minimally diminished. Fitzgerald, "Chemical Castration: MPA Treatment of the Sexual Offender" 18 AM. Jour. of Crim. Law 1, 7 at n. 37 (Fall 1990).

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. - Authorizes a court, upon a first conviction, and mandates a court upon a second conviction of sexual battery, to order MPA treatments as discussed in section II, B. It also provides that the Department of Corrections shall provide services necessary to administer MPA. Lastly, it creates a second degree felony for failing or refusing to submit to MPA treatments.

Section 2. - Provides that if any provision of the bill, or any application thereof is held invalid, such invalidity shall not affect any provisions or applications of the bill which remain valid, and declares the provisions of the bill to be severable.

Section 3. - Provides for an effective date of October 1, 1997.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

- 1. Non-recurring Effects:

Indeterminate, see *Fiscal Comments*.

2. Recurring Effects:

Indeterminate, see *Fiscal Comments*.

3. Long Run Effects Other Than Normal Growth:

Indeterminate, see *Fiscal Comments*.

4. Total Revenues and Expenditures:

Indeterminate, see *Fiscal Comments*.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

Not applicable.

2. Recurring Effects:

Not applicable.

3. Long Run Effects Other Than Normal Growth:

Not applicable.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Not applicable.

2. Direct Private Sector Benefits:

Not applicable.

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

Not applicable.

D. FISCAL COMMENTS:

The fiscal impact of this bill would consist primarily of the cost of continued weekly injections (presently the cost is \$40 per injection) given to each offender sentenced to MPA treatments for an indeterminate term of years, but potentially for the lifetime of the defendant. Based on estimates from the Department of Corrections, an average of 32 offenders would qualify for mandatory MPA treatment each year, and would begin treatment one week before their release. Estimating this cost for those offenders whom the court **may** sentence to MPA treatment is unknown since the number of offenders without prior convictions that would be sentenced to these treatments is not determined.

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 (CJEC), 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.

The CJEC has reviewed projected the fiscal impact of this bill as it relates to the new felony created, and has determined that there is no fiscal impact.

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:

A. MPA HAS NOT BEEN APPROVED BY THE FOOD AND DRUG ADMINISTRATION FOR THIS TYPE OF USAGE.

At this time, MPA has not been approved by the Federal Food and Drug Administration for the purpose of lowering testosterone levels in males. Use of MPA in this fashion would be covered by the Federal Food, Drug and Cosmetic Act relating to "use of unapproved drugs for unlabeled indications." Fitzgerald, "Chemical Castration: MPA Treatment of the Sexual Offender." 18 AM. Jour. of Crim. Law 1, 6 at n. 24 (Fall 1990). In order to comply with federal regulations, a physician would need to prescribe MPA for an offender for a period of time deemed necessary by the physician. The bill as written authorizes a court upon a first conviction, and mandates a court upon a subsequent conviction, to order MPA treatments, without reference to whether such treatment would be initially appropriate for a particular defendant. While the bill does require a determination based on expert medical testimony that a particular defendant is an appropriate candidate for MPA treatment when the court is considering ordering treatment that will surpass the maximum period of incarceration, that provision is not sufficient to cover court ordered treatments that are **within** the time frame of the statutory maximum periods of incarceration.

One solution to this would be to include in the bill language which provides that court ordered treatment would be contingent upon a physician's determination that such treatment is appropriate for a defendant sentenced to MPA treatments, and have MPA

prescribed by the physician after such determination is made. This would permit the court to order MPA treatment at time of sentencing, and would still allow for the contingency that a particular defendant should not be prescribed MPA treatments for medical reasons.

B. EIGHTH AMENDMENT CONSIDERATIONS

Compelling sex offenders to undergo MPA treatments raises issues to be considered in light of the Eighth Amendment's prohibition against cruel or unusual punishment. Unfortunately, there are no Florida cases nor United States Supreme Court cases which have directly dealt with this issue. By analogy, however, there is a New Jersey case where the district court held that forcing a defendant to take psychotropic medication did not infringe upon the defendant's eighth amendment rights because the drug was proven effective and was an integral part of an overall treatment plan. "Comments, Chemical Castration: An Alternative to Incarceration." 31 *Dusquense Law Review* 307, 318 n. 79 (Winter 1993) *citing* Rennie v. Klein, 462 F. Supp 1131 (D NJ 1978). There is also the Michigan case of People v. Gauntlett, 352 N.W. 2d 310 (Mich. App. 1984) which involved a defendant convicted of rape who challenged the imposition of Depo-Provera treatments as a condition of probation. The court struck down the condition on the basis that the FDA had not approved the drug for that particular use, studies of the drug's effectiveness and safety were inconclusive (at the time), and that the condition of probation was without authority of law.

For all practical purposes, there is no distinction between "treatment" and "punishment" for purposes of the eighth amendment. Factors to consider in evaluating this bill in terms of the eighth amendment are: 1) whether the punishment, i.e., MPA injections, are "inherently cruel"; 2) whether the punishment is commensurate to the crime for which it is imposed, and 3) whether the punishment is excessive in relation to the accomplishment of the state's legitimate aims i.e.: reducing the frequency of sexual batteries, and curbing recidivism rates among sexual batterers. These are factors the United States Supreme Court would weigh in determining whether the bill would pass an eighth amendment challenge. "Comments," *supra*, at 320 n. 91, *citing* Trop v. Dulles, 356 U.S. 86 (1958); *Id.* at 320 n. 94, *citing* Weems v. United States, 217 U.S. 349 (1910); *Id.* at 321 n. 96 *citing* Furman v. Georgia, 408 U.S. 238 (1972).

C. THE RIGHT TO REFUSE "TREATMENT"

Under the purview of the Fourteenth Amendment lies a protected liberty interest recognized as the right to refuse medical treatment. Cruzan v. Missouri, 110 S.Ct. 2841 (1990). This right is not absolute. In Washington v. Harper, 110 S.Ct. 1028 (1990), the United States Supreme Court upheld a policy of the state of Washington which permitted the forced administration of antipsychotic drugs to a prisoner who was determined to be 1) suffering from a "mental disorder" and 2) "gravely disabled" or posing a "likelihood of serious harm" to himself or others. *Id.* at 1034. The Court held that the prisoner possessed a "significant liberty interest" in avoiding unwanted administration of antipsychotropic drugs under the Due Process Clause of the Fourteenth Amendment." *Id.* at 1036. Upon review of the prison policy, which infringed on the prisoner's right to refuse treatment, the Court upheld the policy on the ground that it was reasonably related to legitimate penological interests. *Id.* at 1037.

When considering this bill in terms of an offender's right to refuse medical treatment, the offender's interest in refusing treatment is to be balanced against the State's interests in requiring it. These interests include, among others, the protection of life, and the protection of innocent third parties.

Also, the argument could be made that when MPA treatment is ordered as part of a sentence imposed in a criminal case it should be considered punishment, in which case there would be no "right to refuse" in the absence of adverse medical consequences.

D. MPA TREATMENT IS EFFECTIVE IN REDUCING RECIDIVISM AMONG CERTAIN SEX OFFENDERS

MPA's effectiveness in reducing recidivism rates among those groups tested is substantial. There have been numerous studies which demonstrate the effectiveness of MPA treatment in the United States and Europe. Fitzgerald, "Chemical Castration: MPA treatment of the Sexual Offender," Am. Jour. Crim. Law 1, 8 n. 46 & 47 (Fall 1990). MPA has proven to be a successful treatment for the "paraphiliac offender". Id. at 9. A paraphiliac is a particular type of sexual deviant that exhibits a pattern of sexual arousal, erection and ejaculation, which is characterized by a specific fantasy or its actualization. Id. at 4. Recognized paraphilia include: pedophilia, exhibitionism, transvestism, voyeurism, frotteurism, fetishism, sexual sadism, sexual masochism, and other forms of psychosexual disorders. Id. at 5.

According to a study of the Berlinos Institute in 1991 of 626 patients, 5 years after they had been treated with MPA, fewer than 10 percent had committed sex offenses again. Of the most compliant patients, fewer than 5 percent committed new sex acts.

Paraphiliacs make up one of four types of sex offender referred to as Type IV. A brief description of the other three types of sex offenders are as follows: Type I - which are offenders that deny the perpetration of the crime; Type II - offenders which admit to the crime, but blame their criminal behavior on non-sexual forces, (such as drugs or alcohol); and Type III - offenders that are violent and are prompted by non-sexual forces, (such as anger, power and violence). Fitzgerald, supra at 4.

Dr. Fred Berlin, the Director of the National Institute For The Study, Prevention, and Treatment of Sexual Trauma, and whose institute conducted the study referenced above, cautions that MPA is not an effective treatment for **all** types of sex offenders. Dr. Berlin advised this author that in order to be effective treatment it would be necessary to evaluate sex offenders to determine if they meet the criteria for the type of offender that would benefit from the treatment. He further advises that he knows of no studies where the persons subjected to MPA treatments were not willing participants who desired treatment. According to Dr. Berlin, MPA is very effective when treating sexual deviants who commit offenses in response to a powerful biological drive. In basic terms, MPA acts as a suppressant to that drive.

With regard to side effects, Dr. Berlin reports that MPA is routinely administered to women as a contraceptive (one of its current approved uses under the FDA guidelines). Administering this drug to men would expose them to basically the same risks and potential side effects as women currently on MPA for contraceptive purposes.

E. PENDING MATTERS OF CONSIDERATION

Some issues raised in consideration of avoiding or clarifying possible misinterpretations of the bill are the following: Ambiguity in the interpretation of what is meant by the terms "maximum period of incarceration" regarding the length of time offenders would be sentenced to MPA treatment may exist in this CS. Confusion may arise over whether the term is referring to the maximum term of prison months under the sentencing guidelines in

Chapter 921, or the penalty provisions of s. 775.082, F.S. A solution to a potential misinterpretation regarding what is meant by these terms could be cured by revising this language to read "statutory maximum period of incarceration as provided in s. 775.082, F.S." These statutory periods are distinct from the sentencing guidelines. Under s. 775.082, F.S., the applicable statutory maximum periods of incarceration are as follows:

- For sexual battery as a second degree felony 15 years;
- For sexual battery as a first degree felony 30 years;
- For sexual battery as a life felony for life.

Also, in it's present form, the bill makes no reference to whether the Department of Corrections or the court has the task of determining the qualifications of medical experts who would examine defendants. A solution to this problem, would be to insert a provision in the bill which clarifies that such a task would be the function of the court.

Finally, the bill is silent on how to address situations where a defendant begins treatment, but due to adverse medical or psychological reactions, the doctor prescribing the treatments concludes it is necessary to discontinue treatment. A possible solution to this would be to include language in the bill that provides that treatment may be discontinued when medically necessary.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The committee substitute to HB 83 incorporated provisions which provide as follows

1. That orders of the court imposing treatment be contingent on a determination by a qualified medical expert that a defendant is an appropriate candidate for MPA treatment, and that such determination be made within 60 days of sentencing.
2. That for defendants sentenced to a period of incarceration, MPA treatments begin one week before the defendant's release from prison.
3. That MPA treatments continue until the Department of Corrections determines the treatments are no longer necessary but, in no case shall such treatments, ordered under this section, exceed the maximum period of incarceration.
4. That the act will become effective for offenses committed on or after October 1, 1997.

VII. SIGNATURES:

COMMITTEE ON CRIME & PUNISHMENT:

Prepared by:

Legislative Research Director:

David De La Paz

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